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THE
ATLANTIC REPORTER,
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CONTAINING ALL THE REPORTED DECISIONS OF THE

Supreme Courts of MAINE, NEW HAMPSHIRE, VERMONT, RHODE ISLAND,
CONNECTICUT, and PENNSYLVANIA; Court of Errors and Appeals,
Court of Chancery, and Supreme and Prerogative Courts
of NEW JERSEY; Supreme Court, Court of Chancery,
Superior Court, Court of General Sessions, and
Court of Oyer and Terminer of DELAWARE:
and Court of Appeals of MARYLAND.

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³ Appointed January 31, 1907.

⁴ Died December 4, 1906.

⁵ Became Chief Justice December, 1906.

⁶ Resigned March 31, 1907.

⁷ Appointed to fill vacancy.

⁸ Appointed June 23, 1907, to fill vacancy.

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**MANCHESTER BUILDING & LOAN
ASS'N v. BEARDSLEY et al.**

(Court of Chancery of New Jersey. March 19, 1907.)

**1. BUILDING AND LOAN ASSOCIATIONS—LOANS
— PAYMENT — AUTHORITY OF PRESIDENT —
CANCELLATION OF MORTGAGE.**

The by-laws of a building and loan association provided that the secretary shall receive all moneys from members and others and pay the same to the treasurer who shall receive and hold for the association all moneys and securities. One who borrowed from an association received the money from its president who transacted all the business relating thereto. Arrangements were made with the president to pay the loan, and pursuant to his directions the borrower went to his office where he found the bond and mortgage. Payment was made to the president who then tore the seals from the mortgage, and indorsed a certificate of cancellation thereon. *Held*, that the borrower and the holder of a second mortgage, who furnished the money to pay the loan, could assume that the president was authorized to receive the money and indorse the certificate of cancellation.

2. SAME—FORECLOSURE—NEGLIGENCE OF ASSOCIATION.

In a suit by a building and loan association to foreclose a mortgage which had been canceled by its president to whom the money had been paid, but who had failed to pay it to the association, evidence *held* to show that the negligence of the association and its officers was the proximate cause of the loss which must be borne by the association, and that the mortgage was properly canceled.

3. MORTGAGES — SATISFACTION — RECORD OF SATISFACTION—STATUTES.

2 Gen. St. p. 2107, § 23, provides for entry by the clerk on the margin of a registered mortgage of a minute of its discharge. Section 25 provides that a mortgage registered or recorded shall be discharged by an acknowledged certificate which shall be recorded. Revision of 1848 (Nixon, Dig. pp. 526, 527). Act to Register Mortgages, §§ 1, 5, the words "record" or "recording" are used synonymously with "register" or "registering." In 1858 (P. L. p. 90), a supplement to the act to register mortgages provides for their being registered or recorded in full. *Held*, that the method provided in section 25 is not exclusive, but that the one contained in section 23 is equally effective.

Suit by the Manchester Building & Loan Association against J. Frank Beardsley and others. Bill dismissed.

66 A.—1

This is a bill to foreclose a mortgage made by Beardsley to the complainant. The defendants are Beardsley, Baker, who is the holder of a mortgage upon the same premises, and Shippee, who is the present holder of the title to the property in question.

J. W. De Yoe, for complainant. W. Carlington Cabell, for defendants.

GARRISON, V. C. The defendant Beardsley, on the 14th of June, 1901, made application to the Manchester Building & Loan Association for a loan in the sum of \$1,800. Up to this time he was not connected with the association as a shareholder. His application was acted upon favorably, and he became a shareholder of nine shares, and executed a bond and mortgage, dated July 8, 1901, to the association to secure \$1,800. This mortgage was recorded in full in the clerk's office of Passaic county on the 12th of September, 1901. All of the business which Beardsley then transacted with the association was done with William H. Belcher, its president. Belcher had been president of the association for many years, Allee had been its secretary, and Roe its treasurer during the same period. The association met at Haledon in Passaic county. Belcher, its president, practiced law in the city of Paterson, and in his office there there was also an office of the building association. Its name was on the door, and its safe was in Belcher's private office. In December of 1902 Beardsley arranged with one Baker to borrow money from him, and mortgage the property to him, to secure the loan, and, with the money thus borrowed, to pay off the Building & Loan Association mortgage. Having been informed by Belcher that if he came to the office in Paterson on the 2d of January, 1903, the business could be transacted, Beardsley, Baker, and an attorney procured by Baker to protect his interests, attended there upon that day. Beardsley had previously sent in his pass book to be balanced, and when they got there it was figured up how much was due upon the bond and mortgage, and Baker gave his check to Beardsley for the amount.

which check Beardsley indorsed, and turned over to Belcher, who indorsed upon the mortgage, after tearing the seals off of the mortgage, the following language: "This mortgage is paid and satisfied and the clerk of Passaic county is hereby authorized to cancel the same of record. The Manchester Building & Loan Association, W. H. Belcher, President. Dated Jan. 2, 1903."

The mortgage thus indorsed and mutilated, together with the bond, which was similarly mutilated by having its seals torn off, were then delivered to Beardsley or Baker. The mortgage, on the same day, was taken to the clerk of Passaic county, who made the following entry upon the margin of the record of the mortgage: "This mortgage given by J. Frank Beardsley to the Manchester B. & L. Ass'n is this 2d day of January A. D., 1903, canceled of record, the same being produced before me canceled, the seals removed and satisfaction indorsed thereon by Manchester Building & Loan Association, W. H. Belcher, President. Jno. J. Slater, Clerk, Dated Jan. 2, 1903." At the same time a mortgage from Beardsley to Baker for \$1,600 was filed to secure the money which Baker had just advanced. Later in the same year another mortgage, to secure \$500, was given by Beardsley to Baker, which was duly recorded. On the 17th day of November, 1904, Beardsley conveyed the lands in question to David N. Shippee who paid \$700 in cash, and, of course, took the land subject to the mortgages of Baker aggregating \$2,100. In July, 1905, Belcher, the president of the Building & Loan Association, absconded, never having paid into the association's treasury the money received on account of this mortgage. Among the papers in the safe of the Building & Loan Association at its office in Paterson there was found, after Belcher's departure, what purported to be a bond and mortgage from Beardsley to the association. The witness in each of these papers is William H. Belcher. The irresistible conclusion is that Belcher substituted at some time this forged bond and mortgage for the genuine bond and mortgage, which, as before stated, were delivered by him to Beardsley or Baker on the 2d day of January, 1903. There is also an irresistible conclusion that Belcher continued to pay into the treasury of the association the dues and interest upon the Beardsley stock and loan after the receipt of the principal due on the mortgage. Beardsley certainly did not continue to make these payments, as he assumed that when he paid the mortgage off all of his connection with the association ceased, and he did not consider that he was any longer a stockholder. The dues were paid, and therefore the conclusion must be that Belcher paid them. Of course, it is easy to conjecture why he made such payments, because, by so doing, there would not be any occasion to investigate the Beardsley loan or to commence foreclosure proceedings, upon the mortgage which,

to his knowledge, was canceled and in place of which he had substituted a forged mortgage. After Belcher's departure and a default then occurring in the payment of dues upon the Beardsley stock, the Building & Loan Association commenced this foreclosure suit. It made as parties Beardsley, Baker, and Shippee.

The complainant seeks to foreclose the mortgage, notwithstanding the payment of the full amount due thereon to the president of the complainant association, and the cancellation thereof by the said president, by claiming that the payment was not made to the proper officer so as to bind the association, and that the cancellation was not made by the proper officer so as to similarly bind the association. The contention on behalf of the association is that Beardsley was a member or shareholder; that the by-laws provide that the secretary "shall receive all moneys from the members and others, and without delay pay the same over to the treasurer, taking a receipt therefor. He shall keep accurate account with all shareholders and others doing business with the association. He shall give such bonds as shall be satisfactory to the board of directors," and that the treasurer shall receive all moneys, pay all orders, and "shall receive and hold in trust for the association all bonds, mortgages, * * * and other securities upon which money may have been loaned by the board of directors." They argue, therefore, that Beardsley could only make payment so as to bind the association by giving the money to the secretary, and that because the treasurer was the one to have custody of the mortgage he was the only person authorized to execute a certificate of cancellation thereof. It is undoubtedly true that members of Building & Loan Associations are bound by the by-laws thereof, and may not bind the association by payments not made in accordance therewith, unless such irregular payments, or payments to persons not authorized, are ratified or confirmed by the association; or unless the association, by its conduct, has estopped itself to deny the righteousness of the conduct of the shareholder. Citation of authorities of this principle is unnecessary. Another equally well-settled principle is that a president or other officer of a corporation may not bind the same unless he be authorized; but his action will frequently bind the association if, by its conduct, it has estopped itself to deny the right of the person dealing with the president to consider him authorized. The sole question in the case before us, in view of the well-settled principles applicable thereto, is whether, under the circumstances of this particular case, the association is to be bound by the payment, and by the action of the president with respect to the cancellation of the mortgage. I am of opinion that the association is bound.

The money which was paid was not dues,

and was not paid by a member on account of dues, but was paid to satisfy a debt due the association. Of course, such payment must be made to some one who is either specifically or impliedly authorized to receive it. As all of Beardsley's dealings with the association were had through Belcher, as he received the money from Belcher when he gave the bond and mortgage, and received from Belcher the word as to when he should attend to pay the same off, and, upon going to the Paterson office of the association, found Belcher there with the bond and mortgage, I think the only proper conclusion is that he was justified in believing that Belcher was authorized by the association to receive the debt due upon that bond and mortgage. And to the extent that Baker's rights are involved, certainly he was justified in assuming that this bond and mortgage were being properly paid off when the money therefor was paid to the president of the association who had physical possession of the bond and mortgage. Although it is argued by the complainant that the president was not the proper person to execute or sign the informal certificate of cancellation, there is nothing to support this contention. I know of no law which, of itself, designates what officer of a corporation is the proper one to make such an informal certificate. While it may be true that the treasurer is the indicated person to sign a receipt for money received by the company—or, perhaps, in cases where the secretary is the proper person to receive the money as in this case, he should be held to be the indicated person to sign a receipt—the writing in question is not a receipt. It is an indorsement upon a mortgage, certifying that it has been paid and satisfied, and directing or authorizing its cancellation. Such a writing, it seems to me, in the absence of any specific law or by-law upon the subject, should more properly be made by the president than by any other officer, since his are general powers; and this is a writing in the name of the corporation of a general nature. Therefore, I find that the defendants Beardsley and Baker were justified in assuming that Belcher, as president, not only was authorized, as I have previously found, to receive the money, but also to make the certificate of cancellation upon the mortgage which he did make.

There is ample testimony to show that this association intrusted large powers to Belcher, and carried on a large part of its business through him, having its Paterson office as just stated in his private office, where it kept its safe in which its securities were contained. While it is true that the treasurer testifies that he had the Beardsley bond and mortgage at one time, and put them in the safe, and kept the key of the portion of the safe in which these papers were contained, it also appears that numerous other mortgages were paid off to Belcher, and I think it clear that he did have physical possession of them for that purpose. The treasurer swears that he did not give this bond and mortgage to Bel-

cher, but there is no explanation as to how Belcher got them; and, if the treasurer's testimony is true, Belcher could not have obtained them. The very fact that he had them shows that he did have access to the securities of the association, or that the treasurer did give them to him. In any event, as against the innocent persons whose moneys were paid in good faith on account of this bond and mortgage, I think it proper to hold, under the proven facts, that the carelessness or negligence of the association and its officers was the proximate cause of the loss. Under such circumstances the authorities are clear that the association should be the one to bear the loss.

Furthermore, there is proof that during the 10 years of Belcher's presidency 84 mortgages were canceled in the clerk's office of Passaic county, of which 28 bore substantially similar indorsements to the one in question; 3 thereof were canceled on a certificate signed by Allee, the secretary; 1 on the signature of Belcher, as president, and Allee, as secretary; 10 on the signatures of Belcher, as president, and Roe, as treasurer; 39 on the signature of Roe, as treasurer; and 3 certificates of discharge signed by the president and secretary under the seal of the association. It thus appears, not only from the oral testimony, but from the records of the county, that Belcher constantly exercised this power, and that he must have exercised it to the knowledge, and with the consent, of the association. Under all the circumstances therefore, I conclude that this mortgage was properly canceled.

The only other matter relied upon by the complainant is that since the mortgage was recorded in full, and not merely registered in abstract, it cannot be properly discharged excepting by a certificate of discharge duly acknowledged or proved and recorded. The argument is that 2 Gen. St. p. 2107, § 23, provides that when a mortgage is registered, and shall be redeemed and paid, it shall be the duty of the clerk, on application of the mortgagor or person paying the same, and producing to him said mortgage canceled, or a receipt thereon signed by the mortgagee, etc., to enter in a margin to be left for that purpose a minute of said redemption, payment and discharge, which minute shall be a full and absolute bar to and discharge of the said entry, registry, and mortgage; while section 25 provides that any mortgage that has been recorded or registered shall be discharged upon presentation of a certificate signed by the mortgagee, his heirs, etc., acknowledged or proved, and certified in the manner prescribed, etc., and that every such certificate shall be recorded and a reference made, etc. Therefore, the complainant claims that, unless the certificate of discharge is acknowledged and recorded as provided by the twenty-fifth section, the alleged discharge is not effective. By going back to the Revision of 1846 (Nixon, Dig. pp. 526, 527), it will be found that in sections 1 and 5 of the act

to register mortgages the words "record" or "recording" are used synonymously with the words "register" or "registering." Since the registry of a mortgage has a limited use for the purposes of evidence, there was in 1858 (P. L. p. 80), enacted a supplement to the act to register mortgages, providing for their being registered or recorded in full, and such record then became receivable in evidence as copies of deeds are. In 1869 the act was passed which is now section 25 of the General Statutes (page 2107), providing for another and fuller discharge of mortgages by the instrument therein provided for. I am of opinion that this is not an exclusive method, and that the other statutory method as contained in section 23 of the same act (page 2107), is equally effective.

The result is that the bill must be dismissed, with costs.

(79 Conn. 496)

GILMORE v. AMERICAN TUBE & STAMPING CO.

(Supreme Court of Errors of Connecticut.
March 5, 1907.)

1. MASTER AND SERVANT — INJURIES TO SERVANT—NEGLIGENCE—INSPECTION.

Plaintiff was injured while operating a steel drop press by the parting of a belt due to a defective lacing. The work of adjusting the lacings was not easily accomplished by operators of the presses, and had been placed on a superior servant in charge of some 35 of such presses in defendant's factory. Plaintiff was not familiar with the lacing of the belts, and could only have ascertained that the lacing was defective by making a special inspection. *Held*, that defendant did not perform its entire duty by furnishing suitable material and a competent servant to lace the belts, but was negligent in failing to inspect the lacing.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 84, Master and Servant, §§ 235-242.]

2. SAME — FELLOW SERVANTS — VICE PRINCIPAL.

Plaintiff's superior servant, whose duty it was to lace the belt, was not plaintiff's fellow servant with reference to such act, but a vice principal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 84, Master and Servant, §§ 422, 486-489.]

3. EVIDENCE — EXPERT WITNESSES — COMPETENCY.

Where, in an action for injuries to a servant caused by a defective belt lacing attached to a drop press, an expert on such presses denied knowledge as to belt lacings, he was not competent to testify as to what lacings were suitable, how they should be used, and when they should be inspected and replaced.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 2349-2352.]

4. MASTER AND SERVANT—INJURIES TO SERVANT—ACTIONS—EVIDENCE.

In an action for injuries to a servant caused by the defective lacing of a belt attached to a power press, evidence that defendant for 15 years before the occasion in question had exercised reasonable care in examining the lacings and replacing worn ones did not justify an inference that reasonable care was exercised in lacing the belt in question.

5. EVIDENCE—STATEMENTS TO PHYSICIAN.

In an action for injuries, evidence of complaints by plaintiff to his physician of the

"wound throbbing at night and loss of sleep," made during the actual treatment of the wound, was admissible.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 383-387.]

6. MASTER AND SERVANT—INJURIES TO SERVANT—CONTRIBUTORY NEGLIGENCE.

Where, in the operation of certain machinery, all of plaintiff's fingers on his left hand were injured, and, if he had followed instructions, only his thumb and his first and second fingers would have been injured, plaintiff's failure to comply with the instructions did not constitute negligence contributing to his injuries.

Appeal from Superior Court, Fairfield County; Edwin B. Gager, Judge.

Action by Charles H. Gilmore against the American Tube & Stamping Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Arthur M. Marsh and Henry B. Stoddard, for appellant. Stiles Judson, for appellee.

HALL, J. The finding states substantially these facts: The plaintiff sustained a serious injury to his hand by the falling of a heavy hammer of a drop press which he was operating as an employé of the defendant. The cause of the fall of the hammer was the parting in two places of the lacing of a double canvas belt by which the hammer was raised. The parting of the lacing was due to the facts that at the time of the accident it was badly worn so that it was ready to part at certain points; that from previous wear it was unfit for further use when it was last placed in the belt before the accident; and that, owing to the character of the lacing used, it was improperly placed in the belt, in that it was not doubled in drawing it back and forth through the three holes in the four layers of the double belt, where it was turned back to attach it to an iron sling by which it was connected with the hammer. The drop press in question, with many others in the same room, were under the care of a foreman, one Shea, a competent workman selected and assigned for the purpose, without negligence, by the defendant, whose duties, among others, were to watch the condition of the drop presses, replace broken belts, insert belt lacings when necessary, and to operate one of the drop presses when his other duties permitted. For the purpose of cutting belt lacings therefrom to be used in the factory, the defendant kept a stock of lacing hide, which had been carefully inspected by competent persons, in a room adjoining the press-room and available to said foreman when wanted. The belt lacing at the points where it parted were not observable to an operator of the press, and its condition at these points could only be discerned by a particular examination after separating the double belt. There was no mechanical obstacle to prevent the plaintiff from pulling down the belt on his machine and unlacing it, and examining the lacing, but it was not his duty to do so. He had never been requested to, and he was

not familiar with the use of lacings. He had no knowledge of the condition of the lacing, and paid no attention to it. It was the duty of the men in the pressroom to report the fact to Shea when a belt broke or a machine became out of order. The examination and inspection of the lacings had been confided only to Shea, and he was familiar with these duties and had performed them for several years. The life of the inner belt, of the double belt, which alone comes in contact with the pulley above—the purpose of the outer belt being for protection when the inner one breaks—is, in ordinary continuous use, about three months, and of a belt lacing, in ordinary continuous use, about six months. When a lacing was taken out on account of the breaking of an inner belt of a drop press, Shea examined it, and it was his duty, if the lacing was found to be sound, to place it in use again, otherwise to discard it and put in a new one. The defendant did not cause the belt laces to be inspected except as above stated. The belt on the press in question had been in use about three months, and the lacing, when then placed in it, was, from previous wear, unfit for use. Shea knew, or by the use of ordinary care would have known, the defective condition of the lacing. He was negligent in using the worn lacing, in placing it in the belt without doubling it, and failing to inspect and replace the lacing as frequently as was reasonably necessary to prevent accident. The defendant used reasonable care in the selection and supervision of the fellow servants of the plaintiff, and in the furnishing of materials provided for his employment. No belt lacing on a drop press had ever broken before in the factory during the many years the defendant had used them. These facts fall short of establishing what the defendant undertook to prove upon the hearing in damages, that it had fulfilled its duty to the plaintiff to exercise reasonable care to provide for him "reasonable safe appliances and instrumentalities for his work."

Conceding that it appears that the defendant at all times kept suitable material in a proper place ready for use from which sufficient belt lacings could have been cut, the case at bar differs in many important respects from Whittlesey v. New York, N. H. & H. R. Co., 77 Conn. 100, 58 Atl. 459, 107 Am. St. Rep. 21, and from Kelly v. New Haven Steamboat Co., 74 Conn. 343, 50 Atl. 871, 57 L. R. A. 494, 92 Am. St. Rep. 220, and other cases cited by the defendant, in which it was held that the master is not liable when he has provided his workmen with suitable appliances and materials which it is within their capacity to use, and the use and care of which are incidental to their work, or are matters of detail entrusted to operators in the management of safe machinery. It appears in the case before us that the duty of preparing and placing lacings in belts was never imposed upon the

plaintiff, nor upon any other mere operator of a drop press, but upon Shea. It does not appear that the work of preparing and adjusting the lacings were acts easily accomplished by the operators of the drop presses, and which did not require the services of a person of special skill. It does appear that the plaintiff was not familiar with that work, and that upon the 35 drop presses in the defendant's factory that work had been intrusted entirely to Shea for several years. While the duty of inspection is sometimes of such a character that it may properly be imposed upon either the employer or employé (Bergin v. Southern N. E. Telephone Co., 70 Conn. 54-65, 38 Atl. 888, 39 L. R. A. 192), the finding shows very clearly that in this case it was not imposed upon the operator, since it appears that the condition of the lacing was not observable to him; that it could only be discovered by a particular examination, and since, as we have stated, it appears that the duty of watching its condition was imposed upon Shea. In preparing the lacings, placing them in the belts, and inspecting them Shea was not acting as a fellow servant of the plaintiff. The defendant argues that Shea was not a foreman, and did not have control over the other men. Shea is referred to in the finding as a "foreman." Whether he had authority over the other men does not appear. But the relative rank of Shea and the plaintiff in the defendant's business is not as reliable a test of whether they were fellow servants as the "nature and character of the duty violated by the offending servant." Whittlesey v. New York, N. H. & H. R. Co., 77 Conn. 100-102, 58 Atl. 459, 460 (107 Am. St. Rep. 21); Kelly v. New Haven Steamboat Co., 74 Conn. 343-346, 50 Atl. 871, 872 (57 L. R. A. 494, 92 Am. St. Rep. 220). That Shea at times operated a drop press did not render him a fellow servant with the plaintiff as to the other duties of the former, the failure to properly perform which caused the accident. These duties which included the exercise of reasonable care in keeping the belt attached to the iron sling connected with the hammer in such a manner and with such belt lacings that the drop press could be operated safely by the person working upon it, and also in inspecting the lacings to ascertain when they were so worn as to require replacing, were, upon the facts before us, duties of the employer. The employer intrusted these duties to a competent agent, Shea, and furnished him with necessary materials for discharging them. But this did not relieve the defendant from responsibility for the negligent failure of Shea to perform those duties. "The designation of an agent, however fit and competent, * * * does not * * * relieve the master from further responsibility. Until the agent thus selected and empowered, in fact acts up to the limit of the duty of his master to act, the master's duty is not done." McElligott v. Randolph, 61 Conn. 157-162, 22 Atl. 1094, 1095 (29 Am. St. Rep. 181); Rin-

alcotti v. O'Brien Contracting Co., 77 Conn. 617-620, 60 Atl. 115, 116 (69 L. R. A. 936).

During the trial one Stapely, having qualified as to his "expert and practical knowledge of drop presses and their operation," but not of the strength or endurance of leather lacings, was asked by defendant's counsel the following question: "Supposing in the operation of 30 or 40 drop presses over a period of 15 or 16 years the lacings at the point which we have looked at on Exhibit 2 are examined when the under belt is changed—that is, the under belt breaks perhaps every three or four months—when it does a new belt has to be put on, the lacing is taken out, and then examined, and either replaced or a new one put in, and in that time in the experience of that establishment no accident from the breaking of the lacing has occurred, and the lacing which has been used over this period of years has been substantially of uniform quality and size and length, and the lacing has been of the same character over that period—what is your opinion on these assumed facts about the care and prudence that it indicates in the maintenance of those machines?" This inquiry was properly excluded. Apparently the witness had not qualified as an expert upon the question of what belt lacings were suitable; how they should be used; and how often they should be inspected and replaced with new ones, which were the important matters affecting the question of negligence in this case. And, further, the fact that the defendant, for a period of 15 years before this time had, when putting on a new belt, exercised reasonable care in examining the lacings and in replacing those worn out with new ones, did not tend to prove that it did so when this lacing was last put in the belt.

The ruling of the court admitting the complaints of the plaintiff to his physician of the "wound throbbing at night and loss of sleep" was correct. As the complaints were made during the "actual treatment" of the wound, they were, in the absence of evidence to the contrary, presumably made for the purpose of receiving medical treatment and advice, and when made for that purpose were admissible. *Martin v. Sherwood*, 74 Conn. 475-482, 51 Atl. 526, 528; *Wilson v. Granby*, 47 Conn. 59-76 (36 Am. Rep. 51). When the plaintiff was injured, he was stamping what is known as a "steel dome," and was in the act of seizing one to remove it from the iron stand of the press, when the hammer with the stamping form attached to it fell upon his left hand, crushing the fingers in a diagonal line, from and including the knuckle of his little finger, to and including the first joint of his first finger, so that it was necessary to amputate the crushed portions of the fingers. He had been adequately instructed by the defendant as to the proper and careful method of inserting and removing the steel domes, by the thumb and the tips of the first and second fingers.

When the hammer fell he had placed under it at least so much of his hand as was injured, and the court finds that in so doing he increased the injury to the extent that, had he followed the proper method, his injury would have been limited to his thumb and his first and second fingers.

Among the reasons of appeal assigned are that the court erred in ruling that the defendant had failed to sustain the burden of proof as to contributory negligence, since the facts showed that the plaintiff placed nearly his whole hand under the hammer in violation of instructions; and in rendering judgment for the full amount of damage suffered by the plaintiff, including that caused by his own misconduct and negligence. These reasons of appeal cannot be sustained. The finding shows that the entire injury sustained by the plaintiff was caused by the fall of the hammer occasioned by the negligent failure of the defendant to place and keep in the belt in a proper manner a suitable lacing, and that the plaintiff's conduct "in no way contributed to cause the falling of the hammer." It does not appear that the plaintiff increased or added to the extent of his injury by any act of misconduct or negligence. The finding does not state that in placing his hand under the hammer the plaintiff was guilty of negligence, but, on the contrary, expressly says that he was "exercising due care when said injury occurred." This finding is conclusive unless the want of such care is a necessary inference from other facts found. It does not necessarily follow that the plaintiff was negligent because he was removing the steel dome in a different manner from what he had been instructed was the proper way, even though it appears that he would have received a less injury, or even no injury, had he followed the directions given him. The court finds that "the injury to the plaintiff was not due to the ordinary danger incident to the use of a press in reasonably safe condition." It was evidently that ordinary and obvious danger only arising from the possibility of injury from a wrong motion of the hand of the operator in inserting or removing the article to be stamped, or of the foot in controlling the motion of the hammer against which it was intended to warn the plaintiff by the instructions given him, and not the danger that the belt might break from the improper use of unsuitable lacing, a source of danger wholly unknown to the plaintiff, and the one from which his injury really resulted. Having successfully avoided the danger against which he was warned, he was not necessarily negligent in failing to remove the steel dome in a particular way for the purpose of avoiding a danger which he had no reason to anticipate. This question is very fully discussed in the case of *Smithwick v. Hall & Upson Co.*, 59 Conn. 261-268, 21 Atl. 924, 12 L. R. A. 279, 21 Am. St. Rep. 104, where it was held that the plaintiff was not prevented from recovering

the full amount of the damage sustained by him by a fall from the platform upon which he was standing, caused by a danger arising from the defendant's negligence, against which the plaintiff had not been warned, by proof that he would not have fallen if he had obeyed his employer's order not to stand upon that part of the platform. The court properly granted the plaintiff's motion to correct the finding and denied that of the defendant.

There is no error. All concur.

(79 Conn. 535)

IN RE ANDERSON'S APPEAL.

(Supreme Court of Errors of Connecticut.
March 6, 1907.)

1. EVIDENCE — OPINIONS OF EXPERTS — HYPOTHETICAL QUESTIONS.

Where a medical expert testified on cross-examination that his judgment as to testator's capacity was based to some extent on the will which the witness had read, but that his opinion would have been the same if based on the hypothetical question alone, the court properly refused to charge that the opinion of the witness should be disregarded, because not based entirely on the assumed facts.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 2376.]

2. TRIAL—PROVINCE OF JURY—INSTRUCTION.

On an issue of testamentary capacity, a request to charge that the opinions of experts should be disregarded, unless the jury should find that all the facts stated in the hypothetical question propounded to such experts were true, was properly refused; the weight to be given to such opinions being for the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 439-446.]

3. APPEAL—EVIDENCE—PREJUDICE.

Where, in a will contest, if the jury found the facts assumed in a hypothetical question propounded to experts to be true, they should have found the verdict they did irrespective of the evidence of such experts, proponent was not prejudiced by the refusal of the court to sustain an objection to such question.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4229, 4230.]

4. SAME—ASSIGNMENTS OF ERROR.

An assignment that the court erred in charging the jury, as stated in appellant's proposed finding of facts, and as stated in the finding of the court, was too general to constitute a proper assignment of error.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3013-3016.]

Appeal from Superior Court, Fairfield County; Edwin B. Gager, Judge.

Application for the probate of a writing dated March 4, 1902, as the last will of David Hoyt, deceased. From an order disallowing probate of such instrument, and admitting to probate a writing, dated October 26, 1894, as the last will of said Hoyt, Gertrude M. Anderson appeals. Affirmed.

J. Belden Hurlbutt and Levi Warner, for appellant. John H. Light, for appellees.

HALL, J. The testator, David Hoyt of Norwalk, died March 8, 1902, in the eightieth year of his age. It was admitted upon the

trial in the superior court that an instrument, executed by him on the 26th of October, 1894, was his last will, unless one executed by him on the 4th of March, 1902, was a valid will. The appellees claimed that when the testator signed the second will he was of unsound mind, and was induced to execute it by the undue influence of the appellant, and, in support of this claim, asked of one Dr. Huntington, as an expert witness, the following hypothetical question: "David Hoyt, in the 80th year of his age, after two or three weeks' sickness with a cold, though not confined to the house, was taken down with pneumonia on March 2, 1902, from which he died on Saturday, March 8, 1902. He gradually grew worse from the time he was taken sick, until the time he died. Tuesday morning, March 4th, at 10 o'clock, he was suffering very much, and breathing with great difficulty, and he did not recognize his brother who called and spoke to him. About 2 o'clock in the afternoon of the same day his sister called, and found him lying on his back breathing with great difficulty, and making no effort to move. She spoke to him, but he did not recognize her. Before she left the house an attorney at law called to have him execute a will. Immediately after his sister left the house, Mr. Hoyt went through the form of executing a will. Just after this work was finished, and before the lawyer left the house, Mr. Husted, an old friend of the sick man called, and passed into the sick room, and spoke to Mr. Hoyt, but he did not recognize him; and while he was present Mr. Hoyt talked incoherently. That evening between 6 and 7 o'clock, a nephew of the sick man called upon him, and found him suffering very much, and heard him talk incoherently; and during the same hour Mr. Mayhew, a friend and neighbor of Mr. Hoyt called and found him very sick, and tossing about the bed and mumbling something to himself, and Mr. Mayhew spoke to him, but was not recognized. Assuming the foregoing fact to be true, was the testator, in your opinion, capable of planning and executing such a paper as is here offered as his will?" The attorney for the appellant objected to this question, upon the ground that it required the witness to give an opinion as to the sufficiency of the will, and upon the suggestion of the court it was amended, so that the last sentence of it read as follows: "Assuming the foregoing facts to be true, was or was not the testator, in your opinion, a person of sound mind?" This question thus amended was asked by the appellant of said witness, and of several other doctors as expert witnesses, and answered by them without objection.

Upon the cross-examination of Dr. Tracey, one of said expert witnesses, as to the facts assumed in the hypothetical question, and the effect of certain of such assumed facts, he was asked, among others, the following questions, and gave the following answers:

"Q. You have read this particular will? A. Yes, sir. Q. Did that affect your judgment as to the man's capacity? A. Somewhat, yes. Q. Will you tell us where that is in the hypothetical question? A. That isn't in the hypothetical question. Q. Then your judgment in this matter is affected by something outside of the hypothetical question? A. Not at all; the hypothetical question alone. Q. You just said it did? A. If I never read the will, my opinion would be just the same." The record states that the appellee offered evidence to prove, and claimed to have proved, all the material facts assumed in the hypothetical question, and that "the appellant offered evidence to disprove, and claimed to have disproved, substantial and material facts assumed in said question."

There are four errors assigned in the appeal.

The first is in admitting the hypothetical question. This cannot be considered, as no objection was made to the admission of that question or to the answers made to it.

The second is in refusing to charge the jury in accordance with the following written request: "The evidence of Dr. Tracey should be disregarded by the jury. It is based upon the hypothetical question and upon the will. It should have been in reply to the question alone, and he had no right to base his opinion on the will or to permit his opinion to be affected by the character of the will, and he says it was. The extent to which the character of the will affected his judgment cannot be known, and it does not appear what his opinion would have been had not his opinion been influenced by reading the will. The opinion is not given in response to the question asked him, but in response to that and something else which he had no right to consider." This request was properly refused. It assumes that the answer of the witness was based to some extent upon a fact not contained in the hypothetical question, because, upon cross-examination, he said that the fact that he had read the will affected his judgment somewhat as to the testator's capacity. But he also said that his judgment was based upon the hypothetical question alone. It did not follow, as a matter of law, that his judgment was not based upon the facts assumed in the hypothetical question only because the witness had read the will. Whether it was or was not was a question for the jury, and not for the court, to decide.

The third error assigned is the refusal of the court to charge the jury that the answers of all the other witnesses must be disregarded by the jury unless the jury should find that all the facts stated in the hypothetical question were true. There was no error in refusing to so charge. The opinions of expert witnesses given in answer to hypothetical questions can have little, if any, value, unless the material facts assumed in such questions are substantially true, and it is al-

ways proper for the court to so instruct the jury, whenever there is conflicting evidence as to the truth of such assumed facts. Such opinion evidence does not, however, necessarily become wholly valueless because there is some variance between the facts assumed in the hypothetical question, and the actual facts as proven. What weight should be given in such cases to the opinions of such expert witnesses is generally a question for the jury under proper instructions from the court. *Gunter v. State*, 83 Ala. 96, 8 South. 600; *Epps v. State*, 102 Ind. 539, 1 N. E. 491; *Guertig v. State*, 66 Ind. 94, 32 Am. Rep. 99; *Hovey v. Chase*, 52 Me. 304, 83 Am. Dec. 514; *People v. Benham*, 160 N. Y. 445, 55 N. E. 11; *Quinn v. Higgins*, 63 Wis. 864, 24 N. W. 482, 53 Am. Rep. 305; *State v. Kelly*, 77 Conn. 266-275, 58 Atl. 705. In the case before us it is difficult to see how the so-called expert testimony could have worked any injury to the appellant. What the "substantial and material facts assumed in the hypothetical question" were which the appellant claimed to have disproved is not expressly stated in the finding. That the testator was about 80 years old; that he had made a will in 1894; that on the 2d of March, 1902, he was taken sick with pneumonia; that on the 4th of March, 1902, four days before he died, he executed a second will materially different from the first, both of which wills were signed by him with "his mark"—were apparently undisputed facts. Evidently the real contest between the parties upon the matter of testamentary capacity was upon the question of whether at the time of the execution of the second will, the disease of which the testator died a few days thereafter had so far advanced that he manifested the symptoms of mental weakness described in the hypothetical question. What the so-called expert witnesses testified to in answering the hypothetical question, as amended, was in effect that a person of the testator's age, who, four days before his death from pneumonia, was in such a mental condition from that disease, that he talked incoherently, and did not recognize his relatives and friends, was not of sound mind. Certainly the opinion of experts was not required to enable the jury to reach that conclusion upon proof of the assumed facts. The whole question of testamentary capacity seems to have been purely one of fact for the jury in the determination of which the so-called expert could have had no real weight. If the jury found the material facts assumed in the hypothetical question substantially true, they should have rendered the verdict they did, whether they considered the so-called expert testimony or not. If they did not find them substantially true, it is unreasonable to suppose that they could have been influenced to render their verdict by the answers given to the hypothetical question, or could have given these answers any consideration whatever.

The fourth reason of appeal, that the court erred "in charging the jury, as stated in the appellant's proposed finding of facts, and as stated in the finding of the court," contains no proper assignment of error. To refer in an appeal to a part of a proposed finding, not marked proven, as showing the charge of the court, or the rulings or requests to charge made during the trial is improper, as the statements of the proposed finding are not authenticated by the trial judge. The statement in this reason of appeal, that there is error in the charge as stated in the finding, is nothing more than a statement that there is error somewhere in the three pages of the charge printed in the finding of facts. Such an assignment of error is too general. *Chase v. Waterbury*, 77 Conn. 295-304, 59 Atl. 87, 69 L. R. A. 329; *Simmonds v. Holmes*, 61 Conn. 1, 9, 23 Atl. 702, 15 L. R. A. 253. The portion of the charge contained in the finding of facts is only referred to in the appellant's brief, as showing that the court refused to charge as requested. As we have shown that there was no error in such refusal, we refrain from further discussion of the charge.

There is no error. In this opinion the other Judges concurred.

(102 Me. 119)

KELLEY v. TARBOX.

(Supreme Judicial Court of Maine. Nov. 14, 1906.)

1. SHERIFFS—NEGLECT OF DUTY—LIABILITY.

When an officer has made a valid attachment of personal property on a writ of attachment, he must maintain it at his peril.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, *Sheriffs and Constables*, § 196.]

2. ATTACHMENT—RETURN—EFFECT AS EVIDENCE.

When an officer has made an attachment of personal property on a writ, his return on the writ is at least prima facie evidence that the property enumerated in such return was attached.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 5, *Attachment*, § 1171; vol. 43, *Sheriffs and Constables*, § 296; vol. 21, *Execution*, § 1033.]

3. SAME—FILING COPY OF RETURN.

When an officer has made an attachment of personal property on a writ, the filing in the office of the clerk of the town in which the attachment was made, of an attested copy of so much of his return as relates to the attachment, etc., as provided by Rev. St. c. 83, § 27, is an act independent of the attachment, and is calculated to operate only as one of the modes of preserving an attachment already made.

4. SAME—TAKING POSSESSION OF PROPERTY ATTACHED.

When an officer has made return on a writ of attachment that he has attached certain personal property, it does not follow from the return that he did not take possession of the property attached, although, as a matter of precaution, he filed under the statute an attested copy of his return, nor even if he undertook to preserve the attachment by filing an attested copy of his return that he did not afterwards take possession of the property attached.

5. SAME—RIGHT OF REMOVAL.

When an officer has attached personal property on a writ and has filed an attested

copy of his return in the office of the town clerk, as provided by Rev. St. c. 83, § 27, he does not thereby deprive himself of the right to gain actual possession of the property attached, and to remove it whenever necessary for its preservation.

6. SHERIFFS—VALIDITY—ISSUE OF EXECUTION—DEMAND ON ATTACHING OFFICER—FAILURE TO MAKE—LIABILITY OF SHERIFF.

In the case at bar, the plaintiff is a judgment creditor of one H. L. S. The original writ in the action in which the plaintiff recovered his judgment against H. L. S. was placed in the hands of the then sheriff of Washington county, who attached certain personal property thereon and made return as follows:

"Washington—ss.: April 17, A. D. 1902.

"At 9:45 o'clock in the forenoon, by virtue of the within writ, I attached one carpet, one couch, one Morris chair, two rugs, four rockers, one table, one hat tree, one hardwood chamber set, one rolling-top desk, one table, one bookcase, six chairs, one safe and one blank cabinet in said county of Washington, and within five days after the above attachment I filed in the office of the clerk of the town of Machias a true and attested copy of so much of this return as relates to said attachment, with the value of said defendant's property, which I am herein commanded to attach, the names of the parties, the date of the writ and the court to which the same is returnable; and on the same day I gave to the within named defendant a summons in hand for his appearance at court."

After the plaintiff had obtained his judgment and execution thereon, he placed the execution in the hands of a deputy of the defendant sheriff, with instructions to make demand, within 30 days after the date of the judgment, upon the attaching officer, whose term of office had then expired, for the personal property attached on the original writ. *Held*: (1) that the attachment made by the attaching officer was valid; (2) that it was the duty of the defendant's deputy to make demand on the attaching officer, within 30 days after the date of the judgment, for the personal property attached on the original writ; (3) that the defendant's deputy failed to make such demand; (4) that as the failure of the defendant's deputy to make such demand released the attaching officer from all liability relating to the attachment, and deprived the plaintiff of any right of action against the attaching officer, the defendant sheriff became liable for all damages occasioned by the neglect of his deputy.

(Official.)

Exceptions from Supreme Judicial Court, Washington County.

Action by Alden W. Kelley against Charles F. Tarbox. Verdict for defendant, and plaintiff excepts. Exceptions sustained.

Action on the case brought by the plaintiff, a judgment creditor of one Harry L. Smith, against the defendant, sheriff of Washington county, to recover damages caused by the alleged failure of one of the defendant's deputies to make demand, within 30 days after judgment on an execution, for certain personal property attached by the former sheriff of said county on the original writ, in the action in which the plaintiff recovered judgment against said Smith. The term of office of the former sheriff, who made the attachment, had expired at the time the plaintiff obtained his said judgment and execution thereon.

Tried at the January term, 1906, of the Supreme Judicial Court, Washington county. Plea, the general issue.

"After the evidence upon both sides was introduced, the court ruled that the defendant was not liable for the failure of his deputy to make demand upon the attaching officer for the goods alleged to have been attached, unless it be shown that there was a valid attachment of such goods.

"That the return of the officer upon the original writ showing that an attachment was attempted to be maintained by filing in the town clerk's office an attested copy of his return, under Rev. St. c. 83, § 27, of the present Revised Statutes, did not show a valid and maintained attachment of such goods, since it appears that the goods were not bulky, and there was no other reason why the same could not have been immediately removed.

"That, in view of the officer's return, it was incumbent upon the plaintiff to prove, by evidence outside of the officer's return that a valid attachment of the goods in question was made and maintained, and that there is no presumption, in view of the officer's return, that the attachment was properly made and maintained, and that there was no sufficient evidence thereof.

"The court further ruled that the action could not be maintained, and thereupon ordered a verdict for the defendant."

To these various rulings, and to the order of the presiding justice directing a verdict for the defendant, the plaintiff took exceptions, "all of the evidence, documentary and oral, to be made a part of the bill of exceptions; but the counsel by agreement may omit from the printed report of the case any portion of the evidence that they agree is immaterial."

It was also "further agreed by counsel for the plaintiff that, if the foregoing rulings and the direction of a verdict should be considered by the law court to be erroneous, and if the law court should decide upon all of the evidence that the plaintiff is entitled to judgment, judgment for the plaintiff shall be ordered and the case remanded to nisi prius for the assessment of damages only."

Argued before EMERY, WHITEHOUSE, SAVAGE, PEABODY, and SPEAR, JJ.

J. H. Gray, for plaintiff. A. D. McFaul, for defendant.

SPEAR, J. This is an action in which the plaintiff, a judgment creditor of Harry L. Smith, seeks to recover of the defendant, sheriff of Washington county, for the failure of Fred P. Gilson, one of his deputies, to make a demand, within 30 days from the date of judgment, upon an execution, for personal property attached by Isaac P. Longfellow, former sheriff of the county, upon the original writ, upon which said judgment and execution were obtained.

The facts show that the plaintiff, on the 16th day of April, 1902, brought suit against one Harry L. Smith, returnable at the next October term of court. On the 17th day of

April, the writ was delivered to Isaac P. Longfellow, sheriff of the county, who by virtue thereof attached certain personal property of the estate of the debtor. The writ was served and the action entered at said October term of court and continued from term to term. On the 29th day of October, 1903, judgment was entered in favor of the plaintiff for \$126 debt or damage and \$20.70 costs. On the 3d day of November, 1903, a writ of execution was issued directed to the sheriff of said county or any of his deputies. On the 6th day of November, 1903, the writ of execution was delivered to Fred P. Gilson of Machias, then a deputy sheriff of Charles F. Tarbox, sheriff of said county; the term of office of said Isaac P. Longfellow as sheriff having expired before the rendition of judgment.

At this point the allegation became a matter of dispute, but the plaintiff avers that the said Longfellow on the 6th day of November, 1903, had in his hands and possession the goods and chattels of the said Harry L. Smith, above described, which he held by virtue of the attachment on the original writ; that said Fred P. Gilson was on said 6th day of November, 1903, requested by the plaintiff to demand and receive of the said Longfellow the goods and chattels aforesaid, and apply them to the satisfaction of said judgment and execution; and that the said Gilson neglected and refused to make such demand within 30 days after judgment was rendered, so that the plaintiff lost his right of action against the said Longfellow, in case the said Longfellow had failed to keep said goods and chattels by virtue of said attachment as required by law and surrender them to the officer holding the execution, and afterwards, about the 1st of March, 1904, returned the execution to the plaintiff in no part satisfied.

The plaintiff's exceptions show that:

"After the evidence upon both sides was introduced, the court ruled that the defendant was not liable for the failure of his deputy to make demand upon the attaching officer for the goods alleged to have been attached, unless it be shown that there was a valid attachment of such goods.

"That the return of the officer upon the original writ, showing that an attachment was attempted to be maintained by filing in the town clerk's office an attested copy of his return, under Rev. St. c. 83, § 27, of the present Revised Statutes, did not show a valid and maintained attachment of such goods, since it appears that the goods were not bulky, and there was no other reason why the same could not have been immediately removed.

"That, in view of the officer's return, it was incumbent upon the plaintiff to prove by evidence outside of the officer's return that a valid attachment of the goods in question was made and maintained, and that there is no presumption, in view of the officer's return, that the attachment was properly made

and maintained, and that there was no sufficient evidence thereof."

The court further ruled that the action could not be maintained, and thereupon ordered a verdict for the defendant.

The decision of this case must finally turn upon the question of fact whether the deputy sheriff, Fred P. Gilson, made a demand upon Isaac P. Longfellow, the former sheriff, for the goods and chattels attached upon the original writ. If the evidence sustains the contention of the defendant that he made such demand, that is the end of the plaintiff's case, as the deputy sheriff would have discharged his full duty. If, on the other hand, the evidence proves that he neglected to make such demand, then the defendant, who was responsible for the misfeasance of his deputies, will be liable.

By the stipulation in the record the court is to determine this issue of fact.

When established by the plaintiff that the execution was placed in Gilson's hands with directions to make a demand, and that it was returned in no part satisfied and without any demand indorsed upon it, it then devolved upon the defendant, if he would interpose the defense that a demand was made, to assume the affirmative of that proposition. It was incumbent upon him to sustain the burden of proof. We are of the opinion that, upon the evidence, he has failed.

We must then proceed farther, and, upon the assumption that no demand was made, determine the ruling of the court. The presiding justice held, as a matter of law, that the return of the officer upon the original writ "did not show a valid and maintained attachment of such goods, since it appears that the goods were not bulky, and there was no other reason why the same could not have been immediately removed"; and, further, that it was incumbent upon the plaintiff to prove by evidence outside of the officer's return, a valid attachment, and that there was no presumption, in view of the officer's return, that the attachment was properly made and maintained.

The first question that arises for discussion is whether the officer's return showed a valid attachment of the goods in question. "The return of the officer is the evidence that property referred to therein has been attached." *Darling v. Dodge*, 36 Me. 370; *Wentworth v. Sawyer*, 76 Me. 434; *Perry v. Griefen*, 90 Me. 420, 59 Atl. 601.

"To constitute an attachment, it is not necessary that the officer should handle the goods attached, but he must be in view of them with the power of controlling them and of taking them into his possession." *Nichols v. Patten*, 18 Me. 231, 35 Am. Dec. 713.

The return of the officer on the writ of *Kelley v. Smith* is at least prima facie evidence that the property therein enumerated was attached. The officer, in his return, says: "At 9:45 o'clock in the forenoon, by virtue of the within writ, I attached one car-

pet, one couch, one Morris chair, two rugs, four rockers, one table, one hat tree, one hard-wood chamber set, one rolling-top desk, one table, one bookcase, six chairs, one safe and one blank cabinet in said county of Washington." This is the clause that constitutes the return of the officer's attachment, and, if it stopped right here, would operate as a valid attachment of the goods. Then follows another clause relating to the filing of the certificate in the town clerk's office: "And, within five days after the above attachment, I filed in the office of the clerk of the town of Machias a true and attested copy of so much of this return as relates to said attachment, with the value of said defendant's property, which I am herein commanded to attach, the names of the parties, the date of the writ and the court to which the same is returnable."

We are unable to discover anything in the last clause of the return which is inconsistent with the declaration of the officer in the first clause that he had made an attachment. In fact, the language of the second clause, "within five days after the above attachment," admits the attachment in the first, and becomes only the evidence of one of the modes authorized by law of preserving the attachment.

Non constat, from the officer's return, that he did not retain possession of the goods, although he had also filed his certificate under the statute as a matter of precaution; nor, even if he undertook to preserve the attachment by filing a portion of his return, that he did not thereafter take possession of the articles attached.

Upon this phase of the case relating to attachments and the different methods of preserving them, our court, in *Wentworth v. Sawyer*, 76 Me. 434, in discussing the reason for the statute authorizing the preservation of attachments by filing an attested copy of a portion of the return, say: "It will be seen by this provision that no attempt is made to change the mode of making the attachment but a new and easier method of preserving it is provided." "Nor are we satisfied that the officer, by filing with the town clerk the copy and certificate required by statute, deprived himself of the right to gain actual possession of the property attached, and remove it whenever necessary for its preservation." See, also, *Perry v. Griefen*, supra.

The officer's return shows a valid attachment in the original suit, but the presiding justice, in ordering a nonsuit, held that not only a valid attachment must be made by the officer but must be maintained by him. It seems to us, however, that, when an officer has made a valid attachment upon a writ, he must maintain it at his peril. And it becomes immaterial, if Sheriff Longfellow had made a valid attachment, whether he maintained it or not, as he would be liable in either case, if demand was made upon him on execution for the delivery of the goods for the benefit of the attaching creditor. To be

sure, the case at bar is not against Longfellow, but, to fix his liability, even if guilty of the misfeasance alleged, the statute required that a demand should be made upon him for the goods attached, by a proper officer, within 30 days from the rendition of judgment; that is, if it be assumed that Longfellow, after he had made a valid attachment, absolutely released it, and let the property go out of his control and custody, yet, without a demand, he was relieved from all liability. On the other hand, having made a legal attachment, he must himself assume the responsibility of preserving it, and if by neglect, mistake, or intention, he lost the control and custody of the personal property attached so that he could not surrender it to the officer for the benefit of the creditor, if demanded, within 30 days from judgment, he would become liable.

Hence it was incumbent upon the officer, charged with the duty, to make the required demand in order to preserve the liability of the attaching officer, whether the property attached was in his custody or not.

The duties of the attaching officer in his relations to the attaching creditor is stated in *Wentworth v. Sawyer*, 76 Me. 434, supra, as follows: "The sheriff is the mere minister of the law to preserve for the creditor satisfaction of the debt, and it is therefore indispensably necessary that he should sustain such a relation to personal property which he has seized as will enable him to hold it to answer the purpose for which it was attached. His relation to the property by virtue of the attachment, and the reduction of it into his possession and control, are such that he is vested with a special property in it which enables him to protect the rights he has acquired, and this special property continues so long as he remains liable for it, either to have it forthcoming to satisfy the plaintiff's demand, or to return it to the owner, upon the attachment being dissolved."

Blake v. Kimball, 106 Mass. 115, is an action of tort against a sheriff for the negligence of one of his deputies, and clearly states the duties of the attaching officer and his relations to the attaching creditor, as follows: "Upon the attachment of personal property on mesne process, the duty of the attaching officer to the plaintiff in the suit is to keep the attached property safely, so that it may be forthcoming in order to be taken upon such execution as shall be issued in 30 days after the final termination of the suit in a judgment in favor of the plaintiff. The extent of the plaintiff's right and of the officer's duty, as to such property, is that it shall be forthcoming. During the pendency of the suit, the officer may make such arrangements upon his own responsibility, in regard to the custody of the property, as he may see fit. To these arrangements the attaching creditor is not a party, unless he

should choose to make himself so by direct participation or express consent. The removal of the attached property beyond the officer's reach would have no effect on the rights and liabilities of the parties in relation to each other. The attached goods remain constructively in the officer's possession, and his liability to the creditor's rights against him is exactly the same as if the possession, instead of being constructive, was actual and literal."

In his ruling, the court undoubtedly assumed that, inasmuch as the attachment had not been maintained, and the attaching officer could not produce the goods, the plaintiff had suffered no loss on account of the failure of Gilson to make a demand within 30 days after judgment; but it clearly appears from the above decisions that the attaching officer, whatever had become of it, was legally responsible to the attaching creditor for the "actual and literal" possession of the property attached.

Upon the necessity of demand, see *Parsons v. Tincker*, 36 Me. 384, which was an action against an attaching officer for failure to preserve his attachment upon a brig, which soon afterwards sailed on a voyage, and, at the time of the issue of judgment and execution upon the writ of attachment, and for more than 30 days thereafter, was beyond the jurisdiction of the state. The execution seems not to have been placed in the hands of the officer within 30 days for the purpose of preserving the judgment lien, and it was held that nothing had been done whatever to fix the liability of the defendant, and, further, that the fact that the vessel was out of the jurisdiction of the state did not relieve the defendant from the necessity of seasonably placing his execution in the hands of the officer for a demand upon the deputy sheriff making the attachment on the original writ.

To the same effect is *Wetherell v. Hughes*, 45 Me. 61, and *Bicknell v. Hill*, 33 Me. 297.

This being the law, it was the duty of Gilson, the defendant's deputy, in whose hands the execution was seasonably placed, to make a demand upon the attaching officer, within 30 days from the date of judgment, for the goods attached upon the original writ, in order to fix his liability for the goods so attached. In other words, such a demand was a prerequisite to the right of the plaintiff to maintain an action against Mr. Longfellow for not preserving the attachment. The failure of the deputy to make such demand deprived the plaintiff of any right of action, whereby the defendant became liable for all damages occasioned by the neglect of his deputy.

According to the stipulation in the report, the case is remanded to nisi prius for assessment of damages only.

Exceptions sustained.

(105 Md. 135)

RIGGS et al. v. TURNBULL.

(Court of Appeals of Maryland. Feb. 28, 1907.)

1. BROKERS — COMPENSATION — FAILURE TO COMPLETE CONTRACT — DEFAULT OF PURCHASER.

A sale of property negotiated by a broker for \$38,000 provided for a payment in cash of \$500, a payment of \$4,500 on a later date when the deed was to be delivered, and a mortgage for the remainder given, together with a bond for improvements to be placed on the property by the purchaser. On the date when the deed was to be given, the purchaser was unable to comply with the contract, but paid \$3,000, and further time was granted. A few months later, the purchaser, still being unable to comply with the contract, gave his note to the vendor for \$2,000, and the contract was canceled. *Held*, that the broker was not entitled to his commission.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Brokers, § 97.]

2. TRIAL—MOTION TO TAKE CASE FROM JURY—WAIVER.

A request by defendants at the close of plaintiff's case to withdraw the case from the jury is waived by introducing evidence after the request is denied.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 982, 983.]

Appeal from Court of Common Pleas; John J. Dobler, Judge.

Action by Edwin L. Turnbull against Clinton L. Riggs and Mary C. Riggs. Judgment for plaintiff and defendants appeal. Reversed.

Argued before BRISCOE, BOYD, PEARCE, SCHMUCKER, and BURKE, JJ.

Leon E. Greenbaum and George R. Galtner, for appellants. John H. Morgan and John Phelps, for appellee.

PEARCE, J. This action was brought by Edwin L. Turnbull for the recovery of commissions as a broker for the sale of a house and lot, No. 908 North Charles street, the property of Clinton L. Riggs.

Some time in March, 1905, the plaintiff was employed by William B. Ehlen to purchase for him the adjoining property, No. 901 North Charles street, to be converted into an apartment house, and while this negotiation was pending, the plaintiff urged Ehlen to purchase the defendants' adjoining property, and convert the two into one large apartment house. Ehlen authorized plaintiff to negotiate for him for the purchase of this property also, but upon the distinct understanding that he would not pay any commissions upon that purchase, though he had agreed to pay commissions upon the purchase of No. 901, because the owner refused to pay them. After three interviews with Riggs, plaintiff negotiated a sale to Ehlen for \$38,000, Riggs agreeing to pay the usual commissions of 2½ per cent. on the purchase price, the commissions to be paid when Riggs received his money, and at that time plaintiff informed Riggs that the two properties were to be used as an apartment house, but did not disclose to him that he was acting for

Ehlen in the purchase of the property. On the date of the last interview, March 29, 1905, a written agreement was entered into between Riggs and his wife, and Ehlen for the purchase of the latter of the property, No. 903 North Charles street, for the sum of \$38,000, of which \$500 had been paid before the signing of the agreement, and the balance was to be paid as follows: "\$4,500 on the 1st of June, 1905, at which time a deed for the property shall be executed, and a mortgage for the unpaid price shall be given, with a satisfactory bond for improvements to be erected. Said mortgage to bear 5 per cent. interest, and to be payable as follows: \$5,000 in 6 months from date of mortgage; \$3,000 in 12 months, balance payable within 5 years at option of vendee." The plaintiff explained that the bond for improvements mentioned in this agreement was to protect Riggs in event that the existing improvements were torn down to make way for the new, and to secure him until the new improvements were erected, and Riggs testified that, when Ehlen was disclosed as the purchaser, he questioned his financial responsibility, and at the suggestion of Riggs' brother, who was his counsel, it was stipulated in the agreement that a satisfactory bond should be given for the erection of the apartment house, which was to cover the property, so that he might be protected. On June 1, 1905, Riggs had moved out of the house and was ready to deliver it to Ehlen, but Ehlen told him he was unable to carry out the terms of the contract, but he then paid \$3,000, and asked indulgence until he could get his clients together, and put the deal through. This indulgence was given, and Riggs testified that he repeatedly urged Ehlen to comply with the contract, and did everything in his power to aid him, personally offering to take \$50,000 of the bonds to carry out the scheme of the apartment house. This condition of affairs continued until the month of October. In the meantime, Riggs had placed the matter in the hands of his brother Alfred R. Riggs, as his attorney, who testified that he told Ehlen he was instructed to enforce the contract, and Ehlen assured him he had not a dollar in the world; that the men who had agreed to go in the deal with him had all backed out, and if he was sued, it would simply put him out of business, and Riggs would get nothing. The result of this was that on October 11, 1905, Ehlen gave his note for \$2,000, payable four months after date, and the contract was canceled by Alfred R. Riggs, attorney for Clinton L. Riggs by indorsement thereon. No part of this note has ever been paid. The adjoining property, No. 901 North Charles street, was not converted into an apartment house at all, and is now occupied as a furniture store, and Mr. Riggs has since endeavored to sell his property at \$5,000 less than Ehlen contracted to pay, but has been unable to find a purchaser at any price because the ad-

joining property is in the hands of real estate speculators. The bond for improvements stipulated for in the contract was never given, and it is clear from Ehlen's statement to Alfred R. Riggs that he was utterly unable to comply with that stipulation.

In 23 Amer. & Eng. Enc. of Law, 917, the general rule is said to be that "where the purchaser presented by the broker is accepted by his employer, and they enter into a valid, binding, and enforceable contract of sale, the broker is entitled to his commissions, whether or not the contract is actually carried into effect, and the sale made," and substantially the same rule is announced in *Mechem on Agency*, § 966, and in *Clark & Skyles on Agency*, § 773. An examination of the cases shows that this rule prevails in most of the states of this country, where the question has been clearly raised and decided. The ground upon which most of these cases proceed may be illustrated by the case of *Ormsby v. Graham*, 123 Iowa, 202, 98 N. W. 724, in which a consummated sale is defined as "one consummated by such a contract as will be enforced by the courts if enforcement be demanded," and by the case of *Brennan v. Perry*, 7 Phila. (Pa.) 243, where it was held that: "In order to entitle a broker to commissions, there must be an actual sale, vesting the right to the purchase money in the vendor, and transferring the right of property to the purchaser." But this is not the rule prevailing in England, or in this state.

In *Keener v. Harrod*, 2 Md. 70, 56 Am. Dec. 706, the court said: "The legal import of an agreement to procure a purchaser, binds the party to name a person who ultimately buys the property," as was held in *Murray v. Currie*, 32 Eng. Com. Law, 641, cited by the court in support of its language. In *Kimberly v. Henderson and Lupton*, 29 Md. 515, the court said: "To be entitled to their commissions as brokers they should have completed the sale; that is, they should have found a purchaser in a situation, and ready and willing to complete the purchase according to the terms agreed upon. The undertaking to procure a purchaser requires of the party so undertaking, to produce a party capable and who ultimately becomes the purchaser. These propositions are settled in *Keener v. Harrod and Brooke*, 2 Md. 63, 56 Am. Dec. 706, and *McGavock v. Woodlief*, 20 How. (U. S.) 221, 15 L. Ed. 884."

In *Kimberly v. Henderson and Lupton*, supra, there was a written agreement for sale with a stipulation that in case either party should fail to comply with the contract, a forfeit of \$1,000 should be paid by the party in default to the other party. The vendee was unable to comply, being disappointed in the receipt of funds which he expected to receive, and he paid the forfeit accordingly. In a suit for brokers' commissions, the court below granted a prayer of the plaintiff that if the agreement for the sale of the property

offered in evidence was made through the plaintiffs as brokers of defendant, the plaintiffs were entitled to their commissions as brokers, "for their services in effecting the negotiations which terminated in said agreement, as fully as if a deed had been executed for said property, and the purchase money had been paid," and refused a prayer of defendant that plaintiffs were not entitled to recover, "even if the jury found that the parties entered into the contract offered in evidence, if the jury further found that the contract of sale was put an end to by the payment by the purchaser of the forfeit of \$1,000." On appeal, this court reversed a judgment in favor of the plaintiffs, saying that the prayer of the plaintiffs should have been refused, and that of the defendant should have been granted, and it will be seen that this prayer of the plaintiffs presented the theory that the broker is entitled where the parties enter into a contract of sale, whether the contract is actually carried into effect or not, while that of the defendant made the right of recovery to depend upon the carrying of the contract into execution. In delivering the opinion in that case, Judge Alvey said: "A party was produced, it is true, and a contract entered into through the agency of the appellees, but of such a character that the party contracting, by the exercise of an option given him, relieved himself of the obligation to complete the purchase, and did not in fact become the purchaser." The appellee's counsel in the case before us sought to avoid the effect of this decision, because of the option given the purchaser to relieve himself of his obligation by payment of the forfeit. But this cannot avail the plaintiff. The distinct ground upon which the plaintiff's right of recovery was denied in the case referred to, was that he "did not in fact become the purchaser," and it is immaterial whether this was because he was literally unable to comply with the contract, or because the terms of the contract negotiated by the broker permitted him to substitute the payment of a forfeit for performance. The forfeit was provided for the exclusive benefit and protection of the vendor, and not for that of the broker, whose right of recovery depends absolutely upon the carrying of the contract into execution, except in the single case where the vendor by his own fault prevents its execution. The commissions are recoverable for a sale made and executed, not for the receipt of a forfeit provided to indemnify the vendor for nonperformance by the vendee.

In *McGavock v. Woodlief*, 20 How. (U. S.) 229, 15 L. Ed. 884, cited in *Kimberly v. Henderson*, 29 Md. 515, the Supreme Court said: "The broker must complete the sale; that is, he must find a purchaser in a situation, and ready and willing to complete the purchase on the terms agreed on, before he is entitled to his commissions. Then he will be entitled

to them, though the vendor refuse to go on and perfect the sale." Mr. Benjamin argued that case for the defendant, the plaintiff in error, and one of his propositions, apparently approved by the court, was that it was necessary for the broker to show "that the sale was actually made, and the price received, or at all events, that it was his employer's own fault that the sale was not effected." The view thus expressed by Mr. Benjamin was distinctly announced in *Chapman v. Winson*, 91 Law Times Rep. (N. S.) 17. In that case, the broker introduced a person who signed a formal contract for the purchase of a hotel for £2,000, of which £200 was paid at once, and the balance was to be paid upon completion of the purchase. The purchaser was unable to carry out this contract, and communicated this fact to the broker, who informed the vendor, but also claimed full commissions. The vendor subsequently agreed with the purchaser that the vendor should retain the £200, and that the purchaser should be released from the contract, and the broker sued for his commissions and was denied the right to recover. The Master of the Rolls said: "It seems to me the *prima facie* meaning of this contract is that the condition precedent is to be that the purchase is to be completed, in the legal sense, by payment of the purchase money. * * * In my opinion, she would become the purchaser when the purchase was completed by payment of the purchase money." In complete accord with the earlier Maryland cases, and with the above recent English case, is the case of *Richards v. Jackson*, 31 Md. 250, 1 Am. Rep. 49, where there was a written agreement for the purchase, and the purchaser refused to comply because he was advised the title to the property was defective, though in a subsequent proceeding it was pronounced by the court to be a good title. The broker then sued for his commissions and recovered judgment, which this court reversed, saying: "It is not sufficient that he [the purchaser] should enter into an agreement to purchase, but he must actually purchase by complying with the terms agreed on, unless his failure to do so is occasioned by the fault of the vendor." This case, and the case of *Kimberly v. Henderson* in 29 Md. 515, *supra*, were approved in *Melvin v. Aldridge*, 81 Md. 658, 32 Atl. 389, in which, in an equity case, it was held that, where purchase money in an executed sale was payable in installments, the broker was only entitled to commissions on the installments as paid from time to time, because, in the language of the court, "until they are actually paid, the terms of sale have not been complied with."

In the very recent case of *Coates v. Locust Point Company*, 102 Md. 291, 62 Atl. 625, there was an agreement between the parties that if the lessee of property who had been procured by the real estate broker exercised an option given him in the lease to buy the same, the broker should be entitled to

commissions on the sale also. The option was exercised, but a part only of the purchase money was paid when the broker sued for his commissions. It did not appear from the record in that case just how much of the purchase money had then been paid, or whether the circumstances were such as to require the broker to wait until the purchase money was paid, but it was very strongly intimated that there could be no recovery for the amount unpaid.

In the present case, as we have already said, an important term in the contract of sale, was that a satisfactory bond for improvements to be erected should be given by the purchaser, which improvements contemplated the tearing down of the dwelling then on the premises. There was not only not a particle of evidence to show that such a bond was ever given or tendered, but the undisputed evidence shows that the purchaser stated to the defendants' attorney that "he had not a dollar in the world; that all the money he had put into the transaction was borrowed money, and he was unable to borrow any more; that the men who had agreed to go into the deal with him had all backed out, and he was unable to do anything." The giving of this bond was the only thing, which, under the scheme of improvement, would afford any rational protection to Riggs, and without such bond there could be no pretense of compliance with the terms of the contract. If any authority were needed to show how vital to this contract is that provision, it is found in the case of *Inge v. McCreery*, 60 N. Y. App. Div. 557, 69 N. Y. Supp. 1052. In that case, one of the terms required by the defendant was the production of a bond of a surety company for \$25,000, conditioned for the completion of a building on the premises. The court said: "The undertaking [of the broker] was not to get a purchaser to take the property and pay the purchase money. It was more than that. He was to get some one to erect a large building, and the defendant was to make a builders' loan for that purpose, when protected by the stipulated bond."

In harmony with this case it was held in *Hale v. Kumler*, 85 Fed. 161, 29 C. C. A. 67, that "where the [any] condition upon which a broker is to be entitled to his commissions has not been fulfilled, but performance has not been prevented by the wrongful conduct of the principal, the latter is entitled, in an action by the broker for compensation, to rely upon the fact of nonperformance." In the light of these principles, sound and satisfactory in themselves, and illustrated by the cases which we have cited from the courts of this state, the federal court and the English courts, there was error in the rejection of the defendants' first prayer offered at the close of the defendants' testimony, which is as follows: "The defendants pray the court to instruct the jury that there is no legally sufficient evidence that William B. Ehlen, who signed the agreement to purchase the

property referred to in the evidence, was ready and willing to complete the purchase according to the terms agreed upon, and, as a matter of fact, did complete the purchase, and that by the undisputed evidence in this case, the defendants were ready and willing to comply with the terms of agreement of sale, and that their verdict must be for the defendants." In view of this conclusion, it is unnecessary for us to consider any of the other prayers in the case, those offered by the defendants at the close of the plaintiff's case seeking to withdraw the case from the jury, being waived by proceeding to offer their own testimony, after the rejection of these prayers, and, as there can be no recovery in this state of the case, no new trial will be awarded.

Judgment reversed, with costs above and below.

(106 Md. 397)

STEWART v. STEWART.

(Court of Appeals of Maryland. March 1, 1907.)

1. DIVORCE—GROUNDS—STATUTORY PROVISIONS.

Under divorce laws (Code Pub. Gen. Laws, art. 16, § 37), providing that a divorce a mensa et thoro shall be granted only for cruelty of treatment, excessively vicious conduct, or abandonment and desertion, a bill praying for divorce a mensa et thoro on the ground of adultery alone is insufficient.

2. SAME—PROCEEDINGS—PLEADINGS—ANSWER.

Where a bill for divorce does not contain such allegations as would warrant the decree sought, the proper mode of taking advantage of such defect is by demurrer, but, where the objection goes to the whole bill except the prayer for alimony and the defendant would by his demurrer admit the charge of adultery in the bill, the defense may be properly made by answer.

3. SAME—INJUNCTION—SALE OF PROPERTY.

An allegation in an action for divorce that defendant has declared his intention to dispose of his dwelling and place of business, followed by the expression of plaintiff's belief that he would do so to her injury, was not sufficient to warrant the granting of her prayer for an injunction restraining him from disposing of his property.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Divorce, § 600.]

Appeal from Circuit Court of Baltimore City; Alfred S. Niles, Judge.

Bill by Lottie J. Stewart against Randall Stewart. From a decree for plaintiff, defendant appeals. Reversed and remanded.

Argued before BRISCOE, BOYD, PEARCE, SCHMUCKER, BURKE, and ROGERS, JJ.

C. Dodd McFarland, for appellant. W. Purnell Hall, for appellee.

PEARCE, J. The bill in this case was filed by the appellee against the appellant for divorce a mensa et thoro; the only ground alleged being adultery. The bill, after alleging that the defendant, had been guilty of the crime of adultery with a woman specifically named, and others unknown to the plaintiff, within six months preceding

the filing of the bill, further alleged that the defendant is possessed of certain leasehold property on Druid Hill avenue, in Baltimore City, and that he conducted a restaurant and saloon on Lee street, in Baltimore, which business yielded him over \$100 a week; that she had not lived or cohabited with the defendant since September 7, 1906, when she discovered his adulteries, though she is destitute of means of support, or of prosecuting her suit for divorce; and that the defendant had informed her "that he intended to dispose of his dwelling and business place, and that she believes he will do so to the great injury of your oratrix in the premises, and that only by the writ of injunction can your oratrix's marital rights be fully protected until the final determination of this suit." The prayer of the bill was for alimony, both pendente lite and permanent, and for a reasonable sum of money for employment of counsel and expenses of her suit; also, for an injunction restraining the defendant "from disposing of or assigning said leasehold property or his place of business, or the contents thereof, until the final disposition of the suit." An injunction was issued immediately upon the filing of the bill, in the precise language of the prayer therefor. In a few days thereafter the defendant filed an answer, denying that he had been guilty of any act of adultery, and alleging that the plaintiff abandoned him on September 7, 1906; that they had resided on Druid Hill avenue, though he conducted his business on Lee street; and that about the date last mentioned he proposed for reasons of economy to rent out his dwelling and remove to the building in which he conducted his saloon and restaurant, and, to gain the plaintiff's consent, offered to give her the rent of the dwelling, about \$25 a month, and allow her all the profit she could make by managing the restaurant, but that she declined to live with him at his place of business. He alleged that he purchased the leasehold property mentioned for \$1,500, paying \$300 of his own money, and giving a building association mortgage for \$1,200, on which he paid \$7.97 weekly; that he had only been in business on Lee street about four months, and that the expenses were equal the receipts, and that he had no other property, but that the plaintiff had furniture worth \$400 or \$500. He also denied the allegations of that paragraph of the bill in which plaintiff stated he had informed her he intended to dispose of his dwelling and place of business, and that she believed he would do so, to her injury, and further denied that she was entitled to a divorce a mensa et thoro or to any relief whatever under the allegations of her bill, because she does not charge either cruelty of treatment, excessively vicious conduct, or abandonment and desertion; these being the only three causes for which a divorce a mensa et thoro may be decreed as he alleges, under section 37 of article 16,

Code Pub. Gen. Laws, which is the only statute in this state relating to divorces a mensa et thoro, and the bill praying specifically for such decree.

On the same day this answer was filed the defendant moved for the dissolution of the injunction. Upon the filing of the bill on September 8, 1906, an order was passed the same day requiring the defendant to pay the plaintiff \$25 as counsel fee for her solicitor, and \$7.50 per week as alimony pendente lite, unless cause to the contrary was shown on or before September 25, 1906, provided a copy of that order was served on defendant on or before September 18, 1906, and service was made September 8, 1906. On October 12, 1906, the motion to dissolve was refused, and the order of court as to alimony and council fee was made absolute, and appeal was entered from that order same day. There is nothing in the record to show whether any testimony was taken, nor does it appear whether any argument or hearing was had at or before the passage of the order appealed from. The principal question in the case, and the one which goes to its root, is whether the court has power to decree a divorce a mensa et thoro, when that is the specific decree sought, and the only ground alleged is adultery.

Prior to Act 1841, c. 262, all divorces emanated from the Legislature. By that act jurisdiction "of all applications for divorce" was given to the Chancellor or to the county courts of the state, and section 21 of article 3 of the Constitution of 1861 forbid the granting of any divorce by the General Assembly, and this has ever since continued to be the fundamental law in this state. The transfer of jurisdiction from the General Assembly to the courts thus became exclusive, but full discretion was not conferred upon the courts. From a period before the Revolution, however, the Court of Chancery in this state had full jurisdiction in cases of alimony, though no divorce had been decreed or was asked for, and though the case made by the bill and proof would not, according to the ecclesiastical courts in England, entitle her to a divorce a mensa et thoro. *Hewitt v. Hewitt*, 1 Bland, 101. *Jamison v. Jamison*, 4 Md. Ch. 289. In 2 *Nelson on Divorce & Separation*, p. 979, the author says: "The power to grant a decree from bed and board must be conferred by a statute stating the causes for which it may be granted. If the power is not so conferred, the court will not grant a separation for the common-law causes of divorce." In 14 *Cyc.* p. 74, it is said: "In some jurisdictions either kind of divorce may be granted in the discretion of the court." We have examined the cases referred to in this passage, and find that they all rest upon construction of the statute. Thus, in *Collier v. Collier*, 16 N. C. 352, the court said: "The Legislature had transferred that jurisdiction, with full discretion, to the courts." And in *Sullivan v. Sullivan*, 112 Mich. 674,

71 N. W. 487, where the complainant asked for a decree of separation, and not for one a vinculo, and the court decreed the latter, justifying its action by the statute, one section of which provided for a divorce from bed and board on the ground of extreme cruelty, and for certain other causes, and the next section provided that a divorce from the bond of matrimony might be decreed for any cause mentioned in the preceding section, whenever in the opinion of the court the circumstances of the case should be such as made it discreet and proper to do so. It is not believed any case is referred to by the text-writers warranting the exercise of discretion by the court in granting a decree for a cause not stated in the statute, unless that discretion is conferred by the statute either in express terms or by clear implication.

Apart from the technical rules of construction generally which lead to this conclusion, and the apparent absence of authority to sustain the contention of the appellee, an examination of our own statute seems to strengthen this conclusion. Section 36 of article 16 relates exclusively to the granting of decrees for divorce a vinculo, and enumerates the grounds upon which the statutory jurisdiction conferred may be exercised, but intimates no authority to grant such decree for any cause not enumerated in that section. Section 37 of article 16 relates exclusively to the granting of decrees a mensa et thoro, and enumerates the grounds upon which that jurisdiction (which is also purely statutory) may be exercised, none of which causes would warrant a decree of divorce a vinculo; but it then proceeds to provide that "the court may decree a divorce a mensa et thoro in cases where a divorce a vinculo is prayed, if the causes proved be sufficient to entitle the party to the same"; that is to say, if the causes or some of them proved, though not necessarily alleged, are such as warrant a decree a mensa et thoro, though the causes alleged as ground for a decree a vinculo, may not be established by proof. A reference to Act 1841, c. 262, shows that as originally enacted the clause last quoted above was followed by the words, "under the provisions of this act"; these words being omitted when that act was originally codified. This provision only dispenses with formal allegation in a bill for a decree a vinculo, of ground for a divorce that would warrant a decree a mensa et thoro, but permits the offer of proof of the latter ground, upon failure of proof of the former, and bases the decree upon the actual proof, thus confining the exercise of jurisdiction to the special statutory ground named in the statute.

In *Schwab v. Schwab*, 93 Md. 385, 49 Atl. 331, 52 L. R. A. 414, Judge Schmucker, speaking for the court, said: "An action for a divorce a vinculo is in every respect different from that for a divorce a mensa et thoro. They are both statutory proceedings. and they proceed upon different sections of the

statute, are founded upon a different state of facts and aim at entirely different results." And in *Robertson v. Robertson*, 9 Daly (N. Y.) 53, in a similar case, Judge Van Brunt said: "The action for absolute divorce is entirely different in every respect from an action for a separation. They have no relation one to the other, and proceed under entirely different divisions of the statute law." The question here is not, as stated by the appellee, whether the party complaining can be required to take more than is desired or asked for, but whether the court has power to grant any other relief upon the single ground stated than the one provided by the statute. Whatever views we might entertain of the wisdom of the law in discriminating and fixing the different grounds upon which alone these respective forms of divorce may be granted, our only power is to construe the law as it stands upon the statute book, and we are not able to construe this law otherwise than we have done. There is much diversity of opinion as to the desirability of decrees of separation from the standpoint of public policy, and that subject is well discussed in *Nelson on Divorce & Separation*, pp. 978, 979. In *Barclay v. Barclay*, 98 Md. 374, 56 Atl. 804, we have expressed our approval of the opinion of the Master of the Rolls in *Besant v. Wood*, L. R. 12, Ch. Div. 605: "That it would be better in many cases for married people to avoid the expense and scandal of suits for divorce by settling their differences quietly by the aid of friends out of court, though the consequence might be that they would live separately." But the appellee contended that, if the bill did not contain such allegations as warranted the decree sought, the proper remedy was to demur to the bill, citing in support of this contention *Miller v. Balto. County Marble Co.*, 52 Md. 646, in which the court said: "Whenever the ground of objection or defense is apparent on the face of the bill itself, either from matter contained in it or from defect in its frame, it is well settled that the proper mode of taking advantage of such objection is by demurrer." In this case the objection goes to the whole bill, or at least to all except the prayer for alimony, and if the defendant is not guilty of adultery, as he has sworn he is not, he would by demurrer have admitted the truth of that charge in the bill. He ought not to be driven to that position, and we think in such a case as this the defense may be properly made by answer. Ordinarily the defense of limitations in equity must be relied on by plea or answer. *Allender v. Trinity Church*, 3 Gill, 166. But in *Belt v. Bowie*, 65 Md. 355, 4 Atl. 295, it was held that it might be availed of by demurrer, and again in *Blays v. Roberts*, 68 Md. 512, 13 Atl. 366.

It is a settled law in this state that a husband may alienate his property at will, even though in the exercise of this right he strips himself of all means of supporting or main-

taining his wife, provided he does so bona fide, and with no design of defrauding her of her just claims upon him and his estate. *Ricketts v. Ricketts*, 4 Gill, 105; *Feigley v. Feigley*, 7 Md. 561, 61 Am. Dec. 375. There is no charge in this bill of any intent to defraud her of her marital rights. The only charge is that he had declared his purpose to dispose of his dwelling and place of business followed by the expression of her belief that he would do so to her injury. We do not think this allegation warranted an injunction, and the motion to dissolve should have been allowed. Moreover, the injunction is only ancillary to the chief purpose of the suit, and, if the case made by the bill did not entitle her to a decree, she could not be entitled to an injunction. *Gelston v. Sigmond*, 27 Md. 334. In *Rose v. Rose*, 11 Paige (N. Y.) 167, an injunction which prohibited the husband not only from parting with his property, but from carrying on his ordinary business, was declared too broad, and properly, as we think. This objection is especially apparent in this case, since the order which continued the injunction also made absolute the order for weekly alimony of \$7.50, and the only evidence in the case of his ability to pay that sum is the alleged weekly profits for carrying on his ordinary business. It follows from what we have said that the order appealed from must be reversed and the injunction be dissolved, but, as the plaintiff would have a right to proceed for permanent alimony, without asking for any decree of divorce, and may desire to apply for leave to amend her bill accordingly, the case will be remanded to enable her to do so if she desires.

Decree reversed, injunction dissolved, and cause remanded for such further proceeding as may be in conformity with this opinion; costs to be paid by appellant.

(106 Md. 171)

SLOAN v. CLARKSON.

(Court of Appeals of Maryland. Feb. 23, 1907.)

CORPORATIONS — STOCKHOLDER'S ACTION — RIGHT TO COMPEL ACCOUNTING BY AGENT.

Where the petition in an action by a resident minority stockholder of a foreign corporation doing business in the state against the corporation and a resident agent thereof, alleged that the corporation refused to require the agent to account to it respecting sales made by him and the business conducted by him as agent, and that such refusal was due to improper and fraudulent motives and was based on the fact that the agent, the president, the secretary, the treasurer, director and majority stockholder were one and the same person, and that the action of defendants and of the majority of the directors of the company was fraudulent and in violation of complainant's legal rights, a court of equity had jurisdiction to require the agent to account.

Appeal from Circuit Court of Baltimore City; Alfred S. Niles, Judge.

Bill by Frank S. Clarkson against F. Eugene Sloan, trading as Frank B. Sloan & Co., and another. From an order overruling a

demurrer to the complaint, defendant, Sloan, appeals. Affirmed.

Argued before BRISCOE, SCHMUCKER, BOYD, PEARCE, and BURKE, JJ.

Frank Gosnell and George W. Taylor, for appellant. Aubrey Pearre and Randolph Barton, Jr., for appellee.

BRISCOE, J. This is an appeal from an order of the circuit court of Baltimore city passed on the 13th day of November, 1906, overruling a demurrer of F. Eugene Sloan, trading as Frank B. Sloan & Co., one of the defendants, to the plaintiff's amended bill of complaint. The original bill was filed by the appellee against the appellant and the Norris Sash Pulley Company, a West Virginia corporation transacting business in this state. The court below sustained the demurrer to the original bill, with leave to the plaintiff to amend, and also held that the plea of the Norris Sash Pulley Company "be, and it is hereby, allowed to stand as the answer of the company." Thereupon the plaintiff amended the bill of complaint, and a demurrer and plea were filed to the amended bill. The demurrer being overruled, the defendant Frank B. Sloan & Co. has appealed.

The bill avers that the plaintiff and the defendant F. Eugene Sloan are citizens and residents of the city of Baltimore, Md., and that the defendant the Norris Sash Pulley Company is a West Virginia corporation, but having its place of business and principal office in the city of Baltimore; that the plaintiff and the defendant Sloan are practically the substantial owners of all the stock of the Norris Sash Pulley Company, to wit, nine shares being held by the Sloans, and three shares by the plaintiff. The bill further alleges that on the 14th of May, 1899, by an agreement between the parties, the firm of Frank B. Sloan & Co. was constituted managing and selling agents of the pulley company; the contract providing that, as such agents, they should pay all expenses of manufacture and of conducting the business, including a commission, as compensation for their services, on all sales, and to pay over the residue to the sash pulley company. Subsequently, in September, 1905, Frank B. Sloan & Co. failed and made an assignment for the benefit of creditors, and the plaintiff, who had been employed as bookkeeper and salesman, in connection with the business of the company, was notified by the trustee that his services would no longer be required in this capacity. Thereupon the plaintiff engaged in the sash pulley business with another house, in the same line of work. Afterwards, F. Eugene Sloan, a son of Frank B. Sloan, was elected by the votes of the nine shares of stock held by them, president, secretary and treasurer of the company, and conducts the same business under the trade-name of "F. B. Sloan & Co." And on the 19th of January, 1906, a contract was made between F. B. Sloan & Co., the appellant

here, and the Norris Sash Pulley Company, whereby the former was appointed agent for the latter, upon the identical terms in all respects, as those herein mentioned, formerly had with his father, except with an increased commission on sales. The bill also charges that the plaintiff was elected one of the five directors of the pulley company; the remaining four directors being chosen by the Sloan family, and that, as stockholder and director of the company, he requested the right to inspect the books, records, and accounts of the company, but was only shown a minute book, containing reports of the meetings of stockholders and directors; it being stated that the company had no other books, and that all other books, accounts, etc., are the property, not of the company, but of the agents. The bill then charges that F. Eugene Sloan, trading as Frank B. Sloan & Co., is the agent of the pulley company, and, as such, is bound to render a true and accurate account of the business so conducted by him as agent, and these accounts when submitted to the company should be open to the inspection and consideration of the board of directors, and of each member thereof; that the relationship existing between the majority of the directors of the company and the agent of the company (F. Eugene Sloan being not only the agent, but a director, president, secretary, treasurer, and chief stockholder of the company), makes it necessary that the board of directors should be fully advised of the business conducted by the agent of the company; that the company controlled by F. Eugene Sloan has been called upon by the plaintiff, both as a stockholder and as a director, to require from its agent F. Eugene Sloan, doing business as F. B. Sloan & Co., an accounting, but this the company has refused to do; that this refusal is due to improper and fraudulent motives, and is based upon the fact that the agent, and the president, secretary, and treasurer of the company are one and the same person. The bill further charges that the action of the defendants herein, and of the majority of the directors of the company, is fraudulent, oppressive, and in violation of his legal rights. The prayer of the bill is, first, that the defendant F. Eugene Sloan, trading as Frank B. Sloan & Co., be required, as agent, to render to the Norris Sash Pulley Company a full and detailed report and account of his transactions as such agent, accompanied with all vouchers, etc., relating to such transactions; second, that the defendant the Norris Sash Pulley Company may be required hereafter at proper times to exact of its agent such due and proper accounts, and then follows the usual prayer for general relief.

The defendant Frank B. Sloan & Co. demurred to the amended bill, based upon the following grounds: (1) That the court lacks jurisdiction, because to grant the relief prayed would involve interference with the

internal management of a foreign corporation, the Norris Sash Pulley Company; (2) that the plaintiff has not stated in his bill such a case as entitles him to any relief in equity against this defendant; (3) and for other causes to be assigned at the hearing. We have set out the averments in the bill, which cover 13 pages of the record, in greater detail than usual, so as it may clearly appear what are the real questions involved on this appeal between the parties, and we will now proceed to consider them: The relief sought under the second (b) prayer of the bill, that the Norris Sash Pulley Company be required hereafter to exact of its agents a proper accounting, is not urged in this court; it being practically conceded by the appellee that this prayer of the bill would be beyond the jurisdiction of the court, and within the rule relating to the internal management of a foreign corporation. *Condon v. Mutual Reserve Fund Ass'n*, 89 Md. 99, 42 Atl. 944, 44 L. R. A. 149, 73 Am. St. Rep. 169. The real and substantial question presented on the record is whether the facts alleged in the bill and admitted by the demurrer to be true entitled the plaintiff to the relief, under the first (a) prayer of the bill; and that is, that the agent, F. Eugene Sloan, be required to account to the company, its principal, and that the plaintiff be permitted to inspect the books of the corporation. There can be no question, it seems to us, that a court of equity has jurisdiction to require a factor or agent to account to his principal upon the allegations set out in this bill. *Welhenmayer v. Bitner*, 88 Md. 331, 42 Atl. 245, 45 L. R. A. 446. In this case, the company, of which the plaintiff is a stockholder and director, refused, upon demand, to require the accounting, and the relief is asked by the plaintiff, on behalf of the company.

The rule is stated in *Booth v. Robinson*, 55 Md. 438, to be, that the proper and primary party to call the directors to an account, for fraud or breaches of trust in the management of the affairs of the corporation, is the corporation itself. But to enable a shareholder, either for himself alone, or for himself and others, to maintain a bill against directors for such fraud or breaches of trust, he must allege and show, not only the violations of duty or breaches of trust on the part of the directors, but that he, as stockholder, has been damaged thereby, and that the corporation has failed or refused to take the proper steps for the redress of the wrong. In the case at bar, the bill distinctly avers that the refusal of the company to take the steps required is due to improper and fraudulent motives, and is based upon the fact that the agent, the president, secretary, treasurer, and majority stockholder, and majority director, are one and the same individual, and that the action of the defendants, and of the majority of the directors of the company, is fraudulent, oppressive, and in violation of his legal duties. In *DuPuy v. Terminal Com-*

pany, 82 Md. 408, 33 Atl. 889, 34 Atl. 910, it is distinctly held that when the acts of the officers of a corporation are fraudulent, illegal and ultra vires, any stockholder is entitled to ask for the protection of a court of equity. 8 Pomeroy Equity Juris. p. 2124; *Shaw v. Davis*, 78 Md. 308, 28 Atl. 619, 23 L. R. A. 294; *Bond v. Gray Imp. Co.*, 102 Md. 426, 62 Atl. 827. These principles are well settled in this state and elsewhere, and the reasons on which they rest are so fully stated in the adjudicated cases as to need no further comment here. But it is urged upon the part of the appellant that the pulley company is a foreign corporation organized under the laws of the state of West Virginia, and the courts of this state have no jurisdiction over any case whatsoever that involves the internal management of a foreign corporation.

In answer to this contention, it can be said, that the plaintiff abandons the relief sought by him under the second (b) prayer of his bill, and rests his case upon the first (a) prayer, which asks on behalf of the corporation, or that the corporation itself require an accounting from its agent, who has charge of the entire business of the company. The corporation is composed entirely of citizens of Maryland, and its business appears to be conducted within the state. The agent, F. Eugene Sloan, is a resident of the state, and his firm is a Maryland company, so the suit could only be brought in the jurisdiction where the defendant from whom the accounting is desired resides, and where he is subject to process. It is clear, if the corporation had brought the suit against its agent, a resident of Maryland, the court would have jurisdiction to entertain the bill, and we do not therefore see upon what ground the jurisdiction of the court to entertain this suit can be questioned. In *Ernst v. Rutherford*, 38 App. Div. 338, 56 N. Y. Supp. 403, it is said: The right of the plaintiffs, as stockholders, to compel a restoration by the officers of the corporation is coextensive with the right of the corporation itself. Surely the corporation would not be confined to the courts of the state which created it, but could pursue its officers in whatever jurisdiction it might find them; otherwise it would be remediless, if those officers remained without the state. If the corporation could revoke the relief, in this jurisdiction, the plaintiff, as stockholder and director, can institute and maintain such a suit. The rationale of the rule is thus stated by Mr. Pomeroy in his work on Equity Jurisprudence, vol. 3, § 1095. The stockholder does not bring such a suit because his rights have been directly violated, or because the cause of action is his, or because he is entitled to the relief sought; he is permitted to sue in this manner simply in order to set in motion the judicial machinery of the court. The stockholder, either individually or as the representative of the class, may commence the suit, and may prosecute

it to judgment; but in every other respect the action is the ordinary one brought by the corporation, it is maintained directly for the benefit of the corporation, and the final relief when obtained belongs to the corporation, and not to the stockholder plaintiff. There is nothing in this view that conflicts with the cases relied upon by the appellant in his brief. Those cases are very different from this. They rest upon dissimilar facts and the application of different legal principles.

It is also contended that the suit cannot be maintained because the plaintiff is a minority stockholder, and, as such, cannot invoke the interposition of a court of equity. The cases of *Shaw v. Davis*, 78 Md. 308, 28 Atl. 619, 23 L. R. A. 294, and *Bond v. Gray Imp. Co.*, 102 Md. 428, 62 Atl. 827, are relied upon to sustain this well-settled proposition. It appears, however, in the case now before us, that the bill distinctly charges that the refusal of the company to act is due to improper and fraudulent motives, and the action of the defendants, and of the majority of the directors of the company, is fraudulent, oppressive, and in violation of his legal rights. It also alleges that the defendant is the managing agent of the corporation, who conducts the entire business of buying, manufacturing, and selling, and turns over to the company the net profits, less his commissions; that this agent is also the president, the secretary, the treasurer, majority stockholder, and majority director of the Pully Sash Company; the company, who is F. Eugene Sloan, has refused upon demand of a stockholder and director to require Sloan, as agent, to render an account as such agent to the company, of the business of the corporation. These allegations are admitted by the demurrer to be true, but it is denied that the plaintiff is entitled to any relief. We fully agree with the court below in the statement that the effect of allowing the validity of such a defense in a case like this would be to declare that, if in any corporation, one man can obtain control of a majority of the stock, he may appoint himself agent, carry on the entire business of the corporation, and render only such accounts as he, in his capacity of the majority holder of the corporate stock, may require from himself in his capacity of agent. The allegations of the bill, in this case, we think, are sufficiently clear and definite to sustain the court below in overruling the defendant's demurrer, and requiring an answer on the part of the appellant. The acts complained of are charged to be both fraudulent and illegal, and if they can be established, and shown to be true, would entitle the plaintiff to the relief asked. *Bond v. Gray*, 102 Md. 428, 62 Atl. 827; *Weißenmayer v. Bitner*, 88 Md. 325, 42 Atl. 245, 45 L. R. A. 446.

For the reasons stated, the order of the circuit court of Baltimore City will be affirmed, with costs.

Order affirmed, with costs.

(165 Md. 305)

DICK et al. v. BIDDLE BROS.

(Court of Appeals of Maryland. March 1, 1907.)

1. EVIDENCE — BEST AND SECONDARY — CONTENTS OF WRITING — ADMISSIBILITY.

In an action for a balance due on a contract, where it was shown that a proposal from plaintiff, made out by the witness, had been received and accepted by one of the defendants, who declined to produce it in response to a written notice, plaintiff was properly allowed to show by the witness the contents of the proposal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 570, 595-597.]

2. SAME—BOOKS OF ACCOUNT—ADMISSIBILITY.

In an action on a contract, evidence of entries contained in a book, which purported to be a copy of original entries made by the witness and used by him, not for the purpose of aiding his memory, but as substantive and independent evidence of charges contained in the bill of particulars, was improperly admitted.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 556, 557.]

3. TRIAL — INSTRUCTIONS — APPLICABILITY TO ISSUES.

In an action for a balance due on a contract, an instruction, which failed to limit the recovery for the work done to contract prices, as set forth in the declaration, was erroneous.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 587-595.]

4. SAME — VERDICT — CONFORMITY TO PLEADINGS.

Where, in an action for a balance due on a contract, the jury found for plaintiff in a greater sum than that claimed in plaintiff's bill of particulars, the judgment will be reversed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 784.]

5. CONTRACTS — ACTIONS — EVIDENCE—SUFFICIENCY.

In an action against a husband and wife for a balance due on a contract, where the only evidence that the husband was a party to the contract was that his check for \$400 was received by the plaintiff and credited on the account, he cannot be held liable.

Appeal from Circuit Court, Wicomico County; Charles F. Holland and Henry Lloyd, Judges.

Action by Biddle Bros. against Minnie Mills Dick and another. From a judgment for plaintiff, defendants appeal. Reversed, and new trial ordered.

Argued before BRISCOE, BOYD, PEARCE, SCHMUCKER, BURKE, and ROGERS, JJ.

F. Leonard Waller, for appellants. Elmer H. Walton and John H. Handy, for appellee.

BURKE, J. The appellees brought suit against the appellants in the circuit court for Wicomico county, and recovered a judgment for the sum of \$336.56, from which this appeal was taken.

The declaration contained the common counts, and three special counts. Two witnesses were produced on behalf of the plaintiff, but no testimony was offered by the defendants. During the course of the trial, five exceptions were taken by the defendants,—four to the ruling of the court on the admissibility of evidence, and one to the action of the court upon the prayers submitted by the

respective parties. The following bill of particulars was filed with the narr.:

Bill of Particulars.

Salisbury, Md., May 11th, 1905.

Minnie Mills Dick, and Frank M. Dick, Her Husband, to Biddle Brothers, Dr.

May 3—Oct. 7, 1904.
To plumbing as per contract..... \$554 00
" gas piping house as per contract..... 122 00
" radiator in bathroom as per contract..... 26 75
" extra for connecting rain spout to sewer
" 15 ft. of 4 in. soil pipe..... \$ 3 60
" 2 ft. 4 in. bends..... 60
" 15 lbs. of lead..... 1 05
" 4 hours time plumber and helper 75c..... 3 00

May 13—Oct. 7.
To extra for gas piping tenant house:
To 22 ft. of 1/2 in. black pipe, 8c..... \$ 1 76
" 32 ft. of 1/2 in. black pipe, 7c..... 2 24
" 58 ft. of 1/2 in. black pipe, 6c..... 3 48
" 12 lbs. fittings, 24c..... 2 88
" 20 gas pipe hooks..... 40
" 19 hours' time plumber and helper 75c..... 14 25

Sept. 29—Oct. 7.
To extra for running gas pipe to tenant and to barn and fitting gas lights in barn:
To 1 1/2 in. galv. running screws..... \$ 26
" 6 lbs. of galv. gas fittings, 24c..... 1 44
" 162 ft. of 1/2 in. black pipe 10c..... 16 20
" 167 ft. of 1/2 in. black pipe, 8c..... 13 36
" 7 ft. of 1/2 in. black pipe, 7c..... 49
" 25 ft. of 1/2 in. black pipe, 6c..... 1 50

Sept. 29. To one day plumber and helper
" 29. " 5 hours time plumber 50c..... 6 00
" 29. " 1 day labor..... 2 50
" 30. " 1 day plumber and helper..... 1 50
" 30. " 1 day plumber..... 6 00
" 30. " 1 day labor..... 4 00
" 30. " 1 day labor..... 1 50

Oct. 7. " 12 hours time plumber and helper..... \$ 9 00
" 7 " 9 hours time plumber 50c..... 4 50

Sept. 30. " Car fares from Salisbury to Hebron and return, 4 men 40 cents..... 1 60
Oct. 7. " Car fare from Salisbury to Hebron and return, 3 men 40 cents..... 1 20

May 18 and 19.
To water pipe to poultry yard:
38 ft. of 1/2 in. galv. iron pipe..... \$ 8 80
1 1/2 in. galv. tee..... 08
4 1/2 in. galv. ell..... 32
1 1/2 in. galv. tee..... 14
2 1/2 in. galv. nipples..... 16
1 1/2 in. stop and waste..... 80
1 1/2 in. hose bibb..... 65
14 hours time plumber and helper.... 10 50
2 day time labor..... 3 00

May 17.
To putting spigot on porch at tenant house:
10 ft. 1/2 in. galv. pipe..... 80
1 1/2 in. galv. tee..... 08
1 1/2 in. galv. ell..... 06
1 1/2 in. hose bibb..... 80
2 hours time plumber and helper..... 1 50
Oct. 8.
To one set gas pipe testing tools..... 10 00

Oct. 4, 1904. On this date by Mrs. Dick's request, I made a trip to your place to repair leak in plumbing. On arriving there I found no leak. Some one, I presume, had upset some water on the bathroom floor. This water followed piping down to ceiling. This trip cost us:
Horse hire \$ 1 50
5 hours' time, 50 cts..... 2 50

Oct. 6. On trip to your farm as per request of Mrs. Dick in interest of gas fixtures, horse hire..... \$ 1 50

\$550 45

Credits.

June 24th, 1904. By order given Dor-man & Smyth..... \$150 00
June 30th, 1904. By check from Mr. F. M. Dick 400 00 \$550 00

Balance \$300 45

The case was tried on the 24th of September, 1906, and it appears that on the 22d day of March, 1906, the plaintiffs served upon the defendants' attorneys a notice to produce at the trial of the cause the proposal submitted by the plaintiffs, either directly or indirectly, to the defendants or either of them, of the work to be done by the plaintiffs for the defendants, as set forth in the bill of particulars, and particularly the typewritten proposal, estimate, specification, or specifications submitted by the plaintiffs to the defendants, or either of them, directly or indirectly, for the work mentioned in the first three items of the bill of particulars, and set forth in the narr., filed herein. The proposals or specifications called for were not produced in response to the notice. At the trial the court permitted Arthur Biddle to testify:

(1) That he and Harry Biddle were partners, trading as "Biddle Bros.," and were engaged in the business of plumbing, and offered to show that Minnie Mills Dick, one of the defendants, sent for him and asked him to furnish an estimate of cost for doing certain plumbing work at her farm in Wicomico county, and that, after calling on her, he submitted a proposal to her for the work which she desired to have done. The written proposal was produced and offered in evidence. It was addressed to Mrs. Dick, and showed an offer on the part of the plaintiff to do certain specified work at her residence. The plumbing work, the nature and character of which were specifically described in the proposal, was to be completed for \$646; a radiator in the bathroom and the necessary work in connection therewith was to cost \$26.75; a gas machine and a gas pipe house, with about 50 lights, was to cost \$122. The proposal provided for two bathrooms. The witness testified that, after Mrs. Dick had examined the proposal, she wanted one of the bathrooms left out, but no other changes were to be made; that he made out a new proposal, and took the same to Samuel S. Smyth for the purpose of having it sent to Mrs. Dick; that later, on the same day on which he had delivered the new proposal to Smyth, the witness called Mrs. Dick over the phone, and testified that he recognized her voice; that he asked her if she had received the new proposal, and she said she had received the \$554 proposal, and told him to go on with the work; that the new proposal was for the contract price of \$554, and the original proposal (which had been offered in evidence, and which witness stated had been submitted to Mrs. Dick) was precisely the same as the new proposal which he said Mrs. Dick had accepted over the phone, except the item of one bathroom, which had been eliminated, and which had thereby re-

duced the original contract price from \$648 to \$554. The first special count is based upon this contract. The defendants objected to this evidence, and, their objection being overruled, they excepted, and this constituted their first bill of exceptions.

(2) The witness then testified on cross-examination that he did not see the copy of the new proposal as made out and given to Smyth to be sent to Mrs. Dick, either before or after it was sent to her; that Mrs. Dick said she had received the new proposal, and told him to go ahead with the work. The defendants "moved the court to rule and exclude from the jury the proposal as offered in evidence by the plaintiffs." This motion the court denied, and the defendants excepted, and this constitutes the second bill of exceptions.

The first and second exceptions may be considered together, as they involve substantially the same question. The evidence tended to show that the witness had himself made out the new proposal, and that it had been received by Mrs. Dick, who had directed him to proceed with the work; and, she having declined to produce it in response to the written notice to which we have referred, the legal result of its nonproduction was to permit the plaintiffs to offer secondary evidence of its contents. This they did in the way we have mentioned. As the method adopted to prove the contents of the proposal was not open to valid objections, and as the evidence offered of its contents was very satisfactory, the court was right in its ruling on both objections to the testimony.

(3) The witness was then asked if he had done any other work "for the defendant, Minnie Mills Dick," and he said he had, and that the work done was set out in the bill of particulars. He was then asked to refer to his books, and tell the respective items on which "Minnie Mills Dick was indebted to the plaintiffs." The witness stated that he did not make the entries in said book, was not present when they were made, but said they were made by his bookkeeper from the original entries in another book kept by the witness, although said witness testified to all items in said bill of particulars, and said he was present when the work was performed, and that said entries had been made in said books by the bookkeeper from the original entries made by him, and the witness had himself compared the entries and knew they were correct, and had performed a part of all the work himself, and knew that the entries were correct, and knew that the work as charged was correct, apart from said entries. To the offer of the entries in said book in evidence, the defendants objected, and, their objection being overruled, and the court having permitted the entries in the book to be read in evidence, the defendants excepted, and this constitutes the third bill of exceptions.

(4) The witness then testified that as to the

number of hours of work his employé had performed, as charged in said books and set out in the aforesaid bill of particulars, he had employed the men and knew the time they had been employed; that he had personal knowledge of all the work, and knew the time was correct, though the said entries were not made by him, and he admitted he had no knowledge of the correctness of the exact number of hours of work of some of the employé, and was not present, though he did know as superintendent of the work, and the time required for the work, that the time charged is correct as told and given in by said employé. To this testimony the defendants objected, and the court overruled their objection, and this constitutes their fourth exception.

The third and fourth exceptions may also be considered together. They relate to the introduction in evidence of the entries contained in a book produced by Arthur Biddle, one of the plaintiffs. The book purported to be a copy of certain original entries made by the witness, and was used by him, not for the purpose of aiding his memory, but as substantive and independent evidence of charges contained in the bill of particulars. The circumstances under which the entries in such a book may be used, and the purposes to which they may be used, have been stated in a number of cases in this court, among which are the cases of *Bullock v. Hunter*, 44 Md. 416, *Owens v. State*, 67 Md. 307, 10 Atl. 210, 302, and *Stallings v. Gottschalk*, 77 Md. 429, 26 Atl. 524. The facts embraced in these exceptions, as hereinbefore set out, do not bring the offer within the authority of those cases so as to make the entries evidence in such a way as was done in this case.

(5) The witness further testified that Minnie Mills Dick accepted the work, and that there was a balance of \$300.45 still owing, and on cross-examination he testified that he never had any conversation with the defendant Frank M. Dick, the husband of Minnie Mills Dick, in regard to said contract, or the work done or the materials furnished either before or after the said contract and the doing of said work; but that the payment of \$400 on the 30th day of June, 1904, had been made by the said Frank M. Dick. The record then states that the plaintiffs called a competent witness, who testified that he did a part of the work testified to by Mr. Biddle, and, after the same was completed, he went over the premises with Mrs. Dick, and that she made no objections to the work, except some trifling defect, which he remedied. At the close of the testimony, the plaintiffs offered one prayer, which was granted, and the defendants submitted nine prayers, all of which were by the court refused. To this action of the court, the defendants excepted, and this constitutes the fifth bill of exceptions.

By the plaintiffs' prayer the jury were told that if they found from the evidence that the plaintiffs were employed by the defendant, or

either of them, to do the work and furnish the materials mentioned in the narr. and accompanying bill of particulars, and did perform said work and furnish said materials, and further find the same, after being so done and furnished, were accepted by the defendants, then their verdict must be for the plaintiffs, and if they find that after the work was all finished and completed, and materials furnished, the defendant Minnie Mills Dick went over the work with an employé of the plaintiff, and examined the same, and made no objection to the same, except a trifling defect, which was remedied on the spot by said employé and occupied the same without objection to the said work and materials, and that they may consider that fact with the other evidence in the case in determining an acceptance on the part of said defendants, and if they find for the plaintiff their verdict must be for such sum as the evidence will satisfy them the plaintiffs are entitled for the services rendered and materials furnished, together with interest, if any, as the jury may believe the plaintiffs are entitled to.

The defendants' first, second, and third prayers asserted that there was no evidence in the case legally sufficient to entitle the plaintiffs to recover against both defendants under either of the special counts of the declaration; and the fourth prayer asserted that there was no evidence legally sufficient, under the pleadings and evidence, to entitle the plaintiffs to recover against Frank M. Dick; and the fifth prayer, that there was no legally sufficient evidence to entitle the plaintiffs to recover under the common counts. The defendants' sixth, seventh, eighth, and ninth prayers asked the court to instruct the jury that there was no evidence legally sufficient to entitle the plaintiffs to recover for the items of extra work specifically mentioned in each of those prayers.

The plaintiffs' prayer was bad, and should have been refused. It failed to limit the recovery, for the work done under the special contract, to the contract prices as set forth in the eighth, ninth, and tenth counts of the declaration, and, since the jury found for a greater sum than that claimed in the bill of particulars, the judgment for this reason alone must be reversed. A like prayer, under a very similar state of facts as that contained in this record, was declared wrong in the case of *Walsh v. Jenvey*, 85 Md. 240, 36 Atl. 817, 38 Atl. 938. We do not find in this record any evidence whatever upon which Frank M. Dick can be held liable upon the causes of action sued on. According to the plaintiffs' evidence, the property was owned by Mrs. Dick, the proposal for the work was made to Mrs. Dick, the contract was made with her, she alone accepted it, and no communication of any kind passed between the plaintiffs and Frank M. Dick either before or after the making of the contract with Mrs. Dick, or during the course of the work, and no charge was

made against him by the plaintiffs, and no account was ever rendered to him. There is absolutely nothing in the case to fix a liability upon him. The mere fact that it appears from the bill of particulars, and by the testimony of Arthur Biddle, that on June 30, 1904, a check of F. M. Dick for \$400 was received by the plaintiffs, and credited upon the account, is wholly insufficient in an action of this nature to impose a liability upon him. In *Hand v. Evans Marble Co.*, 88 Md. 220, 40 Atl. 899, Judge Pearce announced the principle, which we think controls this branch of the case: "The general rule has long been established that: 'One who is not a party to a contract cannot be included in the rights and liabilities which the contract creates, so as to enable him to sue, or be sued thereon.' A man cannot incur liabilities, and, again, a man cannot acquire rights, from a contract to which he is not a party." We therefore think that, upon the evidence contained in this record, the defendants' first, second, third, and fourth prayers, which asserted that there was no legally sufficient evidence to hold Frank M. Dick liable for the bill sued on, should have been granted.

There was no error in refusing the other prayers of the defendants, as there was evidence in the case tending to show Mrs. Dick's liability for the extra work charged, and for which the plaintiffs could have recovered under the common counts.

For the errors committed by the court, in its rulings upon the third, fourth, and fifth exceptions, the judgment must be reversed.

Judgment reversed, with costs, and new trial awarded.

(105 Md. 304)

CAIN v. SHUTT.

(Court of Appeals of Maryland. March 1, 1907.)

1. SLANDER—MEANING OF SLANDEROUS LANGUAGE — QUESTION FOR JURY.

In slander for calling plaintiff a liar and a thief, the evidence showed that plaintiff and defendant had a dispute over bills for goods sold by defendant to plaintiff, and that defendant in his store, while disputing with plaintiff, called him a thief and a liar. There was nothing to show that the bystanders hearing the words knew the nature of the dispute. Defendant before the trial and after suit brought stated in the presence of a third person that he had called plaintiff a liar and a thief, and could prove it. *Held*, that the question whether defendant used the language as imputing a crime to plaintiff and was so understood by the bystanders was for the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Libel and Slander, §§ 357, 358.]

2. SAME—MALICE—EVIDENCE.

In slander, the jury may consider a subsequent repetition of the slanderous words in determining the presence of malice in speaking the words at the time charged in the declaration.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Libel and Slander, §§ 286-288.]

Appeal from Baltimore City Court; Dan'l Giraud Wright, Judge.

Action by Thomas Cain against William Shutt. From a judgment for defendant, plaintiff appeals. Reversed and remanded for new trial.

Argued before BRISCOE, BOYD, BURKE, SCHMUCKER, PEARCE, and ROGERS, JJ.

Arthur L. Jackson, for appellant.

SCHMUCKER, J. The appellant sued the appellee in the Baltimore city court for slander. The declaration contained but one count. It averred that the defendant, on a day named, at No. 608 East Baltimore street, in the city of Baltimore, falsely and maliciously spoke and published of and concerning the plaintiff the words following; that is to say: "You are a thief," "You are a beat," "You are a liar," and "You are a dead beat." The defendant pleaded not guilty.

On the trial of the case at the close of the plaintiff's evidence the court granted the following prayer offered by the defendant: "It appearing from the plaintiff's own testimony that the language alleged to have been used by the defendant was not used as imputing a crime to the plaintiff, and could not have been so understood by the bystanders, the verdict must be for the defendant." The jury thereupon under the court's direction rendered a verdict for the defendant, and a judgment was entered thereon from which the present appeal was taken. The plaintiff at the trial, after stating that there had been a dispute of about two years standing between him and the defendant over the bill for some goods purchased by him from the latter, testified as follows: "I came to Baltimore and brought his oil can back that he loaned me to take the oil in. I brought that can back, and asked him how much money did I owe him. He said, 'You know.' I said, 'I don't owe you for the oil.' He said, 'Yes; you do.' I said, 'I do not.' He said, 'You know devilish well you do.' He said, 'You are a thief.' I said, 'No, sir; I am no thief.' He said, 'You are, you are, a beat.' I said, 'No, sir; I am no beat.' He said, 'You are a liar; and, not only that, you are a dead beat.' He repeated those words several times, and I contradicted him several times that I was no beat and no thief." A Mr. Hopwood at that juncture came in to the store, and, according to the plaintiff's account, the defendant having gone back of the counter commenced to tell Hopwood that the plaintiff had come in there to beat him out of some money, whereupon the plaintiff stepped up to him, and said: "No; I am not trying to beat him out of any money. I am trying to explain that I had already paid him for the oil. He said, 'You are a liar,' 'You are a thief,' and he repeated it right over again before Mr. Hopwood, and then I walked out." The plaintiff further testified that, when the defendant applied to him the language complained of, there were in the store besides Mr. Hopwood a young clerk, about 15 or 16 years old, and also a

gentleman, about 55 or 65 years old, neither of whom were personally known to the plaintiff.

Upon cross-examination the plaintiff said that the defendant was angry and acted very ugly when applying the objectionable epithets to him; and he answered, "Yes," to the question whether the language used by the defendant did not relate to the transaction of the nonpayment of the bill. The plaintiff on redirect examination testified that on the second day before the one on which the case was tried he was standing in the courthouse by the side of his counsel, who was engaged in conversation with Mr. R. T. Gill of the defendant's counsel, when the defendant came up and said: "I am your man. You have no case. I called him a liar and a thief, and I can prove it." Mr. Gill was put upon the stand by the plaintiff, and fully corroborated his account of what the defendant had said at the interview in the courthouse. With this evidence in the case we think the court below erred in taking the case from the jury. There was clear proof of the application by the defendant to the plaintiff of an epithet actionable per se at the interview in the store in the presence of three other persons and of the repetition of the same expressions in the courthouse, accompanied by the assertion that he could prove their truth, in the presence of the counsel for both parties. There was evidence from which a jury might have concluded that the slanderous words used in the interview at the store were uttered in heat, and not wantonly or through spite or hatred, or even under such circumstances as to indicate, to persons fully informed of the occasion of their utterance an intention to impute to the plaintiff the commission of theft. But no such mitigating conditions attach to the voluntary and unprovoked repetition, at the interview at the courthouse, of the same charges accompanied by an assertion of an ability to prove them; nor does it appear that the clerk or the gentleman who stood by the stove at the interview in the defendant's store had such knowledge of the circumstances under which the slanderous words were uttered as to know that the defendant did not intend to impute to the plaintiff the commission of a crime. The mere fact that those two persons were present in the store of the defendant when he uttered the slanderous words, without proof that their position was such that they must have heard the entire conversation between the plaintiff and defendant, and that they were familiar with the nature of the dispute between them, did not justify the court in instructing the jury that the defendant's language could not have been understood by the bystanders as imputing a crime to the plaintiff.

The jury were also entitled to consider the repetition of the slanderous words by the defendant at the interview in the courthouse, mentioned in the testimony, in determining

the presence or absence of malice of the defendant in speaking the words laid in the declaration. This would have been true, even if the words laid in the declaration had been uttered under circumstances of privilege. In *Garrett v. Dickerson*, 19 Md. 418, this court said, upon the authority of many cases there cited: "Although the occasion may be such as to justify the legal inference of privilege, yet the jury may look to the words themselves, in connection with other facts and circumstances than those from which the privilege is deduced, in passing upon the question of express malice, and evidence of any other words or acts having reference to the subject-matter of the actionable words may be submitted to the jury for the same purpose, whether such words or acts were spoken or done before or after suit brought." The same principle was asserted in *Duval v. Griffith*, 2 Har. & G. 31, and *Boteler v. Bell*, 1 Md. 178. In *Gambrill v. Schooley*, 95 Md. 280, 52 Atl. 500, 63 L. R. A. 427, we said: "The mere utterance of defamatory words not privileged may afford no substantial evidence of malice in fact. They have been spoken in thoughtless, though indiscreet, jest, in unguarded repetition of idle rumor, or in momentary heat, free from real malice; but, if it be shown that similar words referring to the same subject have been uttered with more or less frequency, either before or after those charged, a presumption is created, varying in strength with the frequency and character of such utterances, that the words charged were not merely malicious in law, but in fact." The rule there announced is in our opinion applicable with especial force to the present case.

The judgment appealed from must be reversed, and the case remanded for a new trial.

Judgment reversed, with costs, and new trial awarded.

(105 Md. 90)

LUCAS v. TAYLOR et al.

(Court of Appeals of Maryland. Feb. 28, 1907.)

1. MARITIME LIENS—TIME FOR FILING LIEN CLAIM—STATUTORY REASONS.

Under Code Pub. Gen. Laws, art. 63, § 44, requiring a lien claim against a vessel to be filed within six months from the commencement of the building, repairing, equipping, or refitting of the same, a lien claim for the installation of an electric light equipment, begun after the commencement of the building of the vessel, was properly filed within six months from the time the work on such equipment was commenced.

2. SAME—SUFFICIENCY OF CLAIM.

Under Code Pub. Gen. Laws, art. 63, § 44, requiring a lien claim against a vessel for materials furnished or work done in building, repairing, or equipping the same to state, among other things, the place where the boat was built, repaired, equipped, or refitted, a lien claim stating that the work was done and materials were furnished at the instance and request of a certain shipbuilding company in Baltimore city was sufficient.

3. SAME—OWNERSHIP OF VESSEL—CONTRACT—CONSTRUCTION.

Under a contract whereby a shipbuilding company agreed to construct and fully complete, on or before a certain date, for a steamboat company, a steamer at a certain price, and providing for the payment of the purchase money in installments as the work progressed, the steamboat company being entitled to have an inspector present in the yard of the builder, the last installments of the purchase price to be paid on completion of a satisfactory trial trip and within a certain time after delivery in accordance with the terms of the contract, etc., the ownership of the vessel, as respected a lien for work performed and material furnished in the building thereof, remained in the shipbuilding company, irrespective of the fact that in a supplemental memorandum appended to the contract the steamboat company was several times designated as the owner.

4. SAME—LIEN CLAIM—AMENDMENT OF PROCEEDINGS.

Under Code Pub. Gen. Laws, art. 63, § 41, providing that the article shall be construed and have the same effect as laws which give general jurisdiction or are remedial in their nature, and authorizing the making of proper amendments at any time in the proceedings, commencing with the claim or lien to be filed and extending to all subsequent proceedings, where a lien claim against a vessel described a shipbuilding company as agents and contractors of the vessel and a steamboat company as its owner, an amendment of proceedings to enforce the lien, describing the former company as the owner and builder, and the latter company as being "now the owner," was properly permitted, neither the shipbuilding company nor the steamboat company being prejudiced thereby, and another defendant purchasing the completed steamer from the steamboat company not averring in its answer to either the original or amended bill to enforce the lien that it purchased the boat without notice of the lien.

5. SAME—METHOD OF AMENDMENT—SUFFICIENCY.

The amendment was not ineffective because no amended lien claim was filed in the clerk's office, defendants not demurring to the amended bill, or by any form of pleading objecting to the manner in which the amendment had been made, and, moreover, formally adopting by a paper filed by them in the case, as their answers to the amended bill, the ones which they had, respectively, filed to the original bill.

6. SAME—EXPIRATION OF LIEN—STATUTORY PROVISIONS.

Under Code Pub. Gen. Laws, art. 63, § 46, providing that a lien on a vessel for materials furnished or work done shall continue for two years from the day on which the lien claim is filed and no longer, where proceedings are begun within two years from the filing of a lien claim to enforce the same, the lien does not expire at the end of such two years, and before the filing of the decree.

Appeal from Circuit Court No. 2 of Baltimore City; Pere L. Wickes, Judge.

Bill by J. O. M. Lucas against Archibald H. Taylor and others, receivers. Decree for defendants, and plaintiff appeals. Reversed.

Argued before BRISCOE, BOYD, PEARCE, SCHMUCKER, BURKE, and ROGERS, JJ.

Alexander Preston, for appellant. Arch. H. Taylor and Edward Duffy, for appellee.

SCHMUCKER, J. This is an appeal from a decree of circuit court No. 2 of Baltimore city dismissing a bill filed by the appellants for the enforcement of a boat lien. The lien

was claimed against the steamer *Anne Arundel*, which was built at Baltimore city by the Baltimore Shipbuilding & Dry Dock Company under a contract with the Weems Steamboat Company. The lien claim was for a balance of \$1,764.13 for work done and materials furnished in equipping the steamer with an electric light plant at the instance of the shipbuilding company.

It appears from the record that the keel of the steamer was laid on or about January 2, 1904, and the completed vessel was delivered on July 1, 1904, to the Weems Steamboat Company, which paid in full the contract price for its construction. The formal contract for building the steamer was not actually executed until 11 days after the construction had been commenced, but the terms of the contract had been agreed upon. The contract for installing the electric light plant on the steamer was made between the appellants and the shipbuilding company on April 19, 1904, and the work called for by the contract was completed by July 1, 1904. A few changes or alterations were made in some of the wires between July 1st and 11th after the steamer had passed into the hands of the Weems Steamboat Company, and the charges for those alterations form part of the lien claim. The claim was filed in the office of the clerk of the superior court on October 11, 1904, which was within six months from the commencement of the work for which the lien is claimed, but not within that time from the laying of the keel of the steamer. The claim is in the usual form, and states that the work was done and the material furnished by the appellants "at the instance and request of the said Baltimore Shipbuilding & Dry Dock Company in said Baltimore City." In the claim as originally filed the shipbuilding company were described as "agents and contractors" for the steamer and the Weems Steamboat Company as its owner, but by the amendment hereinafter mentioned the former company was described as its owner and builder and the latter company as being "now the owner." After the steamer had been completed and delivered to the Weems Steamboat Company, the shipbuilding company failed, and its affairs were by a decree of the circuit court of Baltimore city placed in the hands of Archibald H. Taylor and Walter Ancker, as receivers, and the Weems Company sold the steamer to the Maryland, Delaware & Virginia Railway Company. In that situation of affairs the present bill for the enforcement of the lien was filed on February 24, 1904. The bill alleges the facts which we have mentioned, and prays for a sale of the steamer for the satisfaction of the lien. A certified copy of the lien claim was filed with the bill as an exhibit. All of the defendants answered the bill. The receivers of the shipbuilding company and the Weems Steamboat Company in their answers deny the validity of the lien, but the railway company states that it has no

knowledge of the facts set forth in the bill, and neither admits nor denies them, but demands proof of them. The railway company further states in its answer that it has purchased the steamer *Anne Arundel* with all the other property of the Weems Steamboat Company, but does not aver that it has paid for the same nor set up the defense of being a bona fide purchaser for value without notice of the lien.

The plaintiffs took testimony proving their contract with the shipbuilding company for the installation of the electric lighting plant on the steamer, the performance by them of the contract on their part, that the balance claimed of \$1,764.13 of the contract price remained unpaid, and that on September 28, 1904, they gave written notice to the Weems Steamboat Company of their intention to claim a lien therefor. The defendants put in evidence the contract for building the steamer between the shipbuilding company and the Weems Steamboat Company. It was admitted that the Weems Steamboat Company paid to the shipbuilding company the full contract price for the construction of the steamer. The learned judge below filed no opinion in the case, and we are therefore not informed as to the ground on which he relied in dismissing the bill.

The reasons asserted in argument by the appellees for denying the validity of the lien claim were substantially as follows: That the appellants were subcontractors to whom the Code does not give a lien on boats; that the lien claim was not filed within six months from the commencement of the building of the steamer; that the claim does not state at what place the boat was built; that the Weems Steamboat Company, and not the shipbuilding company, was the owner of the steamer; that there was no proper amendment of the lien claim; and that the lien, if it ever was valid, had expired by limitation at the date of the decree. The provisions of the Code of Public General Laws, in reference to liens on boats and vessels, are found in article 63, relating to mechanics' liens. Section 43 provides that all boats or vessels of any kind whatsoever used or intended to be used on the Chesapeake Bay or other waters of this state, or belonging in this state, shall be subject to a lien and bound for the payment thereof as preferred debts for all debts due to boat builders, mechanics, etc., from the owners, masters, captains, or other agents of such boats or vessels for materials furnished or work done in the building, repairing, or equipping the same. Section 44 requires the lien claim to be filed in the office in Baltimore city of the clerk of the superior court "within six months from the commencement of the building, repairing, equipping or refitting of the boat or vessel," and provides that the claim shall state, along with other things, the place where the boat was built, repaired, equipped or refitted. Section 46 provides that the

lien on the boat or vessel shall continue for two years from the day on which the lien claim is filed, and no longer. Section 41 provides that article 68 "shall be construed and have the same effect as laws which give general jurisdiction or are remedial in their nature; and such amendments shall from time to time and at any time be made in the proceedings, commencing with the claim or lien to be filed and extending to all subsequent proceedings as may be necessary and proper; provided that the amount of the claim or lien filed shall not in any case be enlarged." Considering the objections urged by the appellees against the validity of the lien claimed in this case, in the order in which we have stated them, we observe that the question of the right of a subcontractor to a lien has been eliminated from the case by the amendment of the proceedings so as to treat the shipbuilding company, for whom the work was done, as the owner of the vessel.

We think that the filing of the lien claim on October 11, 1904, for the balance due for the installation of the electric light equipment which was begun on or after April 19, 1904, was a compliance with the requirement of section 44 that the lien claim must be filed "within six months from the commencement of the building, repairing, equipping or refitting" of the boat or vessel. If we were to adopt the contention of the appellees that all boat liens against a newly constructed vessel must be filed within six months from the commencement of its building, we would not only ignore the language of the statute, but would, whenever more than six months were consumed in building a vessel, deny the benefit of any lien at all to such mechanics and others as furnished labor or material to the vessel for that portion of its building which was done after the expiration of six months from the laying of its keel. We also think that the lien claim, in stating that the work was done and the materials were furnished "at the instance and request of said Baltimore Shipbuilding & Dry Dock Company in said Baltimore city," sufficiently complied with the requirement of section 44 as to the statement of "the place where" the boat was built, repaired, equipped, or refitted. Upon a proper construction of the contract between the shipbuilding company and the Weems Steamboat Company for the building of the Anne Arundel the former, and not the latter company, must be regarded as having been the owner of the steamer while it was being built. The essential features of that contract, which is too long for insertion here, are as follows: The shipbuilding company agrees to construct and fully complete on or before the 1st day of July, 1904, for the Weems Steamboat Company a steamer to be a substantial duplicate of the steamer Potomac then owned by the latter company. "The price for said steamer so constructed and ready for delivery within

the time aforesaid" is fixed at \$91,560, to be paid in installments as set forth in the contract. The last two installments are stated to be "eleven thousand dollars (\$11,000) upon completion of satisfactory trial trip; nine thousand five hundred and sixty dollars (\$9,560) within thirty (30) days after delivery in accordance with the terms of this contract and accompanying specifications and the establishment of the fact that the speed and carrying capacity are equal to those of the 'Potomac.'" A memorandum attached to the contract and signed by the parties provides, among other things, that the material and workmanship of the vessel to be constructed are to be first class and to be satisfactory to the owner's inspector, who shall at all times have access to the same. In this supplemental memorandum the Weems Steamboat Company are described as "the owners." The builder was required by the contract to give a bond for \$50,000 for its performance.

There is some conflict of authority as to who is to be regarded as the owner of a vessel being built, under a contract to furnish both work and materials, before her completion and delivery to and acceptance by the party for whom she was to be built. Treating the vessel merely as a chattel, its title during its manufacture would remain in its manufacturer until its completion, and would then pass by delivery to and acceptance by the party for whom it was made; but in contracts of this class, like others, the true method of interpretation to be followed is to ascertain from the terms and circumstances of the contract what was the intention of the parties in making it. The English courts, while upholding this rule, have shown a tendency to regard the fact that the contract price for building a ship was to be paid to the builder in installments as the work progressed as furnishing strong evidence that the title to so much of the ship as was paid for by each installment was to vest in the vendee at the time of the payment. *Woods v. Russell*, 5 Barn. & Ald. 942; *Clarke v. Spence*, 4 Ad. & El. 448; *Wood v. Bell*, 5 El. & Bl. 772; *Laidler v. Burlinson*, 2 Mees. & Wel. 614; *McBain v. Wallace*, L. R. 6 App. Cases 589. Lord Campbell in *Wood v. Bell*, supra, referring to *Woods v. Russell* and *Laidler v. Burlinson*, supra, and other earlier cases, said: "Still it must be remembered after all that what we have to determine is a question of fact, namely, what upon a consideration of all of the circumstances we believe to have been the contract into which the parties have entered." No Maryland decision construing a shipbuilding contract of this character has been brought to our notice, nor are we aware of the existence of any. In *Clarkson v. Stevens*, 106 U. S. 505, 1 Sup. Ct. 200, 27 L. Ed. 139, the Supreme Court of the United States had occasion to pass upon and construe a shipbuilding contract containing many of the features of the one now before us, in order

to determine whether the title to the vessel while unfinished remained in the builder or passed to the party for whom it was being constructed. Under the contract in that case Stevens was to build for the United States government a harbor defense vessel of a specified character by a certain date. The government was to have an inspector to be admitted at all times to Stevens' shipyard, who should receive, receipt for, and mark with the letters "U. S." all materials for the construction of the vessel, and certify the accounts presented therefor. The government was to pay a gross price of \$586,717.84 for the vessel, when fully completed and delivered at the Navy Yard at Brooklyn in conformity with the contract, but payments to the extent of not exceeding \$500,000 were to be made on account as the work progressed upon bills certified by Stevens and the government inspector, and the balance was to be paid when the vessel, fully completed according to the contract, was delivered to the government and accepted by it. In lieu of other security for the faithful performance of his contract, Stevens gave to the government a mortgage upon his shipbuilding establishment. The Supreme Court held that the title to the unfinished vessel remained in Stevens until its completion and delivery to and acceptance by the government. In arriving at its conclusion the court reviewed the English doctrine as announced in the cases which we have cited, and referred to the rule as laid down by Lord Campbell in *Wood v. Bell*, 5 El. & Bl. 772, and adopted by the courts of Massachusetts in *Williams v. Jackman*, 16 Gray, 514, and of New York in *Andrews v. Durant*, 11 N. Y. 35, 62 Am. Dec. 55, and of New Jersey in *Elliott v. Edwards*, 35 N. J. Law, 265, that, "under a contract for supplying labor and materials and making a chattel, no property passes to the vendee till the chattel is completed and delivered or ready for delivery. This is a general rule of law. It must prevail in all cases unless a contrary intent is expressed or clearly implied from the terms of the contract." After alluding to the fact that for a time the English courts, following a dictum in *Woods v. Russell*, 5 Barn. & Ald. 942, held that a provision in such a contract for a payment of the price in installments furnished strong evidence that the title to so much of the vessel as was from time to time paid for vested in the vendee, the Supreme Court further say: "The courts of this country have not adopted any arbitrary rule of construction as controlling such agreements, but consider the question of intent open in every case to be determined upon the terms of the contract, and the circumstances attending the transaction." In that case it was held that the title to the vessel remained in Stevens until its completion, and that, upon his death, pending its construction, it passed to the residuary devisee under his will; the court saying: "We are of opin-

ion that the fact that advances were made out of the purchase money according to the contract for the cost of the work as it progressed, and that the government was authorized to require the presence of an agent to join in certifying the accounts are not conclusive evidence of an intent that the property in the ship should vest in the United States prior to final delivery." In reaching its conclusion, the court laid stress upon the fact that under the terms of the contract the question of its proper performance was in effect reserved for determination until after the completion of the vessel as a condition of acceptance and final payment. Applying the rule of construction thus laid down by the Supreme Court of the United States, which we are prepared to adopt, to the contract in the record before us, it results that the steamer *Anne Arundel* was owned by the shipbuilding company at the time when the work, for which the appellants claim a lien, was done on her. Although the contract under which she was built, provided for the payment of the purchase money in installments as the work progressed, and the Weems Steamboat Company was entitled to have an inspector present in the yard of the builder, the determination of the question whether she had been constructed according to the contract was reserved until her completion, and her conformity to the contract in design, material, and work was plainly made a condition of her acceptance and the payment of the last two installments of the contract price. Under these circumstances we regard as immaterial the mere fact that in the supplemental memorandum appended to the contract the Weems Steamboat Company is several times designated the "owner."

Having determined that the shipbuilding company was to be regarded as the owner of the vessel during its construction, the next question to be considered is whether the record shows a sufficient and effective amendment of the proceedings to entitle the appellants to a decree in this case for the enforcement of their lien claim. This question is not one of the circuit court's discretion in permitting the amendment, but one of its power to do so. The powers of the court in dealing with a proceeding like the present one are wider and greater than those incident to the limited jurisdiction ordinarily exercisable by it in statutory proceedings. Section 41 of article 63 declares, in positive and unmistakable language, that "this article shall be construed and have the same effect as laws which give general jurisdiction or are remedial in their nature" and authorizes the making of proper amendments at any time in the proceedings "commencing with the claim or lien to be filed and extending to all subsequent proceedings." As was said in *Real Estate Company v. Phillips*, 90 Md. 525, 45 Atl. 175: "It is difficult to imagine any more extensive power of amendment than that conferred by the section just quoted." In that

case the mechanic's lien claim alleged that the materials for which the lien was claimed had been furnished to A., the contractor, and that B. was the reputed owner of the property. No notice had been given to the owner of the intention to claim the lien. A bill was filed in equity for the enforcement of the lien, and, in taking the testimony in the case, it was shown that A. and C. were both builders and equitable owners, whereupon, after the time within which a lien could be filed, the plaintiffs were allowed to amend their claim, so as to allege that A. and C. were both builders and equitable owners of the property, and a decree was rendered in the plaintiff's favor. Upon an appeal to this court the decree was affirmed. It was urgently contended in that case that to permit the amendment there made was in effect to allow an entirely new claim of lien to be filed after the expiration of the time prescribed for filing the original lien, but, as both parties to the building contract knew their mutual relations and the interest of no bona fide purchaser without notice was affected, this court held that the lower court had not exceeded its power in permitting the amendment and passing a decree in the plaintiffs' favor. In the present case the shipbuilding company and the Weems Steamboat Company were perfectly familiar with the terms of the contract between them under which the steamer was built, and neither of them were prejudiced by the allowance of the amendment. The railway company, the other defendant, which purchased the completed steamer from the Weems Company, does not aver, in its answer to either the original or amended bills, that it purchased and paid for the boat without notice of the lien, nor does it in any manner set up or rely upon the defense of having been a bona fide purchaser for value and without notice of the lien. We therefore think the court below did not exceed its power in allowing the amendment.

Nor do we think that there was any such technical mistake in the manner of making the amendment as should have caused the appellants the loss of their claim to which there was no defense interposed on the merits. The appellants as plaintiffs below, having obtained leave of the court, after the evidence was in, to amend the lien claim and bill of complaint in the respect already mentioned, proceeded to amend accordingly the bill of complaint and the certified copy of the lien claim which had been filed with the bill as an exhibit, without filing an amended lien claim in the clerk's office of the superior court. The appellees did not demur to the amended bill or by any form of pleading object to the manner in which the amendment had been made, but formally adopted by a paper filed by them in the case, as their answers to the amended bill the ones which they had, respectively, filed to the original bill.

It is doubtless an excellent practice in amending a lien, even when done by leave of court in a pending suit, to also file the amended claim in the clerk's office where the original lien is required by law to be filed, and a failure to take that precaution may debar the claimant from enforcing his claim against the property in the hands of a bona fide purchaser for value without notice of the amendment. It may also be said that the Code requires inferentially, although not in express terms, that an amendment to a mechanic's or boat lien, voluntarily made by a lienor in the exercise of his statutory right, must be filed in the clerk's office where the original lien was filed; but it does not therefore follow that every amendment of the lien claim which may be authorized, during the progress of a proceeding for its enforcement, by a court of equity, in exercise of the general jurisdiction conferred upon it by article 63 of the Code, must be filed in the clerk's office where the original lien is recorded in order to be effective for the purposes of that suit. This is especially true when it is not sought by the amendment to affect the rights of other persons than those who are before the court as parties to the suit in which the leave to amend is granted, and thereby receive notice of the amendment. We see no sufficient reason for holding the amendment now under consideration to have been ineffective as against the interest of the appellees or any of them in the steamer on which the lien is claimed.

Nor do we think that for the purposes of this suit the lien given by the statute to the appellants has expired because more than two years have now elapsed since the filing of their lien claim. We cannot yield our consent to the appellees' contention that the lien expires at the expiration of the two years mentioned in section 46 of article 63, even although the proceedings contemplated by the statute for its enforcement have been instituted within two years and are still pending. To adopt so strict an interpretation of the lien law would not only disregard the provision of section 41 as to the method of construing article 63, but would frustrate the beneficent purposes of its enactment. Under the appellees' view of the law, all that would be necessary to defeat the lien which it gives to a mechanic upon a boat for work done in building it would be to prolong the defense to the proceeding for its enforcement, even if promptly instituted, by obstructive tactics, or the exercise of the right of appeal, for two years from the date of the filing of the lien claim. Or unavoidable delays for that length of time arising from crowded dockets or the illness of a judge, or other causes over which the lien claimant, however diligent, had no control, would deprive him of all benefit from his lien. The primary purpose of the lien law was to give to certain classes of claims regarded by the law as meritorious the security of a lien upon the structures

created by the labor or material forming the basis of the claim. The law does require the party entitled to the lien to enforce it at once. The views of this court upon that subject were expressed in the case of *Blocher v. Worthington*, 10 Md. 1, which in many respects resembles the one now before us. In *Blocher's Case*, in construing section 15 of the mechanic's lien law in Allegany county, enacted by chapter 76 of the Acts of 1841-42, which provided that "the lien of every such debt, for which a claim shall have been filed as aforesaid, shall expire at the end of three years from the day on which such claim shall have been filed unless the same shall have been revived by scire facias," etc., the court said: "The defendant contends that this section interposes an absolute bar to all further proceedings upon the claim after the expiration of three years. We think that the plain meaning of this section is that the scire facias must issue before the expiration of three years from the filing of the claim. Filing the claim creates the lien upon the property, but the party need not proceed immediately to enforce it by process." In several cases which were instituted to enforce mechanics' liens, within five years after the filing of the lien claim, this court has by its decrees, passed after the expiration of the five years, enforced the lien or at least recognized its existence. In *Real Estate Co. v. Phillips*, 90 Md. 515, 45 Atl. 174, the lien claim was filed on January 26, 1891, and the bill for its enforcement was filed on January 5, 1892, but the decree establishing the lien and directing its enforcement was not passed until August 18, 1899, and that decree was affirmed by this court as late as January 11, 1900. In *Baker v. Winter*, 15 Md. 1, which was a scire facias to enforce a mechanic's lien, our predecessors by a decision rendered after the expiration of five years from the filing of the claim reversed the judgment, and sent the case back to permit the lien to be amended in the lower court, and further proceedings had for its enforcement; and in *Greenway v. Turner*, 4 Md. 296, this court by its judgment rendered more than five years after the filing of the lien claim reversed the judgment of the lower court in a scire facias to enforce a mechanic's lien, and sent the case back for further proceedings. In both of these cases the scire facias was instituted before the expiration of the five years. It thus appears that this court has heretofore acted in accordance with that construction of the lien law which holds that the lien may be enforced by an appropriate suit in equity or scire facias, provided the proceeding be instituted within the five years mentioned in the statute, even though the final judgment or decree therein be rendered after the expiration of that period.

The appellees have called our attention to some decisions of a tenor opposite to the views which we have expressed, touching the expiration of mechanics' and judgment liens,

but none of the decisions relating specifically to mechanics' liens are of courts of last resort. Nor is the reasoning in any of those cases sufficiently cogent to induce us to depart from the course pursued by our predecessors in the application of the mechanic's lien law of this state.

For the reasons set forth in this opinion, the decree appealed from will be reversed, and the case remanded for further proceedings in accordance with this opinion.

Decree reversed, with costs, and case remanded for further proceedings in accordance with this opinion.

(105 Md. 226)

GARRETT COUNTY COM'RS v. BLACKBURN.

(Court of Appeals of Maryland. Feb. 28, 1907.)

1. HIGHWAYS — DEFECTS — APPROACH TO BRIDGE—INJURIES—OWNERSHIP OF BRIDGE.

Where county commissioners had charge of the approach to a bridge on which plaintiff was injured by the commissioners' negligence in failing to keep the approach in proper repair, they were liable to plaintiff, though the county had no control of the bridge, and the commissioners were under no duty to repair it.

2. SAME—EVIDENCE.

Where an approach to a bridge from which plaintiff fell and was injured had been uninterruptedly used by the public for over 20 years, and repairs had been made on it from time to time by the county, the duty of maintaining such approach in a safe condition was on the county commissioners.

3. SAME—INSTRUCTIONS.

An instruction that if a road or approach to a county bridge over the Potomac river on the Maryland side thereof was negligently left to remain by defendants, county commissioners, in an unsafe and unprotected condition for persons traveling over such approach, and plaintiff while walking over the same in the exercise of due care was thrown to the ground and injured by reason of the unsafe and defective condition of the highway, she was entitled to recover, was proper.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Highways, § 540.]

4. TRIAL — INSTRUCTIONS—APPLICABILITY TO EVIDENCE.

A request to charge was properly refused where there was no evidence to sustain the proposition asserted.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 596.]

5. SAME — REQUESTS — INSTRUCTIONS ALREADY GIVEN.

It is not error to refuse requests to charge which are fully covered by other instructions.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 651.]

Appeal from Circuit Court, Allegany County; Robert R. Henderson, Judge.

Action by Mary E. Blackburn against the county commissioners of Garrett county. From a judgment for plaintiff, defendant appeals. Affirmed.

Argued before BRISCOE, PEARCE, SCHMUCKER, and ROGERS, JJ.

Albert A. Doub, for appellant. Gilmer S. Hamill and R. T. Semmes, for appellee.

BRISCOE, J. This suit was originally brought in the circuit court for Garrett county, where a trial was had, but the jury failed to agree upon a verdict, and were discharged. It was subsequently removed to the circuit court for Allegany county, where it was again tried, and a verdict and judgment were rendered for the plaintiff. The defendant has appealed.

The suit was brought by Mary E. Blackburn, widow, against the county commissioners of Garrett county to recover damages for personal injuries sustained by the plaintiff by reason of the unsafe condition of one of the public roads of Garrett county, and the approach to a bridge across the Potomac river on the Maryland side to the West Virginia shore. The declaration, in substance, states that on or about the 3d day of September, 1904, the county commissioners of Garrett county, disregarding their duties and obligations imposed by law, did negligently and carelessly allow and permit one of the bridges, the road and approach thereto, under their charge in Garrett county, upon one of the public roads of the county, to wit, the road leading from the town of Kitzmillersville, Garrett county, over the Potomac river, to the village of Blaine, W. Va., at the west end of the bridge on the Garrett county side, to be out of repair, and to be wrongly built in its approach at the end of the bridge, and to remain unmended, in an unsafe and dangerous condition, and in failing to provide guard rails to be put up and along the walls leading up to the bridge; that on the day herein mentioned the plaintiff, while passing and walking up the road and approach to the bridge on the Garrett county side and intending to go over the bridge to a store on the West Virginia side, for the purpose of buying provisions for her home, by reason of the careless, neglectful, and improper manner in which the approach to the bridge was built, and in not having any guard rails to protect persons in passing over the approach to the bridge, and that while the plaintiff was exercising due, proper care and caution she stepped upon a stone, which caused her to fall over the approach to the bridge a distance of 8 feet, striking her body on a pile of loose stone at the bottom of the river, breaking her ankles and the bones of her legs, and receiving other serious injuries from which she cannot recover. It further alleges that the approach to the bridge on the Maryland side was so defective and badly out of repair, and so unsafe and dangerous by reason of the negligence of the county commissioners, and especially in not providing guard rails along and on the side of the approach to the bridge, as to have caused the injury and damage sustained by her. The defendant demurred to the declaration, but the demurrer was overruled. As the ruling of the court upon the demurrer presents the same questions as are raised on the prayers we will consider them together.

The principal questions in the case arise upon the prayers, and relate to the alleged negligence of the defendant and to the contributory negligence of the plaintiff. At the trial of the case the defendant reserved two exceptions. The first to the rejection of the defendant's prayer offered at the close of the plaintiff's testimony asking the court to withdraw the case from the jury, and the second includes the rulings on the prayers offered at the close of the case; to wit, in granting the plaintiff's first and second prayers, and in rejecting defendant's second, third, seventh, eighth, and tenth prayers. There was also an exception to the ruling of the court in overruling defendant's special exception to plaintiff's first prayer. As to the defendant's prayer offered at the close of the plaintiff's case and its second and third prayers at the close of the whole case, asking the court to withdraw the case from the jury, upon the ground that the evidence was legally insufficient to entitle the plaintiff to recover, it is sufficient to say that there was abundant testimony as to the negligence of the defendant, even if it can be regarded as conflicting, to authorize the court in rejecting these prayers.

The main contention in the case raised by these prayers is the want of evidence to show that the bridge was built by Garrett county, or belonged to it or was accepted or under its control, and that it was the duty of the county commissioners of Garrett county to keep it in repair. A complete answer to the contention here made is found in the fact that according to the uncontradicted evidence the accident did not occur upon the bridge, but in the public road as the plaintiff approached the bridge, and within a few feet of the bridge proper. The approach to the bridge was about 20 feet long, and led in an angular shape to the bridge proper. The witness Jenkins who had lived at Kitzmillersville about 9 years, and who had been road supervisor of Garrett county for 5 or 6 years, testified as follows: "Q. Do you know the road that leads to this bridge? A. Yes, sir; I have crossed it. Q. Were you in charge of that road? A. Yes, sir. Q. How wide is that bridge? A. Twelve feet in the clear. Q. How wide is the track of the road leading to the bridge, the approach to the bridge? A. The road is wider than the bridge." He further testified that there were no guard rails to the approach to the bridge; that he had made repairs by "raising it up a little," and at the time of the accident it was in a bad condition. The witness Rafter testified: That he had resided in Kitzmillersville about 38 years, and that he was familiar with the approach to the bridge on the Maryland side. That the bridge was built about 1878 or 1879. The approach to the bridge was built of loose rock, without any mason work at the sides, the middle was filled in with large boulders hauled from the river, and a little dirt put on them. That the floods of 1889 and 1899 put the

approach to the bridge in a very bad shape. The rocks were torn up and scattered over the ground. A very little work, if anything, was done afterwards to repair the damage, except to throw a little dirt on top of the boulders. He further testified that the attention of the county commissioners was called to the condition of the approach to the bridge, and that he called the attention of the president of the board of county commissioners to its unsafe condition about two years before the accident, and upon an examination of it, he replied, "Yes, it is in a pretty bad fix." That he examined the approach to the bridge with a view of giving some instructions to the supervisor or some one to repair it, and stated that the approach to the bridge was not in proper shape. "It does not look very good." He also testified that the road supervisor passed over it frequently, at least once a week, prior to the accident.

This state of case, in connection with the other evidence set out in the record, clearly shows that the place where the accident happened was a part of the public road situate in Garrett county, and over which the county commissioners had assumed charge and control. It had been uninterruptedly used by the public for over 20 years, and repairs had been made upon it from time to time by the county. The duty of maintaining in safe condition the approach leading to the bridge in question, as well as all other parts of the public road, clearly rested upon the county commissioners of Garrett county. The liability of the county commissioners in an action of this kind has been settled by a number of decisions of this court. *County v. Duckett*, 20 Md. 475, 83 Am. Dec. 557; *County v. Gibson*, 30 Md. 229; *County v. Baker*, 44 Md. 2; *County v. Broadwaters*, 69 Md. 533, 16 Atl. 223; *Baltimore County v. Wilson*, 97 Md. 209, 54 Atl. 71, 56 Atl. 596. There was no error in the ruling of the court in rejecting the prayers thus offered by the defendant, nor in the action of the court in overruling the demurrer to the declaration which presented the identical proposition.

The plaintiff's first and second prayers were properly granted. The second prayer relates to the measure of damages, and we do not understand that it is contested. The plaintiff's first prayer is as follows: "The plaintiff by her counsel prays the court to instruct the jury that if they find from the evidence in this cause that the road or abutment leading to the county bridge over the Potomac river from the village of Kitzmillersville to Blaine, on the West Virginia side, and on the Maryland side thereof, was negligently left to remain by the defendants in an unsafe and unprotected condition for persons walking and traveling along and over said abutment and road leading to said bridge, and if they further find that the plaintiff while walking along and over said approach to said bridge and on the abutment leading

thereto, and while using due care and caution on her part was thrown to the ground and injured by reason of the said unsafe and defective condition of said highway, then the plaintiff is entitled to recover." A similar prayer in *Broadwaters' Case*, 69 Md. 534, 16 Atl. 223, was conceded to be correct, and the court in that case—a somewhat similar case—held that the prayer fairly presented the law of the case to the jury. The defendant's special exception to this prayer was properly overruled.

The defendant's fourth, fifth, and sixth prayers were granted, and, in connection with the plaintiff's first, we think fully and fairly presented the law of the case. The fourth prayer instructed the jury that if they found from the evidence that the approach to the bridge where the plaintiff was injured was reasonably safe for persons traveling thereon with ordinary care, then the plaintiff was not entitled to recover. The fifth and sixth prayers presented the relative duties of plaintiff and defendant in cases of this kind, and have been too frequently considered by this court to need further comment. The questions of negligence and contributory negligence were properly submitted by these prayers.

The defendant's seventh and eighth prayers were properly rejected. They were condemned in *Broadwaters' Case*, 69 Md. 533, 16 Atl. 223, and need not be discussed here. The tenth prayer was also properly refused. There was no evidence to sustain the proposition asserted by the prayer. It was, however, fully covered by the defendant's granted ninth prayer, which instructed the jury that if they find from the evidence that the bridge where the accident occurred extended, at the time of the accident, from Garrett county into Mineral county, W. Va., then the plaintiff cannot recover. This prayer was granted in connection with the plaintiff's first prayer, and we do not see upon what ground it was calculated to mislead the jury. It must be considered in connection with the other instructions granted by the court, and could not have injured the defendant's case. The appellant's contention, in this regard, cannot therefore be sustained.

There can be no reason for disturbing the judgment in this case. The law of the case was fairly submitted to the jury by the instructions of the court granted at the instance of both plaintiff and defendant. The allegations of the narr. are supported by the testimony contained in the record, and we shall not prolong this opinion by discussing it further. We are of the opinion, after a careful examination of the whole evidence, that the court committed no reversible error in its rulings on the prayers, or in submitting the case to the consideration of the jury. It follows, therefore, that the judgment appealed from will be affirmed.

Judgment affirmed, with costs.

(105 Md. 154)

BALTIMORE COUNTY WATER & ELECTRIC CO. v. BALTIMORE COUNTY COM'RS et al.

(Court of Appeals of Maryland. Feb. 28, 1907.)

WATERS AND WATER COURSES—WATER COMPANY—USE OF HIGHWAYS—ASSENT OF AUTHORITIES—NECESSITY.

A water company, formed under Acts 1886, p. 138, c. 100, could lay its pipes in the highways in the territory to which its operations were limited, without the assent of authorities in charge of the highways. Acts 1888, p. 81, c. 73, empowered the company to "extend its operations" to certain other territory, and to "exercise and use all the powers, privileges, rights and franchises and to do anything within" such extended territory it could do in the original territory, and Acts 1900, p. 49, c. 52, empowered it to "extend its operations" over new territory, and to enjoy all rights conferred upon corporations formed under Code Pub. Gen. Laws, art. 23, § 358 (Acts 1898, p. 691, c. 190), under which water companies formed under the article may lay pipes, etc., on obtaining the assent of the authorities controlling the highways, and which provides that the powers shall be subject to reasonable regulation by the county commissioners. *Held*, from the language of the act of 1900, and from the policy of the state, as expressed in the act of 1898 and Code Pub. Gen. Laws 1888, art. 23, § 246, which the act of 1898 amended, to require water companies incorporated under general laws to obtain the assent of authorities controlling highways before laying pipes therein; that such act of 1900 did not empower the company to lay its mains, etc., in the highways of the new territory without first obtaining the assent of such authorities.

Appeal from Circuit Court, Baltimore County, in Equity; Frank I. Duncan, Judge.

Suit by the Baltimore County Water & Electric Company against the county commissioners of Baltimore county and others. From a decree for defendants, complainant appeals. Affirmed.

Argued before BRISCOE, BOYD, PEARCE, SCHMUCKER, BURKE, and ROGERS, JJ.

A. De R. Sappington and William S. Bryan, for appellant. Osborne I. Yellott, for appellees.

BOYD, J. This is an appeal from a decree sustaining a demurrer, and dismissing the bill filed by the appellant against the appellees. The bill sought to enjoin the county commissioners of Baltimore county and the highways commission of Baltimore county from preventing, obstructing, or in any way interfering with the construction by the appellant, or its employes, under the supervision of the highways commission, of its mains, pipes, and conduits proposed to be laid in Southbend avenue, Fifth street and North avenue, in accordance with the application for a permit, which it had made to the highways commission. Those highways are in Mt. Washington, which is an unincorporated village in the Third election district of Baltimore county. By Acts 1904, p. 788, c. 465, the county commissioners are constituted the highways commission of Baltimore county, "by which name they may sue and be sued in the courts of this state in all matters per-

taining to the highways and bridges over which they are given control by the provisions of this act." The individuals composing the board of county commissioners were also made defendants. The appellant was formed by the consolidation of the Catonsville Water Company with the Chesapeake Electric & Water Company of Baltimore County. The Catonsville Company was incorporated by Acts 1886, p. 138, c. 100, and its charter was amended by Acts 1888, p. 81, c. 73, and Acts 1900, p. 49, c. 52. The Chesapeake Company was formed by the consolidation of two other companies, organized under the general laws. An application made by the appellant to the highways commission for a permit to lay water mains in the street and avenues named above was refused, and this bill was then filed.

The appellees contend that Acts 1900, p. 49, c. 52, is unconstitutional and void, under section 43 of article 3 of the Constitution; but, without discussing that question, and assuming it to be valid, we will proceed at once to the consideration of what we deem to be the most important question in the case. It is thus stated in the appellant's brief: "Was it within the chartered powers of the appellant to lay its water mains in the highways of Baltimore county, without first obtaining the assent of the county commissioners of Baltimore county?"

Inasmuch as the appellant relies entirely upon the powers conferred on the Catonsville Company by its original charter, and the amendments thereto, to sustain its contention, it becomes necessary to ascertain what they were. It will be conceded that the powers and rights conferred upon that company to lay its pipes in the highways of Baltimore county now belong to the appellant, as the principle is settled in *Con. Gas Co. v. Baltimore Co.*, 98 Md. 695, 57 Atl. 29, *State, Use Dodson, v. B. & L. R. Co.*, 77 Md. 489, 26 Atl. 865, and other cases. Nor do we understand it to be denied by the appellees that the Catonsville Company had the power, under its original charter, to lay pipes in the highways of the village of Catonsville and in the First election district of Baltimore county, without obtaining the assent of the county commissioners. It was so decided by the lower court, and, in the case of *Baltimore City v. Balto. Co. Water Co.*, 95 Md. 232, 52 Atl. 670, we held that it was not necessary to have a permit from the city engineer before it could lay its pipes in what was formerly a part of the First election district of Baltimore county, but had been annexed to Baltimore City. It is admitted by the appellant that it is proper to apply for a permit from the authorities, just as was done in the case last cited, so that they may know the work is being done by those authorized to do it, and they can have proper supervision over it; but, if the permit is refused, then, the appellant contends, it has the right to proceed without it, provided, of course, it is

done within the territory over which it has such powers given it by its charter. The original charter confined the operations of the Catonsville Company to the First election district of the county and Catonsville, and, although the avenues and streets involved in this case are in the Third district, the appellant contends that the amendments to that charter now give it the right to lay its pipes, etc., in all the highways of Baltimore county, without first obtaining the assent of the county commissioners, who, as we have seen, constitute the highways commission.

By the act of 1888 the Catonsville Company was empowered "to extend its operations to and including Ellicott City, and to within a radius or distance of one half a mile from the corporate limits thereof." It was further authorized and empowered by the act "to exercise and use all the powers, privileges, rights and franchises, and in general to do anything within the corporate limits of Ellicott City aforesaid, and the radius or distance of half a mile therefrom as aforesaid, which it is now empowered to do in the village of Catonsville and the First election district of Baltimore county by the provisions of said act" of 1886; and all the provisions of that act were "extended to and declared to apply to and to be in force" in the new territory, as fully as if it had been named therein, and as fully as said act of 1886 then applied to Catonsville and the First district. Then the act of 1900 (page 49, c. 52) was passed. It is an act to amend the act of 1886, incorporating the Catonsville Company, as amended by the act of 1888, "by adding thereto certain sections for the purpose of extending the operations and increasing the powers thereof." As it is the one under which the appellant claims the right asserted in this case, we will quote at length from it. It provides that: "The Catonsville Water Company be and is hereby authorized and empowered, from time to time, to extend its operations to other parts of Baltimore county, and also to Howard and Anne Arundel counties, and that said corporation shall have, in addition to the rights and privileges heretofore conferred upon it, and which it now enjoys, all the rights and privileges conferred upon corporations incorporated under article 23 of the Code of Public General Laws, * * * but nothing herein contained shall be construed to permit said company from further extending its operations in the city of Baltimore." There can be no doubt that the act of 1888 intended to give the company the same powers over the territory therein named as it had over that described in the original charter, but there is nothing on the face of the act of 1900 to suggest to the Legislature that it was intended to give the company power to lay its pipes in any or all the highways of Baltimore, Howard, and Anne Arundel counties, without first obtaining permission from the county authorities.

By article 23, § 246, Code Pub. Gen. Laws

1888 (which was a part of the act of 1868), it was provided that "any corporation which may be formed under the provisions of this article for the purpose of supplying with pure water any town or city in this state" shall have certain powers therein named, including that "to lay its pipes and construct all such other works in said town or city as shall be necessary or suitable to carry out the purposes of said corporation; provided the assent of the municipal authorities of said town or city be first obtained." Then, by the act of 1896 (page 691, c. 199), that section was amended (being now section 358, art. 23, Code Pub. Gen. Laws), so that it embraced any corporation formed under that article "for the purpose of supplying water"—no longer limiting it to supply pure water to a town or city—and it provides that such company "shall also have power to lay pipes and construct all such other works as shall be necessary or suitable to carry out the purposes of said corporation; provided, the assent of the municipal authorities of any incorporated town or city in which the operations of said corporation may be carried on shall be first had and obtained, and if the operations of any such company shall be carried on in any county outside of the incorporated town or city, the assent of the county commissioners of said county shall be first had and obtained." The section then provides that all such works and the exercise of the powers granted shall, at all times, be subject to such reasonable regulations as the municipal authorities or county commissioners, as the case may be, may prescribe. It is thus seen that the policy of this state, as declared by the Legislature in clear and unmistakable terms, was at the time the act of 1900 was passed, and had been for years before, that all water companies chartered under the general laws should be required to obtain the assent of the authorities in control of the public highways, before exercising the valuable franchise of laying their pipes in the public streets and roads. And, although we have not deemed it necessary to determine the question raised by the appellees, as to whether the Legislature could, under the provisions of the Constitution above cited (section 48 of article 3), grant the powers to a corporation incorporated by a special act to thus use the public highways without the assent of the officers in control of them, it is manifest that, if such power be conceded or assumed to be vested in the Legislature, it would be required to use clear and unequivocal language to indicate its intention to do so, in the face of its declared policy on the subject. This court said, in *Purnell v. McLane*, 98 Md. 594, 56 Atl. 832: "The right to a franchise is no more to be presumed than the exemption from taxation, and therefore every assertion of such right must, to be efficacious, be distinctly supported by clear and unambiguous legislative enactment. To doubt is to deny the right to the

franchise." We might with propriety add to this clear and emphatic declaration that this is especially so when the right to use the public highways is asserted, regardless of the assent of those who have been placed in control over them by the laws of the state, and particularly when, as in this case, that right is asserted, although those so in control have actually refused to permit such use of the public highways, as they are presumed to have been acting for the interests of the public, which they represent.

Keeping these important principles in view, let us see how far the act of 1900 complies with them, or approaches the standard fixed by this court, in considering such rights, claimed to exist under legislative enactment. In the first place, a comparison of that act with those previously passed for the Catonsville Company shows a striking contrast, and furnishes strong evidence of an intention of the Legislature not to confer by the act of 1900 such power as is contended for over the highways of the three counties. By the act of 1886 the company was expressly authorized "to excavate the earth and lay pipes for water in the said village of Catonsville and the said First election district of Baltimore county," in addition to the broad powers given it by section 2, where, amongst others, it was authorized to "purchase, lease, hold, use and possess such lands, water rights, powers and privileges, tenements, goods and chattels as may be necessary for collecting streams of water, elevating, preserving, using and distributing the same, as the means of abundantly supplying with pure water, the public and private houses, streets, squares, lanes, alleys and other places in the village of Catonsville and also in the First election district of Baltimore county, and for properly disposing of the said water and such other powers as may be necessary to carry into effect the purposes of this act." When the act of 1888 was passed, although the title read that it was "for the purpose of increasing the capital stock and extending the operations thereof," and the body of the act empowered the company "to extend its operations" (the very language so much relied on by the appellant), the Legislature, intending to give it the same powers in the new territory as it had in the original, said so, in language too plain to admit of doubt, as will be seen by what we have quoted above from that act. But, when the act of 1900 was passed, the general laws required the assent of the county authorities, and there is nothing in it which indicates that the Legislature intended to authorize the Catonsville Company to lay its pipes in the public highways of the three counties without first obtaining such assent—certainly no such clear expression of the intent of the Legislature as was embraced in the act of 1888, which it must be remembered was passed before the general law requiring the assent of the county commissioners, if the operations were

to be carried on in a county, outside of an incorporated town or city. So, comparing the act of 1888 with that of 1900, we may well conclude that, if the Legislature had intended to confer, by the act of 1900, such a power as that now under consideration, it would have used such language as was employed in the act of 1888, or its equivalent, and not simply such general terms as are in the act of 1900. As it did not, the fair presumption is that it did not so intend—especially in view of its policy, as declared just two years before by the act of 1898.

But it is contended that, when the Catonsville Company was authorized "to extend its operations to other parts of Baltimore county, and also Howard and Anne Arundel counties, it was manifestly the intention of the Legislature to authorize the company to transact its business, to operate, to do the things in these new localities that it had heretofore had the power to do, and had done," in the territories included in the acts of 1886 and 1888. It is argued that the words "extend its operations" are meaningless, unless that be so. But is that correct? It cannot be doubted that the operations of the Catonsville Company were limited to the particular territories named in the acts of 1886 and 1888. We need not stop to discuss the question whether it could use the public highways, without the assent of the county commissioners, for its pipes, conduits, etc., in conducting the water from its source or sources of supply to those territories; but, conceding that it had the right to construct dams, reservoirs, and other places for storage outside of those territories, and then, either over its own right of way, or over the public highways, conduct the water to those territories, it cannot be denied that it was not authorized to supply pure water to houses, etc., outside of Catonsville, the First election district, Ellicott City, and the country within a half mile of the limits, before the act of 1900 was passed. Its "operations" were limited to those places, and could not be carried on beyond them, excepting, of course, such of the "operations" as were necessarily and properly carried on elsewhere, in order to enable the company to supply the water within the defined territories, some of which are referred to above. In order to have authority to supply water to houses and other places beyond the points named in the acts of 1886 and 1888, the act of 1900 or some amendment to the charter was necessary, and it by no means follows that, because it was authorized to "extend its operations" to the remaining part of Baltimore county, and to the other two counties, in doing so it could use all, or any, of the public highways of the three counties, regardless of the assent of the officers in control of them. The Legislature undertook to give the company the franchise to conduct its business within those three counties, and without that it would seem to be clear that

It could not use the public highways for laying, repairing, or replacing its pipes, even with the consent of the county commissioners, unless it was given by the general laws or some authority from the state. Such a franchise may be granted either directly by the Legislature or by a municipal corporation, provided the latter is clothed with the power, but it must emanate from the state. *Con. Gas Co. v. Balto. City*, 101 Md. 546, 61 Atl. 532; *Purnell v. McLane*, 98 Md. 592, 56 Atl. 830; 14 Am. & Eng. Ency. of Law 920. The authorities cited refer to gas pipes, but the use of public highways for water pipes stands upon the same principle as their use for gas pipes. 30 Am. & Eng. Ency. of Law, 438.

It could not be pretended that the act of 1900 gave the company power to use private property, without the consent of the owner, and it would seem to be equally clear that neither the Legislature nor the county commissioners could authorize this or any other water company to use county roads, if the fee belonged to the abutting owners, without their consent; for, while the authorities generally concede that gas and water companies, which have received legislative authority to lay their pipes in the streets of cities and towns, can do so without the consent of, and without compensating, abutting owners, a different rule applies to county highways. *Mackenzie's Case*, 74 Md. 47, 21 Atl. 690, 23 Am. St. Rep. 219; 14 Am. & Eng. Ency. of Law, 921; 30 Am. & Eng. Ency. of Law, 438; *Thornton on Oil & Gas*, § 505. The reason for the distinction is that streets in cities and towns are acquired for all the ordinary purposes of streets, which include laying gas and water pipes; but the easement the public acquires in a right of way for a county highway is the right to travel along it, and its incidents, and generally nothing else. *Mackenzie's Case*, supra. The use of such roads for horse and electric railways, without imposing an additional servitude, is explained by the theory that they are only improved methods of travel over the road, as will be seen in *Lona Ry. Co. v. Cons. Coal Co.*, 95 Md. 630, 53 Atl. 420, and cases there cited; but that is not so in the use of a county highway for gas and water pipes. It is therefore manifest that the mere power "to extend its operations" did not necessarily mean that the Catonsville Company was to have the power to use the public highways, regardless of the assent of the county commissioners.

Nor can the provisions that "said corporation shall have, in addition to the rights and privileges heretofore conferred upon it, and which it now enjoys, all the rights and privileges conferred upon corporations incorporated under article 23 of the Code," be construed to give it the power to use the highways without the assent of the county commissioners. Inasmuch as article 23 of the Code expressly requires the assent of the

county commissioners, the reference to it in this connection strongly implies that it was intended that this company should be subject to that restriction. It could scarcely be contended that it would be entitled to the benefit of the provision, contained in what is now section 358 of article 23, that it "shall also have power to lay pipes and construct all such other works as shall be necessary or suitable to carry out the purposes of said corporation," but that it would be free from the proviso immediately following it, which requires the assent of the county commissioners. The expression, "in addition to the rights and privileges heretofore conferred upon it, and which it now enjoys," may have been intended to continue all those conferred by the acts of 1886 and 1888, including the right to use the public highways, even without the consent of the commissioners, within the prescribed limits mentioned therein, but cannot, under the principles of construction to be applied to such rights and privileges, be extended so as to be applicable to the public highways of three counties, and to give that company such powers over them as the appellant now contends for.

Our conclusion is that the appellant was not authorized to lay its mains, pipes, and conduits in the highways mentioned in the bill of complaint without first obtaining the assent of the highways commission of Baltimore county, and, without discussing other questions referred to at the argument, the decree of the lower court must be affirmed.

Decree affirmed, appellant to pay the costs.

(105 Md. 288)

JORDAN v. REYNOLDS et al.

(Court of Appeals of Maryland. March 1, 1907.)

HUSBAND AND WIFE—ACTIONS—JUDGMENT AGAINST HUSBAND—LIEN—PROPERTY AFFECTED.

Under Const. art. 3, § 43, declaring that the property of the wife shall be protected from the debts of her husband, a judgment against a husband is not a lien on real estate held by him and his wife as tenants by the entireties, and they may give a purchaser a clear title unencumbered by the judgment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Husband and Wife, § 866.]

Appeal from Circuit Court of Baltimore City; Alfred S. Niles, Judge.

Suit by George A. Reynolds and others against Charles V. Jordan. From a decree for plaintiffs, defendant appeals. Affirmed.

Argued before BRISCOE, BOYD, PEARCE, SCHMUCKER, and BURKE, JJ.

Edward A. Strauff and William C. Smith, for appellant. Arthur L. Jackson, for appellees.

BRISCOE, J. It is admitted that the only question presented on the record in this case is whether a husband and wife, holding property as tenants by the entireties, can give to a purchaser of the property a good and mer-

chantable title, as will enable them to enforce specific performance against the purchaser, free and clear of an outstanding judgment against the husband. In other words, whether the husband's interest in case of tenancy by the entirety can be subjected to the claims of his creditors during the life of the wife, and whether the right of execution is suspended during the life of the wife, but enforceable on her death.

The facts are undisputed, and the question arises upon a bill in equity, filed by the husband and wife against the purchaser, asking for the specific performance of a contract of sale dated the 16th of October, 1908, for the purchase of certain leasehold property, situate in Baltimore City, held by the husband and wife, as tenants by entireties. The defendant by his answer admits the allegations of the bill to be true, but denies the relief asked by the bill, upon the ground that on the 24th day of June, 1908, a certain August Strauff obtained in the court of common pleas of Baltimore City a judgment against George A. Reynolds, one of the plaintiffs in the case, for the sum of \$950, and this judgment is still unpaid and unsatisfied, that the judgment is a lien upon the property described in the contract of sale, and that the title to the property, in consequence thereof, is not good and marketable as the contract of sale required it to be. And for this reason he refused to pay the purchase price and accept a deed. The case was heard on bill, answer, and exhibits, and, from a decree requiring the defendant to comply with the contract of sale this appeal has been taken.

The character of an estate held by tenancy by entireties, similar to the one here in controversy, has been settled by numerous decisions of this court. In *McCubbin v. Stanford*, 85 Md. 380, 37 Atl. 214, 60 Am. St. Rep. 329, where land was owned by a husband and wife as tenants by entireties, and was mortgaged by the husband to secure his debts, it was held, upon foreclosure proceeding, that, since one tenant by entireties cannot alien the property so as to infringe the rights of the other, the mortgage by the husband could not affect the rights of his wife, and, under Const. art. 3, § 43, declaring the property of the wife shall be protected from the debts of the husband, the purchaser of the husband's interest is not entitled to possession of the property as against the wife, because her undivided entirety of interest in it would thereby be destroyed, and she would be deprived of the protection given her by the Constitution. In *Clark v. Wootton*, 63 Md. 113, where a judgment was obtained by husband and wife against a railway company, it was held that the judgment could not be attached for a debt due by the husband, being exempt from execution in virtue of section 43 of article 3 of the Constitution, which provides that the property of the wife shall be protected from the debts of the husband. And

in *Brewer v. Bowersox*, 92 Md. 569, 48 Atl. 1060, it is said, after a review of the cases upon the subject: "It is not because a conveyance or gift is made to husband and wife as joint tenants that the estate by the entirety arises, but it is because a conveyance or gift is made to two persons who are husband and wife; and since, in the contemplation of the common law, they are but one person, they take, and can only take, not by moieties, but the entirety. The marital relation, with its common-law unity of two persons in one, gives rise to this peculiar estate when a conveyance or gift is made to them without restrictive or qualifying words; and they hold as tenants by the entirety, not because they are declared to so hold, but because they are husband and wife. This estate, with its incidents, continues in Maryland as it existed at the common law. It differs materially from all other tenancies. The right of survivorship, which is one of its chief incidents, cannot be destroyed, except by the joint act of the two, and upon the death of either the other succeeds to the entire property or fund."

Applying the principles enunciated in these cases, we cannot see how the judgment in this case can be regarded, in any legal sense, as a lien upon the property in question, during the life of the wife. The law is well settled in this state that judgments create liens only because the land is made liable by statute to be seized and sold on execution. A judgment creditor stands in the place of his debtor, and he can only take the property of his debtor subject to the charges to which it was justly liable in the hands of the debtor at the time of the rendition of the judgment. *Valentine v. Selss*, 79 Md. 187, 28 Atl. 892; *Morton v. Graffin*, 68 Md. 543, 13 Atl. 341, 15 Atl. 298; *Hartsock v. Russell*, 52 Md. 619. An "execution" is a lien on personal property only because the personal property can be sold in satisfaction of the execution. *Eschbach v. Pitts*, 6 Md. 71; *Hanson v. Barnes*, 3 Gill. & J. 359, 22 Am. Dec. 322; *Harris v. Alcock*, 10 Gill. & J. 226, 32 Am. Dec. 158. It seems, therefore, to be clear, both upon reason and authority, that the judgment in this case is not a lien upon the property, in the lifetime of the wife. There is nothing that can be seized and sold under an execution upon the judgment. Property held by this tenure cannot be sold without the joinder of the wife (*McCubbin v. Stanford*, supra), and the judgment creditor can acquire no greater rights than those possessed by the judgment debtor (*Valentine v. Selss*, supra; *Clark v. Wootton*, supra; *Marburg v. Cole*, 40 Md. 402, 33 Am. Rep. 266; *Samarzevsky v. City Pass. Co.*, 88 Md. 479, 42 Atl. 206).

The case of *Corinth v. Emery*, 63 Vt. 505, 22 Atl. 618, 25 Am. St. Rep. 780, is directly in point. In that case, it was held that a husband has no interest in either the fee or the usufruct of real estate deeded to himself and wife jointly which can be taken in execution for his sole debts. In *Almond v. Bonnell*,

76 Ill. 537, it was held, where land is held by husband and wife as tenants by the entirety, as at the common law, the sale of the same on execution against the husband, followed by a sheriff's deed, will fail to pass any title whatever. The case of *Chandler v. Cheney*, 37 Ind. 391, is an express decision on this point. The court said there can be no partition between tenants by the entireties; while such an estate exists, no interest in it can be sold on execution for the debts of the husband or wife. From the nature of the estate and the legal relation of the parties, there must be unity of estate, unity of possession, unity of control, and unity in conveying or incumbering it. A mortgage upon such an estate executed by the husband alone is void. There are a class of cases, interpreting the statutes and legislation, in some of the states, which hold that the husband has a right to mortgage his interest which is a right to the use of an undivided half of the estate during the joint lives and to the fee in case he survived his wife, and, by the foreclosure and sale, the plaintiff acquired this interest and became a tenant in common with the wife, subject to her right of survivorship. These cases, however, are in direct conflict with the decisions of our own state, and are against the weight of authority upon this question.

The result of a decision according to the appellant's contention would practically destroy the wife's estate and turn her entirety into a joint tenancy or tenancy in common with the purchaser, under either a mortgage sale, or a sale under an execution, on a judgment. An insuperable objection to the position urged by the appellant, here, is the provision of our Constitution (section 43, art. 3), which declares that the property of the wife shall be protected from the debts of the husband. If the judgment creditor possesses a lien against this property, he could collect the debt by an execution, take away the wife's property without her consent, and thereby destroy the sale of the estate as it now stands. To hold the judgment to be a lien at all against this property, and the right of execution suspended during the life of the wife, and to be enforced on the death of the wife, would, we think, likewise incumber her estate, and be in contravention of the constitutional provision heretofore mentioned, protecting the wife's property from the husband's debts. It is clear, we think, if the judgment here is declared a lien, but suspended during the life of the wife, and not enforceable until her death, if the husband should survive the wife, it will defeat the sale here made by the husband and wife to the purchaser, and thereby make the wife's property liable for the debts of her husband.

In *Logan v. McGill*, 8 Md. 469, it was held, in the state of the law at that date, that Acts 1841, c. 161, does not destroy the tenancy of the curtesy, but suspends the right of execution during the life of the wife leaving

the judgment lien perfect on the life estate of the husband, to be enforced on the death of the wife. But the tenancy by the curtesy no longer exists in this state by reason of subsequent legislation, and a statutory life estate has been substituted for the common-law tenancy by the curtesy. *Snyder v. Jones*, 99 Md. 693, 59 Atl. 118. We have been referred to no case in this state, and none can be found, where it has been held that a judgment, such as the one here sought to be enforced, has been declared to be a lien upon an estate possessing the qualities and character incident to an estate by the entireties. In *Vinton v. Beamer*, 55 Mich. 561, 22 N. W. 40, it is said: "In an estate by the entirety the husband and wife take the same estate, the same interest, and it cannot be separated. The right of the one is the right of the other. Neither can by a separate transfer affect the rights of the other or his own. What would defeat the interest of one would also defeat that of the other."

We therefore hold, according to the spirit and policy of our law, that the judgment creditor has no lien upon the property conveyed by the appellees to the appellant in this case. There being no lien under the judgment, the purchaser will take a good and valid title by the joint deed of husband and wife.

The decree requiring the specific performance of the contract of sale will be affirmed.

Decree affirmed, with costs.

(106 Md. 113)

HORNER v. BELL et al.

(Court of Appeals of Maryland. Feb. 28, 1907.)

1. RECEIVERS — APPOINTMENT — SOLVENCY OF DEFENDANT.

Where heirs representing one-third of an estate sued to set aside conveyances of stock, land, etc., as having been obtained from decedent through undue influence, and did not allege defendant's insolvency, and he alleged under oath that he paid par for the stock, there being no evidence to the contrary, and asserted his abundant ability to meet any liability that might be established against him, and heirs representing two-thirds of the estate adopted his answer and maintained the validity of the conveyances, a receiver was improperly appointed to take charge of the land, etc.

2. JUDGMENT — SETTING ASIDE CONVEYANCE — CONCLUSIVENESS.

An adjudication setting aside a conveyance by decedent to defendant as having been obtained through undue influence was not conclusive of defendant's rights under a conveyance of the same property made after another conveyance between the same parties.

Appeal from Circuit Court No. 2 of Baltimore City; Pere L. Wickes, Judge.

Suit by Elizabeth H. Bell and others against Albert N. Horner. From a decree for plaintiffs, appointing a receiver and granting an injunction, defendant appeals. Decree reversed, injunction dissolved, and case remanded.

Argued before BRISCOE, BOYD, PEARCE, SCHMUCKER, and ROGERS, JJ.

John P. Poe and Julius H. Wyman, for appellant. Joseph B. Seth, for appellees.

PEARCE, J. This is an appeal from a decree of circuit court No. 2 of Baltimore city, appointing a receiver to take charge of the real, leasehold, and chattel property of Elizabeth B. Hammersly, deceased (not including the Baltimore city stock mentioned in the bill of complaint), and granting an injunction to restrain the appellant, Albert N. Horner, from transferring or disposing of the said Baltimore city stock. This is a continuation of the litigation between the parties to this case which was the subject of the appeal in *Horner v. Bell*, 102 Md. 435, 62 Atl. 736, to which frequent reference will be required in this opinion.

The bill in this case recites the averments of the bill in the former case, both as to the property of the said Elizabeth B. Hammersly, the persons who are her heirs at law, and the disposition of her property made, or attempted to be made, by four conveyances executed by her on July 29, 1899, which conveyances were by a decree of circuit court No. 2 annulled and set aside as fraudulent and void, and which decree was affirmed in 102 Md. 435, 62 Atl. 736. The bill further avers that Albert N. Horner on February 24, 1906, caused to be placed upon record four other conveyances, all dated December 9, 1901, purporting to be executed by the said Elizabeth B. Hammersly, and conveying respectively to the parties named in the former conveyances the identical properties described in said respective former conveyances—that is to say (1) to Elizabeth H. Bell, her granddaughter, for her life, and after her death to her children, certain leasehold property of little value; (2) to George D. Hammersly, her grandson, certain other leasehold property also of little value, both in bad condition; (3) to Mary D. Horner, wife of Albert N. Horner, and her only daughter, certain goods and chattels contained in No. 108 North Green street, and No. 2045 North Fulton avenue; and (4) to her son-in-law, said Albert N. Horner, all the residue of her estate of every kind, the consideration named in each of said deeds being “five dollars and other good and valuable considerations.” The bill does not allege what is the value of the property mentioned in said conveyances, but the answers filed in the cause admit that the said Elizabeth B. Hammersly, before the execution of said conveyances, was possessed of the real and leasehold property described in the bill, and avers that its maximum value was \$25,000, and also admits that before July 17, 1899, she was possessed of Baltimore city stock worth \$28,000, making her total estate about \$53,000. The bill further alleges that Horner procured said four conveyances to be recorded “out of time,” that is, within four hours after delivery to the recording clerk, and then to be immediately delivered to him, and so prevented the plaintiffs from seeing the original con-

veyances, and that they are “exact copies in their terms and substance” of the four conveyances of July 29, 1899, and of four other conveyances dated February 14, 1900, and filed with the examiner in the former case referred to; that the plaintiffs knew nothing of the execution of the four conveyances of December 9, 1901, until after their recording on February 24, 1906, and that the two conveyances purporting to be made then were never delivered to or accepted by them, and were never intended by the said Elizabeth B. Hammersly to take effect in her lifetime, and are therefore null and void; and that they had no knowledge of the execution or delivery of the conveyances referred to in this bill, and which were the subjects of adjudication in the former case, until shortly before the bill in that case was filed. The bill still further alleges that since the decision of the appeal in the former case the plaintiffs have learned that said Horner has filed with the register of Baltimore city certificates of Baltimore city stock of the par value of \$28,000 owned by said Elizabeth B. Hammersly, which pretended to be transferred by her to said Horner, but which transfer the plaintiffs charge was never legally made by her and is null and void. It further charges that at the time of the execution of said conveyances and transfer of stock said Elizabeth B. Hammersly was 77 years of age, infirm in body and feeble in mind to such an extent as to render her incapable of making a valid deed or contract; that she resided with said Horner, who took advantage of her incapacity to procure said conveyances and transfer, whereby the plaintiffs would receive only a pittance of the large estate of their grandmother, instead of receiving one-third thereof in the natural course of events; that long after the execution of said conveyances of December 9, 1901, said Elizabeth B. Hammersly retained control of, and exercised all rights of ownership over, all said property, and that said conveyances and said transfer of stock were without any consideration, were never legally executed, delivered, or recorded, and should be set aside as fraudulent and void; that the two plaintiffs, together with the said Wm. H. Hammersly and Mary D. Horner, are the only heirs at law of said Elizabeth B. Hammersly, and as such are entitled to her whole estate; that said Wm. H. Hammersly without notice to plaintiffs applied for, and was granted, letters of administration upon the estate of said Elizabeth B. Hammersly, and gave bond as such administrator in the penalty of \$100, and that this was done at the instance of said Horner; that Wm. H. Hammersly is a man of bad habits, an excessive drinker, incapable of properly transacting any business, and wholly dependent for support upon said Horner and his wife, and that he was used by said Horner in this way to enable him fraudulently to possess himself of the estate of said Elizabeth B. Hammersly; that the plaintiffs had applied

to the orphans' court for Baltimore city for a revocation of said letters of administration on the ground of the general unfitness of said Wm. H. Hammersly for the duties of the office, and upon the special ground that his answer to the bill in the former case showed him to be a party to a conspiracy to defraud the plaintiffs of their rights in the estate of Mrs. Hammersly, but that the orphans' court refused to revoke said letters, though it required his bond to be increased to the penalty of \$3,000, which conduct on the part of the orphans' court the plaintiffs allege to be a travesty upon justice, and to require the intervention of this court, in the exercise of its general jurisdiction, to assume control over the administration of said estate through a receiver to be appointed by it, and the prayers of the bill were in conformity with the character of its averments.

Separate answers were filed by each of the three defendants. That of Albert N. Horner is full and specific. He alleges that the conveyances of December 9, 1901, were her free and voluntary act, and were executed and delivered by her when she was absolutely and indisputably in possession of all her mental faculties, and that these conveyances were made to carry out a purpose long and deliberately held by her; that he had in his possession said original deeds and would produce them at the hearing, and that the recording of deeds out of place was neither unlawful nor unusual, and that the four deeds in question were executed before Edwin Erickson, a notary public, whereas the other eight deeds referred to in the bill were executed before Andrew J. Collars, a justice of the peace now dead, and that the property conveyed to the plaintiff Elizabeth H. Bell was worth \$2,000, and that conveyed to George D. Hammersly was worth about \$1,500. He alleged that he purchased said Baltimore city stock of the par value of \$28,000 from Mrs. Hammersly; that the purchase was made in good faith, and that he well and truly paid the whole of said purchase price in cash at the full par value of said stock at different times and in different amounts between May 21, 1898, when she executed a power of attorney authorizing him to transfer said stock to himself, and the 17th of July, 1899, when said transfer was made; and that Mrs. Hammersly never exercised, or claimed the right to exercise, any control or ownership over said stock, or over any of said property after the execution of said conveyances and power of attorney. He further alleged that Mr. Hammersly acquired all of her property through a conveyance from her husband, David L. Hammersly, dated January 4, 1898, who died at a later date in the same month of that year, and that in making the conveyances mentioned in the bill she was following of her own free will and fixed purpose the precedent and example set for her by her husband, and that she sold the Baltimore city

stock because she wished to dispose of it and use the proceeds otherwise, as she had a right to do, as she felt that what she and her husband had done for the plaintiffs in his and her lifetime was sufficient for them; that when Wm. H. Hammersly was about 18 years of age he married a dissolute woman, and one reason why Mrs. Hammersly made the conveyance to Horner was her purpose to debar her son's wife from any interest in her own property, and that her son would be taken care of by Horner and his wife. He also alleges that Wm. H. Hammersly for more than four years before the grant of letters of administration to him had ceased to use any intoxicating liquors, and was competent to discharge properly the duties of the administration. He then specifically alleges at much length that after her husband's death it was Mrs. Hammersly's fixed purpose not to make a will, but to convey her property in her lifetime to those whom she wished to enjoy it; that she was much disturbed by the litigation over the will of George R. Berry, and frequently declared her purpose to prevent controversy over her estate by disposing of it by deed and not by will, as her husband had done; and that with this view she, from time to time, reaffirmed her purpose by renewing such deeds at stated intervals. Thus her first deeds were executed July 29, 1899. Four other deeds of like tenor and effect were executed February 14, 1900. The third set of deeds of like tenor and effect were executed August 1, 1900. The fourth set of deeds of like tenor and effect were executed April 23, 1901, and on the 9th day of December, 1901, the fifth set of deeds of like tenor and effect were executed, and she died on June 4, 1902. Thus it will be seen that she executed a new set of deeds practically every six months. He alleges in his answer that he was not present at the execution of the last set of deeds, but that Mrs. Horner alone, in addition to the notary, was present at that time. This persistent execution of successive conveyances of the same tenor and effect indicates either remarkable tenacity of purpose and intelligent exercise of will on the part of Mrs. Hammersly, or equally remarkable shrewdness and skill on the part of Mr. and Mrs. Horner in devising and executing a plan to defeat the not unnatural expectations of the plaintiffs, and to possess themselves of the bulk of Mrs. Hammersly's estate. Horner further alleges that he was advised by counsel in the former case that the case made by plaintiffs was not sufficient to require of him and his wife any testimony to meet the plaintiffs' case, other than their answers to the interrogatories accompanying the bill. The answers in that case were characterized by Judge Jones as "evasive and perfunctory" and as "framed, if not with the purpose, at least with the effect, to make the burden of the plaintiffs with respect to proof as difficult as possible," and

with this language of the careful and conscientious judge whose lamented death has since occurred we do not disagree; but, in this case, heard on bill and answers, we cannot say that the defendant have not met the averments of the bill with clear and specific denials. There is no averment in this bill of the insolvency of Albert N. Horner, or that he is not of ample means to respond to any claim which the appellees may establish. The case, as now presented upon bill and answer, does not involve a decision upon the final merits, and requires us to examine with care the right of the plaintiffs, at this stage of the case, to a decree for receivers and an injunction.

The fundamental principles governing the appointment of receivers are thoroughly settled in this state, and are stated with great precision in Miller's Equity Procedure, §§ 629-634, accompanied by reference to the cases. From these numerous cases none can be selected which more succinctly and strongly state the controlling principle in this case than the case of Klipp v. Hanna, 2 Bland, 31, in which the chancellor said: "A receiver may be appointed against the legal title in a strong case of fraud, combined with danger to the property. But the court interposes by appointing a receiver against the legal title with reluctance. It must not only be morally sure that at the hearing the party would, upon those circumstances, be turned out of possession, but must see some imminent danger to the property and the intermediate rents and profits from not acting rather prematurely, and if the property should not be taken under the care of the court." In numerous subsequent cases this doctrine has been approved, and it has been repeatedly said in cases of varying character that the power of appointing a receiver is a most delicate one, and should be exercised by the court with extreme caution, and only under special and peculiar circumstances requiring summary relief. The justification for the exercise of this power is the preservation of the subject of litigation or of the intermediate rents and profits. In Blain v. Everitt, 36 Md. 81, the court said: "In such cases the averment of insolvency of the party in possession and receipt of the rents and profits is most important in making out that strong and special case of imminent danger of loss always required as essential to a departure from the old rule not to make such an appointment in any case, under any circumstances, before answer." It is obvious, therefore, that after answer, where the answer under oath fairly meets the averments of the bill, and the case is heard on bill and answer, the same rule must be applied. Accordingly in Furlong & Miller v. Edwards, 3 Md. 112, where the case was in that condition, the court said: "The only allegations in the bill that could have authorized the interference of a court of chancery in the mode prayed for were those which averred

that the defendant was in possession of the property, was selling and converting the same to his own use, that he was insolvent, and that the complainant was thereby in danger of losing his debt. These charges are unequivocally and explicitly denied, and thus the complainant has every pretended ground taken from him, upon which to rest an application for an injunction and receiver." Here the allegation is not even made. The answer however asserts that Horner is of abundant means to meet any liability which might be established at a hearing upon the merits. Moreover, two of the heirs at law of Mrs. Hammersley—Mary D. Horner and William H. Hammersly—representing as such two-thirds of her estate, adopt the answer of Albert N. Horner, and sustain the validity of all the conveyances attacked, so that the case only involves a claim to one-third of the real and leasehold property conveyed to Albert N. Horner, and one-third of the Baltimore city stock assigned to him. He could not, pendants lite, sell or encumber the real or leasehold estate, and therefore only one-third of the rents and profits are involved in this controversy. As to the city stock, the answer avers that Horner paid for it its full par value in cash, and, in the absence of any evidence whatever to contradict this averment, the answer being under oath, swears away all the equities of the bill, there being no allegation of present insolvency in the bill, or of Horner's inability to pay the purchase money for the stock at the time of the alleged purchase.

But it is contended for the appellees that the relief sought in the former case is the same sought in this case, and that the matter here in controversy is therefore *res adjudicata*; but we are not able to adopt this view. Much reliance for this contention seems to be placed upon the case of State v. Brown, 64 Md. 203, 1 Atl. 54, 6 Atl. 172. In that case it was sought to have declared null and void the same deed of trust, which in 62 Md. 439, in a case where the bill was filed between the same complainants and the same defendants, was declared to be good and valid. The court said: "The purpose in each case was to strike down and defeat the power of sale contained in the (same) deed of trust." But the deeds assailed in this case are not the same assailed in the former case. Those assailed in the former case were vacated and annulled, because the court held it appeared from the testimony that there was a confidential relation existing between Mrs. Hammersly and her son-in-law; that the burden of proof to show that the deeds were the voluntary and deliberate act of the grantor had not been met by the defendants; that the physical condition of the grantor at the time of the execution of said deeds was such as to unfit her for the transaction of business without independent advice; and that for these reasons the deeds should be vacated and annulled. It does not

follow that the testimony which is yet to be taken in this case will show, as it did in the former case, that a confidential relation continued to exist between these parties, nor that the physical condition of Mrs. Hammerly was the same at the date of the execution of the deeds assailed in this case as it was when those assailed in the former case were executed. The two transactions are distinct and independent, and their validity must be determined by the circumstances attending them respectively, and it may be observed here that the deeds assailed in the former case were there discussed in argument and considered by the court as deeds, and not as testamentary papers, as the appellees in their brief in this case seek to treat them. This cannot be done consistently with the character of the proceeding in this case, the prayer for relief being that the deeds may be "set aside and annulled." If they could be regarded as testamentary papers there would be no jurisdiction in a court of equity to annul or set them aside, and the counsel for the appellees would not have invoked the relief which they seek.

This case, in respect to the number of similar sets of conveyances alleged in the answer to have been intended to accomplish the same results, is unlike any case to which we have been referred; but if the truth of that allegation in the answer and the bona fides of the transactions be assumed for the purpose of considering only the character of these papers, all those which followed the execution of the first set might be fairly regarded as confirmatory of the title which had been adequately and fully conveyed by the first set. Whether the unusual and peculiar course pursued indicates a persistent and cunningly devised scheme of Horner and wife to dominate the feeble will of an infirm old woman, and by undue influence to acquire possession of the bulk of her property, or whether it disclosed a fixed purpose on the part of a woman of strong will and business capacity to dispose of her property in her lifetime according to a design of her own, can only be properly determined from testimony taken for a hearing upon the merits of the case. The doctrine of *res adjudicata* can in no event be applied to the Baltimore city stock, since that was nowhere mentioned in the former case, and was no part of the rem upon which the decree operated. Nor do we think it can be applied at all in this case. The principles which govern the application of this doctrine are stated with admirable clearness and precision in *Cromwell v. County of Sac*, 94 U. S. 351, 24 L. Ed. 195. That was an action on four bonds of Sac county, and four coupons attached, for interest. To defeat this action the defendant relied upon the estoppel of a judgment in favor of the county in a former action brought by one Smith upon certain earlier maturing coupons on the same bonds, accompanied with proof that *Cromwell* was at the

time the real owner of the coupons in that action, and that the action was prosecuted for his sole use and benefit. Mr. Justice Field there said: "It should be borne in mind that there is a difference between the effect of a judgment as a bar or estoppel against the prosecution of a second action upon the same claim or demand, and its effect as an estoppel in another action between the same parties, upon a different claim or cause of action. In the former case, the judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action. * * * But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue, or points controverted, upon the determination of which the finding or verdict was rendered. * * * Only upon such matters is the judgment conclusive in another action."

In the former case mentioned in *Cromwell v. Sac County* it appeared that the bonds in question which were negotiable instruments were issued and delivered to a person who had contracted to erect a county courthouse, but never did erect it. It also appeared that the plaintiff in the former suit became the holder before maturity of 25 coupons which had been attached to some of these bonds, but there was no finding that he had ever given any value for them, and upon those findings the court held the bonds were void as against the county, and gave judgment accordingly. In *Cromwell v. Sac County* the plaintiff offered to prove that he gave value before maturity for the bonds and coupons then in suit, but was not allowed to do so, because of the supposed effect of the former judgment mentioned. The court said: "There was nothing adjudged in the former action in the finding that the plaintiff had not made such proof in that case which can preclude the present plaintiff from making such proof here. The fact that a party may not have shown that he gave value for one bond or coupon is not even presumptive, much less conclusive, evidence that he may not have given value for another and different bond or coupon. The exclusion of the evidence offered by the plaintiff was erroneous, and the judgment must be reversed." The analogy between that case and the case before us is obvious. In the case of *Horner v. Bell*, 102 Md. 435, 62 Atl. 736, the court held that the burden of proof was upon Horner to sustain the conveyances then before the court, and as he failed to offer any such evidence, the court struck down those particular conveyances. But the fact that he did not offer such evidence is not conclusive, nor is it even presumptive, evidence that he cannot or will not offer such evidence in this action which involves different and later conveyances of the same property. It was adjudged in the former case that he took no title under those conveyances, but there was no ad-

judication that he could take no title to the same property under different and later conveyances. An illustration of the manner in which this doctrine is treated when sought to be applied to the title to land may be found in *Applegate v. Dowell*, 15 Or. 513, 16 Pac. 651, in which it was held that in a suit by a plaintiff to remove a cloud upon his title a decree in a former suit against the plaintiff and his grantor and others rendered subsequent to the plaintiff's purchase of the land and declaring his grantor's deed to be fraudulent did not estop the plaintiff from claiming title to the land. That case was decided upon the authority of *Cromwell v. County of Sac*. The court said: "The bill only sought to annul the deed from Jesse Applegate to Wm. H. H. Applegate, though the latter had long before conveyed to the plaintiff for a valuable consideration. Dowell contented himself with impeaching the deed from Jesse to Wm. H. H., but left the deed from the latter to the plaintiff in statu quo. If the validity of the deed from Wm. H. H. to the plaintiff had been made an issue in the suit, the decree would have been conclusive upon the question, but it would have had to be put directly in issue, and not merely collaterally litigated. The decree does not conclude the appellant from asserting title to the land." In *Packham v. Ludwig* (Md.) 63 Atl. 1049, where a somewhat similar state of facts was alleged as to successive wills, this court said: "A charge of fraud in a particular transaction cannot be proved by evidence of other and independent frauds of the party charged, though in a similar transaction, unless it appears that there is such a connection between the transactions as to authorize the inference that the frauds are both parts of a general scheme or purpose to defraud;" but the existence of this scheme is a question of proof, in no way involving any question of estoppel.

For these reasons the decree of the circuit court No. 2 will be reversed, the injunction will be dissolved, and the case remanded.

Decree reversed with costs to the appellant above and below. Injunction dissolved, and case remanded.

(106 Md. 312)

MAYOR, ETC., OF HYATTSVILLE et al. v. SMITH et al.

(Court of Appeals of Maryland. March 1, 1907.)

1. APPEAL AND ERROR—DECISIONS REVIEWABLE.

An order overruling a demurrer to the entire bill of complaint is in the nature of a final decree, and an appeal lies therefrom.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, § 369.]

2. MUNICIPAL CORPORATIONS—SPECIAL ASSESSMENTS—STATUTES.

Bill of Rights, § 15, declares that every person holding property ought to contribute his proportion of public taxes for the support of the government according to his actual worth in

real or personal property. Section 23 declares that no man should be deprived of property except by the judgment of his peers or the law of the land. Acts 1906, p. 143, c. 113, § 22, authorizing the mayor and common council of a city to cause to be constructed, as they may determine necessary for the public benefit, sidewalks in any of the streets, and to assess upon abutting land the cost thereof, and making the assessment a lien on the property and recoverable as taxes, is not invalid as violative of the Bill of Rights, and especially of sections 15 and 23 thereof.

3. APPEAL AND ERROR—PRESUMPTIONS.

On appeal from an order overruling a demurrer to a bill to enjoin a street assessment, in the absence of any allegations on the question of notice, it will be assumed that the property owners were given proper notice pursuant to the statute.

Appeal from Circuit Court, Prince George's County, in Equity; Geo. C. Merrick, Judge.

Suit by Mary Smith and others against the mayor and common council of Hyattsville and others. From an order overruling a demurrer to the bill, defendants appeal. Reversed, and bill dismissed.

Argued before BOYD, PEARCE, BRISCOE, SCHMUOKER, BURKE, and ROGERS, JJ.

Marion Duckett and Robert W. Wells, for appellants. F. Snowden Hill and James C. Rogers, for appellees.

BURKE, J. The appellees are the owners of four lots of ground numbered, respectively, 11, 12, 13, and 14, in block B, in the town of Hyattsville, in Prince George's county, Md. Each of said lots has a frontage of 45 feet on the north side of Johnson avenue, between Maryland avenue and Wine avenue. Johnson avenue is one of the public streets of the town. Two of these lots are owned by Mary Smith, one by Rufus L. B. Clark, and one by Mary D. Sutton. The appellant is a municipal corporation, and in the year 1906 passed an ordinance providing for the laying of a new cement sidewalk upon the part of the north side of Johnson avenue which lies between Maryland avenue and Wine avenue, to replace a sidewalk then existing, but which was then in a bad condition. This old sidewalk had been constructed in 1895 by the commissioners of Hyattsville, a corporation of which the appellant is the successor. In the month of September, 1906, the appellant caused the old sidewalk to be torn up, and a new cement sidewalk to be laid in its place, and in October, 1906, assessed against each of the appellees' lots the sum of 60½ cents per front foot as its proportion of the total cost of said new cement sidewalk, which assessment constituted under the terms of the act which will be hereafter referred to and considered a lien upon the lots, and collectible by the municipality. No request was made by either of the appellees to the appellant to lay the sidewalk, nor has either assumed or promised to pay the cost of its construction, or any part thereof. The total cost of laying the sidewalk was \$604.55, and the appellant has as-

assessed against the lots on the north side of Johnson avenue fronting the sidewalk the cost of its construction in the proportion that their respective number of front feet bears to the total cost, and by this method or rule of assessment the sum payable by Mary Smith is \$54.45; by Rufus L. B. Clark, \$27.22½; and by Mary D. Sutton, \$27.22½. The mayor and common council of Hyattsville claims the right to make these assessments, and to collect the same from the appellees under the authority of chapter 113, p. 142, of the Acts of Assembly of 1906. The bill in this case was filed to restrain the collection of each of said assessments, and for a decree declaring the assessments to be null and void.

The grounds upon which this relief was asked are stated in the 6th, 7th, and 8th paragraphs of the bill, and are as follows: "(6) That said mayor and common council of Hyattsville has not authority to assess against each of your complainants' said lot or lots a proportion of the total cost of said new cement sidewalk based on the front feet of his or her said lot or lots, or collect the same of your complainants as aforesaid. (7) That said mayor and common council of Hyattsville had no authority under section 22, c. 113, p. 143, Acts 1906, or any other law, either to repave said Johnson avenue as aforesaid, or collect the whole cost of said repaving from the owners of lots fronting the same, and on the north side of said Johnson avenue, or assess the same against their said lots as aforesaid, and said collection from each of the plaintiffs therein and assessments against his or her said lot or lots as aforesaid is illegal and void. (8) That said section 22, c. 113, p. 143, Acts 1906, is unconstitutional and void, being in conflict with the Bill of Rights and Constitution of the state of Maryland, especially with sections 15 and 23 of said Bill of Rights, and each of said assessments is illegal and void." A preliminary injunction was issued as prayed. The appellant demurred to the whole bill, which demurrer the court overruled, and required the appellant to answer the bill within 10 days. From the order of the court overruling the demurrer, the mayor and common council of Hyattsville has brought this appeal.

A motion has been made to dismiss the appeal, because no appeal is allowed from an order overruling a demurrer to the entire bill of complaint. That such an order is in the nature of a final decree from which a party has a right of appeal has been settled by the cases of *Chappell v. Funk*, 57 Md. 465, and *Hecht v. Colquhoun*, 57 Md. 568. The appellees rely in support of their motion upon the cases of *Cunningham v. Board of School Commissioners*, 98 Md. 738, 48 Atl. 1046; *State v. Tag*, 100 Md. 588, 60 Atl. 465; and *McNiece v. Ellason*, 78 Md. 175, 27 Atl. 940. Neither of these cases support their motion, nor modify or change in any manner the ruling on this point in the Cases of *Chappell*

and *Hecht*, supra. In the *Cunningham Case* the appeal was from the opinion of the court. In *Tag's Case* a demurrer to an indictment had been sustained, but there was no judgment on the demurrer in favor of the defendant; and in the *McNiece Case* the court held that an appeal would lie to this court from an order sustaining the demurrer to the entire bill. The motion to dismiss will, therefore, be overruled.

2. We will now consider the main and important question presented by the appeal which is this: Is the twenty-second section of chapter 113, p. 143, of the Acts of 1906, unconstitutional as alleged by the appellees? That section is in the following words: "Section 22: And be it enacted that the mayor and common council shall cause to be constructed, as they may determine necessary for the public benefit, sidewalks in any of the streets of said town not less than four feet in width, of brick, cement, concrete, or other material, and shall assess upon the land abutting said sidewalks the cost thereof, which assessment shall be a lien upon such abutting property, to be assessed at such time as the mayor and common council may determine, and to be recovered from the owners of such abutting property by said mayor and common council as taxes due the corporation of Hyattsville are collected. The mayor and common council shall have power to make all necessary regulations as to the notice of such assessments to property owners." The bill is silent upon the question of notice, and in the absence of all allegations upon that subject, upon the presumption as to the regularity and validity of all governmental acts, it must be assumed that proper notice had been given. Judge Cooley, in the case of *People v. Salem*, 20 Mich. 473, 4 Am. Rep. 400, said that in order to render valid a burden imposed by the Legislature under the exercise of the power of taxation, the following requisites must appear: (1) It must be imposed for a public and not for a mere private purpose. Taxation is a mode of raising revenue for public purposes only, and, as is said in some of the cases, when it is prostituted to objects in no way connected with the public interest or welfare, it ceases to be taxation and becomes plunder. (2) The tax must be laid according to some rule of apportionment, not arbitrarily or by caprice, but so that the burden may be made to fall with something like impartiality upon the persons or property upon which it justly and equitably should rest. A state burden is not to be imposed upon any territory smaller than the whole state, nor is the county burden upon any territory smaller or greater than the county. Equality in the imposition of the burden is of the very essence of the power itself, and though absolute equality and absolute justice are never attainable, the adoption of some rule leading to that end is indispensable. (3) As a corollary from the preceding, if the tax is

imposed upon one of the municipal subdivisions of the state only, the purpose must not only be a public purpose, as regards the people of that subdivision, but it must also be local, that is to say, the people of that municipality must have a special and peculiar interest in the object to be accomplished, which will make it just, proper, and equitable that they should bear the burden rather than the state at large, or any more considerable portion of the state. (4) To these propositions, which are stated by Judge Cooley to be fundamental maxims in the law of taxation, two others, which have been long and firmly fixed in the law of this state, may be added: First, that the Legislature has the power of taxing particular districts for local benefits or improvements; and, secondly, to authorize a municipal corporation to open, grade, pave, curb, etc., any street, or part of a street, and to assess the cost of doing such work upon the property binding on such street, or part thereof, and that in the absence of any declaration of intent to the contrary the presumption would be that the Legislature considered that the purpose for which the tax or assessment was levied was a public purpose, and that the improvement would inure to the special benefit and advantage of the adjacent owner upon whose property the assessment is laid. These propositions were declared in the cases of *Mayor v. Moore & Johnson*, 6 Har. & J. 375; *Mayor v. Howard*, 6 Har. & J. 383; *Burns v. Mayor*, etc., 48 Md. 198; *Mayor v. Hanson*, 61 Md. 462; *Mayor v. Hopkins Hospital*, 56 Md. 28.

In *Burns v. Mayor*, etc., *supra*, the court said that the theory and foundation of all previous legislation imposing these special assessments for improvements of this character upon the owners of adjacent property is that the improvement is for their benefit, and that they derive such an advantage from it, in the enhanced value of their property, over and above what is conferred upon the public at large, that it is just that they should be specially assessed therefor, and on this ground the validity of such laws have been sustained. There is an obvious distinction between the public purpose, the existence of which in the particular case is essential to the exercise of the taxing power, and the special advantages which will accrue to the adjacent owner by reason of the improvement. The one concerns the general public interest or welfare; the other, the private benefit to the individual owner over and above that which he would receive from the improvements as a member of the state, municipality, or taxing district in which he may reside. Chief Judge Alvey, in *Baltimore v. Hanson*, *supra*, said: "Unless there be a public benefit in the use of the street, the city clearly would have no authority to improve it, and assess the cost, or any part of the cost, upon the property of the citizens along the line of such street." As is well

and clearly said by Judge Dillon (2 Dillon, Mun. Corp. § 752, note): "In order to justify an assessment, the improvement must be for a public purpose, since the public have no right to tax a citizen to make improvements for his own benefit solely. All streets which are opened for public use are public benefits, and it is upon that ground only that the state can take private property for streets; but the cost of opening and improving them is assessed on adjoining owners on the ground of private benefit. And this is the precise ground upon which the power of assessment is placed by this court in *Alexander & Wilson v. City of Baltimore*, 5 Gill, 383, 46 Am. Dec. 630." When the provisions of section 22, c. 113, p. 143, of the Acts of 1900, are examined in the light of these principles it would seem to be entirely free of any valid objection against its constitutionality. By that section, which has been hereinbefore quoted in full, the appellant was authorized to construct sidewalks "not less than four feet in width, of brick, concrete, cement, or other materials." It then provided that when the appellant should have determined the condition under which the sidewalks should be constructed, viz., when it should determine that a sidewalk was necessary for a public benefit, it should "assess upon the land abutting said sidewalk the cost thereof, which assessment shall be a lien upon such abutting property."

It is argued upon the part of the appellees that by the use of the language employed in this section the Legislature intended that this sidewalk should be constructed for the sole and exclusive benefit of the general public convenience and interest of the people in Hyattsville, and "with no reference whatever to local benefits to owners of adjoining property, and, therefore, that the cost of the improvement should be borne exclusively from the public treasury." *Hanson's Case*, 61 Md. 466. It is apparent from what we have said that we cannot agree to this contention. We cannot impute to the Legislature an intention to impose upon the adjacent property holders the cost of making an improvement in which they had no benefit distinct from that of the general public. Such an act would be so unjust and oppressive that it cannot be supposed to have been within the contemplation of the lawmaking body, unless it clearly appears that such was its intention. This act is silent upon the subject of special interests and advantages, and the presumption is that the lawmakers "contemplated local benefits as well as the general public convenience." The special assessment is not void, because the improvement is determined to be necessary for the public benefit. The construction we have given this act has the support, not only of the Maryland cases to which we have referred, but also of well-considered cases in other states, among which we may refer to *Sears v. Street Commissioners*, 180 Mass.

274, 62 N. E. 397, 62 L. R. A. 144; *Rogers v. City of St. Paul*, 22 Minn. 498. In *Sears' Case*, supra, the court said: "The fact that the improvement is for a public purpose is no objection to the tax. *Harvard College v. Aldermen of Boston*, 104 Mass. 470, 486; *Lincoln v. Street Commissioners*, 176 Mass. 210, 213, 214, 57 N. E. 356. To invalidate the betterment assessment the general public benefit must be the only result of the improvement. Such a change (in the streets) may have a double aspect of general public benefit, and also of peculiar local advantage. *Gleason v. Waukesha County*, 108 Wis. 225, 237, 79 N. W. 249. It is suggested, to be sure, that the special benefit cannot be made the basis of a tax when they are only incidental and not the object to which the improvement was directed. But we see nothing in the Constitution to prevent it, or to make the power of the Legislature depend upon which of two resultant advantages is especially before its mind when it makes a change in the streets. In this case, plainly it contemplates the improving of the petitioners' land as it provided for making them pay their share of the cost of the improvement." The facts of the cases of *Mayor v. Moore*, 6 Har. & G. 375; *Burns v. Mayor*, etc., 48 Md. 198; *Mayor v. Hanson*, 61 Md. 462, upon which the appellees mainly rely to sustain the order of the lower court, are wholly dissimilar to the facts in this case. No question of the constitutionality of an act of assembly was presented in either of those cases. The questions before the court in all of those cases related to the validity of certain ordinances of the mayor and city council of Baltimore authorizing the paving of streets.

The conclusion we have reached is in entire accord with the principles announced in those cases. We, accordingly, decide that section 22, c. 113, of the Acts of 1906, under which the improvement in question was made, is valid, and that the rule of apportionment of the cost of the improvement adopted by the appellants was fair, just, and equitable. It follows that the order appealed against must be reversed, and the bill dismissed.

Order reversed, and bill dismissed, with costs.

(105 Md. 184)

VANDERFORD v. FARMERS' & MECHANICS' NAT. BANK OF WESTMINSTER.

(Court of Appeals of Maryland. Feb. 28, 1907.)

1. BILLS AND NOTES—LIABILITY OF PARTIES—MAKER AS SURETY—PLEAS.

Where several persons signed a note as joint makers, a plea on behalf of one of them that he signed only as surety for one of the others, and that such fact was known to the payee, was ineffective to change such party's obligation, in the absence of an allegation that such was the understanding of all the parties to the instrument.

2. SAME—NEGOTIABLE INSTRUMENT LAW—DISCHARGE OF MAKER—PLEAS.

Under Negotiable Instrument Law (Laws 1908, p. 227, c. 119: article 13, §§ 13-208, Code Pub. Gen. Laws 1904) § 138, specifying the ways in which a person primarily liable on a negotiable note can be discharged the ways specified are exclusive and hence a plea that one of the makers of a negotiable note signed it as surety only and had been discharged by an extension of time by the payee to the principal debtor was fatally defective.

3. BANKS AND BANKING—AUTHORITY OF CASHIER—PAYMENT OF NOTE—EXTENSION OF TIME.

The cashier of a bank has no implied power by virtue of his office to extend the time of payment of a note, without the knowledge or consent of a party primarily liable thereon.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Banks and Banking, §§ 257-260, 559-546.]

4. ALTERATION OF INSTRUMENTS—ACT OF AGENT—AUTHORITY—EVIDENCE.

Where in an action on a note it was claimed that one of the co-makers signed as surety only, and that the note had been altered by the cashier of the bank to which it was payable, in that a notation thereon of the due date had been so changed as to extend the time of payment without the surety's consent, evidence of such fact was inadmissible as against the bank, in the absence of proof that the alteration was within the scope of the cashier's authority.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Alteration of Instruments, §§ 63, 251.]

Appeal from Circuit Court, Frederick County; James McSherry and John C. Motter, Judges.

Action by the Farmers' & Mechanics' National Bank of Westminster against Florence Leigh Vanderford, as executrix of William H. Vanderford, deceased. From a judgment for plaintiff, defendant appeals. Affirmed.

Argued before BRISCOE, BOYD, BURKE, PEARCE, SCHMUCKER, and ROGERS, JJ.

Charles E. Fink, for appellant. F. Neal Parke and Jas. A. C. Bond, for appellee.

BURKE, J. The Farmers' & Mechanics' National Bank of Westminster sued Garnett Savage, Edwin J. Lawyer, and William H. Vanderford upon a promissory note dated August 4, 1902, for \$300, and payable to the order of the plaintiff in two months from its date. The note is in the following words:

"Two months after date we jointly and severally promise to pay to the order of the Farmers' & Mechanics' National Bank of Westminster, Md., three hundred dollars, payable at the banking house of the said Farmers' & Mechanics' National Bank of Westminster, for value received, hereby waiving the right of all homestead, stay, and exemption laws.

"\$300.

Garnett Savage.

"Edwin J. Lawyer.

"Wm. H. Vanderford."

The declaration contains the six common counts, and a special count setting out the note. Vanderford pleaded the general issue pleas, and four special pleas, two of which

were pleaded upon equitable grounds. Issue was joined upon the general issue pleas, and a demurrer was filed to the special pleas. The record in the case, upon the suggestion and affidavit of Vanderford, was transmitted to the circuit court for Frederick county for trial. William H. Vanderford having died before the trial, Florence Leigh Vanderford, his executrix, was made party defendant. An additional plea was then filed, to which the plaintiff demurred. The court sustained the demurrer to the third, fourth, fifth, and sixth pleas, and overruled the demurrer to the seventh plea. A traverse was filed to the seventh plea, "with errors of pleading," as the record states, "as to said traverse waived." Issue was joined upon the traverse, and, by consent, the case was tried before the court, and resulted in a verdict and judgment for the plaintiff for the sum of \$350.25, from which this appeal was taken.

The defense attempted to be set up by the third, fourth, fifth, and sixth pleas, to which the demurrer was sustained, was that William H. Vanderford was a surety upon said note for Garnett Savage, and was not a joint and several maker thereof with Savage and Lawyer as the terms of the note imported; that the facts of his suretyship on the note was known to the plaintiff at the time the note was executed and delivered; that after the maturity of the note, with the knowledge that Savage was the principal and beneficiary of the note and that the defendant was only a surety thereon, the plaintiff for a valuable consideration paid to it by Savage, and without the knowledge and consent of the defendant and without any reservation of its right to sue on said promissory note, agreed with Savage to extend and did extend the time for the payment of the note until the 4th day of December, 1902, whereby, the pleas aver, the defendant was discharged from the payment of the note, and from all liability thereon. The proposition asserted in these pleas is that where, by the terms of a promissory note, two or more persons are joint and several makers thereof, the mere knowledge by the payee, at or before the execution and delivery of the note, that one is surety for another, will, in connection with such facts as are alleged in the pleas, and which we have stated above, operate to discharge the surety in an action at law brought on the note. Such is certainly not the rule in this state. In *Yates v. Donaldson*, 5 Md. 402, 61 Am. Dec. 283, this court said that the principle deducible from the cases being, as we think, that where the party does not appear on the instrument to have made himself liable as surety, he cannot at law avail himself of the equities between himself and the other parties to the instrument, unless he was accepted by the creditor as surety, or has been discharged by the acts of the creditor, according to the principles of *Glenn v. Smith*, 2 Gill. & J. 493, 20 Am. Dec. 452. It will be seen, by

reference to the case of *Glenn v. Smith*, supra, that the principles there announced have no application to the pleadings in this case. Where the facts attending the execution and negotiation of the note bring the case within the rule stated in the cases of *Ives v. Bosley*, 35 Md. 262, 6 Am. Rep. 411, *Owings v. Baker*, 54 Md. 82, 39 Am. Rep. 353, and *Keyser v. Warfield*, 100 Md. 72, 59 Atl. 189, it would undoubtedly be open to the defendant to show, under the authority of those cases, either under the general issue, or under a special plea in bar, that he was surety on the note, and that he was discharged from liability thereon.

The principle announced in those cases is that if the contract set up is different from that which attached by presumption of law, it must be established by proof that it was the understanding of all the parties to the instrument, and it necessarily follows that if a different contract from that which arises from the terms of the instrument is relied on by special pleas in bar, it must be alleged and proven that such was the understanding of all the parties. This fact the defendant fails to do in either of the special pleas, nor is it stated in either that the bank accepted the defendant as surety, and not as a joint and several maker of the note. Assuming, *ex gratia*, that such a defense is now open to one who is primarily liable on a note against the payee, we are of the opinion that each of the special pleas for the reasons stated was fatally defective, and that the demurrer thereto was properly sustained. But apart from this ground of objection it seems clear that the negotiable instrument law of 1898 (Acts 1898, p. 206, c. 119; article 13, §§ 13 to 208, inclusive, Code Pub. Gen. Laws 1904), has so modified the prior law upon this subject as to preclude the defendant from setting up his suretyship against the payee of the note. By section 15 of that article William H. Vanderford was primarily liable for the payment of the note, inasmuch by the terms of the instrument he was required to pay it.

Section 138 of that article provides that: "A negotiable instrument is discharged: (1) By payment in due course by or on behalf of the principal debtor; (2) by payment in due course by the party accommodated, where the instrument is made or accepted for accommodation; (3) by the intentional cancellation thereof by the holder; (4) by any other act which will discharge a simple contract for the payment of money; (5) when the principal debtor becomes the holder of the instrument at or after maturity in his own right."

Section 139: "A person secondarily liable on the instrument is discharged: (1) By any act which discharges the instrument; (2) by the intentional cancellation of his signature by the holder; (3) by the discharge of a prior party; (4) by a valid tender of payment made by a prior party; (5) by a release of

the principal debtor, unless the holder's right of recourse against the party secondarily liable is expressly reserved; (6) by any agreement binding upon the holder to extend the time of payment, or to postpone the holder's right to enforce the instrument unless the right of recourse against such party is expressly reserved."

Since the passage of the negotiable instrument law this is the first time that the precise question raised by the pleadings in this case has been presented to this court for decision; but the intention of the Legislature, as expressed in the sections of the Code we have quoted, would seem to be obvious. That intention is to be ascertained by the words used to express it, and when its meaning, as gathered from the words employed, is plain and intelligible the court should give it effect. When the Legislature has declared, as it has done in these sections, that a negotiable instrument signed by a party who is primarily liable thereon, as that liability is defined by the act, may be discharged in one of five specified methods, it would seem plain that it meant that the particular method prescribed for the accomplishment of that result should exclude a discharge by any other, or different method, upon the familiar maxim that the express mention of one thing implies the exclusion of another. Since the enactment of the English bill of exchange act in 1882, negotiable instrument laws have been passed, modeled upon the English act, in at least fifteen states of the Union. The leading purpose of these laws was stated in the case of *Bank of England v. Vagliano Bros.*, L. R. 1891 Appeal Cases, 144, and in *Wirt v. Stubblefield*, 17 Appeal Cases D. C. 283. In this case the court had under consideration the construction of the negotiable instrument law passed by Congress in 1899, which in its main and substantial provisions is identical with our own. Mr. Chief Justice Alvey, in the course of his judgment in that case, said "that the great and leading object of the act, not only with Congress, but with a large number of the principal commercial states of the Union that have adopted it, has been to establish a uniform system of law to govern negotiable instruments wherever they might circulate or be negotiated. It was not only uniformity of rules and principles that was designed, but to embody in a codified form as fully as possible all the law upon the subject, to avoid conflict of decision, and the effect of mere local laws and usages that have heretofore prevailed. The great object sought to be accomplished by the enactment of the statute is to free the negotiable instrument, as far as possible, from all latent or local infirmities that would otherwise inhere in it to the prejudice and disappointment of innocent holders as against all the parties to the instrument professedly bound thereby." In that case the court held two statutes which had theretofore been in force in the District of Columbia, and which have been in force in

this state, to have been repealed by implication. Since, by the terms of the act, a person primarily liable on a negotiable instrument can only be discharged in one or the other of the particular ways specified in the act, and since the defendant, William H. Vanderford, did not in either of his pleas claim to have been discharged in either of the prescribed ways, it follows that upon this ground alone the demurrer to the pleas were rightly sustained.

2. The defendant's seventh plea alleged that the time of payment of the note sued on had been materially altered, in that the time of payment was altered from October 4, 1902, to December 4, 1902, without his authority or consent. To support this plea, he offered to prove by John H. Cunningham, the plaintiff's cashier, that at the time the note was discounted by the bank the witness made a marginal notation upon the note as follows: "No. 8580. Due 4 Oct., '02," and, further, that subsequently, at the time Garnett Savage paid interest in advance for two months upon the note, witness erased the word "Oct.," which the witness had written upon said note, and wrote "Dec." above it so as to read "No. 8580. Due 4 Dec. '02," and also that witness at the same time wrote the following endorsement on back of the note: "Oct. 11, 1902, interest paid to 4 Dec. 1902;" and further offered to prove that the witness was cashier at the time said note was discounted, and at the time he made said entries upon the note, and that an entry as to the maturity of the note on the index book of notes of the plaintiff made on Oct. 4, 1902, as follows: "No. 8580. Savage, Garnett. 4 Oct. 1902, \$300"—was changed by the witness on said book of the plaintiff on October 11, 1902, as follows: "8580. Savage, Garnett. 4 Dec. 1902;" that is to say, changed from "Oct. 4, 1902, to Dec. 4, 1902." To this offer of proof the plaintiff objected, and the court sustained its objection, and this ruling constitutes the defendant's second bill of exceptions. In the absence of evidence to show, or an offer on the part of the defendant to show, that the plaintiff's cashier in doing these acts was acting within the authority conferred upon him by the bank, or in the line of his duty, or that what he did was sanctioned or ratified by the bank, the court was clearly right in refusing to admit the proffered testimony. The cashier had no implied power by virtue of his office to extend the time of payment of the note without the knowledge or consent of the defendant. The ruling of the court is fully supported by the case of *Gray v. Farmers' National Bank of Annapolis*, 81 Md. 631, 82 Atl. 518.

What has been said in discussing the demurrer, and the ruling on the second exception, disposes of the first exception, which was taken to the action of the court in admitting the note in evidence. As we find no error in the rulings of the lower court, the judgment will be affirmed.

Judgment affirmed, with costs.

(106 Md. 280)

JARRELL v. YOUNG, SMYTH, FIELD CO.
(Court of Appeals of Maryland. March 1, 1907.)**1. FRAUDS, STATUTE OF—SALES OF GOODS—ACCEPTANCE.**

On an issue as to whether the purchaser of goods had accepted and received them within the statute of frauds, it appeared that, when the shipment arrived, the purchaser paid the freight both ways, and at once reshipped the goods to the seller. *Held*, that such facts did not show such acceptance, but the question was whether there had been an acceptance with an intention to take possession as owner.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Frauds, Statute of, §§ 165-173.]

2. SAME—EVIDENCE—ADMISSIBILITY.

In an action for the price of the goods, it was error not to permit defendant to testify that he did not at the time intend to receive and accept the goods as owner.

Appeal from Circuit Court, Kent County; James A. Pearce, Austin L. Crothers, and Wm. H. Adkins, Judges.

Action by the Young, Smyth, Field Company against Olifton L. Jarrell. From a judgment in favor of plaintiff, defendant appeals. Reversed, and new trial ordered.

Argued before BRISCOE, BOYD, BURKE, and SCHMUCKER, JJ.

Hope H. Barroll and James P. Gorter, for appellant. Lewin W. Wickes, for appellee.

BOYD, J. The appellant, who was a merchant at Chestertown, gave the appellee's agent a verbal order for some articles of merchandise, which the appellee claims were to be shipped to him on March 10, 1906; while the appellant contends that they were not to be shipped until the 15th of that month, and that he could, in the meantime, countermand the order. No payment was made on them by the appellant, and, there being no memorandum in writing signed by him, the real question at the trial below was whether there was such acceptance and receipt of them as complied with the requirements of the seventeenth section of the statute of frauds. A verdict was rendered in favor of the plaintiff (appellee), and this appeal is from the judgment entered thereon.

A prayer was offered at the close of the plaintiff's case, seeking to take the case from the jury; but, when that was rejected, the defendant called a witness and proceeded with his case. The exception taken to the rejection of that prayer was thereby waived, and is not before us for review. *Barabasz v. Kabat*, 91 Md. 53, 46 Atl. 337, and other cases since decided.

The defendant's attorney called the defendant, and asked him the following question: "Did you at any time ever intend to receive and accept as owner these goods after you were notified of their receipt at the railroad?" The court sustained an objection to that question, and its ruling is presented by the second bill of exceptions. The third bill of exceptions embraces the rulings on the

prayers. Exceptions were taken to the court's action in granting the plaintiff's second prayer, and rejecting the defendant's fifth, and modifying his first, offered at the end of the case. It will be convenient to first consider the rulings on the prayers.

The appellant not having done anything from which it can be claimed that the seventeenth section of the statute of frauds had in other respects been complied with, the question was whether he did "accept part of the goods so sold and actually receive the same," to use the language of the statute. The goods were shipped to the appellant at Chestertown from Philadelphia, on the 10th of March, and were received at the railroad station on the 12th of that month. A carter who hauled for the appellant went to the station to get them, but the appellant sent word to him not to take them; that he did not want them. The appellant paid the freight both ways, and reshipped the goods to the appellee, and on that day (March 16th) signed a shipping order and wrote a letter to the appellee. The letter stated he was returning the goods, and asked the appellee to take them back, as he had disposed of his stock and mercantile business; that "the goods were not opened, and go back as they were shipped, freight paid." The appellee replied on April 10th, but declined to accept the goods, as they had reason to believe he was still in business. On April 20th they were received by the railroad company from Easton, Md.; they having been shipped there by mistake, and then forwarded to Chestertown, where they still remain at the depot. The carter paid the railroad company the freight; but, when the appellant notified him not to take the goods, the company refunded the amount. There were some expressions in the letters of the appellant which might have led the jury to believe that he had accepted the goods, although they were not instructed as to what was a sufficient acceptance to comply with the statute of frauds.

It was important for them to be so instructed, in order that they could understand what was necessary to show an acceptance, within the meaning of the law. The defendant's first prayer, as offered, and the court's instruction, in lieu of it, will be considered before referring to the plaintiff's prayer which was granted, as the theory of the appellant is thereby distinctly presented. After asking the court to say there was no sufficient memorandum in writing to evidence the sale of goods sued for, the defendant's prayer proceeded: "And, in order for the plaintiff to recover in this cause, it is necessary for the plaintiff to establish by a preponderance of evidence, to the satisfaction of the jury, that the defendant intended to receive the goods sued for, and to accept the same as owner." The court's instruction used the language of that prayer to and including the words "preponderance of evidence," and in place of the rest of it substi-

tuted the words, "*that the defendant received and accepted said goods.*" We will italicize the parts of the two which differ. Under the circumstances of the case, which we have sufficiently stated, it would seem to be clear that the instruction of the court was not as specific, as to acceptance and receipt, as the defendant was entitled to. The fact that the defendant did pay the freight from and to Philadelphia, and did give the shipping order for the goods to be returned, together with other facts we have mentioned, might have led the jury to believe he had accepted and received the goods, and they could not be presumed to know what sort of an acceptance or receipt was required to bind the defendant. As early as *Belt v. Marriott*, 9 Gill, 335, our predecessors quoted with approval from 2 Starkie on Evidence, 490, that: "In order to satisfy the statute, there must be a delivery of the goods with intent to vest the right of possession in the vendee, and there must be an actual acceptance by the latter, with intent to take possession as owner." That has been since followed a number of times in this court. See *Jones v. Mechanics' Bank*, 29 Md. 293, 96 Am. Dec. 533; *Hewes & Co. v. Jordan*, 39 Md. 479, 17 Am. Rep. 578; *Corbett v. Wolford*, 84 Md. 429, 85 Atl. 1088; *Cooney & Co. v. Hax & Co.*, 92 Md. 136, 48 Atl. 58; *Richardson v. Smith*, 101 Md. 19, 60 Atl. 612, 70 L. R. A. 321, 109 Am. St. Rep. 552. Judge Miller, in *Jones v. Mechanics' Bank*, referred to the necessity of discrimination "between a sale at common law, which is consummated by delivery, and a sale as effected by this statute," and referred to the rule quoted in 9 Gill, 335, from Starkie on Evidence, as being "very accurately stated." In *Hewes & Co. v. Jordan*, supra, Judge Alvey discussed the question at length. He said: "That the acceptance and actual receipt of the goods sold, or some part of them, by the vendee, to gratify the statute, must be intended by the parties to effect a final and complete change of property in the goods so actually received, under the contract, would seem to be clear." He quoted with approval from Blackburn on Sales that: "It is immaterial whether his (buyer's) refusal to take the goods be reasonable or not. If he refuses the goods, assigning grounds false or frivolous, or assigning no reasons at all, it is still clear that he does not accept the goods, and the question is not whether he ought to accept, but whether he has accepted, them. The question of acceptance or not is a question as to what was the intention of the buyer, as signified by his outward acts." The third prayer offered by the defendant in that case, which this court said should have been granted, concluded by saying "that, in order to constitute an acceptance, so as to bring the case within the provisions of the statute of frauds, there must have been an actual acceptance by the defendants, with an intention of taking possession as owners." That prayer is very

similar, in its effect, to the one under consideration, which we think the defendant was entitled to have granted. The delivery of the goods to the carrier and receipt of them by it as carrier did not operate as such acceptance and receipt as the statute requires (*Jones & Co. v. Mechanics' Bank*, supra), nor did the payment of freight by him (29 Am. & Eng. Ency. of Law, 983). The fifth prayer ought also to have been granted. The fact that the defendant's third, which was granted, concludes by saying, "and if the jury shall further find that the defendant did not at any time receive and accept said goods as owner, then the verdict of the jury must be for the defendant," did not correct the error in rejecting the first and fifth. That prayer presented the defendant's theory that it was a conditional sale; that, if he did not need the goods, he could countermand the order, and the appellant could not have had advantage of that prayer, unless the jury found those facts in his favor. It follows, from what we have already said, that the plaintiff's prayer should have been rejected, as, on that question, it simply left to the jury to find whether "the said goods were accepted and received by the defendant," without in any way instructing them what those terms meant. Under the circumstances, that was not sufficient and was too general.

2. It only remains to determine whether the court should have allowed the defendant to answer the question stated in the second bill of exceptions. There can be no doubt that the intent of the buyer is material and relevant in a case of this kind, as is shown by the cases above cited. The only question is whether the buyer can testify to his own intent. We do not see any valid reason for excluding such evidence. It is, of course, not conclusive, but the opposite party can prove such facts and circumstances as he can obtain, which reflect upon the question. It might be that a purchaser might do some act which would be conclusive of his intention, as to the question whether there has been such an acceptance and receipt as complies with the requirements of the statute of frauds. The court could then instruct the jury that, if they found that the purchaser had done such acts, the statute was complied with, and the mere fact that the purchaser would swear he did not intend thereby to become the owner of the goods would not relieve him. As said in 29 Am. & Eng. Ency. of Law, 982: "Acts of ownership consistent only with the intent to keep the property are often sufficient and sometimes conclusive evidence of acceptance." But, in a case like this, the intention of the appellant, in doing what it was proven he did, was very material, and he should have been permitted to testify to it.

The subject of permitting a party to a suit to testify as to his intention is fully and ably considered in 1 Wigmore on Evidence, § 581. The author mentions, as one argu-

ment which is urged against its admissibility, that "such testimony may be falsified without the possibility of detection, and that therefore it is dangerous to permit an interested person to allege, in effect, whatever he pleases in his own state of mind." He then proceeds to give some answers to the argument, amongst others that the "assumption is incorrect in fact, namely, that there is no available and sufficient evidence of intent or motive by which the person's own testimony can be tested and checked; for the evidence, from conduct and circumstances and from other testimony, is not only a permissible but a potent source of belief, and is amply sufficient to guard against falsifications." He quotes in the text from cases in New York, Vermont, Indiana, and California, and cites, in over four pages of notes, numerous cases where such testimony was held admissible, briefly stating the character of each case.

The decisions in this state are not opposed to the views of that author, in so far as the question has arisen. In *Friend v. Hamill*, 34 Md. 307, an action was brought by the appellee against the appellants, who were judges of election, to recover damages for refusing to allow him to vote at an election. They were permitted to testify to their own intentions and motives at the time they acted. In *Phelps v. G. & C. R. R. Co.*, 60 Md. 536, which was an action of deceit, the president and engineer were allowed to testify as to their intentions in doing certain acts and making certain statements. The court said: "We think the weight of authority to be that, where the fact to be established is the intention with which an act has been done, to which act as matter of law no conclusive presumption attaches, as for instance the intention of a party in determining his place of residence, the party whose intention is the subject of inquiry may testify to the nature of his intention as he might to any other material fact. As we have intimated, what credit is to be given the testimony of the witness on this point is for the jury to determine, looking to all the evidence in the cause." In *Fenwick v. State*, 63 Md. 239, the court held that it was competent for a person on trial for assault with intent to murder to testify as to the purposes for which he procured the instrument with which he committed the assault. See, also, *Roddy v. Finnegan*, 43 Md. 501 and *Gambrill v. Schooley*, 95 Md. 260, 52 Atl. 500, 68 L. R. A. 427.

Such cases as *Lineweaver v. Slagle*, 64 Md. 465, 2 Atl. 693, 54 Am. Rep. 795, and *Ecker v. McAllister*, 45 Md. 309, cited by appellee, do not in any way conflict with the general doctrine. As was said in the first of those cases: "Where the law imputes an intent from the acts done by a party, his testimony as to what his intention was in doing the acts cannot be received in evidence"—referring to *Ecker v. McAllister*, in which case

the court went on to say: "Every person of sound mind is presumed to intend the necessary natural or legal consequences of his deliberate act. This legal presumption may be either conclusive or disputable, depending upon the nature of the act and the character of the intention. And when, by law, the consequences must necessarily follow the act done, the presumption is ordinarily conclusive, and cannot be rebutted by any evidence of a want of such intention." Such a case as this is altogether different. As we have seen, there must be an actual acceptance of goods by the purchaser, with intent to take possession as owner, in order to comply with the statute, and hence it becomes material to ascertain his intention. As we have indicated, there may be acts done which would be conclusive of his intent, but in this case the appellant's theory is that he only accepted the goods, in so far as there was any acceptance, for the purpose of reshipping them to the appellee, and not for the purpose of taking possession as owner. Of course, the appellee would not have been concluded by his answer, but could have cross-examined him, and relied on such facts as tended to show that he did take possession, as owner. Oftentimes the circumstances might be such as it would be important to explain the purpose of a purchaser in doing what was claimed to be evidence of acceptance, and, inasmuch as parties are now authorized to testify in their own behalf (unless, of course, there be some statutory disqualification), the purposes of justice may require that he be permitted to testify as to his intention. We are of the opinion that the appellant should have been allowed to so testify.

It follows, from what we have said, that the judgment must be reversed.

Judgment reversed, and new trial awarded, the appellee to pay the costs.

(28 R. L. 120)

McGANN et al. v. McGANN et al.
(Supreme Court of Rhode Island. Jan. 14, 1907.)

1. DEAD BODIES—RIGHT TO DISPOSITION—HUSBAND AND WIFE.

In general, the primary right to control the burial of a husband is in the widow in preference to the next of kin; the husband being entitled to the same rights with reference to the body of his dead wife.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Dead Bodies, §§ 1, 3.]

2. CEMETERIES—MONUMENTS—ERECTION.

Where a wife buried her husband's body in a lot belonging to her father, and was authorized by the probate court, as administratrix, to erect a monument to her husband's memory, not to cost more than a specified sum, she was entitled to erect a monument within such limit of cost bearing such inscriptions as she and her father might agree on, not in violation of the rules of propriety, or those prescribed by the authorities of the cemetery.

3. SAME.

Where a widow buried her husband's body in a cemetery lot belonging to her father, the

latter was entitled to impose a condition on the widow's right to erect a monument to her husband's memory, that she should also place the names of her father and mother on the monument.

4. SAME—MONUMENT—OWNERSHIP.

Title to a monument erected by an administratrix out of the proceeds of the estate was not in the distributees to the extent of their distributive shares of the estate, but in the administratrix during her life, and then in the heirs.

Appeal from Superior Court.

Bill by James McGann and others against Mary A. McGann, as administratrix, and others. From a decree dismissing the bill, complainants appeal. Affirmed.

See 58 Atl. 458.

Argued before DOUGLAS, C. J., DUBOIS, BLODGETT, JOHNSON, and PARKHURST, JJ.

Charles E. Gorman and Joseph J. Cunningham, for appellants. John W. Hogan and Phillip S. Knauer, for respondents.

PARKHURST, J. This is a bill in equity brought by James McGann and three others, being two brothers and two sisters of Michael J. McGann, late of Providence, deceased; the four complainants being 4 out of 10 heirs at law and distributees of the estate of said Michael J. McGann, who died without issue. The defendants are Mary A. McGann, the widow and administratrix of Michael J. McGann, and Bernard McGovern, who was made a party defendant on his own application as being a party interested in the cause. The gravamen of the bill is that the defendant Mary A. McGann, having been duly appointed administratrix of the estate of Michael J. McGann, her husband, and having been, by decree of the municipal court of Providence, dated March 25, 1902, "permitted to expend a sum not exceeding \$700 in the erection of a monument at the grave of said Michael J. McGann," proceeded thereafter to erect a monument at the grave of said Michael J. McGann, having inscribed on one side thereof the name of said Michael J. McGann, and on the other side the names of Bernard and Alice McGovern; neither of said McGoverns being relatives of the complainants or of said Michael J. McGann, nor having contributed to the erection of said monument. The complainants claim that they have contributed to the erection of said monument by reason of the fact that it was paid for with money of the estate of which they would have been entitled to their distributive shares if it had not been so expended; that they consented to the entry of said decree "with the express understanding that said monument was to be erected, dedicated, and inscribed to perpetuate the memory of Michael J. McGann and his memory exclusively;" that they have requested the defendant Mary A. McGann "to remove and erase said names of Bernard and Alice McGovern from said monument," and that she has ignored their request; and they pray that Mary A.

McGann may be restrained by injunction from keeping and maintaining said names of Bernard and Alice McGovern upon said monument, and may be ordered and decreed to remove said names from said monument.

It appears by the answers, which are fully supported by the testimony in the cause, that there was no such express understanding between the parties as set forth in the bill, and "no express understanding of any kind with the complainants or any of them regarding the inscriptions or design of said monument;" that Michael J. McGann was buried in a burial lot held by Bernard McGovern in St. Francis Cemetery, in accordance with his desire expressed prior to his death; also in accordance with the choice, request, and desire of his wife; with the consent of Bernard McGovern, and without opposition or objection on the part of the complainants or heirs; that the widow, Mary A. McGann, is the daughter of Bernard and Alice McGovern; that the most affectionate relations always existed between the deceased Michael J. McGann and said Alice and Bernard McGovern; that Alice McGovern, the wife of Bernard, had died and been interred in said burial lot about six months prior to the death of Michael J. McGann; that Bernard McGovern had intended to erect a family monument to his wife and himself, in said lot (the lot being called a "six-grave lot," and being 18 feet long by 10 feet wide); and that when Mrs. McGann proposed to erect the monument at the grave of her husband upon said lot, in accordance with the decree of the municipal court, it was objected by Mr. McGovern that the monument as designed was of such size that it would be impracticable to so erect it without interference with the rights and intentions of him, the said McGovern, to erect a monument on his lot as he had intended; that therefore Mrs. McGann, "desiring to properly perpetuate the memory of her said deceased husband, and having in mind the affectionate relations that had always existed between her late husband and her father and mother, then and there offered to and agreed with said Bernard McGovern that if he would consent to the erection of said monument as designed that she would have placed and inscribed thereon the names of Alice McGovern and Bernard McGovern." The names were so inscribed, and the monument was placed in accordance with such agreement.

Mrs. McGann claims by her answer that "if she is compelled to remove from said monument the said names of Alice and Bernard McGovern, that she will thereby violate her agreement with said Bernard McGovern, and entitle him to have said monument removed from said lot, and the same will thereby become a total loss to the estate and to said heirs and your respondent." Bernard McGovern by his answer claims "that if the said Mary A. McGann is permitted or compelled to remove the names of Alice Mc-

Govern and Bernard McGovern from said monument she will thereby violate the aforesaid agreement," and prays, by way of cross-relief, "that his rights as owner and holder of the title to said lot, and under and by virtue of said agreement with said Mary A. McGann, may be protected against infringement, and that this honorable court may enter a decree denying the prayer of the complainants and preventing the removal of the names of Alice McGovern and Bernard McGovern from said monument, and may grant such other and further relief," etc.

It also appears that while said monument was in process of construction, and before it was actually erected on said lot, the defendant, Mary A. McGann, as administratrix, having ascertained the balance in her hands for distribution, made settlement with all of the complainants and other heirs and distributees, paid over the moneys due to them and took their general release in the usual form, whereby they released said Mary A. McGann as administratrix and individually from all and all manner of actions, causes of actions, debts, dues, claims, and demands both in law and in equity; and the defendant Mary A. McGann sets up this release by way of plea in her answer. This release was not delivered until December 9, 1902, and at that time the monument, although not actually erected on the burial lot, had been completed, with all its inscriptions, and was in the yard of the maker, where it was open to inspection, and there was no concealment or attempt at concealment on the part of the defendants as to the nature of the inscriptions. It is to be noted that no one of the complainants appears as a witness in support of any of the allegations of the bill, and there is no attempt to prove that there was any express agreement or understanding between them and the widow as to the monument or its inscriptions, or that there was any injury to their feelings by reason thereof, or that there was any "hostility" or "antagonism" displayed by the widow towards the complainants, as alleged in the bill. Under all the circumstances of this case, we are of the opinion that the complainants have failed to show any ground for the relief prayed for.

It has been decided in this state that, "as a general rule, the primary right to control the burial of a husband should be with the widow, in preference to the next of kin," for the same reasons, and on the same grounds that in case of the death of a wife such right of control belongs to the husband, under ordinary circumstances. *Hackett v. Hackett*, 18 R. I. 155, 158, 26 Atl. 42, 19 L. R. A. 558, 49 Am. St. Rep. 762. If, then, the widow has such right of control, and, being also administratrix, has obtained authority to expend the money of the estate for erecting a monument, she must, as a matter of course, have the right to erect such a monument as she chooses, within the limits of expenditure authorized, with such inscription thereon as she may

deem appropriate, subject to such reasonable rules and regulations as may be imposed by the authorities in control of the cemetery; subject also to the rights of the owner of the lot, where, as in this case, the interment is made in a lot owned by a third person; and further subject to such reasonable control, regarding the character of the monument and its inscriptions, as shall prevent any such infraction of those recognized rules of propriety as would shock the sense of the community or show disrespect or contempt for the dead, or in any real sense do injury to the feelings of the surviving relatives. We think that a court of equity could and should exercise control, in its discretion, in such matters upon a proper case. This is simply a logical extension of the principles held in regard to the burial of the dead, and the protection of the rights of parties interested therein, as set forth in *Pierce v. Prop'rs of Swan Point Cemetery*, 10 R. I. 227, 14 Am. Rep. 687; *Hackett v. Hackett*, 18 R. I. 155, 26 Atl. 42, 19 L. R. A. 558, 49 Am. St. Rep. 762; *Weld v. Walker*, 130 Mass. 422, 39 Am. Rep. 465; *Fox v. Gordon*, 16 Phila. (Pa.) 185; *Thompson v. Deeds*, 93 Iowa, 228, 61 N. W. 842, 35 L. R. A. 56; and the numerous cases cited therein. But in this case we do not find that the widow has done anything of which the parties can properly complain. She has erected a monument, with a proper inscription, to her husband's memory; and the only complaint is that she has placed upon the same monument the name of her mother, who was buried in the lot prior to the husband's decease, and the name of her father, who owns the lot and expects to be buried therein when he dies. We are of the opinion that it was entirely proper for the widow, under the circumstances, to so place the names of her father and mother upon said monument. It was done in pursuance of an agreement with her father, in consideration of his permission to erect such a monument as she desired, and such as would, by reason of its size and location, prevent him from erecting his own monument on his lot to himself and his wife. He had a perfect right to impose such a condition, and it could not be regarded as, in any sense, a disrespect of or contempt for the dead, in view of the request of the deceased to be buried in said lot, and in view of the affectionate relations which always subsisted between the deceased and his widow's father and mother. The right of the widow to erect a monument to her husband, who was buried at his own request by the side of a former wife in a lot owned by his daughter who was born to him by such former wife, was expressly recognized in *Thompson v. Deeds*, 93 Iowa, 228, 61 N. W. 842, 35 L. R. A. 56, but was also made expressly subject to reasonable conditions imposed for the benefit of the lot owner "as to the size and location of the monument, having in mind the plaintiff's right to occupy and use the rest of the lot." Restrictions were also imposed as to inscrip-

tions, in accordance with the wishes of the lot owner.

In our opinion the claim set up by the complainants, that by reason of the use of the money of the estate in the erection of the monument they were contributors to the cost of the monument and thereby became interested as part owners of the same, and so entitled to relief, is untenable. If the legal title to the monument were to be determined according to the doctrine of contribution contended for by the complainant's counsel, the widow would own one-half and each of the complainants would own one-twentieth; so that the total representation of interests on behalf of the complainants would be four-twentieths, or one-fifth, as against one-half represented by the widow; and the widow would appear to have the superior right. It will at once appear that any such principle of ownership, if recognized by law, would be likely to lead to most unseemly wrangles and to suits of various kinds of very doubtful solution by the courts. We find no case in which such principle of ownership has ever been recognized. On the contrary, it has been the recognized doctrine of the English law that property in monuments and gravestones remains in the executor, or in the person who erects them (if other than the executor), during life; and after decease of executor (or other person erecting), then in the heirs. 3 Coke's Inst. 202; 1 Burn's Eccl. Law, p. 372, § 21; Spooner v. Brewster, 3 Bing. 136. And the same doctrine is recognized in this country in *Re Brick Presbyterian Church*, 3 Edw. Ch. (N. Y.) 155, 168; *Mitchell v. Thorne*, 134 N. Y. 538, 539, 32 N. E. 10, 30 Am. St. Rep. 699, and cases cited.

But courts of equity deal with matters of this kind upon broad grounds, and are not governed by rules which grow out of the ownership of property. As was said by the court in *Fox v. Gordon*, 16 Phila. (Pa.) 185: "Questions which relate to the custody and disposal of the remains of the dead do not depend upon the principles which regulate the possession and ownership of property, but upon considerations arising partly out of the domestic relations, the duties and obligations which spring from family relationship and the ties of blood; partly out of the sentiment so universal among all civilized nations, ancient and modern, that the dead should repose in some spot where they will be secure from profanation; partly out of what is demanded by society for the preservation of the public health, morality, and decency, and partly often out of what is required by a proper respect for and observance of the wishes of the departed themselves. When we speak therefore of the right and obligation to select the place and direct the manner of the burial of a relative or friend, we do not speak of a right of property, but of rights and duties recognized by the laws and usages of society, as growing

out of the natural relations of human beings to each other and the divine and human laws which bind society together."

In our view of the case, it becomes unnecessary to consider the effect of the release given by the complainants, and others to the administratrix upon the settlement of the estate, since in our opinion the rights of the parties would have been the same, under the circumstances, if the estate had not been settled and no release had been given. We think, furthermore, that the interests of the defendant Bernard McGovern will be sufficiently protected, in view of the foregoing opinion, by the dismissal of the bill, and that no decree for cross-relief need be entered under the prayers contained in his answer.

The decree of the superior court is affirmed, and the appeal is dismissed.

(28 R. L. 137)

In re CROSSWELL'S PETITION.

(Supreme Court of Rhode Island. Jan. 23, 1907.)

1. INSANE PERSONS — COMMITMENT — CERTIFICATE.

Gen. Laws 1896, c. 82, § 11, provides that insane persons may be removed to and placed in Butler Hospital for the Insane, on a certificate from two practicing physicians of good standing, known to the superintendent of the hospital to be such, that such person is insane. *Held*, that such certificate may be signed by physicians practicing without the state, who are not officers of an institution for the care of the insane, and need not be sworn to.

2. SAME — REMOVAL FROM ANOTHER HOSPITAL.

Under such act, it is not necessary that the patient should be removed from another hospital in order to justify his restraint in the hospital in question.

3. GUARDIAN AND WARD — RELATIONSHIP — ESTABLISHMENT — FOREIGN DECISIONS.

The relation of guardian and ward when legally established by a court of competent authority, having jurisdiction of the person of the ward, will in general be recognized by courts in other jurisdictions into which the ward may be brought, who have occasion to examine questions relating to the custody of the ward's person.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 24, Guardian and Ward, § 559.]

4. INSANE PERSONS — INCARCERATION — RESIDENCE.

Gen. Laws 1896, c. 82, § 11, provides that an insane person may be removed to and placed in the Butler Hospital by their parents or parent or guardians, if any, there be, and if not, by their relatives and friends on a certificate from two practicing physicians in good standing, etc. *Held*, that the term "guardian" included those of foreign, as well as domestic, appointment, so that a nonresident insane person might be properly confined in such hospital on the request of his nonresident guardian.

5. CONSTITUTIONAL LAW — DUE PROCESS OF LAW — INCARCERATION OF INSANE PERSONS.

Gen. Laws 1896, c. 82, § 11, authorizes the restraint of insane persons in the Butler Hospital by authority of their parents, or parent, or guardians, if they have any, and, if not, by their relatives and friends; and section 12 declares that any person committed to the charge of such institution may be received and detained by the superintendent, etc., until discharged in one of the modes provided. Section 19, as amended by Court & Practice Act 1905, § 1112, requires the court, on an application for habeas

corpus, to inquire and determine as to the sanity or insanity, or the necessity of restraint of the person confined at the time such application was made, and provides for the trial of the issue to a jury in the discretion of the court, declaring that if it appears on the verdict, or it is the opinion of the court, that the person so confined is not insane, or that he is not dangerous to himself or others, he shall be discharged from confinement. *Held*, that such act was not unconstitutional, as depriving insane persons of their liberty without due process of law.

Petition by Simon G. Crosswell for a writ of habeas corpus to obtain his discharge from the Butler Hospital for the Insane. Petition dismissed.

Argued before DOUGLAS, C. J., and DU-BOIS, BLODGETT, JOHNSON, and PARK-HURST, JJ.

Amasa M. Eaton and Simon G. Crosswell, for petitioner. Gardner, Pirce & Thornley, for Butler Hospital.

DOUGLAS, C. J. This proceeding is a petition for a writ of habeas corpus and for discharge from custody of a patient confined against his will in the Butler Hospital.

Citation was issued to show cause why the writ should not issue, and a hearing was had before the court at which the petitioner was present with experienced counsel appointed by the court, and at which he and his witnesses were heard. Subsequently briefs were filed by him, and by his counsel, and by counsel representing the respondent. All parties have been given full opportunity to present their evidence and arguments. We find as matter of fact, upon the concurrent testimony of all the expert witnesses, that the petitioner is insane; and upon uncontradicted evidence, that his malady is in its nature progressive, and that it is liable at any time, without warning, to induce in him acts of violence to himself or others. In these circumstances it is clear that for his own good, as well as for the protection of the community, he requires restraint and medical care such as the Butler Hospital affords and for the purpose of furnishing which it is incorporated and authorized by law to receive patients.

The petitioner is a citizen of Massachusetts, and was brought from that state, and, by order of two of its trustees, admitted to the Butler Hospital upon the following certificate and application presented to the superintendent:

"Certificate and Application.

"We hereby certify that Simon G. Crosswell, of Cambridge, Mass., is insane.

"E. Stanley Abbott, M. D.,

"Guy G. Fernald, M. D.,

"Physicians.

"Date, 29 April, 1905.

"I request that the above-named insane person may be admitted as a patient into the Butler Hospital.

"Mary C. Crosswell, Guardian."

The signers of the certificate were known to the superintendent, as he testifies, to be practicing physicians in good standing. It appeared, also, by their own depositions, taken on behalf of the petitioner, that they are salaried officials of the McLean Hospital, living in one of the hospital buildings and exclusively occupied in attendance upon the patients of that institution and medical practice therein. The signer of the application is sister and the nearest relative of the petitioner, and on May 13, 1903, both of his parents having died, she was appointed guardian of the petitioner, as an insane person, by the probate court of Middlesex county, Mass., where he is domiciled.

The commitment and reception of the petitioner at the hospital were under the provisions of Gen. Laws 1896, c. 82, §§ 11, 12, as follows:

"Sec. 11. Insane persons may be removed to and placed in said Butler Hospital, or in any other curative hospital for the insane of good repute in this state, managed under the supervision of a board of officers appointed under the authority of this state, by their parents, or parent, or guardians, if any they have, and if not, by their relatives and friends; but the superintendent of said hospital shall not receive any person into his custody in such case without a certificate from two practicing physicians of good standing, known to him as such, that such person is insane, and the state shall not be liable for the support of any such person.

"Sec. 12. Any person committed to the charge of any of said institutions for the insane as aforesaid, in either of the modes hereinbefore prescribed, may be lawfully received and detained in said institution by the superintendent thereof, and by his keepers and servants, until discharged in one of the modes herein provided; and neither the superintendent of such institution, his keepers or servants, nor the trustees or agents of the same, shall be liable, civilly or criminally, for receiving or detaining any person so committed or detained."

The statute does not require that the certificate mentioned in section 11 should be sworn to or that it should be signed by physicians practicing in this state, or that they should not be officers of an institution for the care of the insane, or that the removal shall be from another hospital. These objections, urged against the validity of the certificate in the present case, have no basis in the statute. The certificate fulfilled the requirements of the law. The power given to parents or guardians, so far as it relates to minors or wards, is only a recognition of the power which nature gives to the one class and the courts have bestowed upon the other. A parent, without this statute, may abridge the liberty of his child, may confine him in a school, or workshop, or hospital, may determine his place of abode or occupation, according to the parent's judgment, consulting

the interests of the child, not its desire; and a guardian, wherever his authority is recognized, has similar rights over his ward. While it is true that an appointment by the court of any state has legal and imperative effect only within the jurisdiction of the state, it is also true that the relation of guardian and ward, when legally established by a court of competent authority having jurisdiction of the person of the ward, will generally be recognized by courts in other jurisdictions, into which the ward may be brought, who have occasion to examine questions relating to the custody of the ward's person. In such cases the court will make such order as is apparently for the benefit of the ward, and will remand him to the custody of the foreign guardian unless it sees that such control is improper. 1 Wharton, *Con. Laws* (9d Ed.) 263, 263a; *State ex rel. Raymond v. Lawrence*, 86 Minn. 310, 90 N. W. 769, 58 L. R. A. 981; *Nugent v. Vetzera*, L. R. 2 Eq. 704; *Townsend v. Kendall*, 4 Minn. 412 (Gil. 315) 77 Am. Dec. 584; *Ex parte Dawson*, 5 Bradf. (N. Y.) 130; *Warren v. Hofer*, 18 Ind. 167; *Re Parker*, 39 La. Ann. 333, 1 South. 891; *Vick v. Volz*, 47 La. Ann. 42, 16 South. 568; *Taylor v. Nichols*, 86 Tenn. 32, 5 S. W. 436.

Our statutes expressly confer upon non-resident guardians certain powers with regard to property of their wards which may be in this state. *Gen. Laws* 1896, c. 196, §§ 41, 42, re-enacted in *Court & Practice Act* 1905, §§ 1075, 1076, construed in *Mitchell v. People's Savings Bank*, 20 R. I. 502, 40 Atl. 502. We think the statute now under consideration should be held to include in the word "guardian" those of foreign as well as domestic appointment. Many of the patients in the Butler Hospital are not citizens of Rhode Island, and we cannot narrow the construction of so comprehensive a statute, and construe it so as to require in many cases the appointment of a local guardian before a person needing the care of this institution could be committed to it. But the person who signed the application in this case is the sister of the petitioner, and in either case the requirement of the law was satisfied.

The important question raised by counsel for the petitioner is whether the statute itself is in violation of the clause of the fourteenth amendment to the Constitution of the United States which reads: "Nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." This question came before the court in *Doyle, Petitioner*, 16 R. I. 537, 18 Atl. 159, 5 L. R. A. 359, 27 Am. St. Rep. 759, upon a commitment under *Pub. St.* 1882, c. 74, §§ 11, 12, which are substantially the same as the sections of the general laws, now under discussion. The petition in that case was brought by the guardian of a patient in the Butler Hospital who had been committed thereto by his wife

before the guardian was appointed, and the provisions of these sections were held to be unconstitutional. July 23, 1889, 24 days after the delivery of the opinion in that case, the General Assembly, recognizing the necessity of providing for the restraint of the insane, passed an act in amendment of said chapter 74 (*Pub. Laws* 1889, p. 156, c. 819), intended to obviate the objections to the validity of chapter 74. Chapter 819 was further amended April 22, 1891, by chapter 935, p. 35, *Pub. Laws* 1891, and the changes in and additions to the law as it stood at the time of the decision, which were made by these statutes, with the exception of the right of trial by jury given by chapter 935, are substantially embodied in the statutes as they stand to-day.

The objections to the validity of the statute, as it was in 1889, are thus stated by the court: "The peculiarity of our statute is this: That, if said sections 11 and 12 be constitutional, any person committed under section 11 'may be lawfully received and detained' under section 12 until he is discharged in one of the modes provided by said chapter 74. He cannot be discharged on writ of habeas corpus if the sections be constitutional, since the proper function of the writ of habeas corpus is simply to discharge persons who are unlawfully restrained. The modes of discharge provided by chapter 74 are not modes which can be initiated or pursued by the person confined, but depend on the will and action of others. The persons confined may be removed from the institution where they are confined by the persons who have placed them there, or by the persons who have voluntarily become liable for the expenses of keeping them there, section 13; or the superintendent may discharge them on the application of any relative or friend, with the written approval of the visiting committee of the trustees, section 14. The only other mode is by a commission, appointed by a justice of the Supreme Court, to inquire into the question of sanity and report thereon, and by the action of the justice on such report, sections 15, 16, 17, 18, and 20. Such commission, however, is to be appointed, not at the instance of the person confined, but only on application by some other person, who, unless applying under section 20, is required, before the appointment, to pay or secure the payment of the expenses, which are sometimes onerous. And, moreover, it is provided in express terms that no notice of the pendency of the inquiry before the commission shall be served on the person confined, and that such person shall not have the right to confer with counsel, to produce evidence, or be present at the inquisition. The report of such commission may be more worthy of credit than the mere certificate of two physicians; but, inasmuch as the person confined cannot himself initiate the proceeding, or take part in it in any way when initiated by another, we

do not see how it relieves sections 11 and 12 of the objection that their effect is to deprive the persons confined under them of their liberty without due process of law." None of these objections apply to the present law. The function of the writ of habeas corpus was enlarged to apply to such cases by Pub. Laws 1889, p. 154, c. 819, now embodied in section 19, c. 82, Gen. Laws 1896, as amended by Court & Practice Act 1905, § 1112, by making it the duty of the court, upon an application for such writ "to inquire and determine as to the sanity or insanity or the necessity of restraint of the person confined, at the time such application was made." The section as now in force further provides for trying the issue to a jury in the discretion of the court, and enacts that: "If it appears upon the verdict of the jury, or if it is the opinion of the court, if the issue is not submitted to a jury, that the person so confined is not insane, or that he is not dangerous to himself or others and ought not longer to be so confined, he shall be discharged from such confinement."

The right of filing with a justice of the Supreme Court a petition for a commission to determine the question of sanity or insanity is given to the person confined, as well as to any one on his behalf, and he is also given the right to prosecute such petition in person. Gen. Laws 1896, c. 82, §§ 15, 16. In short, the commitment by a parent, guardian, or relative under the law considered in *Doyle, Petr.*, was final and permanent so far as concerns any right in the person confined to have a trial of the question of his sanity, while the present law gives the power to confine him on such a commitment only until he chooses to apply to the court for relief. The argument of the petitioner's counsel goes to the length of demanding that a trial shall in all cases precede the apprehension and restraint of a person suspected to be insane. The opinion in *Doyle, Petitioner, supra*, does not approve this extreme ground. Judge Tillinghast says (page 541 of 16 R. I., p. 161 of 18 Atl. (5 L. R. A. 359, 27 Am. St. Rep. 759): "Whether they are insane is the very question which ought to be determined before they are so completely confined as not any longer to have power to institute proceedings for their own relief, or to be heard and adduce evidence in their own behalf;" and on page 538 of 16 R. I., p. 160 of 18 Atl. (5 L. R. A. 359, 27 Am. St. Rep. 759): "We are not prepared to say that even so the sections would be void, if they were intended simply for the temporary detention, preliminary to or pending a judicial inquiry. The right of personal liberty is to be reasonably understood, and there are many restraints which are allowed as consistent with it." It seems to us that much popular misapprehension of this subject grows out of the feeling that constraint of a person as insane is analogous to the punishment of a criminal, and carries with it some stigma; and to

this may be added in some minds a repulsion to submitting one's self or one's friend to hospital treatment away from the continued supervision of family and personal friends. But insanity is a disease, and the state has the right to treat one who has the misfortune to suffer from it, as it does one who has a contagious malady. The exercise of this right of self-protection must be regulated by the circumstances of the case. If it is dangerous to the community that a citizen should go at large, whether because he is liable to spread contagion, or to commit some act of violence, public safety demands that he be immediately confined, either with or against his will, and the extent of his personal right can only be to test by judicial process, at a time when it may safely be done, the propriety of his restraint. We are of the opinion that the safeguards of this right provided by the statute are ample and just. The person confined has two methods at his command of invoking the action of the highest judicial authority, and severe penalties are imposed upon the managers and guards of the institution if they fail to bring the remedial provisions of the statute to his notice or impede his access to the remedies provided. In addition to this, careful supervision of such institutions is provided for by citizens of character and standing, and the system of operation is so regulated by law as to prevent abuses, or to insure the correction of them, as far as wise legislation can go. It would serve no useful purpose in this case to compare the systems which have been adopted in other states for securing the restraint of the dangerously insane. Many of them are criticised by plaintiff's counsel as liable to the same strictures which he applies to our own. They are all attempts by different minds to protect the community by such measures as may least infringe the personal liberty of the insane person. We think that our own system is a reasonable exercise of the legislative power, and secures to the subject of its restraint all rights which the Constitution of the United States guaranties to him.

This petition must be dismissed.

(28 R. I. 126)

NATIONAL & PROVIDENCE WORSTED MILLS v. FRANKFORT MARINE ACCIDENT & PLATE GLASS INS. CO.

(Supreme Court of Rhode Island. Jan. 9, 1907.)

INSURANCE—EMPLOYEE'S LIABILITY—AMOUNT OF LOSS—LITIGATION EXPENSES—COSTS.

An employer's liability policy, insuring against loss not exceeding \$5,000 in respect to one employé, provided that if any legal proceedings were taken against assured on a claim covered by the policy, the insurer should at its own cost undertake the defense of such proceedings, and should have the entire control of the defense; that assured should not, except at its own cost, settle any claim or incur any expense without the consent of the insurer. On suit for injuries to an employé, the insurer defended, and a judgment was rendered against

the insured for \$6,000, with costs, amounting to \$161.70, and interest amounting to \$326. The insurer paid \$5,000 on such liability and refused to pay more. *Held*, that the insured was entitled to recover from the insurer \$75 paid to physicians for services rendered at the request of the insurer in defense of the proceedings, but could not recover either the costs or interest.

Exception from Superior Court, Providence County.

Action by the National & Providence Worst-Ed Mills against the Frankfort Marine Accident & Plate Glass Insurance Company. From a judgment in favor of plaintiff, defendant brings exceptions. Overruled.

Argued before DOUGLAS, C. J., and DU-BOIS, BLODGETT, JOHNSON, and PARK-HURST, JJ.

Vincent, Boss & Barnefeld, for plaintiff. Lewis A. Waterman, for defendant.

PER CURIAM. We have carefully considered the questions involved in this case and the authorities cited by the parties. While the cases are conflicting, we think the correct rule is stated in *Munro v. Maryland Casualty Co.*, 98 N. Y. Supp. 705, 48 Misc. Rep. 183, and the decision of the presiding justice of the superior court is correct. We accordingly adopt his decision as the opinion of this court.

"Decision.

"Sweetland, P. J. In this case a jury trial has been waived. On April 1, 1898, the defendant issued to the plaintiff an employer's liability policy wherein the defendant agrees to indemnify the plaintiff for one year against loss arising from legal liability for damages, on account of bodily injury or death, suffered by any of the plaintiff's employees, resulting from accident happening in the plaintiff's premises. Said indemnity not to exceed the sum of \$5,000 in respect to any one employee suffering bodily injury or death. Under the terms of the policy, if any legal proceedings were taken to enforce against the plaintiff a claim covered by the policy, the defendant should at its cost undertake the defense of such legal proceeding in the name and behalf of the plaintiff, and the said defendant should have the entire control of such defense. And it was further provided by the terms of the policy that the plaintiff should not, except at its own cost, settle any claim or incur any expense without the consent of the defendant thereto previously given in writing.

"During the term of the policy, one Susan McGarr, an employee of the plaintiff, began legal proceedings against the plaintiff to enforce a claim covered by the policy. The defendant undertook the defense of such legal proceedings, and had entire control of such defense. In said proceedings the said Susan McGarr recovered judgment. The plaintiff satisfied the execution issued on said judgment, amounting to \$6,000, with costs amounting to \$161.70 and interest amounting

to \$326. In all, the sum of \$6,487.70. Thereafter the defendant paid to the plaintiff the sum of \$5,000 on its liability under said policy. In this case at bar the plaintiff is suing to recover the sum of \$161.70, the costs, and \$326, the interest in the execution in case of McGarr against the plaintiff. The plaintiff claims that the defendant is liable for such sum under its agreement that it would defend said legal proceedings at its own cost. The plaintiff also seeks to recover the sum of \$75 paid to two physicians, Drs. McCaw and Keene, for services which the plaintiff claims were rendered for, and at the request of, the defendant, in the defense of said legal proceedings. The court finds from the testimony that in the defense of said legal proceedings the defendant employed the late David S. Baker, Esq., that to care for its interests the plaintiff employed Cyrus M. Van Slyck, Esq., and that in said legal proceedings the said Van Slyck did assist the said Baker, but the entire control of said defense was in the said Baker acting for the defendant; that in the preparation of said case for trial the said Van Slyck, at the request of the said Baker, did cause the two physicians named to be employed; that said employment was for the defendant in the conduct of the defense which it had undertaken in the name of the plaintiff, and that the employment of said physicians was not an expense incurred by the plaintiff. The court finds that the plaintiff is entitled to recover the money which the plaintiff was obliged to expend in payment for the services of these physicians, employed in the plaintiff's name by the defendant. The court is of the opinion that the sum of \$161.70, costs, and \$326, interest, the plaintiff is not entitled to recover. The policy contemplates that the question of the defense of said legal proceedings, and the extent to which said defense shall be carried, are to be determined entirely by the insurance company.

"When said legal proceedings are terminated, if the insured is found to be liable to the employee, then the amount of loss arising from said legal liability is fixed. In this case it was \$6,000, the amount of the verdict; \$161.70, costs, which are an allowance made to the successful party as recompense for the expense to which she was subjected; \$326, interest, which is an allowance made to the successful party for the delay in obtaining the amount of her verdict during the time that the amount of the verdict was in the hands of the plaintiff and subject to its use. The item of costs and interest are not part of the cost of defense. A reasonable construction of the provisions of the policy that the insurance company should undertake the defense of the legal proceedings at its own cost is that it should be responsible for the employment of counsel, the fees of witnesses called in defense, and such other expenditures as are necessary to conduct the defense. The defense of the legal proceedings

was for the benefit of the plaintiff as well as the defendant, and perhaps could not have been avoided save by the payment of the employee's claim in full. The items of costs and interest are parts of the loss arising from the plaintiff's liability, and when that is fixed the terms of the policy require that the defendant should indemnify the plaintiff to the extent of \$5,000. That the defendant has done by the payment to the plaintiff of the sum of \$5,000. The plaintiff is entitled to recover \$75, paid to the physicians, with interest from the date of the writ in case at bar, amounting to \$23.41.

"Decision for the plaintiff \$98.41."

(28 R. I. 113, 133)

ARNOLD v. RHODE ISLAND CO.

(Supreme Court of Rhode Island. Jan. 9, 1907.
On Rehearing, Jan. 23, 1907.)

1. CARRIERS—EJECTION OF PASSENGER.

Where a passenger on a street car line presented a valid transfer, which the conductor refused to honor, and, as the passenger refused to pay fare, ejected him from the car, he was entitled to recover damages for the ejection; it not being necessary for him to pay his fare, and then resort to an action to recover it back.

2. SAME—TRANSFERS.

Where a street car company, according to its rules, issues transfers from and to certain lines, and the passenger presents a transfer which is not honored by the conductor, and the passenger is ejected, it is no defense to an action for the ejection that the statute does not require the issuance of a transfer between the particular lines in question.

3. SAME—RULES OF COMPANY.

In an action by a passenger against a street car company for ejection from a car after presentation of a proper transfer, it appeared that a rule of the company required the giving of transfers between the two lines in question, but that when the rule was made the cars on the two lines ran in such directions that the point of intersection was other than the intersecting point at the time of the ejection, but it appeared that transfers had been habitually given at the new intersection. *Held*, that a contention that, under the circumstances, the rule was not applicable, and no transfer required, was without merit.

4. SAME—DAMAGES.

Where, in an action for the ejection of a passenger from a street car after he had presented a valid transfer, it appeared that plaintiff had previously had trouble in regard to transfers at the point in question, and had been assured by the officers of the carrier that he was right in his demands, and that transfers should be honored, a verdict for \$175 was not excessive.

Exceptions from Superior Court, Providence County.

Action by Allen J. Arnold against the Rhode Island Company. Verdict for plaintiff, and defendant brings exceptions from the denial of its motion for a new trial. Exceptions overruled.

Argued before DOUGLAS, C. J., and DUBOIS, BLODGETT, JOHNSON, and PARKHURST, JJ.

William J. Brown, for plaintiff. Henry W. Hayes, Frank T. Easton, Lefferts S. Hoffman, and Alonzo R. Williams, for defendant.

DOUGLAS, C. J. This is an action of trespass on the case, brought by a passenger upon one of the street cars which the defendant operated in the city of Providence, to recover damages for being forcibly ejected from the car by the defendant's servant. The plaintiff presented a transfer which he claimed to be good, but which the conductor refused to accept for his fare, demanding a further cash payment, which the plaintiff refused to pay. The plaintiff recovered a verdict of \$175 in the superior court, and the presiding justice refused the defendant's motion for a new trial based on the ground that the verdict was contrary to the evidence, and that the amount was excessive. The exceptions allege error in the denial of the defendant's motion for a new trial, and in certain rulings of the court at the trial, and in the charge.

1. The first question raised by the exceptions is whether the form of action is correctly chosen; the defendant contending that, if the transfer were valid, the plaintiff should have paid the fare demanded and resorted to an action of assumpsit to recover it back. The cases which are cited by counsel, however, do not support this proposition to its full extent. Thus, it is held, in *Norton v. Consolidated Ry. Co.*, 63 Atl. 1087, 79 Conn. 109, that a passenger who is aboard a street car without a proper transfer ticket, due to the negligence of the conductor of the car from which he was transferred, is entitled to sue for breach of contract for failure to furnish a proper ticket and recover the loss necessarily following therefrom, but he cannot refuse to pay his fare, and to forcibly resist being expelled from the car; and where he does so, and no more force is used than necessary to remove him from the car, he can only recover nominal damages. The case is supported by abundant citations from many jurisdictions, but it does not decide the issue presented to us. So, in *Bradshaw v. South Boston R. Co.*, 135 Mass. 407, 46 Am. Rep. 481; *Dixon v. N. E. R. Co.*, 179 Mass. 242, 60 N. E. 581; *Kiley v. Chicago City Ry. Co.*, 189 Ill. 384, 59 N. E. 794, 52 L. R. A. 626, 82 Am. St. Rep. 460; *Brown v. Rapid Ry. Co.*, 134 Mich. 591, 96 N. W. 925—the passenger did not present a ticket which entitled him to passage in the car in which he was traveling, as the plaintiff in the case at bar claims that he did. In *Monnier v. N. Y. C. & H. R. R. Co.*, 175 N. Y. 281, 67 N. E. 569, 62 L. R. A. 357, 96 Am. St. Rep. 619, and in *Crowley v. Fitchburg & L. St. Ry. Co.*, 185 Mass. 279, 70 N. E. 56, the passenger had no ticket at all. In *Western Maryland R. Co. v. Schaun*, 97 Md. 563, 55 Atl. 701, the passenger had an invalid ticket, and in *McGhee & Fink, Rec'rs, etc., v. Reynolds*, 117 Ala. 413, 23 South. 68, the ticket offered was void on its face. In *Hufford v. Grand Rapids & Indiana Ry. Co.*, 53 Mich. 118, 18 N. W. 580, in the opinion, by Chief Justice Cooley, it is said: "If the conductor,

who was manager of the train, informed him that for any reason the ticket was one he could not receive, a contest with him over it must generally be very profitless, and therefore unadvisable. But we are all of the opinion that, if the plaintiff's ticket was apparently good, he had a right to refuse to leave the car."

We have no doubt that this is generally understood to be the law. It would be as reasonable to require the company to carry a man who refuses to pay his fare and sue him for it afterwards as it would be to require a man who presents the proper evidence that he has paid his fare to pay it again and resort to his action of contract to recover it. If the passenger is entitled to his transportation, and presents to the conductor the evidence of his right which the company has established for that purpose, he may lawfully resist expulsion and recover in a suitable action against the company for damage caused by the violence of its servant. In *Atchison, etc., R. R. Co. v. Dickerson*, 4 Kan. App. 345, 354, 45 Pac. 975, 978, the court treated a similar argument to the one here presented, as follows: "It is also contended that Dickerson could have escaped the humiliation and indignity by paying the excess, and then his measure of damages would be 10 cents; that he had no right to aggravate the damages by not complying with the demand of the conductor. We are not partial to a rule that would require a person to submit to an extortion for the purpose of relieving the extortioner from the natural consequences of his acts." In *Jeffersonville R. Co. v. Rogers*, 28 Ind. 1, 6, 92 Am. Dec. 276, the court say: "It is argued that the utmost damages recoverable was the difference between the two rates of fare, 15 cents, by paying which all other inconvenience and damage would have been avoided. But no man is bound to submit to even a trifling extortion. If he had a right to be carried for the sum tendered to the conductor, then the expulsion was purely wrongful, and for the consequences thereof the defendant was liable. The plaintiff was under no obligation to purchase even for a trifle the right which was already his own. This principle is elementary." In *N. Y., Lake Erie, etc., R. Co. v. Winter's Adm'r*, 143 U. S. 60, 73, 2 Sup. Ct. 356, 36 L. Ed. 71, it is held that, where a party is rightfully on a car or train as a passenger, he has a right to refuse to be ejected from it, and to make sufficient resistance to being put off to denote that he was being removed by compulsion and against his will; and the fact that under such circumstances he was put off the car or train is of itself a good cause of action against the company, irrespective of any physical injury which he may have received. See, also, *Murdock v. Boston & Albany R. Co.*, 137 Mass. 293, 50 Am. Rep. 307, and *New Jersey Steamboat Co. v. Brockett*, 121 U. S. 637, 7 Sup. Ct. 1039, 30 L. Ed. 1049.

2. The next contention is that the statute requiring the defendant corporation to give transfers between its lines does not in terms require a transfer, such as the plaintiff had, to be accepted on the car on which he offered it, and that therefore a rule of the company making such a transfer valid is of no effect. The insufficiency of this argument is apparent. The statute, while requiring certain accommodations from the company, did not forbid it to grant more ample ones to the public. If the transfer offered by the plaintiff was good for passage upon the car where he offered it, according to the rule and practice of the defendant, it is immaterial, as ruled by the court below, whether the statute had compelled it to enact such a rule and establish such a practice. Its obligation to the public had been established by its own course of dealing, and so had become binding upon it by its voluntary act, whether it exceeded the requirement of the statute or not. The statute imposed upon the defendant the duty of giving transfers. The plaintiff had paid for passage along Brook street to Waterman, and thence along Waterman by either line passing that corner going east. The company had adopted a certain voucher to be presented to its conductors by a passenger, like the plaintiff, who claimed the right to ride on the Butler avenue line by transfer from another car. The company was therefore bound to see that its conductor accepted and honored the voucher which it had provided for that purpose. The language or marks on the transfer card were nothing to the plaintiff so long as it was the card which the defendant's rule made good for him to show on the car to which he transferred.

In order to understand the evidence in the case, it is necessary to know that Waterman and Angell streets between Prospect street and Wayland avenue run east and west, substantially parallel to each other, Angell street lying to the north of Waterman; and that Brook street runs north and south, crossing Angell street at right angles. At the time to which the case relates the Dyer avenue line, after crossing Brook street, ran easterly on Waterman street to Wayland avenue, thence northerly to Angell street, thence easterly to Butler avenue, thence northerly to Blackstone boulevard, and along Blackstone boulevard to the entrance of Swan Point Cemetery. The Elmgrove avenue line ran over the same route to Angell street, thence westerly on Angell street to Elmgrove avenue, and thence northerly on Elmgrove avenue to its termination. About half past 6 p. m., June 14, 1905, the plaintiff, who wished to go from his place of business on Brook street to his home on Elmgrove avenue, boarded a Brook street car going north on Brook street. He paid his fare, and asked for and received a transfer to the Elmgrove avenue line. When he reached the corner of Waterman street and Brook, the Elmgrove avenue car had passed

by, and he boarded the next car going east on Waterman street, which was a Dyer avenue and Swan Point car. When the plaintiff's fare was demanded by the conductor, he tendered the said transfer, which the conductor refused to accept, upon the ground that it was not good upon that line. After some conversation, in which the plaintiff informed the conductor that he had been assured by Mr. Potter, the general superintendent of transportation, that such transfers were good on that line, and in which he requested the conductor to take from his pocket the printed regulations of the company, which directed him to receive such transfers upon that line, the conductor persisted in refusing the transfer, insisted that the plaintiff must pay his fare, or he would put him off the car; and thereupon, the plaintiff refusing to pay his fare, the conductor stopped the car, and with the assistance of the motorman removed the plaintiff from the car, using such force as was necessary. There was no contradiction of this evidence, the defendant calling no witnesses. The plaintiff accepted the burden of showing that the transfer which he offered was valid. To prove this he introduced a rule of the company for the guidance of its conductors, as follows: "Dyer Avenue and Butler Avenue Line. On east bound trips conductors will honor transfers punched for Butler Ave., Elmgrove Ave., or Red Bridge, E., in accordance with the general rules and time limit, telling the passengers how far you go on Angell street." It appeared also in evidence that, some time previous to the occurrences to which this action relates, a change had been made in the direction in which these lines of cars were run on Waterman and Angell streets. When this rule was printed, it was the custom for the Dyer avenue, Elmgrove avenue, and Red Bridge lines of cars to run easterly on Angell street and to return westerly on Waterman street, instead of running easterly on Waterman street and returning westerly on Angell street, as they did at the time in question. It was seriously urged that this rule could have no application to the state of affairs existing after the change of direction, although the testimony was overwhelming that the rule still continued in force and operation, simply making the transfer point from Brook street the corner of Waterman street, instead of the corner of Angell street, and reversing the change to passengers changing to Brook street. The new point of intersection became, of necessity, the point of transfer, and the rule applied as before.

In further support of the validity of his transfer, the plaintiff testified that on two occasions previous to the 14th day of June, 1905, the last time some six or eight weeks before that date, the Dyer avenue conductor had refused to accept from the plaintiff a transfer from the Brook street line to the Elmgrove avenue line; that on each occasion the plaintiff had paid his fare and reported

the circumstances to Albert E. Potter, who was then the superintendent of transportation of the defendant company, and who had charge of all conductors and motormen and issued all instructions and rules of government for the lines of the company; that on these occasions his fare was refunded, and he was told by Mr. Potter that, under the rules of the company, an Elmgrove avenue transfer from Brook street was good on a Dyer avenue car. This evidence was corroborated by Mr. Potter, who was called by the plaintiff, and also by Roscoe E. Anderson, chief clerk of the transportation department of the defendant, who also assented to the existence and application of the general rule quoted above. The objections which are made and urged to the admission of evidence during the trial, and the objection to the charge, relate to this testimony. They are not strenuously relied upon before us, and an exhaustive examination of the specific objections does not show us that any substantial error was committed in the admission of the questions to which they relate, or in the comments thereon in the charge.

3. The final ground of exception is that the damages assessed were excessive. Considering all the facts of the case, we do not think so. The plaintiff had submitted to the impositions practiced upon him by the servants of the defendant until forbearance had ceased to be a virtue. In each preceding case he had been assured by the managing officers of the road that he was right in his demands, and that the rule which he was informed was in operation should be observed. Nothing less than substantial damages would seem likely to compel the company to see that its regulations should be obeyed by its servants. The plaintiff's counsel has cited a number of cases in which larger verdicts have been sustained in no more aggravated cases. Among them are *Finch v. No. Pac. R. Co.*, 47 Minn. 36, 49 N. W. 329; *Chicago, etc., R. Co. v. Holdridge*, 118 Ind. 281, 20 N. E. 837; *Hardenbergh v. St. Paul, etc., Ry. Co.*, 41 Minn. 200, 42 N. W. 933; *Lake Shore, etc., R. Co. v. Teed*, 14 Ohio Cir. Ct. 355, 6 O. C. D. 339.

Our conclusion, upon the whole case, is that the exceptions must be overruled, and the cause remanded to the superior court for judgment on the verdict, and it is so ordered.

On Rehearing.

PER CURIAM. The opinion of Judge Brayton in *Hagan v. Prov. & Wor. R. R. Co.*, 3 R. I. 88, 62 Am. Dec. 377, approved in *Staples v. Schmid*, 18 R. I. 232, 26 Atl. 193, 19 L. R. A. 824, and in *Vogel v. McAuliffe*, 18 R. I. 790, 31 Atl. 1, holds that punitive damages are not allowable in a suit based on the tort of a servant, unless the principal participates in or approves the servant's act. In the case at bar, the offense had been twice before threatened by servants of the defendant, and the plaintiff had notified the defendant of

these occurrences. The final assault, for which this action was brought, may well be considered as growing out of the defendant's neglect to take measures to insure the observance of its rule after warning that it had been repeatedly disregarded. We cannot say that, in these circumstances, the jury erred in making the damages sufficiently large to punish the principal for this neglect.

The petition for reargument is denied.

(28 R. I. 125)

WILLIAMS v. SMITH.

(Supreme Court of Rhode Island. Dec. 31, 1906.)

1. GUARDIAN AND WARD—ACTION ON BEHALF OF WARD.

An action on behalf of an adult who is under guardianship must be commenced in the name of the ward by the guardian.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Guardian and Ward, § 434.]

2. ACTION—CONDITION PRECEDENT—CRIMINAL PROSECUTION.

By the express provisions of Gen. Laws 1896, c. 233, § 16, a criminal prosecution was a condition precedent to an action for damages arising from any act constituting a crime.

Exceptions from Superior Court.

Action by Hope T. Williams by James N. Smith, her guardian, against Clarence A. Smith. Heard on exceptions of defendant after denial of a petition for a new trial. Case remanded to the superior court, with directions to enter judgment for defendant.

Argued before DOUGLAS, C. J., and DU-BOIS, BLODGETT, JOHNSON, and PARK-HURST, JJ.

Irving Champlin and James Harris, for plaintiff. Marquis D. L. Mowry and Louis L. Angell, for defendant.

PER CURIAM. There is no ground on which the jury could have found for the plaintiff upon the evidence in this case, except that the defendant embezzled the money of the plaintiff. It must have been found either that the defendant was party to a scheme by which the plaintiff was induced to sign orders in his favor, intending to appropriate the proceeds to his own use, or that, being intrusted as her agent to procure money from various banks and deliver the same to her, he feloniously appropriated the same.

The statute in force at the time the cause of action accrued (Gen. Laws 1896, c. 233, § 16) required a criminal prosecution to be commenced in such a case before a civil action could be brought; and, as no such criminal complaint preceded the commencement of this action, the verdict cannot stand. As the case may be brought again after criminal complaint is made, we may say that the commencement of the writ and of the declaration are in proper form, as held in *Hamilton v. Colwell*, 10 R. I. 39.

The other exceptions need not be consider-

ed, as they apply only to procedure in the present case.

The case is remanded to the superior court, with direction to enter judgment for the defendant as of nonsuit.

(28 R. I. 144)

KENYON et al. v. FIDLER.

(Supreme Court of Rhode Island. Feb. 1, 1907.)

LANDLORD AND TENANT—RECOVERY OF POSSESSION — ACTIONS — DECLARATION—VARIANCE.

A declaration, in trespass and ejectment, to recover a tenement held by defendant as tenant at will, alleged ouster on April 27th, but the evidence showed that notice was given to quit on that date, which made defendant a trespasser on the following day. *Held*, that the variance was material.

Exceptions from Superior Court. Providence County.

Action by Lydia L. Kenyon and others against Jennie L. Fidler. A verdict was directed for plaintiffs, and defendant brings exceptions. Reversed and remanded.

Argued before DOUGLAS, C. J., and DU-BOIS, BLODGETT, JOHNSON, and PARK-HURST, JJ.

Walter B. Dixon and Benj. W. Grim, for plaintiff. John W. Sweeney, for defendants.

PER CURIAM. This is an action of trespass and ejectment for the recovery of a tenement held by the defendant as tenant at will of the plaintiffs. Due notice was given to quit the tenement on April 27, 1906, and the defendant therefore became a trespasser on April 28th. The declaration in each of three counts alleges the ouster on the 27th. The defendant, relying upon the variance, submitted no evidence, and the court directed a verdict for the plaintiffs.

We think the correct rule of pleading in such case is laid down in 7 Ency. Pl. & Prac. 337, where it is said: "The exact date of the occurrence of such ouster need not be stated, provided it be laid subsequent to the accrual of the plaintiff's title and before the commencement of the suit." In this case on the 27th the plaintiffs' right to possession had not accrued, inasmuch as the notice had not expired until the day was finished, and the case as set forth was not proven.

The cause is remanded to the superior court for a new trial, and the plaintiffs will be permitted to amend the declaration by substituting the 28th day of April, 1906, for the 27th, in each count.

(28 R. I. 157)

HARTLEY v. RHODE ISLAND CO.

(Supreme Court of Rhode Island. Feb. 6, 1907.)

EXCEPTIONS, BILL OF—ALLOWANCE—TIME.

Court & Practice Act 1905, § 494, declares that, if the justice who presided at the trial shall, for 20 days after a bill of exception has been filed, fail to act on or return the same, or shall disallow, alter, or refuse to allow the same, and either party is aggrieved thereby, the

truth of the exceptions may be established before the Supreme Court on petition filed within 30 days after filing of the bill of exceptions in the superior court, etc. *Held*, that such section should be strictly construed, and that, where a bill was not allowed by the presiding justice within 20 days after it had been filed in the clerk's office, he had no further jurisdiction over the same, and, in the absence of a petition to establish the truth thereof in the Supreme Court within 30 days, the bill became functus officio. [Ed. Note.—For cases in point, see Cent. Dig. vol. 21, Exceptions, Bill of, § 91.]

Exceptions from Superior Court, Providence County.

Action by Gertrude Hartley against the Rhode Island Company for negligence. On motion to dismiss defendant's bill of exceptions. Granted.

Argued before DOUGLAS, C. J., and DU-BOIS, BLODGETT, JOHNSON, and PARK-HURST, JJ.

John W. Hogan and Philip S. Knauer, for plaintiff. Henry W. Hayes and Frank T. Easton, for defendant.

DOUGLAS, C. J. This is a motion to dismiss a bill of exceptions presented to this court, on the ground that the bill and transcript have never been duly allowed, nor the truth of the exceptions duly established; the bill having been filed in the superior court September 24, 1906, and signed by the judge November 10, 1906.

The privilege of review by a bill of exceptions is given by Court & Practice Act 1905, §§ 490 to 497, and, as we said of petitions for new trials, in *Haggelund v. Oakdale Mfg. Co.*, 26 R. I. 520, 523, 60 Atl. 106, is contingent upon a diligent observance of the conditions imposed. The following are the provisions of the court and practice act on this subject:

"Sec. 492. The clerk, immediately upon the filing of a bill of exceptions, shall present the same, with the transcript, if any, to the justice who presided at the trial; and if upon examination thereof, after hearing the parties, he shall find the exceptions, evidence, rulings, instruction, and findings correctly stated, he shall allow them. In all cases the exceptions and transcript shall be restored by the justice to the files of the clerk, with a certificate, signed by him, of his action thereon.

"Sec. 493. Upon a bill of exceptions being allowed and restored to the files, the clerk of the superior court shall forthwith certify and transmit the papers in the cause to the clerk of the Supreme Court.

"Sec. 494. If the justice who presided at the trial shall, for a period of twenty days after a bill of exceptions has been filed, fail to act upon or return the same, or shall disallow, alter, or refuse to alter the same, and either party is aggrieved thereby, the truth of the exceptions may be established before the supreme court upon petition stating the facts, filed within thirty days after the filing of the bill of exceptions in the superior court;

and thereupon the truth of the exceptions being established in such manner as the court shall by rule prescribe, they shall be heard and the same proceedings taken as if the exceptions had been duly allowed and filed. And upon such petition being filed, the supreme court may order the clerk of the superior court to certify and transmit to the clerk of the supreme court the papers in the cause."

The statute thus gives the justice who presided at the trial 20 days within which to consider and act upon the exceptions. If his action within that time aggrieves either party, such party, within 30 days from the time the bill was filed, may apply by petition to this court to establish the exceptions as he conceives the truth to be. If the justice neglects to act at all within the 20 days, the party who is aggrieved by his inaction may apply to this court within the 30 days. The manifest intent of the act is to deprive the justice who presided at the trial of any jurisdiction in the matter after the expiration of the 20 days. While the act does not specifically declare this, it confers upon the parties rights which are inconsistent with an extension of the power of the justice beyond the 20 days. If the power to sign exceptions may be exercised beyond the 20 days, it may be exercised beyond the 30 days, and so the act or neglect to act would become final, and the parties, though aggrieved, would be precluded from any remedy by petition to this court. The two provisions must be read together, and, if so, the obvious limitation of time must be set to the jurisdiction of the superior court justice.

The counsel for defendant asks us to read into the statute the word "willfully" before neglect; but, if we could thus amend the law, it would remove the objection only in one contingency. As urged by plaintiff's counsel: If the superior court could hold a bill of exceptions beyond 20 days and validly allow it, then it could hold one beyond 20 days and validly disallow or alter it. If held beyond 30 days and altered or disallowed, the excepting party would have no remedy; if held beyond 30 days and allowed against the objection of the opposing party whose requested alterations were refused, then such opposing party would have no remedy. The construction which we place upon this statute is the only one consistent with its apparent plan and purpose. Stringent directions precede these sections quoted for giving notice of intention and filing the bill of exceptions. Definite periods of time are limited for the process, in which the only delay allowed is on account of the necessity of procuring the transcript of evidence. After the bill is filed, the clerk must act immediately. The justice must decide within 20 days, and application to this court, as a last resort, must be made within 30 days. The whole arrangement is designed to promote diligence, and the alternative to compli-

ance is inevitably a loss of the right to prosecute the exceptions.

A strict construction of statutes relating to bills of exceptions everywhere prevails. After a litigant has had his day in a court of general jurisdiction, with all the presumptions which exist in favor of the decision of a jury instructed by an educated and experienced judge, if he desires a review of the case in an appellate court, he must apply for it in the time and manner prescribed by the statutes.

As the defendant's bill of exceptions in this case was not allowed by the justice who presided at the trial within 20 days after it was filed in the clerk's office, and as no petition to establish the truth of the exceptions was filed in this court within 30 days after the bill was filed in the clerk's office, we cannot entertain it, and it must be dismissed, and the cause remanded to the superior court for judgment on the verdict.

(28 R. I. 153)

BAKER v. TYLER.

(Supreme Court of Rhode Island. Feb. 1, 1907.)

EXCEPTIONS, BILL OF—TIME FOR FILING—EXTENSION.

Court & Practice Act 1905, § 473, provides that, when any person is aggrieved by any order or judgment of the superior court, and from accident, mistake, or unforeseen cause has failed to prosecute a bill of exceptions, etc., the Supreme Court may, on petition, allow an appeal, etc. Section 490 provides that any person who has taken exceptions in the superior court may prosecute a bill of exceptions by pursuing the procedure pointed out. By the first paragraph, the party is required to file a notice of intention to prosecute a bill of exceptions, together with a request to the stenographer for a transcript of the testimony. The second paragraph provides that, within such time as the court shall fix, not later than 50 days after filing the notice of intention to prosecute a bill of exceptions, or within 10 days after the expiration of such extended time as is provided by section 72 for filing a transcript of the evidence, he shall file his bill of exceptions. Section 71 provides, in relation to stenographers, that the stenographer shall make a transcript on written request filed with the clerk by either party, and when completed, and within the time limited by the court for filing the same, but not later than 40 days from the request, except as provided in section 72, shall immediately deliver the same. By section 72, the superior court is given authority to grant an extension of the time of filing a transcript beyond the 50-day period. *Held*, that where the application of a party was duly made to the court, but the court, instead of fixing the time for filing the bill of exceptions and the transcript of the evidence, or extending the time for filing the transcript, filled out an order to the stenographer to deliver the transcript on a certain day, on petition after the expiration of 50 days from the notice of intention, the Supreme Court, under section 473, would order the judgment set aside and grant the aggrieved party time within which to file his bill of exceptions.

Action by John B. Baker against Thomas D. Tyler. Petition by defendant for relief after judgment. Relief granted.

Argued before DOUGLAS, C. J., and DUBOIS, BLODGETT, JOHNSON, and PARKHURST, JJ.

Irving Champlin, for plaintiff. Edward M. Sullivan, for defendant.

DOUGLAS, C. J. The following facts appear from the record in this case: June 5, 1906, the plaintiff recovered a verdict in the superior court against the defendant for \$500. June 11th the defendant moved for a new trial, which was denied July 2d. July 7th the defendant filed a notice of his intention to prosecute his bill of exceptions and a motion to the court to fix the time wherein he should file his bill of exceptions, transcript of evidence, etc., and a request for a transcript of the evidence. At the foot of the notice and motion, which were upon a printed form, is the following order; the words and figures italicized being in the handwriting of the justice of the superior court who presided at the trial: "Transcript of evidence, etc., to be made and delivered by stenographer to party ordering same or his attorney of record on or before *Sept. 29*, A. D. 1906. Bill of exceptions and transcript of evidence, etc., to be filed in the clerk's office on or before — A. D. 190—." *W. B. Tanner, Justice of Superior Court.* October 17th the plaintiff moved that the judgment of the superior court be entered upon said verdict, and December 16th said motion was heard and judgment entered as of June 5th. On October 29th the defendant filed his alleged bill of exceptions to the decision of Judge Tanner denying the defendant's motion for a new trial, but this bill was never allowed by the superior court or established in this court. On December 17th the defendant filed his exception to the entry of judgment and his notice of intention to prosecute his bill of exceptions, and on the same day he filed in the superior court a paper, in the form of a bill of exceptions, and allowed as such by the justice who ordered the entry of judgment, setting forth the travel of the case, and claiming that the judgment was erroneously entered.

It should be remarked, in the first place, that a bill of exceptions does not lie to a judgment of the superior court. The review of the decision or verdict on exceptions thereto, provided by the statutes, is to be had before judgment is entered. The filing of notice of a bill of exceptions stays the judgment or sentence until further order of the court. It is too late to give such notice after judgment is entered or sentence is pronounced. But the case stated is one of a judgment entered erroneously, or which, if duly entered, was the consequence of the failure of the party aggrieved by the verdict to file his bill of exceptions from omission of the court to fix the time within which he should file it, and so we may treat the application as one for relief under Court & Practice Act 1905, § 473. The general procedure of a party, who, after an adverse verdict and an adverse decision of the superior court upon his motion for a new trial,

desires to prosecute a bill of exceptions in this court, is prescribed by Court & Practice Act 1905, § 490, which refers also to the provisions of sections 71 and 72. The first paragraph of section 490 needs no construction. It prescribes two plain steps: first, to file notice of intention to prosecute exceptions; and, secondly, to take means to procure a transcript of evidence in cases where that is necessary. The second paragraph provides as follows: "Second. Within such time as the court shall fix, not later than fifty days after filing notice of intention to prosecute a bill of exceptions, or within ten days after the expiration of such extended time as is provided by section 72 for filing a transcript of the evidence, he shall file in the office of the clerk of the superior court his bill of exceptions. * * * If exceptions shall be founded upon evidence and rulings thereon, or upon findings or decision of the court, or to the instructions of the court to the jury, or to a decision upon a motion for a new trial on the ground that the verdict is against the evidence or the weight of evidence or for newly discovered evidence, he shall file in the office of the clerk, with his bill of exceptions, a transcript of the evidence and the rulings thereon, and of the instructions to the jury, or so much thereof as may be necessary for determination of the exceptions."

To analyze the process, it is this: First, the party files in the clerk's office his notice and motion and request for the transcript of evidence. Sections 71 and 490. Next, the court in answer to his motion fixes a time, not more than 50 days in the future, at which the party must file in the clerk's office his bill and transcript. Section 490. By section 71 it is made the duty of the stenographer to deliver the transcript to the party or his attorney within the time fixed for the party to file it, but in no case later than 40 days from the filing of the request. No act of the court is required to direct the stenographer. The statute defines his duty when the court has fixed the time within which the party must act. This is the ordinary and normal course of procedure contemplated by the statute, and there is no provision in any case by which the court can directly extend the time for filing the bill of exceptions beyond 50 days from the date of the notice. It may, however, often be impossible to procure the transcript for filing within the 50 days or the period fixed, and section 72 is designed to remedy this difficulty. It gives the court the power, for cause, to grant an extension of time for filing the transcript beyond the time originally fixed.

When an extension of time for filing the transcript is given, the statute again, without action by the court, fixes the time for filing the bill of exceptions within 10 days from the expiration of the extended time to file the transcript. In the case at bar, the application of the party was duly made to the court, and thereupon the court, instead of

fixing the time for filing the bill of exceptions and the transcript of evidence, or extending the time for filing the transcript, which would have automatically fixed the time for filing the bill of exceptions, filled out an order to stenographer to deliver the transcript to the party at a certain day. This order is not the order required by the statute, and is not a performance of the duty which the statute imposes upon the court. The time within which the defendant may file his bill of exceptions has never been fixed, and, as more than 50 days have elapsed since his notice, it cannot now be fixed by the superior court.

It is urged on behalf of the plaintiff that the statute imposes upon the moving party, in this case the defendant, the duty not only of filing his notice and motion, but also of seeing that the motion is granted. We think he is charged with the responsibility of calling his motion to the attention of the court, but we do not see how he can force the court to act. In this case the justice took the matter into his own hands after it was presented to him, and himself filled the blanks in the form. Doubtless by inadvertence he filled in the unnecessary order and neglected to fill the one required by the statute. It may have been carelessness on the part of defendant's counsel not to have discovered the error; but the mistake was originally the act of the court, and the printed form, furnished by the clerk's office, was itself misleading.

In view of all the circumstances, we think the case is one which justice demands should be reviewed, and it is therefore ordered that the judgment entered December 16, 1906, be set aside, on condition that the defendant, within 10 days, shall file his bill of exceptions and transcript of evidence, etc., in the clerk's office of the superior court, give due notice thereof as prescribed by rule 32, and prosecute his exceptions according to law.

(23 R. I. 160)

STATE v. SHEEHAN.

(Supreme Court of Rhode Island. Feb. 18, 1907.)

1. FISH—STATUTORY PROVISIONS—LOBSTERS.

Const. art. 1, § 10, provides that in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury, shall be confronted with the witnesses against him, and shall have compulsory process for obtaining witnesses. Section 14 provides that every man shall be presumed innocent until pronounced guilty by law. *Held*, that Pub. Laws 1902, p. 30, c. 969, providing for the punishment of persons having short lobsters in their possession, and that the possession of any such lobster shall be prima facie evidence to convict, is not in conflict with those sections of the Constitution.

2. INDICTMENT AND INFORMATION—COMPLAINT—MOTION TO DISMISS—TIME.

A motion to dismiss a criminal complaint, on the ground that complainant has not given security for costs, and was not an officer authorized by law to bring such complaint, comes

too late, if not made before defendant pleads in bar.

3. FISH—CRIMINAL PROSECUTION—EVIDENCE.

In a prosecution for having short lobsters in his possession, evidence that on previous occasions defendant had in his possession lobsters of lawful size is incompetent.

4. SAME—INSTRUCTIONS—KNOWLEDGE OF OFFENSE.

An instruction after defendant had introduced evidence explaining his possession, that if defendant, knowing that he had lobsters in his possession, and having full opportunity to examine them, neglected to inform himself that they were under legal size, he might be found guilty, is correct without charging that if he can explain the possession, and did not know he had short lobsters in his possession, he is not guilty.

5. CRIMINAL LAW—APPEAL—INSTRUCTIONS—EXCEPTIONS.

An exception in a criminal prosecution to the charge as a whole cannot be considered on appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 2671.]

Appeal from Superior Court.

Patrick Sheehan was convicted of having short lobsters in his possession, and appeals. Affirmed.

Argued before DOUGLAS, C. J., and DUBOIS, BLODGETT, JOHNSON, and PARKHURST, JJ.

Clark Burdick, for appellant. James C. Collins, Jr., Asst. Atty. Gen., for the State.

DOUGLAS, C. J. This is a complaint charging the defendant with having had in his possession 75 short lobsters, in violation of Pub. Laws 1902, p. 38, c. 969. After being found guilty in the district court, on his plea of not guilty, the defendant appealed to the superior court, where the jury found him guilty of having had 60 short lobsters in his possession. Before sentence he moved to dismiss the complaint, on the ground that the provisions of chapter 969 are void, being contrary to article 1, §§ 10, 14, of the Constitution of Rhode Island. During the progress of the trial several exceptions were taken, which are now brought to this court in a bill of exceptions. The constitutional question and the bill of exceptions were tried together, and are now before us for consideration.

The constitutional question is not stated with sufficient definiteness to enable us to ascertain what specific objection to the statute is intended to be relied upon. We find nothing in the sections mentioned which can be supposed to be violated by the provisions of the statute. The argument in support of this motion was addressed to the clause of the law which provides: "The possession of any such lobster, cooked or uncooked, not of the prescribed length shall be prima facie evidence to convict." As the offense charged in this case was having in possession, it could be no infringement of the defendant's constitutional rights to enact that proof of the fact should be prima facie proof of the offense. If the clause has any

effect in a case like this one, it is only to emphasize the right of the defendant to introduce evidence to show that his possession was not with guilty knowledge, as he was admitted to do at the trial before the jury. We cannot see that any constitutional question properly arises in this case.

The first exception is that a witness was allowed to testify to facts, which are matters of public record, without producing such record. The transcript shows that this objection was expressly waived by the defendant, rather than submit to an adjournment, that the record might be produced.

The second exception is taken to the refusal of the presiding justice to dismiss the complaint, on the ground that the complainant had not given surety for costs, and was not an officer authorized by law to bring such complaint without giving surety. The motion to dismiss, grounded on the objection to the complainant's official status came too late. It should have been made before the defendant had pleaded in bar to the complaint. *State v. McCarty*, 4 R. I. 82.

The third exception is to the refusal of the court to the offer of the defendant to prove that lobsters which he had had in his possession on previous occasions were of lawful size. This evidence was obviously incompetent.

The fourth exception is to the refusal of the court to charge the jury that: "The possession of short lobsters is only prima facie evidence of guilt. The defendant can explain the possession, and if he did not know he had short lobsters in his possession, he is not guilty." The court had already allowed the defendant to introduce evidence explaining his possession of the lobsters in question, and had charged the jury to the effect that if the defendant, knowing that he had lobsters in his possession, and having full opportunity to examine them, neglected to inform himself that they were under legal size, he might be found guilty of the offense charged. We think this instruction correctly stated the law as applicable to the case, and the request was properly refused.

The last exception was taken to the charge as a whole, and, as we have repeatedly held, cannot be considered. The exceptions are overruled, and the cause is remanded to the superior court for sentence.

(28 R. I. 145)

WILLIAMS v. STARKWEATHER.

(Supreme Court of Rhode Island. Jan. 23, 1907.)

1. EXECUTORS AND ADMINISTRATORS—LIABILITY ON BONDS.

Gen. Laws 1896, c. 218, § 27, provides that if any executor or administrator neglect or refuse to raise money out of the estate, or shall refuse to pay over what he has in his hands to the creditors of the testator or intestate whose claims have been presented and allowed or proved according to law, and, if cited before the probate court, shall fail to show reasonable

cause therefor, he may be decreed guilty of unfaithful administration, so that an action may be brought on his bond. *Held*, that a claim evidenced by final decree in equity is within the statute as a claim proved according to law.

2. SAME—INSOLVENT ESTATES—FAILURE TO DECLARE INSOLVENCY—EFFECT.

Where an executor made no attempt to declare the estate insolvent within the statutory period, he was estopped to subsequently assert its insolvency in proceedings by a creditor under Gen. Laws 1898, c. 218, § 27, providing that, if any executor or administrator neglects or refuses to raise money out of the estate or to pay over what he has in his hands to the creditors of the testator, and on citation cannot show reasonable cause therefor, he may be decreed guilty of unfaithful administration, so that an action may be brought on his bond.

Appeal from Probate Court.

Proceedings by Joseph U. Starkweather, as administrator de bonis non of James O. Starkweather, deceased, with the will annexed, against George Fred Williams, as executor of the will of Amey M. Starkweather. Heard on exceptions to a decision of the superior court dismissing an appeal from the probate court. Exceptions sustained.

Argued before DOUGLAS, C. J., and DUBOIS, BLODGETT, JOHNSON, and PARKHURST, JJ.

Gorman, Egan & Gorman, for appellant. Bassett & Raymond, for appellee.

DUBOIS, J. This is an appeal from the following decree of the probate court of the city of Pawtucket: "The complaint of Joseph U. Starkweather, administrator de bonis non of James O. Starkweather with the will annexed, alleging that George Fred Williams, executor of the last will and testament of Amey M. Starkweather, has neglected and refused to raise any money out of the estate of the said Amey M. Starkweather or to turn over money in his hands as such executor to liquidate a judgment debt due from the said executor to the complainant as the administrator as aforesaid, and that the said executor has absolutely failed to perform his duty in that respect, praying that the said executor be cited to appear in this court to show cause why he should not be adjudged guilty of unfaithful administration, came on to be heard, the said executor appearing in obedience to a citation issued in compliance with said complaint and prayer, and was argued by counsel; and it appearing upon such hearing that the said complainant as such administrator had recovered (judgment) against the said executor in the Supreme Court within and for the county of Providence on the 2d day of February, A. D. 1900, for the sum of \$2,865.09, and that said judgment remains wholly unsatisfied and in full force, although the said executor had in his hands and still has in his hands assets belonging to the estate of the said Amey M. Starkweather applicable to the payment of said debt and sufficient to satisfy the same, has neglected to pay the same or any part thereof, and has, upon such hearing, failed to show sufficient

and reasonable cause for such neglect, upon the consideration thereof it is ordered, adjudged, and decreed that under the statute the said executor is guilty of unfaithful administration of said estate"—which went to the superior court upon the following reasons of appeal: "First. That said Joseph U. Starkweather, administrator as aforesaid, hath no interest in said Amey M. Starkweather's estate. Second. Said Williams hath not been guilty of unfaithful administration of said Amey M. Starkweather's estate. Third. Said decree was entered, by said court, without having the lawful jurisdiction to enter the same."

Jury trial having been waived, the case was heard by one of the justices of the superior court upon proof: That Amey M. Starkweather died on the 11th day of January, 1898. That George Fred Williams was on the 23d day of February, 1898, appointed executor of the last will and testament of said Amey M. Starkweather and qualified as such executor on February 24, 1898. That George Fred Williams on October 5, 1898, filed his inventory in said probate court of Pawtucket, which showed that as such executor he had funds to the amount of \$3,255.60 as belonging to the estate of Amey M. Starkweather. That the estate of Amey M. Starkweather has never been represented insolvent, and no account by such executor has been allowed. That the following decree was entered in this court in equity case No. 4,794: "Providence—*sc.* Supreme Court, Appellate Division. Joseph U. Starkweather, Adm'r, v. George Fred Williams, Ex'r, et al. Eq. No. 4,794. The above-entitled cause coming on to be heard at the present session, and it now appearing by the admission of the parties that the following sums have been paid out by the respondent for which this complainant desires credit to be given to said executor, to wit: Aug. 10, 1898, Patt & Davis, \$45; June 21, 1898, S. C. Wilson & Son, \$2.05; February 25, 1899, B. F. Smith, \$1.50; May 1, 1899, taxes, 1898, \$426.23—amounting in the whole to the sum of \$430.23. Now, therefore, upon consideration hereof it is ordered, adjudged, and decreed that said complainant recover of the said respondent George Fred Williams as aforesaid from and out of the estate of the said Amey M. Starkweather remaining in his hands as executor said sum of \$3,296.82, less said sum of \$430.23, to wit: the sum of \$2,865.09, and also that the said respondent executor as aforesaid turn over to the said complainant upon his receipt therefor all the articles of household furniture, coming into his hands and possession as such executor of said Amey M. Starkweather, that were contained in the inventory returned by her, the said Amey M. Starkweather, as executrix of James O. Starkweather late of said Pawtucket, deceased. Entered as the decree of court, February 2d, A. D. 1900. By order, Bertram S. Blaisdell, Clerk." That execution was issued

thereon on the 18th day of February, 1900, for the sum of \$2,865.09. That said appellant had neglected to pay the same, and failed to show reasonable cause therefor.

Said justice thereupon rendered the following decision: "Brown, J. If the petitioner was a creditor of Mrs. Starkweather at the time of her decease, he was bound to present his claim in accordance with the provisions of chapter 215, § 2, of the General Laws of 1896. In the language of that statute, 'No claims other than those presented as aforesaid can be enforced against said estate, but other just claims may be paid by the executor or administrator of solvent estates out of assets in his hands at any time.' The petitioner did not claim to be a creditor. Upon examination of the record in the equity suit in which the decree which forms the basis of his right was entered, it appears that he was there seeking to obtain property which belonged to the estate of James O. Starkweather, and, being in possession of Mrs. Starkweather at the time of her decease, as the life tenant, came into the possession of the appellant as her executor. His prayer in that suit is that by decree of court this property may be 'transferred, paid over, and delivered to the' petitioner. The decree entered by the court is that the petitioner recover of the appellant 'from and out of the estate of' Mrs. Starkweather, 'remaining in his hands as executor' the sum of \$2,865.09. The petitioner insists that by reason of this decree he is now a creditor of the estate of Mrs. Starkweather, and, the amount not being paid, that he is entitled to proceed, under chapter 218, § 27, of the General Laws of 1896, to have the appellant cited before the court and adjudged guilty of unfaithful administration. The sole object of having the appellant so adjudged is that an action may be brought upon his bond. The effect of the statute is that if the executor shall neglect 'to pay over what he has in his hands to the several creditors, * * * whose claims have been presented and allowed or proved according to law, or shall otherwise fail to perform his duties as such executor,' he may be cited, etc., and adjudged guilty of unfaithful administration, and thereupon an action may be brought upon his bond, etc. In my view of the case, upon a comparison of the language of chapter 218, § 27, with that of chapter 215, § 2, of the General Laws of 1896, the petitioner's claim is one which the appellant may pay if the estate of Mrs. Starkweather is solvent, but is not one which can be enforced against her estate in this form of proceeding. The petitioner's remedy against the appellant, I do not think, is to be found in chapter 218, § 27, and therefore the petition must be denied and dismissed."

To the aforesaid rulings and findings the appellee duly excepted, and the case then came to this court upon the appellee's bill of exception, wherein he claims: "First.

That said rulings and decisions are contrary to law. Second. That said rulings are not supported by the evidence. Third. That said rulings and decisions are not based upon any of the reasons as claimed by the appellant in his reasons of appeal from the ruling of the probate court."

The complaint was based upon Gen. Laws 1896, c. 218, § 27, which reads as follows: "Sec. 27. If any executor or administrator shall neglect or refuse to raise money out of the testate or intestate estate by collecting debts due or by selling the personal estate, or real estate if need be, and has power, or can obtain leave, to sell the same, or shall neglect or refuse to pay over what he has in his hands to the several creditors of the testator or intestate whose claims have been presented and allowed or proved according to law, or shall otherwise fail to perform his duties as such executor or administrator, and, if cited before the probate court, shall fail to show reasonable cause therefor, said court may decree that he is guilty of unfaithful administration; and thereupon an action may be brought upon the bond of such executor or administrator by any such creditor who may have been damnified thereby, although the said period of two years has elapsed." Under this statute it was incumbent upon the appellee to satisfy the court, by a fair preponderance of the evidence, that he is a creditor of the testatrix, whose claim has been proved according to law, and that said appellant has neglected to pay the same out of what he has in his hands. The claim has not been paid, nor has any excuse been offered for its nonpayment, but an attempt is made to attack the validity of the decree of this court, entered February 2, 1900, in equity cause No. 4,794, hereinbefore set forth. By virtue of the decree the relation of debtor and creditor between the executrix of the appellant and the appellee has been established, and by the proceedings in said equity cause the claim has been "proved according to law"; that is, duly, regularly, lawfully, etc. Anderson's Law Dict.

The argument that a claim evidenced by a final decree in equity is not proved according to law is preposterous. It is a refinement of technicality. The words are not used in a technical sense. They do not mean proved in a court of law as contradistinguished from a court of equity. They mean legally proved. It cannot be contended successfully that a claim fully proved and adjudicated in a court of equity has been proved illegally or contrary to law. The matter is res adjudicata and cannot now be brought in question. The decree is not subject to criticism in this collateral matter. Two attempts have been made by bills of review to reach and amend the same, but without success. See 24 R. I. 512, 53 Atl. 870, and 25 R. I. 77, 54 Atl. 931. This decree has never been modified in any particular. Nor was

any attempt ever made to disturb it in any manner within the period allowed by law for such purposes, viz., one year from the entry of final decree. As this court well said in *Williams v. Starkweather*, 24 R. I. 512, 514, 53 Atl. 870: "It is important in equity proceedings, as well as in actions at law, that there should be a time when decrees become fixed and absolutely final. Concurring in the decisions and intimations of this court already referred to, we decide that such time cannot exceed one year from the entry of the original decree. We may add that the rule herein followed has not deprived the complainant in this case of any substantial right. The objections set out were as fully known to him when the decree was entered as they are now, and he could have presented his petition seasonably, as well as to do so after the lapse of so long a time."

The appellant is also estopped from claiming that said estate is insolvent. He made no attempt to declare the same insolvent within the statutory period, and his attempt to attain that result by bill in equity was unsuccessful. See 22 R. I. 501, 48 Atl. 689.

Two of the reasons of appeal hereinbefore set forth are insufficient, because the first objection relates to a matter heretofore finally determined by this court, which determination is no longer open to question. The third objection, that said decree was entered by said probate court without having the lawful jurisdiction to enter the same, is also without foundation. The only valid reason of appeal is the second, which raises a question of fact upon which the evidence is entirely in favor of the appellee. The reasons given by the justice of the superior court for his decision are invalid. The first, second, and third depend upon a reopening of the final decree which determined the rights of the parties in this very matter, and which cannot be disturbed, while the fourth is a consequence of the erroneous premises assumed by the court in relation to the matters in question. The exceptions of the appellee must be sustained.

Case remanded to the superior court, with direction to enter a decree confirming the decree of the probate court, and for further proceedings according to law.

(216 Pa. 463)

GIVEN v. SANDS et al.

(Supreme Court of Pennsylvania. Jan. 7, 1907.)
TRUSTS—CONSTRUCTION.

On the delivery of a deed, the husband of the grantee wrote to the grantor that he (the writer) was to look after the property, and sell it for a price agreed on, whereupon the grantor should receive, "after everything had been equitably satisfied," whatever balance might be due. On a sale in excess of the grantor's debt, the grantor filed a bill for an accounting. The defendants alleged that the grantor was indebted in another matter, and that the agreement to pay referred to all matters between the parties. The evidence showed that, if the other debt had been contemplated by the

parties, there could have been no balance remaining under any circumstances. *Held*, that plaintiff was entitled to the balance which he claimed.

Appeal from Court of Common Pleas, Allegheny County.

Bill by William K. Given against J. D. Sands and Sarah E. Sands. Decree for defendants, and plaintiff appeals. Reversed.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, ELKIN, and STEWART, JJ.

G. W. Williams, A. J. Edwards, and W. S. Woods, for appellant. William Yost, for appellees.

STEWART, J. William K. Given, plaintiff in the original bill filed in this case, in the spring of 1901 conveyed to Sarah E. Sands certain real estate in the borough of Oakmont. The grantee, with her husband, J. D. Sands, both of whom were made defendants in the bill, sold and conveyed the premises to another, realizing from the sale the sum of \$1,143.92, over and above certain indebtedness of William K. Given to Mrs. Sands, which it was admitted was properly payable out of the proceeds of the sale. This balance of \$1,143.92 passed from Mrs. Sands into the hands of her husband. The purpose of the bill was to have both declared trustees of plaintiff with respect to it. The defendants filed separate answers to the bill. The facts we have stated were admitted in each answer, and each contained an averment that, while the conveyance from the plaintiff to Mrs. Sands was in trust, whatever balance remained after paying the claim of Mrs. Sands, under the terms of the trust, was to be applied to plaintiff's liability upon certain notes of the Monongahela Textile Company, on which plaintiff was co-indorser with defendant J. D. Sands and one John M. Given, which liability, it was averred, far exceeded the balance remaining, after paying the claim of Mrs. Sands. The position taken in the answer was that the trust had been wholly executed, and defendants had nothing to account for. The defendant J. D. Sands filed a cross-bill, John K. Given being made a party defendant therein, in which the liability of himself, John M. Given, and William K. Given for the obligations of the Monongahela Textile Company were set out specifically, and the relations of said parties as officers and stockholders of said textile company defined. The cross-bill alleged that the textile company had proved insolvent, and that, William K. Given having refused to pay any part of his liability on this indebtedness, Sands and John M. Given had been compelled to pay the entire debt. Sands claimed that, in any event, he was entitled to retain and apply the balance resulting from the sale to the plaintiff's liability on the notes aforesaid. The prayer was for an accounting of the balance of the purchase money, and the sums paid by Given

and the defendants, or either of them, on the obligations of the textile company for which they were severally bound. The answer to this bill did not deny the original liability of the plaintiff on the notes mentioned, but denied present liability therefor, because of what had occurred after the insolvency of the company, and concluded with a prayer that the cross-bill be dismissed. Replications were filed, and upon the issue thus made up the evidence was taken. The findings and conclusions of the court were adverse to the plaintiff in the original bill, resulting in a decree (1) awarding to J. D. Sands the balance remaining of the proceeds of the sale of the real estate, to wit, \$1,143.92, to be applied to account of William K. Given's share of the indorsements on the Monongahela Textile Company notes; (2) ordering that William K. Given pay to J. D. Sands the sum of \$1,078.87, and to John M. Given the sum of \$1,667.22, in settlement of the accounts between them. The action of the court was virtually a dismissal of the plaintiff's bill and the affirmance of the cross-bill. Exceptions were taken to the several findings and conclusions, and this appeal followed.

Whether the cross-bill could be sustained at all depends on how we shall find the facts to be as to the matters averred in the original bill. If the contention of the plaintiff in that bill be correct, that the real estate was conveyed to Mrs. Sands on the trust that, upon the sale of it, she would reimburse herself for the money she had advanced, and if this was all of the trust, it would follow that the affirmative relief asked for in the cross-bill had no relation to the subject-matter of the original bill, did not grow out of it, and therefore could not be considered. The real inquiry must be as to what the terms of the trust embraced. The deed to Mrs. Sands was delivered to J. D. Sands, who throughout the whole transaction, down to the making of the sale, acted for his wife. The terms of the trust were defined, or sought to be defined, in a certain letter written by Sands, addressed to William K. Given, immediately upon the delivery of the deed. This letter reads as follows: "I am in receipt from Mr. Frazer, of Morgantown, of a deed to Mrs. Sarah E. Sands from you. I understand by this that I am to assume the note in bank and look after the property and pay the taxes and keep up repairs and collect the rents, and if I can sell it for a price agreed upon by you, after everything has been equitably satisfied, you are to receive whatever balance there may be. Of course, it is understood that out of the rents the interest on mortgage is to be paid. If this is the understanding, you will kindly notify the tenant, so that I may be able to arrange with him and have the rent paid up promptly. I will try to so handle it that there may not be any sacrifice or loss to you." Testimony was admitted to explain what seemed to the court an ambiguity in the expression, "after every-

thing has been equitably satisfied, you are to receive whatever balance there may be." This testimony resulted in little, if any, advantage to either side. "The testimony admitted to explain these words," says the learned judge in his conclusion, "was conflicting. W. K. Given testified they referred only to matters connected with the property and the note indorsed by his father and held by the Monongahela National Bank, while Sands testified they were intended to include the indebtedness incurred by the joint indorsements of the textile company's notes, as well as the matters directly connected with the property." While it is true that the evidence was conflicting, as to what occurred in the interview between the plaintiff and Sands, when the conveyance to Mrs. Sands was discussed, we are of opinion that the testimony of the plaintiff had the better support; but we need not go into this, for the reason that what immediately followed in the learned judge's finding makes it evident that his conclusion was uninfluenced by the oral testimony. He proceeds: "Under the circumstances, the letter should receive a liberal construction — a construction that would be equitable between the parties. Considering the relationship existing between the parties, the fact that Mr. Sands was an indorser on the note of William K. Given held by the Monongahela National Bank, and also the joint liability of each of the textile company's notes, we think the words 'after everything has been equitably satisfied' should be interpreted 'after all things or all matters have been equitably satisfied.' Such interpretation certainly would be equitable, at least as between these parties. Each is both morally and legally bound to discharge his proportionate share of the textile company's obligations. No reason has been shown why the others should not make good the overpayment."

We are compelled to dissent from the view here expressed. In the first place, the note referred to in the letter being admittedly the note of the plaintiff, on which plaintiff's father and J. D. Sands were indorsers, and which had been afterwards lifted by Mrs. Sands, the letter defining the trust, standing by itself, is clear of all ambiguity. It can be made ambiguous only by resorting to evidence dehors. The letter first denotes the trust property (the premises conveyed); then defines the duty and obligation of the trustee in connection therewith (to assume the note referred to, look after the property, pay the taxes, keep up repairs, collect the rents, and upon the sale of the property, after everything has been equitably satisfied, to pay over to plaintiff whatever balance there might be). If there was nothing in the trust as expressed to which the word "everything" could properly relate, it might be urged with at least some show of reason that the instrument was obscure; but, with the word standing in proper and expressive relation to what precedes

it, its meaning is too obvious to be speculated upon, certainly too obvious to admit of the implication that it stands for something not only not expressed in the instrument, but for something the existence of which is not even suggested in the instrument itself. Without explanation other than can be derived from the letter, the equitable satisfaction referred to must be held to have regard to those matters which the letter expressly provides for. When it is considered what Sands was to do in connection with the real estate, the amounts he was to receive therefrom, and the amounts he was to expend in connection therewith, the period during which his control might continue, and the compensation he might possibly claim, the necessity for a settlement at the conclusion embracing all these matters was too obvious to have escaped the attention of the parties. They wanted this settlement to be made on an equitable basis, and they provided for it. Such reference being at least reasonable and adequate to give force and effect to the instrument as written, there can be no excuse for resorting to extrinsic evidence. Without such evidence, plaintiff's liability for the indebtedness of the textile company would have been undiscoverable in this case; but, with this liability introduced into the case as a fact to be considered in construing the letter, the inquiry is simply widened without any advantage to the defendant. Before he could hope for a construction that would make the clause under consideration refer to and include the liability that was joint with himself and John M. Given, he would have to explain why, in a paper written by himself, intended to express the terms of the trust, he makes specific mention of a certain other individual liability of the plaintiff for \$2,000, for which he (Sands) was bound as indorser, with another, and which was to be secured, and omits any specific reference to the far greater liability which was his own as well, and which he now says was also to be secured.

Again, the paper evidently contemplated a balance remaining after the purpose of the trust should be accomplished. This balance amounts to \$1,143.92. If the conveyance was to secure as well the indebtedness on account of the textile company, it must have been manifest from the beginning that there could under no circumstance be any balance remaining. Why such care to make specific provision for the payment of the balance which in no likelihood could result, and leave not only unmentioned, but unmentioned to in any such way as would identify it and bring it within the terms expressed, the indebtedness which, as it now appears, is sufficient to absorb it four times over? Whether we interpret the paper from what is within its four corners, or in the light of the situation of the parties with respect to its subject and object, or read it in the light of the testimony, we can come to but one conclusion in

regard to its true meaning, and that is adverse to the defendant's claim. When this money passed into the defendant's hands, it was impressed with the trust which the defendant fully understood. He made himself a trustee with respect to it. His wife stood in that relation from the beginning. Neither had any right to apply the fund in any other way than in accordance with the terms of the trust. It now belongs to the plaintiff.

The case before us presents but one phase of the dispute between these parties, and our determination has regard to this one phase alone. Whether it is calculated to promote or prevent a just settlement in the end of the whole, we cannot tell. We take the case as it is presented. Applying to its facts the law, and interpreting the writing according to settled rules of construction, no other conclusion than that we have indicated is possible.

The decree of the court below is reversed, and it is now ordered, adjudged, and decreed that Sarah E. Sands and J. D. Sands pay to the said William K. Given, plaintiff, the sum of \$1,143.92, with interest thereon from October 11, 1904, and pay the costs of this proceeding.

(216 Pa. 564)

**ALLEGHENY COUNTY LIGHT CO. v.
BOOTH et al.**

(Supreme Court of Pennsylvania. Jan. 7, 1907.)

1. ELECTRICITY—LIGHTING COMPANIES—USE OF STREETS.

A company was incorporated under the act of April 29, 1874 (P. L. 73), to manufacture light, and received in 1881 from a city the right to erect poles and wires to conduct electricity for lighting purposes on the streets of a city from time to time as necessary. The company thereafter surrendered its original charter, and under Act May 8, 1889 (P. L. 186), took out a charter for the purpose of supplying light and heat and power by electricity. *Held*, that the company was not required to obtain a renewal of municipal consent, but could lay its conduits under the sidewalks under the original ordinance.

2. SAME—CHANGE OF SYSTEM.

Act May 8, 1889 (P. L. 186), providing for the incorporation of companies for the supplying of light, heat, and power by electricity, authorizes a change of system from poles and wires to conduits by a provision giving the right "to alter, inspect and repair its system of distribution."

3. SAME—CONDUITS UNDER SIDEWALKS.

An electric light company having the right to use the streets of a city can lay its conduits under the sidewalks; they being parts of the streets.

4. SAME—REMOVAL OF CONDUITS—LACHES.

Where an electric light company changes from the pole to the conduit system, and the city makes no complaint of the new construction, and no complaint is made by individuals for more than six years, equity will not decree the removal of the conduit.

Appeal from Court of Common Pleas, Allegheny County.

Bill by the Allegheny County Light Company against Walter D. Booth and others.

From a decree dismissing the bill, plaintiff appeals. Reversed.

Bill in equity for an injunction to restrain defendants from interfering with a conduit under the sidewalk of the property of Vincent, Scott & Co. Cross-bill for a mandatory injunction for the removal of the conduit. From the record it appeared that Vincent, Scott & Co., by their contractors, Kerr & Fox, were making an excavation for a vault under their sidewalk, and, in doing so, caused a part of the plaintiffs' conduit to fall and break. Plaintiffs claimed a vested right to maintain a conduit under the sidewalk. The defendants denied this right.

The following is the decree of Young, J., of the court below:

"And now, to wit, July 18, 1906, this cause came on to be heard at this term, and was argued by counsel, and upon consideration thereof it is ordered, adjudged, and decreed as follows: (1) The preliminary injunction entered October 24, 1905, is dissolved. (2) The original bill of complaint is dismissed. (3) The Allegheny County Light Company, the defendant in the cross-bill, is ordered and directed, within 30 days from the date hereof, to remove its conduit from beneath the sidewalk on the west side of Beatty street, from Penn avenue to Kirkwood street, in the city of Pittsburgh. (4) That the Allegheny County Light Company pay the costs of this case."

Argued before MITCHELL, O. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

David A. Reed and James H. Beal, for appellant. Levi Bird Duff and L. B. D. Reese, for appellees.

BROWN, J. In determining whether the Allegheny County Light Company has the right to construct and maintain conduits under the sidewalks of the streets of the city of Pittsburg for its wires, we must turn to its charter. It was originally incorporated March 6, 1880, under the act of April 29, 1874 (P. L. 73). Assuming that it had the power under its charter to furnish electric light to the public, the city of Pittsburgh, by ordinance of October 31, 1881, authorized it "to erect and maintain poles and wires for the purpose of conducting electricity to be used for lighting purposes, on such streets, lanes and alleys of this city as may from time to time be required by said company for the purpose aforesaid." The poles to be erected were to be of such size and shape and located in such places as the city engineer might direct.

But the appellant was not authorized under its original charter to supply light by electricity (Appeal of Scranton Electric Light & Heat Co., 122 Pa. 154, 15 Atl. 446), and, having surrendered its original charter, letters patent were issued to it on May 29, 1889, under the act of May 8, 1889 (P. L. 136), which is a supplement to the act of 1874.

Section 2 of the act of 1889 is as follows: "Companies incorporated under the provisions of this act for the supply of light, heat and power, or any of them, to the public by electricity shall, from the date of the letters patent creating the same, have the powers and be governed, managed and controlled as follows: Every such corporation shall have the authority to supply light, heat and power, or any of them, by electricity, to the public in the borough, town, city or district where it may be located, and to such persons, partnerships and corporations, residing therein or adjacent thereto, as may desire the same, at such prices as may be agreed upon, and the power also, to make, erect and maintain the necessary buildings, machinery and apparatus for supplying such light, heat and power, or any of them, and to distribute the same, with the right to enter upon any public street, lane, alley or highway for such purpose, to alter, inspect and repair its system of distribution: provided, that no company which may be incorporated under the provisions of this act, shall enter upon any street in any city or borough of this commonwealth until after the consent to such entry, of the councils of the city or borough in which such street may be located, shall have been obtained." In locating and installing their systems of distributing electricity electric light companies are given by this section the right of eminent domain upon public streets, lanes, alleys, or highways outside of city or borough limits, and, within such limits, they may use the streets with municipal consent. This is a limited right of eminent domain; the limitation upon it being found in the words of the grant of it. *Brown v. Electric Light Co.*, 208 Pa. 458, 57 Atl. 904. The third section of the act of 1889 provides that "any association of persons or corporations heretofore engaged in the business of supplying light, heat and power, or any of them, by electricity, under color of a charter or letters patent of this commonwealth, issued under the provisions of the act to which this act is a supplement, upon accepting the provisions of this act by writing under seal of the company, filed in the office of the Secretary of the commonwealth, and filing therewith its letters patent or charter, which shall be a surrender and acceptance thereof, shall thereupon be a body corporate hereunder and be entitled to and possessed of all the privileges, immunities, franchises and powers conferred by this act upon corporations to be created under the same, and all the property, rights, easements and privileges belonging to said associations and corporations, theretofore acquired by gift, grant, conveyance, municipal ordinance or assignment, or otherwise, upon such acceptance as aforesaid, shall be and hereby are ratified, approved, confirmed and assured unto such acceptors and corporations, with like effect and to all intents and purposes, as if the same had been originally acquired by and under the authority of this act, and such company

or corporation shall thereafter be governed by the provisions of this act." The "rights, easements and privileges" which this appellant had acquired from the city of Pittsburg by municipal ordinance under its first charter were ratified, approved, and confirmed with like effect as if they had been acquired under the act of 1889. They are to use the streets, lanes, and alleys of the city for the purpose of distributing electric light. The ordinance is municipal consent to appellant "to enter upon any public street, lane, alley or highway" within the city of Pittsburg for the purpose stated. This includes sidewalks, which are parts of the streets; and that the conduit of appellant was placed under the pavement in front of appellees' property is not in itself a ground of complaint in this proceeding. The city has the same control over its sidewalks that it has over the driveways. *McDevitt et al. v. People's Nat. Gas Co.*, 160 Pa. 367, 28 Atl. 948; *Provost v. Water Co.*, 162 Pa. 275, 29 Atl. 914.

The right granted by the ordinance of 1881, it is conceded by counsel for appellees, is unlimited as to streets, but it is contended that it was for a specific purpose, viz., "to erect and maintain poles and wires for the purpose of conducting electricity to be used for lighting purposes," and therefore the only privilege that exists is the one clearly and expressly given. This would mean that the city, in giving the right to erect poles and wires, impliedly forbade the use of any other system; but it could not so restrict the right of the company to change its system, for the supreme power of the state gives it the right to "alter" it. True, the permission is to erect and maintain poles and wires, but at the time it was given they constituted the means universally used in distributing electricity; and with what must be regarded as general permission to the appellant to use the streets for its corporate purposes there went, by the express words of the act of 1889, the right "to alter, inspect and repair its system of distribution." In placing its conduits under the sidewalk in front of appellees' property, the appellant simply altered its system of distribution, and in doing so it but exercised a right with which the city could not interfere, unless in the exercise of it there was a violation of reasonable police regulations, adopted by the city for the protection of persons and property from the danger of the new system.

The error into which the learned court below fell was in holding that the "company's sole authority for the occupancy of the highways of the city beneath the surface was the ordinances of November 21, 1892, November 25, 1892, and May 22, 1895." The authority was the ordinance of October, 1881, and the ordinances subsequently passed relating to conduit systems cannot affect the right of the company to alter its original system, unless in altering it reasonable police regulations are not complied with. After

consent is obtained to use the streets, the right is to use them in altering any system of distribution. The alteration requires no consent, though in making it the company may be subject to proper police regulations.

Turning to the ordinances of November 21, 1892, November 25, 1892, and May 22, 1895, nothing can be found in them prohibiting a change by the appellant from the pole to the conduit system of distributing electricity. On the contrary, each ordinance encourages, and, as to a portion of the city, requires, the adoption or substitution of the conduit system. Among the provisions relating to the adoption or substitution of this system is section 2 of the ordinance of November 25, 1892, which is as follows: "Every such corporation, co-partnership, or individual before entering upon any of the streets, lanes, alleys or highways, aforesaid, for the purpose of constructing thereunder, any conduits, subways, apparatus, devices or means as aforesaid for transmitting, conducting or conveying electricity shall file in the office of the department of public works a full plan showing the location, size and details of such proposed conduits and subways, and all such plans shall be subject to the approval of the chief of the department of public works, or, of the committee on public works, and no corporations, co-partnerships, or individuals shall enter upon any of the streets, lanes, alleys or highways aforesaid, or occupy or do any work upon the same until the said plans have first been approved in writing by the said chief of the department of public works, or, the committee on public works, or, as may be directed by councils, in accordance with the provision of section seventh." The appellant offered in evidence the plan for its conduit system, which, on July 13, 1899, was approved, in writing, by E. M. Bigelow, director of the department of public works. The court found that other provisions of the ordinances had not been complied with, and, having been of opinion that compliance with them was a condition precedent to appellant's right to construct its conduit system, dismissed its bill and granted the relief asked for in the cross-bill. Whether other provisions of the ordinances are reasonable police regulations, with which the appellant was bound to comply before altering its system in constructing its underground conduits, we need not now determine. In the year 1899 it constructed the conduit of which the appellees now complain. The city of Pittsburg has never complained of its construction. The twenty-fourth finding in the cross-bill is: "The Allegheny County Light Company has not been ordered by the director of the department of public works of the city of Pittsburg to take up this conduit or to relay it." The finding immediately preceding it is: "It does not appear that any complaint has been made or that any notice has been given or that any action has been taken

in regard to the construction or maintenance of its conduit by Vincent, Scott & Co., or any of their predecessors in title from the time of the construction of the conduit in the summer of 1899 until the fall of 1905."

With no complaint either by the municipality or the appellees and their predecessors, as private owners, of the construction of the conduit or of its use for more than six years as a part of appellant's large and expensive system, equity will not now decree its removal. The city has never made complaint of any disregard or violation of police regulations in connection with its construction or use, and it is now too late for either it or the appellees to ask, for the first time, that the appellant be interfered with in exercising what, in this proceeding, must be regarded as a vested right.

The decrees of the court below are reversed. The cross-bill is dismissed, and it is ordered, adjudged, and decreed that appellant's bill be reinstated, and the appellees are perpetually enjoined from interfering with, displacing, removing, destroying or tampering with the subway and conduit of the appellant mentioned in the bill, and from excavating, digging, or undermining under or about the said conduit, so as to interfere with it, either by themselves, their agents, servants, or employes, the costs on this appeal and below to be paid by the appellees. This decree is without prejudice to the right of the appellant to recover at law any damages which it may have sustained.

(216 Pa. 586)

ARMSTRONG v. CONSOLIDATED TRACTION CO.

(Supreme Court of Pennsylvania. Jan. 7, 1907.)
STREET RAILROADS—INJURY TO PERSON ON TRACK.

In an action against a street railway company to recover for injuries received while crossing the track at night, the question of contributory negligence held one for the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Street Railroads, §§ 251-257.]

Appeal from Court of Common Pleas, Allegheny County.

Action by William P. Armstrong against the Consolidated Traction Company Judgment for plaintiff. Defendant appeals. Affirmed.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

James C. Gray, Clarence Burtleigh, and William A. Challener, for appellant. Rody P. Marshall and Thos. M. Marshall, for appellee.

FELL, J. The question raised by this appeal is whether the case should have been withdrawn from the jury on the ground of contributory negligence. The plaintiff was injured at night, while crossing Penn avenue at Seventh street, in the city of Pittsburgh.

Cars were passing over the crossing every few seconds. There are two tracks on the avenue and two on Seventh street, and these tracks are connected by curves, and cars pass from the street to the avenue. There was a rule of the company, known to the plaintiff, that when a car had passed from the street to the avenue, and was standing to receive or discharge passengers, the car following it should not enter on the curve. After reaching the crossing he waited until it was clear. When he started, a car which had come from Seventh street was standing on the avenue, and the car following it, which struck him, was standing diagonally across on the far side of Seventh street. He walked on the crossing to the narrow space, less than 4½ feet wide, between the straight tracks, and stopped, looked at the car on Seventh street, saw that it was standing, looked up and down the avenue, and went on. He was struck when on the far side of the curved track by the car from Seventh street, which had been started without a signal being given and was running very rapidly around the curve.

From the plaintiff's testimony it appears that the crossing was an exceptionally dangerous one. There were four tracks to watch—two straight ones and two that curved from the street. There was no safe place to stop until all the tracks had been crossed. He exercised due care before starting. The car standing on the avenue blocked the way of the car standing on Seventh street, and was an assurance to him that the latter would not immediately start. He halted in the narrow space between the straight tracks in the middle of the avenue, and saw that the car on Seventh street was still standing, and he was struck as he left the curved track. The weakness of his case is that, between the time he looked at the Seventh street car and the time he was struck by it, it must have moved from a full stop 65 feet on a curve, and during this time he had only to glance in another direction and walk about 12 feet. It is highly improbable that his recollection was accurate as to all the facts detailed, and that the accident happened in the way described by him. It is not, however, impossible that it happened in this way, and the court would not have been justified in withdrawing the case from the jury on the ground that he stepped in front of a moving car, which he either saw or should have seen. He was not proceeding heedlessly, but with care, in a situation that was both dangerous and confusing. It has been repeatedly said that the rule stated in *Carroll v. Penna. Railroad Co.*, 12 Wkly. No. Cas. 348, is in its nature applicable only to clear cases, where the conclusion of negligence is irresistible. It was said by the present Chief Justice in *Ely v. Pittsburg, etc., Railway Co.*, 158 Pa. 233, 27 Atl. 970: "Stopping is opposed to the idea of negligence, and unless, notwithstanding the stop, the whole evidence shows negligence so clearly that no

other inference can properly be drawn from it, the court cannot draw that inference as a conclusion of law, but must send the case to the jury."

The judgment is affirmed.

(216 Pa. 538)

McCLELLAND v. PITTSBURG RYS. CO.
(Supreme Court of Pennsylvania. Jan. 7, 1907.)
STREET RAILROADS—COLLISION WITH VEHICLE
—CONTRIBUTORY NEGLIGENCE.

Where the driver of a vehicle about to cross the tracks of a street railway company drives so close to the track as to be hit by an approaching car while turning into the space between the track and the curb in an endeavor to avoid the car it constitutes contributory negligence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Street Railroads, §§ 210-218.]

Appeal from Court of Common Pleas, Allegheny County.

Action by R. W. McClelland against the Pittsburgh Railways Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

James Balph and R. A. Balph, for appellant. James C. Gray, Clarence Burleigh, and William A. Challener, for appellee.

POTTER, J. This action was brought to recover damages for personal injuries caused by a collision between the buggy in which appellant was riding and one of defendant's cars. The accident occurred just as plaintiff was driving out the driveway of a private residence, intending to cross directly over the track. It appears from the evidence that he saw the car approaching at some distance, and, keeping his eye upon it, he allowed his driver to proceed at a slow trot. Just as the head of the horse reached the first rail, he concluded that the car was too near, and was coming too fast, for him to cross the track in safety. He then directed the driver to turn the horse to the right into the space between the track and the curb, so as to avoid the car; but in doing so, the wheel turned sharply under the body of the buggy, and apparently swung or pushed it so far around as to bring the hind wheel in contact with the car as it passed.

The testimony shows that the car was running at an excessive rate of speed, and that the horse was trotting as it approached the track. Presumably the fact that the horse was trotting made it more difficult to stop or turn when it became necessary to do so, before the buggy reached the track. At any rate, if the driver had approached the track more slowly, or had stopped at a point a few feet further from the track, the collision need not have occurred. Undoubtedly the defendant company was negligent in running the car at so high a rate of speed, but, even then, under the well-settled rule of law, the plain-

tiff cannot recover if by his own conduct he also contributed to the happening of the accident. As we read the testimony, he did this when he approached the point of intersection so rapidly, and drove so close to the track before stopping or turning the head of his horse. There was ample room to permit the turning of the horse and buggy into the space between the curb and the first track as the plaintiff drove out into the street had he so desired. This was the course he finally adopted, but he hesitated a trifle too long in its execution. If he had stopped or turned an instant sooner he would have been safe. The buggy seems not to have been at any time actually upon the track, and, when the plaintiff was caught, it was by reason of being too close to the car, rather than by being in front of it.

We see no error in the refusal of the learned trial judge to take off the nonsuit, and the judgment is affirmed.

(216 Pa. 534)

SMALL v. PITTSBURG RYS. CO.

(Supreme Court of Pennsylvania. Jan. 7, 1907.)

STREET RAILROADS—NEGLIGENCE.

In an action against a street railway company to recover for personal injuries to plaintiff from being struck by a piece of wood torn from a telephone pole by a runaway electric car, evidence of defendant's negligence held insufficient to go to the jury.

Appeal from Court of Common Pleas, Allegheny County.

Action by Frank E. Small against the Pittsburgh Railways Company. Judgment for plaintiff, and defendant appeals. Reversed.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

James C. Gray, Clarence Burleigh, and William A. Challener, for appellant. John C. Haymaker and Thomas E. Finley, for appellee.

POTTER, J. This was an action of trespass brought by Frank E. Small against the Pittsburgh Railways Company to recover damages for an injury alleged to have been sustained by reason of the negligence of the defendant. From East McKeesport to Wilmerding the street railway of the defendant company runs on the public street, for a distance of a mile and a quarter, upon a grade of 6 per cent. At the foot of the slope is the Wilmerding station of the Pennsylvania Railroad. The tracks of the street railway terminate at that point, directly across the street from the station. On the evening of January 29, 1902, shortly before 8 o'clock, the plaintiff, who was standing on the station platform, was struck by a piece of wood broken from a nearby telephone pole. A car of defendant company had gotten beyond control while coming down the Wil-

merding hill, and had left the track at the terminus, crossed the street, and collided with the telephone pole, breaking it and running against the wall of the railroad station. A fragment of the broken pole was thrown against plaintiff, and inflicted serious injuries. The testimony shows that the car escaped from control while coming down the hill by reason of the slippery condition of the tracks upon the grade. Rain had fallen, which froze to the rails as it fell. The car was in good condition, and properly equipped with brakes, and was provided with sand; but the tracks were so incased in ice that, when the motorman attempted to apply the sand, the wheels would not take hold, even when reversed. In consequence the car slid down the grade.

Upon the trial, as the court said, there was no evidence of improper brakes, machinery, or appliances. The only matter which the court submitted to the jury was the conduct of the employes in charge of the car in attempting to take it down the hill when the tracks were icy. He instructed the jury that if prudent employes would have considered it dangerous to take the car down at that time, and would not have taken the hazard, then the employes in charge of the car were guilty of negligence, and the plaintiff was entitled to recover. But the difficulty in sustaining this submission of the question is that there is no evidence that the employes were not prudent men, of long experience, and yet they did as a matter of fact conclude that it was reasonably safe, under the circumstances, to attempt to take the car down.

It will be remembered that the plaintiff was not a passenger on the car, but was standing upon the public highway near the terminus of the tracks. The car which ran into the telephone pole and broke it, thus inflicting injury upon the plaintiff, was the second of the two cars which, by reason of the ice on the rails, escaped from control at the point in question. The motorman of the second car, which is the one which caused the injury to the plaintiff, had no knowledge of the fact that the car immediately preceding had gotten beyond control, and he started down the hill a few minutes afterwards. He had no difficulty until his car had proceeded a considerable distance, when he found it was beyond control. He used every effort to stop the car, but was unable to do so. He tells the story thus in his own words: "I started off so slow that any six years' old boy could get on that car, from the top of the hill until I got within about 200 feet of the bridge that goes under the track. Then I began to notice that the brakes would not hold it any more. It began sliding. Then I threw off the brake and reversed the car, and pulled the sand, and I found there was too much ice on the rail for the wheel to take hold on the sand. It

just brushed the sand off when it was revolving in the backward motion. I kept it on reverse all of the way, and, when I got to the stone quarry, the trolley jumped off. Then I was in darkness from there down to the foot of the hill, and kept using all force from there on down to the foot of the hill, expecting every minute I would get control of it again, but I didn't until I ran into the station." Fryan, the motorman, had many years' experience, and had been engaged two years and a half on that particular line. He had brought his car up the hill over the same track only a little while before without trouble or difficulty; and, after proceeding a short distance along the road, he changed cars and started back again towards the foot of Wilmerding hill.

The evidence shows that before entering upon the down grade he tested his brakes, found they were in good condition, and tested his sand, and found that the supply was good, and that it was running freely. There is no suggestion in the evidence that anything was wrong with the car, or that the motorman did anything which he ought not to have done, or left anything undone which he should have done, in the management of his car. The sole fault which can be imputed to him, under the evidence, is that he erred in his judgment when he started his car down the grade. As the sequence showed, he did underestimate the difficulty caused by the presence of ice on the rails. The motorman of the car immediately ahead of him made the same mistake. But the exercise of judgment—even though it be mistaken judgment—is not negligence. Under ordinary conditions of the weather, and so far as his experience showed, under extraordinary conditions, he would have been safe in taking his car down that hill. He had done it many times before, and his experience certainly fitted him to judge as to the conditions. He occupied the place of greatest danger on the front platform, and regard for his own safety would naturally quicken his instinct to anticipate danger, if, in his judgment, there had been any real occasion for it. The testimony is clear that the accident was caused by conditions most unusual. When asked if he had ever experienced during the two and a half years that he had run over that road such a night as that of the accident, the motorman replied: "No, I told you I never experienced it in 22 years before." The testimony of the defendant's superintendent also was that the night was bad, raining, sleeting, icy; the worst night he had ever seen in all his experience in street railroading.

Negligence is not to be presumed upon the happening of an occurrence which is the result of exceptional and extraordinary conditions. It must be presumed that in a hilly country, such as that in the region of Pittsburgh, some risks must be taken in the operation of street cars. It will not do to stop

them at every change in the weather. The public need for them is greatest in bad weather. The knowledge and experience of the motorman did not suggest to him any undue risk of accident, and we cannot say, or permit a jury to conjecture, that because an accident did happen in this case, it affords good ground for charging the motorman with negligence, because he did not foresee that the car would get beyond control, and did not refuse to start it down the hill. The theory upon which this action was brought, as shown by the statement, was not that the motorman erred in his judgment. There is no such claim made. The plaintiff charged only that the car was improperly operated, and that the employes were incompetent and careless, and that, owing to the careless management of the car, and by reason of deficient machinery and lack of proper brakes, the car became unmanageable. None of these charges were supported by evidence. There was no testimony whatever to show that the motorman was incompetent, or that he was remiss in any way in the operation of the car, or that the brakes or machinery were deficient. The only thing which, in the opinion of the trial judge, could be submitted to the jury was whether the judgment exercised by the motorman in deciding to run his car down the hill was bad. But no witness was produced who testified that the situation at the brow of the hill, as it appeared before the accident, was such as to deter a prudent motorman from attempting to take his car down. The finding of the jury in this respect could not have been based on evidence, but only on conjecture. At most, it would be their judgment after the accident as against that of an experienced motorman, upon the circumstances as they existed before the accident, and in a situation, too, where his own safety was at stake in the course to be pursued. Hindsight is better than foresight, no doubt, and it is easy to criticise after the event; but the law holds men responsible only for such consequence as can, in the exercise of reasonable prudence, be foreseen. We feel that the facts of this case negative any inference of negligence arising out of the mere attempt upon the part of the motorman to operate the car, proceeding as he did, slowly and cautiously, feeling his way, as it were, until unfortunately he found by trial that the conditions were so unusual, that, contrary to his expectation, based upon long experience, the sand would not enable him to control his car. We are unable to find in this record any evidence of negligence upon the part of the defendant company sufficient to justify the submission of the case to the jury. This plaintiff was not upon the car, and was not therefore entitled to the benefit of the presumption which arises in case of injury to a passenger.

The assignments of error are sustained, and the judgment is reversed.

(216 Pa. 583)

POWELSON v. UNITED TRACTION CO.

(Supreme Court of Pennsylvania. Jan. 7, 1907.)

CARRIERS—INJURY TO PASSENGER—EVIDENCE.

In an action to recover for injuries received by a passenger on a street car on entering the same, evidence held to require judgment for defendant.

Appeal from Court of Common Pleas, Allegheny County.

Action by James Powelson against the United Traction Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

William A. Challener, Clarence Burleigh, and James C. Gray, for appellant. Rody P. Marshall, Thomas M. Marshall, and John C. Haymaker, for appellee.

PER CURIAM. Counsel for appellant in their paper book say with great frankness that this appeal has been taken with the direct purpose of having this court review the several cases relating to negligence in getting on or off a moving car, and declare that the general rule that such act is negligence per se is the only rule, and that there are no exceptions to its operation.

The court have given the cases attention, and have not been convinced that they need any substantial modification. The general rule is a good rule, the exceptions are not many, and they will not be lightly increased. But to say that no exception shall be permitted under any circumstances would be to ignore the infinite variations of human action under pressure of emergencies or doubt, and to reduce the elastic principles of the common law to the rigidity of a penal statute. But how clearly the exceptions must be shown to be such is made manifest by the cases of *Hunterson v. Traction Co.*, 205 Pa. 568, 55 Atl. 543, *Bainbridge v. Traction Co.*, 206 Pa. 71, 55 Atl. 836, and *Boulfrois v. Traction Co.*, 210 Pa. 283, 59 Atl. 1007, 105 Am. St. Rep. 809.

This was a very close case, but when it was here before (204 Pa. 474, 54 Atl. 282) it was held to be one for the jury. It was tried by the court below on the lines of the opinion by our late Brother Dean, and we have seen nothing to change our views.

Judgment affirmed.

(217 Pa. 7)

STERLING VARNISH CO. v. MACON et al.

(Supreme Court of Pennsylvania. Jan. 7, 1907.)

APPEAL—APPLICATION TO OPEN DECREE.—**NEWLY DISCOVERED EVIDENCE.**

An employer brought a bill to enjoin former employes from using the secret processes which they had contracted not to use except for complainant's benefit. The evidence showed a clear prima facie case of fraudulent breach of contract. Held, that where the trial court refused an injunction unless evidence of the secret

process was introduced which complainant declined to do, and after an appeal complainant applies for a reopening of the case for newly discovered evidence, the decree will be reversed with directions to reopen the same.

Appeal from Court of Common Pleas, Allegheny County.

Bill by the Sterling Varnish Company against Latimer S. Macon and others. Decree for defendants, and plaintiff appeals. Reversed.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

M. Hampton Todd, A. Leo Well, Breck & Vaill, and Henry C. Todd, for appellant. Johns McCleave and John S. Wendt, for appellees.

PER CURIAM. Defendants obtained knowledge of certain business secrets relative to machinery and processes while in the employment of complainant under contract expressly stipulating that they were not to divulge any of such secrets or to make use of them or any part of them directly or indirectly except for complainant's benefit. This bill was filed on the ground that after leaving complainant's employment the defendants were using such secrets for their own advantage.

It was shown that they had opportunity and motive for such use; that one of them, while in sole charge during the absence of the president of the company, had had blueprint copies of machinery and drawings made, which covered the dimensions of the complainant's unique special apparatus, the drawings for which were kept in the company's safe, to which he had access; that no entry was made on the company's books as to these copies or the payment for them; that during the same period of the president's absence one secret formula at least for extra insulating varnish was copied by Macon in his own handwriting, and that he also had in his custody and charge at the time of the trial a large number of drawings and blueprints of drawings of all the machinery and apparatus in plaintiff's works; and, lastly, that a portion of defendant's machinery known as the "spray pipe" apparatus was a direct copy and infringement of complainant's secret apparatus.

This summary of the facts condensed from the court's finding, omitting details as to the resemblances, etc., shows a clear prima facie case of fraudulent breach of contract by the defendants. The learned judge below was apparently of this opinion; but, complainant having refused to put in evidence its secret formulae, on the very substantial ground that to do so would destroy the secrecy which makes so large an element in its value, the judge thought that the proof was not technically sufficient, and that, unless the secret processes were disclosed, no relief on the vital question of infringement

could be rendered effective. He therefore limited the injunction to the spray pipe apparatus. It is not impossible, however, that appellant may make out satisfactory proof of its case by other evidence without the necessity of disclosure of secrets, nor is it clear that it has not done so. But we need not decide that point at present, as complainant has made application for reopening the case on the ground of material evidence discovered after the appeal was taken to this court. The importance of this evidence is unquestionable, and coming as it does from the other side it cannot be held to have been within the reach of appellant at an earlier date by any reasonable diligence. The application, therefore, should be granted.

The decree is reversed, with directions to allow the case to be reopened for further evidence.

(316 Pa. 425)

WOOD et al. v. SCHOEN.

(Supreme Court of Pennsylvania. Jan. 7, 1907.)

1. WILLS—CONSTRUCTION.

In the construction of a will, if the language employed is plain, no rules of construction are necessary to aid in its interpretation, and the usual and ordinary meaning is to be given to the words and terms unless the context clearly shows that such was not the meaning of the testator.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, §§ 940-953, 972-986.]

2. WILLS—CONSTRUCTION—HEIRS.

Testator gave the income of his estate to his wife and three sisters for life, and provided that on the death of his wife and his three sisters one-third of the real estate and moneys from the personal estate should go to his nephew and niece in fee equally, and the other two-thirds to such child or children as he might leave and the issue of such child or children as might be deceased, and in default of such child or children or issue, then to those who would be entitled thereto under the intestate laws. *Held*, to give two-thirds of the remainder of his real estate to those who were his heirs at the expiration of the particular estate, and not to those who were his heirs at the time of his death.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, §§ 1118-1127.]

3. SAME.

Where testator gave the income of his estate to his wife and three sisters for life, and at their death to certain of his heirs, and to any children or issue thereof, and testator died without leaving children or the issue of children, but his wife and sisters surviving, his heirs at the time of his death could not make a good title to his real estate.

Appeal from Court of Common Pleas, Allegheny County.

Action by James S. Wood and others against William H. Schoen. Judgment for plaintiffs, and defendant appeals. Reversed.

It appeared that the defendant agreed with plaintiff's to purchase a lot of land in the second ward of the city of Pittsburgh. The land formerly belonged to James Scott. The latter died leaving a will by which he directed, inter alia, as follows:

"(1) I devise all of the real estate of which I may die seized, wherever the same may be situated, to George W. Van Fleet, of the place aforesaid, and ———, of ———, and to such successor or successors as may be appointed in law, in trust for the uses and purposes hereinafter expressed. In the event of my death without children my said trustee shall pay one-half of the rents, issues and profits of said real estate, after the deductions aforesaid, annually to my wife Emma, during her natural life, and also the one-half of the interest annually upon the moneys invested as aforesaid, less the expenses—the other half of the said rents, issues, and profits and interest, less the deductions aforesaid, annually to my sisters, Eliza S., Mary and Catharine N., during their joint lives and to survivor or survivors for life. Upon the death of my said wife and all of my first named three sisters, I will, devise and bequeath the one-third of the real estate and moneys from the personal estate in the hands of my said trustee to my nephew, James Wood, and my niece, Lizzie Wallace, in fee, equally; the other two-thirds thereof to such child or children as I may leave, and the issue of such child or children as may be deceased. And in default of such child or children or issue, then to those who would then be entitled thereto under the intestate laws of this state. And I authorize my said trustees aforesaid to convey and assure the same by proper assurances in law to said persons respectively." James F. Scott, deceased, left to survive him neither child nor descendants in any degree, but did leave to survive him a widow, Emma E. Scott, and three sisters, viz., Eliza S. Scott, Mary Scott and Catharine N. Scott, spinsters, and a nephew, James Wood, a son of Grace Wood, a deceased sister, and a niece, Lizzie Wallace, daughter of Ellen Wallace, a deceased sister, all of full age. The plaintiffs were the heirs, or the representatives of the heirs, of James F. Scott. The defendant refused to accept a deed, claiming that the title offered to him was not marketable.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, ELKIN, and STEWART, JJ.

George T. Hildebrand, for appellant. S. W. Dana and Richard F. Dana, for appellees.

MESTREZAT, J. The purpose in construing a will is to ascertain the intention of the testator, so that it may be carried out in the disposition which he has made of his property. Technical rules of construction should only be resorted to and applied in the interpretation of wills when found to be necessary in determining the meaning of the instrument, so as to effectuate the purpose of the testator. If the language employed by him in disposing of his estate is plain and clearly discloses his intention the will interprets itself, and hence no rules of construction are necessary to aid in its interpreta-

tion. As well said by Sharswood, J., in Reck's Appeal, 78 Pa. 432: "All mere technical rules of construction must give way to the plainly expressed intention of a testator, if that intention is lawful. It is a rule of common sense as well as law not to attempt to construe that which needs no construction." The learned judge below correctly observes in his opinion that remainders are to be regarded as vested rather than contingent, and that where property is limited by will to one for life, and after his decease to the testator's next of kin or heirs, or other classes of persons similarly described, the persons who answer that description at the death of the testator and not those who answer it at the death of the tenant for life shall take, unless a contrary intent clearly appears from the will. But it should be added that when it clearly appears that the testator intended his heirs or next of kin at the death of the tenant or legatee for life to take, such intent will prevail. Buzby's Appeal, 61 Pa. 111.

James F. Scott devised all his real estate to a trustee for the purposes named in his will. If he died without children, he directed his trustee to pay one-half of the proceeds of the real estate to his wife for life, and the other half to his three sisters and the survivor of them for life. Upon the death of his wife and sisters he devised one-third of his real estate to a nephew and niece, and "the other two-thirds thereof to such child or children as I may leave, and the issue of such child or children as may be deceased; and in default of such child or children or issue, then to those who would then be entitled thereto under the intestate laws of this state. And I authorize my said trustees aforesaid to convey and assure the same by proper assurances in law to said persons respectively." The land involved in this action passes under this last clause of the testator's will, and, as the learned judge of the court below says, the question is whether it passed as a vested remainder to those who were at the time of the death of the testator entitled under the intestate laws, or as a contingent remainder to those who shall, at the death of the survivor of the life tenants, one of whom is yet living, be the next of kin of the testator and entitled to take as if the testator had died intestate at the moment of the death of the survivor of the life tenants. The court held that the estate devised to the remaindermen vested at the death of the testator, and passed to those who were entitled under the intestate laws at that time.

We think this was an erroneous interpretation of the will, and defeats the clearly expressed intention of the testator. It is produced by the application of the rule of construction noticed above, without giving due consideration to the language of the will. This language is neither ambiguous nor indefinite, and therefore it is not necessary to invoke the aid of any rules of interpretation in construing the instrument. The

testator did not die intestate as to any part of his estate. The one-third of his real estate he devised to his nephew and niece in fee, and the other two-thirds in dispute here, were given to those who, at the expiration of the particular estate, would then be entitled thereto under the intestate laws of the state. This did not create an intestacy, but was simply descriptive of the persons who were to take as devisees under the will. They were such as would be entitled under the intestate laws, at the time the clause of the will became operative. This phrase of the devise, therefore, can have no significance in fixing the time at which the remaindermen were to be determined. The simple question here is, did the testator limit the estate devised to those entitled under the intestate laws to persons of that description living at his death, or at the death of the survivor of the life tenants? The will itself, unaided by any technical rules of construction, gives a definite and unequivocal answer to the question. Its language is: "Upon the death of my said wife and all of my first named three sisters, I will * * * the other two-thirds * * * then to those who would then be entitled thereto under the intestate laws of this state." The clause provides not only for the event which shall precede the passing of the estate, but also the time when the remaindermen are to be determined and the estate shall pass. The word "then" is used twice in this collocation of words and for both purposes. In the first connection, it is manifestly used as a conjunction, meaning "in that event," and in the second as an adverb of time, meaning "at that time." Inserting the definition for the word itself the clause will read as follows: "Upon the death of my said wife and all of my first named three sisters * * * in that event to those who would at that time be entitled thereto under the intestate laws of this state." A universal rule in construing a will requires that, if possible, effect be given to every word and every part of it; and an equally well-established rule requires the usual and ordinary meaning to be given to words and terms in a will, unless the context shows that such was not the meaning intended by the testator. We must therefore give effect to "then" as used in both connections. It cannot be used in the second connection as a conjunction for the reason that it would be surplusage, it already having been used manifestly in that sense in the same sentence. Having been used twice so closely together in the same sentence, the word clearly was not employed the second time for the same purpose nor with the same meaning as at first used. If, therefore, it is given its adverbial significance in the second connection, it must refer to the death of the surviving life tenant as the time at which the remaindermen are to be ascertained. That is the only reasonable interpretation of which the word used in that

connection is susceptible, and consequently the meaning with which the testator used it. This construction, we think, not only gives full effect to the word, but carries out the evident intention of the testator as disclosed by the entire will.

We cannot agree with the contention of the learned counsel of the appellee that the effect of the disposition of the remainder by the will is the same as if the testator had made no disposition of that part of his estate and had died intestate as to it. In the latter instance, it may be conceded that the intestacy would have taken effect as of the date of the testator's death and the persons then competent would have taken the estate subject to the prior life tenancies. But the manifest purpose of the testator was to change the effect of an intestacy occurring at his death, and to give his real estate to persons other than those who would be his heirs at that time, and hence he devised it, on the death of the life tenant, to those "who would then be entitled" and not to those "who are entitled" under the intestate laws of the state. If the testator had used the latter expression there would be some ground for the appellee's contention. But the language employed leaves no doubt as to the persons who were intended as his beneficiaries. We are of opinion that it was the intention of the testator, as disclosed by his will, to devise the two-thirds of the remainder of his real estate to those who shall be his heirs at the expiration of the particular estate, and not to those who were his heirs at the time of his death. The agreement among those who were heirs of the testator at the time of his decease did not create vested interests in them so as to authorize them to convey a good title to the defendant. The will created a contingent remainder in a class to be ascertained at the death of the surviving life tenant, and hence only those of the class living at that date will have an interest in the remainder and will be capable of contracting in regard to it. We cannot see that *Ralston's Estate*, 172 Pa. 104, 33 Atl. 273, has any application to the facts of this case.

The judgment of the court below is reversed, and in accordance with the terms of the case stated, judgment is now entered in favor of the defendant, and against the plaintiffs, for the sum of \$1,000.

(216 Pa. 604)

ALLES v. LYON.

(Supreme Court of Pennsylvania. Jan. 7, 1907.)

1. HUSBAND AND WIFE—TITLE BY ENTIRETIES—SALE OF WIFE'S INTEREST.

Where a husband and wife are owners by entirety of a lot in a city, and a municipal lien is filed against the wife alone, and judgment entered against her, a sale of the husband's interest under the lien passes no title.

2. SAME—TENANCY IN COMMON—WHEN CREATED.

Where a husband and wife hold an estate as tenants by entireties, and are divorced, the

tenancy does not thereby become a tenancy in common.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Husband and Wife, § 87.]

3. SAME — DIVORCE — RULE TO BRING EJECTMENT.

Where a husband and wife holding an estate by the entireties are divorced, the wife is not entitled to a rule to bring ejectment against the husband, and, if such a rule is allowed, the failure of the husband to appear is immaterial, as the record shows why ejectment cannot be brought.

Appeal from Court of Common Pleas, Allegheny County.

Action by Louisa Alles, formerly Louisa Reis, against David A. Lyon. Judgment for plaintiff. Defendant appeals. Reversed.

The plaintiff, Louisa Alles, was divorced from John P. Reis. Reis and the plaintiff held the land in question as tenants by entireties. Plaintiff claimed that after the divorce she bought the land in at a sale under a municipal lien, and that she had a full fee-simple title, covering the entire interest in the land. Other facts appear by the opinion of the Supreme Court. The court entered judgment for plaintiff for \$1,775. Defendant appealed.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

John W. Thomas, for appellant. W. H. Lemon, for appellee.

MITCHELL, C. J. It appears by the case stated that the husband and wife were registered owners by entireties of the lot in question when the municipal lien was filed against the wife alone. Judgment on it was entered against her only, and though the *levari facias* avers that it is issued "with notice to John P. Reis," the husband, yet, as said by the learned judge below, it does not appear that any such notice was given. As against the husband, therefore, the lien was a nullity, and the sale under it passed no title. *Simons v. Kern*, 92 Pa. 455; *Ferguson v. Quinn*, 123 Pa. 337, 16 Atl. 844. There is no question involved about attacking a judgment collaterally as the record shows the want of jurisdiction in the court to render such judgment. When, therefore, the wife bought at the sale, she bought nothing that she did not have before, her own right of survivorship. But even if the whole title had been divested by the sale she would have bought under an obligation as trustee for her husband as co-tenant, and could not have ousted him in that way. She therefore acquired nothing as against him by the sale.

Coming now to the main question in the case, we are of opinion that the court below erred in holding that the estate by entireties was severed by the subsequent divorce of the husband and wife. The subject is very bare of authorities. The law as to divorce prevented this question from arising in the earlier English cases, and in the few cases re-

ported in this country the decisions, all more or less affected by statutes, are at variance, with no clear preponderance in either way. *Lewis' Appeal*, 85 Mich. 340, 48 N. W. 580, 24 Am. St. Rep. 94, may be regarded as the best discussion in favor of the view that the nature of the estate is not changed, and *Ames v. Norman*, 36 Tenn. 683, 70 Am. Dec. 269, as the best on the other side. The question has not previously come before this court, and we are left to decide it on general principles. An estate by entireties is one held by husband and wife by virtue of title acquired by them jointly after marriage. Being regarded as one person in law they take not in parts or shares, like joint tenants or tenants in common, but each takes the whole, or in the ancient phrase they are seized, not per mie et per tout, but per tout only. Incident to this estate as to joint tenancy is the right of survivorship, with this difference, that on the death of husband or wife the survivor takes no new title or estate; he or she is in possession of the whole from its inception. It was early held that our act of March 31, 1812 (5 Smith's Laws, p. 395), abolishing survivorship in joint tenancy, did not affect estates by entireties. *Robb v. Beaver*, 8 Watts & S. 107 (111); and the same view has been taken of the married women's acts of April 11, 1848 (P. L. 536), and later. *Diver v. Diver*, 56 Pa. 106; *Bramberry's Est.*, 156 Pa. 623, 27 Atl. 405, 22 L. R. A. 594, 36 Am. St. Rep. 64.

The general subject of estates by entireties is learnedly discussed by Lewis, C. J., in *Stuckey v. Keefe's Ex'rs*, 26 Pa. 397, our leading case. It was there held that a conveyance to husband and wife, their heirs and assigns, "as tenants in common, and not as joint tenants" created an estate by entireties, and the opinion was strongly expressed that the estate arose by virtue of "a rule of law founded on the rights and incapacities of the matrimonial union" and therefore that the intention was immaterial. No subsequent case has gone so far, and in *Merritt v. Whitlock*, 200 Pa. 50, 49 Atl. 786, it was said that it may be considered as still an open question whether husband and wife may not, since the married women's property acts, take as well as hold in common if that be the clear actual intent, notwithstanding the presumption to the contrary. The argument for the change by divorce from an estate by entireties to a tenancy in common rests on the assumption that as the basis of the estate is the unity of person, a severance of that unity carries with it a severance of the estate; that as after divorce an estate by entireties could not be created between the parties it cannot be continued. But this view fails to give due weight to the rule that the quality of the estate is determined at its inception. It arises, not out of unity of person alone, but out of unity of person at the time of the grant. "If an estate be made to a man and woman and their heirs, before marriage, and

after [wards] they marry, the husband and wife have moieties between them." Coke Litt. 187b. And see 2 Cruise's Dig. 494, and 2 Plowden, 483, cited in *Stuckey v. Keefe's Ex'rs*, 26 Pa. 397. No stronger illustration could be given. If subsequent unity of person cannot change a tenancy in common to one by entireties, e converso a subsequent severance of the unity of person ought not to change a tenancy by entireties to one in common. In entire accordance is our latest case (*Hetzel v. Lincoln*, 216 Pa. 60, 64 Atl. 866), where a conveyance to husband and wife "jointly" was held to create an estate by entireties which continued with its incident of survivorship, although the husband had conveyed his interest to the wife as "the undivided one-half" and they had subsequently executed a mortgage in which the conveyance by the husband was referred to. A creditor had obtained a judgment against the husband, and after his death sought to revive it against his administrator, with notice to the wife as terre-tenant, on the ground that they had become tenants in common, but it was held that he could take nothing. "Whatever may have been the intention of the husband" said our Brother Brown, "the right of the wife was fixed by the deed from Reed. By it each held an entirety and upon the death of either the estate would vest absolutely in the other as the survivor. The husband conveyed nothing to the wife that she would not have enjoyed if she survived him, which she did." The decisions and the statutes referred to supra, go to show that in regard to the nature and qualities of an estate by entireties the general rule of law applies that they are determined at the inception of the estate.

In the present case, therefore, the parties took an estate by entireties at the time of the grant. By it the husband took a vested estate to which was incident a right of survivorship. That estate could not be divested, or stripped of any of its incidents except by express statutory provision existing at the time of its inception. The divorce severed the unity of person for the future, but it could not avail retrospectively to sever the vested unity of title and possession. The learned court below gave much weight to the judgment of rule absolute to bring ejectment. But the rule was a nullity. By the terms of the statute it was a rule to bring ejectment or "show cause why the same cannot be so brought." The petition for the rule disclosed that the parties held by entireties, and that the petitioner had no other or better title than the husband upon whom the rule was asked. Without regard to actual occupation the husband was in legal possession and could not bring ejectment against his co-tenant. *Martin v. Jackson*, 27 Pa. 504, 67 Am. Dec. 489; and the court could not make a vain order requiring him to do what the law determined he could not do. The petitioner's occupation could not be adverse, because no matter how long continued it was in entire accordance

with her husband's title as well as her own. The act of 1889 is an act to facilitate the settlement of disputed or disputable claims to land. But it was not intended to overturn the settled principles of law. As the petition showed that the rule asked for, even if granted, would have to be discharged, the rule should not have been granted. Ordinarily questions of title await the return of the rule for disposition. *Titus v. Bindley*, 210 Pa. 121, 59 Atl. 694; *Fearl v. Johnstown*, 218 Pa. 205, 65 Atl. 549. But in the present case that was unnecessary, and the default provided for in the statute, the failure to appear and answer, was immaterial, because the face of the record already answered the requirement of the rule by showing "cause why the ejectment cannot be so brought."

Judgment reversed, and judgment directed to be entered for defendant.

(216 Pa. 630)

In re THIEL COLLEGE'S APPEAL.

(Supreme Court of Pennsylvania. Jan. 7, 1907.)
COLLEGES AND UNIVERSITIES — CHARTERS — AMENDMENT.

Under Act April 29, 1874, § 42 (P. L. 106), giving courts the right to grant amendments to charters of colleges and universities, the court of common pleas has no jurisdiction to change the corporate location of a college from one county to another, particularly where it appears that the college was located permanently in the first county under a contract, and the parties to the contract objected to the change of location.

Appeal from Court of Common Pleas, Mercer County.

In the matter of the petition of Thiel College to amend its charter. From a decree dismissing the petition, the college appeals. Affirmed.

Petition to amend charter. On June 5, 1905, Thiel College of the Evangelical Lutheran Church, a corporation, created by special act of assembly, approved April 14, 1870 (P. L. 1167), filed its petition, together with a copy of the charter act, in the court of common pleas of Mercer county, asking for an amendment to its charter which would permit the board of trustees to change the location of the said Thiel College from Greenville, Mercer county, Pa., to or near Greensburg, Westmoreland county, Pa. The petition contained the necessary corporate action taken by the board of trustees May 25, 1905, reciting the provisions of the charter as to the location of the college at Greenville in 1871; the sense of the board that by reason of its location said college has not been successful; the action taken by the Pittsburgh Synod of the Evangelical Lutheran Church, the visitatorial body having power to elect the trustees of the said college, which favored the removal of the college from Greenville under proper conditions; the offer made by the citizens of Greensburg and Westmoreland county of \$100,000 in cash, and certain valuable real estate amounting to \$40,000 more, to secure

the location of the college there; the action of the board of trustees accepting the said offer and the approval of the same by the Pittsburg Synod and the resolution of the board that under these facts the best interest and welfare of the college demand its removal from Greenville, Mercer county, Pa., at or near Greensburg, Westmoreland county, Pa.; and praying for the necessary amendment. To this petition John R. Packard and L. L. Keck on July 8, 1905, filed an answer or exceptions on behalf of themselves and such other citizens of Greenville, Pa., standing in the same relation to Thiel College, alleging that the trustees of said college in consideration of about \$15,000 agreed to permanently locate the said college at Greenville, Pa., and that said Packard and Keck were contributors to the said fund; that the said permanent location was made and the money paid; that the said trustees had attempted to remove the said college and exceptants had filed a bill in equity and obtained a perpetual injunction restraining the same, which was affirmed by the Supreme Court of Pennsylvania, and denying the necessity or the right under the law of the removal of the said college. The court dismissed the petition.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

J. Boyd Duff and W. A. Griffith, for appellant. Q. A. Gordon, Templeton, Orr & Whiteman, W. C. Pettit, H. L. Keck, and J. J. Donaldson, for appellee.

PER CURIAM. We do not go so far as to hold with the learned judge below that the court was without power to grant amendments to a college charter. There may have been reasons why the Legislature was willing to authorize courts to grant amendments, although they could not have granted the charters themselves, and the language of the statute is too explicit on this subject to be lightly disregarded. "As often as the corporations named in the first class specified in the second section of this act, including all such corporations now in existence, and colleges and universities shall be desirous of improving, amending or altering the articles and conditions of their charter, it shall and may be lawful for such corporations respectively, in like manner, to specify the improvements, amendments or alterations which are or shall be desired, and exhibit the same to the court of common pleas of the proper county in which said corporation is situated," etc. Act April 29, 1874, § 42 (P. L. 106). Colleges and universities would not have been included by the general words referring to the second section, and their express mention in enumerating the charters which may be amended by the courts is a plain legislative grant.

But the court was clearly right in holding that the amendment desired in this case could

not be granted. The power to amend is not unlimited. The court is to be satisfied that "such alterations are or will be lawful and beneficial, and do not conflict with the requirements of this statute or of the Constitution." One of the statutory requirements is that the petition shall be presented to the court of common pleas "of the proper county in which said corporation is situated," which is Mercer county. But whether the court of Mercer county can authorize a change by which the college shall thereafter be situated and have its corporate domicile in Westmoreland is, to say the least, doubtful.

But a still more potent objection, not at all doubtful, is that the college was located permanently in Mercer county, in pursuance of a contract to which the present objectors were parties. Their standing to object was affirmed when the case was here last. *Packard v. Thiel College*, 209 Pa. 349, 58 Atl. 670. Decree affirmed.

(216 Pa. 596)

In re MUSGRAVE'S CASE.

(Supreme Court of Pennsylvania. Jan. 7, 1907.)

ATTORNEY—ADMISSION TO BAR—NECESSITY OF EXAMINATION.

Under rule 36 of the court of common pleas of Allegheny county, requiring a registered applicant for admission to the bar to undergo an examination first or present the certificate of the state board of law examiners that he has passed the examination required by the rules of the Supreme Court, a certificate from the state board of examiners that the person named is a member in good standing of the appellate court of another state, and has practiced in a court of record of that state for at least five years, and is of good moral character, without stating that he has passed the examination, will not entitle him to admission.

Appeal from Court of Common Pleas, Allegheny County.

Petition of John H. Musgrave for admission to the bar. From an order refusing a rule to show cause, he appeals. Affirmed.

The petition was as follows: "The petition of John H. Musgrave of the city of Pittsburg, in said county, respectfully represents: That he was born in the city of Pittsburg aforesaid in 1871, and resided in said city until 1894, and after an absence of 10 years returned in 1904. That he is a freeholder in his own right, and a large holder of real estate in the right of his wife, in said county and state. That he attended the common schools of the said city of Pittsburg, the preparatory department of the Western University of Pennsylvania, and studied under a private tutor. After such preparation he entered the law department of Yale University, where he graduated in 1893, after which he returned to Pittsburg, and in 1894 moved to the city of Chicago to reside. That he resided in the said city of Chicago, Ill., from 1894 to 1900, and in the city of Minneapolis from 1900 to 1904. That he was in actual practice of the profession of law in said cities and

states for and during the said period of nine years, being admitted to practice law by and in the courts of last resort of said states, and is still in good standing therein. That in March, 1904, he returned to the said city of Pittsburg on account of business interests and was duly admitted to practice law before the Supreme Court of Pennsylvania, the Superior Court of Pennsylvania, and the District and Circuit Courts of the United States for the Western District of Pennsylvania, by reason of a certificate issued by the state board of law examiners, according to rule 10 of the rules governing admission to practice law in the Supreme Court of Pennsylvania. That in December, 1904, he appeared before the examining board of Allegheny county for a certificate to practice law in the courts of Allegheny county, but was denied the right of examination on the ground that your petitioner did not intend to reside permanently in said county, though then a legal resident. That on June 8, 1906, he appeared before the board of law examiners of Allegheny county, composed of Messrs. E. C. Chalfant, George P. Herriott, E. L. Mattern, John S. Wendt, Charles P. Orr, John P. Hunter, William M. Hall, and R. A. Balph, and presented to said board a certified copy of the certificate of the state board of law examiners before referred to, and requested that said board of law examiners of Allegheny county grant him a certificate recommending his admission to practice law in the several courts of record of Allegheny county, according to rule 36 hereinbefore referred to; but he was denied said certificate on the ground that for the last year and one-half he was not in the active practice of the law, being a resident of Pennsylvania. That said board of law examiners of Allegheny county refused to recognize the certificate issued by the said state board of law examiners in law, claiming that such certificate does not comply with the rules of court in regard to the admission of attorneys. Your petitioner has also attached hereto several letters of residents of Pittsburg and vicinity, showing that he is a person of good moral character, and of good repute in this community. Wherefore, by reason of the premises, your petitioner prays that this honorable court grant a rule upon the said board of law examiners to show cause why the said board should not recommend or move the admission of the said John H. Musgrave to practice law in the several courts of Allegheny county." The certificate of the state board was as follows: "The state board of law examiners hereby certifies that John H. Musgrave, Esq., of Allegheny county, has furnished satisfactory evidence that he is a member in good standing of the bar of the Appellate Court of last resort of the state of Illinois, that he has practiced in a court of record of that state for at least five years, and that he is of good moral character. The board, therefore, recommends that he be admitted

to the bar of the Supreme Court of Pennsylvania."

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

Joseph A. Langfitt and H. W. McIntosh, for appellant. E. C. Chalfant and Chas. P. Orr, for appellees.

MITCHELL, C. J. The rules of court for admission to the bar of Allegheny county, in the regular and usual course, require, inter alia (1) registration as a student, after an examination as to proficiency in preliminary studies, or an attendance at some reputable college which will be accepted as an equivalent for such examination (rule 35); (2) having been so registered the applicant must have served a regular clerkship in the office of an attorney or judge of the county for three years, or its prescribed equivalent; and (3) that he shall have undergone "an examination in the principles and practice of law and equity, or, in lieu thereof, shall present to the board the certificate of the state board of law examiners that he has passed the examination required by the rules of the Supreme Court, relating to admission to the bar of that court, and has been recommended by them for admission to the bar of the Supreme Court, and shall file with the prothonotary * * * a certificate signed by all the examiners present at his examination or in case of the presentation of a certificate of the state board, by all those present at the meeting of the board which passes thereon, that he is qualified for admission to the bar, and that they have received satisfactory evidence of his good moral character. Each examination shall consist partly of written questions to be answered in writing by the student, which questions and answers shall be reported to the court if required. The specific subjects and studies upon which the examination shall be held shall be the same as those designated from time to time by the Supreme Court for the examination of candidates for admission to the bar of that court" (rule 36).

This is the regular and ordinary course, and admission it will be seen is based on the ultimate requirement of an examination in the principles and practice of law and equity. Until quite recently the courts insisted on such examination by their own board, and the recent amendment of rule 36, by which the certificate of the state board of examiners is accepted as an equivalent, is a concession in relief of students from the burden of a double examination, by the state and by the local board, on the same subjects and for the same purpose. But from the provision for written questions and answers, and for the specific subjects and studies, as well as from the general intent, it is manifest that the rule both in its original and its amended form requires an examination, in

the ordinary meaning of that word, to test proficiency in the principles and practice of law and equity, not a mere inspection by the state or the county board of certificates from other courts. Such inspection in exceptional cases of practitioners from other courts is provided for in the next rule, 37, as follows: "Any person admitted to practice in other courts of this or other states who shall have been in actual practice for five years within the six years immediately preceding his application, and who shall have satisfied the board of examiners of this fact and of his good moral character and professional standing, may without previous registration appear for final examination for admission to the bar; provided, however, that when, in the unanimous opinion of the board, the moral character, professional standing and qualifications of the applicant are such as to render an examination unnecessary, he may on filing in the prothonotary's office a certificate to this effect, signed by all the members of the board, present himself for admission on motion." These rules prescribe the conditions and methods by which admission can be had to the bar of Allegheny county. The appellant has not brought himself within any of them. There is no averment in his petition that he has passed an examination by either the state or the county board in the principles of law and equity, nor, indeed, is there any averment of such an examination by anybody at any time, and the statement of graduation at the law department of Yale University is lacking in precision of dates to show how much time he passed there. He has not therefore complied with the requirements of rule 36 with regard to students applying for admission from the county of Allegheny.

Appellant claims to come under rule 36 by virtue of his certificate from the state board. Turning to the certificate, it appears to be only that he "has furnished satisfactory evidence that he is a member in good standing of the bar of the Appellate Court of last resort of the state of Illinois, that he has practiced in a court of record of that state for at least five years, and that he is of good moral character." This is not the certificate contemplated by rule 36, which as already said is intended only to accept the result of an examination to test qualifications as to legal knowledge by the state board as an equivalent for examination for the same purpose by the local board as previously required. The rule and the certificate provided for in it have no reference to the admission of attorneys from other courts of this or other states. That subject is governed by rule 37 already quoted. Appellant makes no claim that he comes within that rule.

It would have been better practice to grant the rule. Any question of fact possibly arising could then have been reached by depositions and the record would have been put in more regular shape, though the rule would

have had to be discharged. But no error was committed of which appellant has any cause to complain.

Appeal dismissed.

(217 Pa. 17)

SAWYER et al. v. CITY OF PITTSBURG et al.

(Supreme Court of Pennsylvania. Jan. 7, 1907.)

1. MUNICIPAL CORPORATIONS — CONTRACTS — INJUNCTION.

A municipal contract will not be enjoined because the highest of the three bidders was a subsidiary company of the successful bidder, where no fraud is shown, and the only evidence to establish such alleged fact was testimony based on hearsay.

2. SAME—FRAUD.

Where two companies are bidders for a municipal contract, the mere fact that one company is called subsidiary to another company, and is controlled by the same interest, does not of itself show fraud.

Appeal from Court of Common Pleas, Allegheny County.

Bill by Harry C. Sawyer and E. H. Stoner against the city of Pittsburg and others. Decree for plaintiffs, and defendant the Welsbach Street Lighting Company of America appeals. Reversed.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

Chas. E. Morgan, Alex. A. Patterson, McKee & Mitchell, Joseph M. Swearingen, and Wm. Findlay Brown, for appellant. George R. Wallace and Thomas Watson, for appellees.

MITCHELL, C. J. This was a taxpayer's bill to enjoin the municipal authorities of the city of Pittsburg from carrying out a contract for lighting the streets of that city. The basis of the bill was fraud, charged in every detail that the ingenuity of suspicion could suggest, including, *inter alia*, that the ordinance under which the contract was made was illegal and void, that the specifications advertised for the work to be done were made so vague, indefinite, uncertain, and illegal that it was impossible for a prospective bidder to form an accurate idea of what would or might be required of him, and therefore free and open competitive bidding was rendered impossible. The particulars of these defects in the specifications were set forth in detail in separate paragraphs of the bill. As, however, the learned court below found that none of these allegations were true, it is unnecessary to do more than to refer to them in this general way to show the nature of the controversy.

The bill then set out that, when the bids were opened, there was one by the Welsbach Company at \$27.50 per light, one by the Cleveland Vapor Light Company for \$25.50 per light, and one by the Sun Light Company at \$28.50 per light, and the contract was awarded to the Welsbach Company. It then aver-

red that there was collusion with reference to said specifications and bids and the award to the Welsbach Company; that the collusion was evidenced, not only by the specifications themselves, which were so drawn as to discourage bidders, but also by the fact that the bid of the Sun Light Company of \$28.50 was a collusive bid, the said company being in fact a subsidiary company of the Welsbach Company and controlled by it; that the said bid was evidently made for the purpose of producing the impression that there was competition and that the contract was not let to the highest bidder. A further evidence of collusion was averred in the matter of the bid of the American Street Lighting Company of Baltimore, which did not arrive in time to be considered. But the court found against this charge, and also found that the contract was let to the Welsbach Company as the lowest responsible bidder, and "there was no sufficient evidence that it was not such."

The court did find, however, that the contract was void, and the bid of the Welsbach Company was collusive because the higher bid was by the Sun Light Company, a "subsidiary" company, and under the control of the Welsbach. The whole case turns on this finding, and the most searching examination fails to show that it has any substantial basis to rest upon. It is said by the court below: "The only testimony upon the subject was that of Mr. Newbold." His testimony thus referred to was as follows: "Q. Isn't it a fact, Mr. Newbold, that practically competition for street lighting and contracts such as is let by the city of Pittsburg is limited to the Welsbach Company, the Cleveland Company and your company? A. Yes; I think that is so. Q. So that, when those three bidders bid, you could not look for much competition outside? A. No, sir; I do not think you can. Q. Either heretofore or the present time? A. I will say at the present time." By Mr. Wallace: "Q. What do you mean by saying that there are only three competitors, when you mentioned the Pennsylvania Globe and Sun Light Company as other companies in this business? A. We understand that the Pennsylvania Globe, the Sun Company, and the New York & New Jersey Gas Light Company are really companies that are subsidiary to the Welsbach Company, controlled by the same interests."

The whole case rests upon that testimony. The witness was the secretary of the American Street Lighting Company, the rival company whose bid failed to get in soon enough, and he was not only not shown to have any competent knowledge of the facts as to the Sun Light Company, but it affirmatively appeared that he had not. In another part of his testimony he was asked: "Q. Do you know anything about the Sun Light Company? A. Only from hearsay. Q. Do you know anything about its relation to the Welsbach Street Lighting Company of Amer-

ica? A. I have heard it was a subsidiary company." But, assuming that the witness had knowledge and that what he testified to was true, the fact that there were only three companies who could be considered as active competitive bidders for that work is not unprecedented, as there are many kinds of large business undertakings in which the field of competition is necessarily limited. Nor do calling a company "subsidiary" and the fact that it is controlled by the same interests show fraud. *Potts v. Philadelphia*, 195 Pa. 619, 632, 633, 46 Atl. 195.

There was no question in the case as to the weight of a responsive answer, or whether it was overcome by testimony of the witness Newbold brought out by appellant itself. The case never got that far. If there had been no answer at all, the complainant's case would have failed for want of evidence. Fraud is never presumed, and suspicion is not proof nor is opportunity guilt. The case depended on collusion in fact, and of that there was no proof at all, nothing but an unwarranted inference from insufficient evidence.

The decree is reversed, the injunction dissolved, and the bill dismissed, with costs.

(216 Pa. 577)

STRASSER v. STECK.

(Supreme Court of Pennsylvania. Jan. 7, 1907.)
VENDOR AND PURCHASER—SALE OF OPTION—
LIABILITY OF PURCHASER.

One owning an option on coal land agreed "to grant, bargain and sell all the coal and land owned and optioned by him," and that, in consideration thereof, the second party to the contract should pay the sum of \$1 for the option, and on his election and notice thereof should pay the sundry sums between the prices mentioned in the option to individual farmers, and the sum of \$40 per acre for every acre which may be taken up; when deeds were delivered from the present owners, the payment to the farmers to be as stipulated in the option. The purchaser thereafter accepted the option and notified the seller thereof, but failed to exercise his right to purchase from the farmers after he became the owner of the option. *Held*, that the seller of the option was entitled to recover the difference between the option price and \$40 per acre.

Appeal from Court of Common Pleas, Allegheny County.

Action by L. S. Strasser against Amos Steck. Judgment for plaintiff, and defendant appeals. Affirmed.

The contract between the two parties was as follows: "This optional agreement, made February 21, 1901, between L. S. Strasser, of New Kensington, Westmoreland county, Pennsylvania, party of the first part, and Amos Steck, of Pittsburg, Pennsylvania, party of the second part, witnesseth: That said party of the first part, for the consideration hereinafter mentioned, covenants and agrees to grant, bargain and sell to the said second party, all the coal and land owned and optioned by him, said party of the first part, situate in Jefferson and adjoining townships,

in the county of Washington, state of Pennsylvania; said options calling for an acreage of 2,237 acres, more or less, and to convey the same to said party of the second part, or his assigns, by deeds of general warranty in fee simple and free of all incumbrances, provided that on or at any time before March 2, 1901, said second party gives to said first party notice in writing that the said second party elects to accept the property described in said options, a schedule of which is hereto attached and made part hereof, said property being more particularly described in said options. In consideration whereof said second party, for himself or his assigns, agrees to pay to said first party the sum of \$1.00, the receipt whereof is hereby acknowledged, in full for this option, and in the event of this agreement being absolute by the election and notice above mentioned, then and not otherwise, said second party agrees to pay said party the sundry sums between the prices mentioned in said options to the individual farmers and the sum of \$40.00 per acre for each and every acre which may be taken up, and to which good titles are to be had, payable as follows: When the deeds are delivered from the present owners the payments to the farmers to be as stipulated in the options and the same may be determined by surveys. This agreement to be binding upon and inure to the benefit of the heirs, executors, administrators and assigns of the parties hereto."

On March 15, 1901, Steck notified Strasser in writing of his election to take and accept the coal franchises and privileges, which had been granted by the landowners under the options. Steck, however, failed to exercise his right to purchase from the farmers, and denied any liability to Strasser. It appeared that the amounts mentioned in the various options ranged from \$28 to \$35 per acre.

Plaintiff presented the following point: "(1) That if, prior to and at the time of the making of the contract between the plaintiff and defendant, the defendant directed the plaintiff that, upon the making of deeds of conveyance for the several tracts of coal referred to in plaintiff's statement of claim, such deeds should be made directly from the several owners to the defendant, and if the jury further find that the defendant continued from that time down to August 3, 1901, to state to the plaintiff that the deeds should be drawn, and that the plaintiff acquiesced therein, then such evidence is to be construed as a construction of the contract entered into between the parties and defendant. Answer: Affirmed."

The court charged in part as follows: "If you find for the plaintiff, then he is entitled to recover what he lost. He alleges that he lost these options, as I understand the testimony, by reason of this conduct on the part of the defendant; that is, postponing the carrying out of this during the summer, and then towards the end of the options (I don't

remember how soon they expired, but my recollection is within a month from August 2d) that he then broke his contract, and by reason of that the plaintiff lost his rights under the options. If that be true, if you find that, by reason of a breach of this contract on the part of the defendant, the plaintiff lost all rights that he had under those options, and was compelled to surrender them, then he is entitled to recover what he lost, and what he lost was the value to him of those contracts, the money that he would make out of those contracts provided the defendant had carried out his part of this contract of purchase. That means, ordinarily, the difference between the purchase price and any expenses which were attached to it by reason of the plaintiff's duties in carrying out his contract. If you find that the plaintiff is entitled to recover because the defendant made an unreasonable demand, and, because of the plaintiff's inability to comply with that unreasonable demand, he declared the contract off, then, if the plaintiff is entitled to recover, he is entitled to recover whatever he lost. If he lost these options because of that, then he is entitled to recover the value of those options to him, provided they had been carried out."

Verdict and judgment for plaintiff for \$20,-358.14. Defendant appealed.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

W. B. Rodgers, H. A. Davis, and Paul H. Galthier, for appellant. Sol. Schoyer, Jr., and John P. Hunter, for appellee.

ELKIN, J. If the agreement entered into between the parties to this action was a contract for the sale of land, the judgment must be reversed; if it was a contract for the sale of options, the case was properly disposed of in the court below. Prior to February 21, 1901, when the contract in question was made, appellee had procured options from 15 landowners giving him the right to elect to purchase the coal underlying their respective properties within certain limits and at certain fixed prices. In addition to the optioned coal, he owed or controlled a couple of tracts in his own right. The appellant had been engaged in buying and selling coal lands, coke plants, and coal operations for a long period of years, and was familiar with the prevailing method of handling such deals through options. He knew that the optioned coal did not belong to appellee, and that the only interest Strasser had to sell was his right or privilege to elect to purchase under his options. This, however, was a substantial interest in land which could be conveyed to a vendee. *Kerr v. Day*, 14 Pa. 112, 53 Am. Dec. 526; *People's Street Railway Company v. Spencer*, 156 Pa. 85, 27 Atl. 113, 36 Am. St. Rep. 22. Appellee had the legal right to sell his options. Did he do so? The con-

tract itself must furnish the answer. We think the second clause clearly indicates that it was a contract to sell the options. This clause is as follows, to wit: "In consideration whereof said second party for himself, or his assigns agrees to pay to said first party the sum of one (\$1.00) dollar, the receipt whereof is hereby acknowledged, in full for this option, and in the event of this agreement being absolute by the election and notice above mentioned, then and not otherwise, said second party agrees to pay said first party the sundry sums between the prices mentioned in said options to the individual farmers and the sum of forty (\$40.00) dollars per acre for each and every acre which may be taken up and to which good titles are to be had, payable as follows: When the deeds are delivered from the present owners, the payments to the farmers to be as stipulated in the options and the same may be determined by surveys." Here, then, in express terms, it is provided that when the agreement becomes absolute by election and notice, which were subsequently made and given, appellant agreed to pay appellee, not \$40 an acre, the full price agreed upon for the coal, but the difference between the optioned price and \$40 per acre. In other words, this difference represented the profit and compensation of the appellee in taking up the options. Again, it is provided that, when the deeds are delivered, not by appellee to appellant, but from the "present owners," the "farmers" are to be paid "as stipulated in the options." Paid by whom? Clearly by Steck, the purchaser of the options. His covenant was to pay, first, Strasser, the difference between the prices fixed in the options and \$40 per acre, and, second, the farmers according to the terms of the options—all of which is inconsistent with the contention that the optional agreement was a contract whereby appellee agreed to sell and convey to appellant the coal lands under option.

If Steck was contracting to purchase the optioned coal land from Strasser, why did he insert in the agreement the covenant about the delivery of the deeds from, and the payment of the purchase money to, the "farmers"? It is true appellee did, in the first clause of the agreement, covenant to grant, bargain, and sell the coal land owned and optioned by him, and these words are ordinarily used in the conveyance of absolute title; but they may be used in the conveyance of any estate, or interest, which may be transmitted to a vendee, and it follows that appellee had such an interest under his options as could be granted, bargained, and sold. In the present case the legal effect of the whole contract was to grant, bargain, and sell options. In the options with the landowners, it was provided that the conveyance should be by "good and sufficient deed," while in the optional agreement between appellant and appellee the covenant was to convey by deed of general warranty free

of all incumbrances. It is strongly urged that Steck by this covenant contracted for the warranty of Strasser, and not for that of the landowners. If this covenant stood alone, without explanation or qualification by other parts of the contract, there could be no doubt as to the correctness of this position. It, however, must be read and understood in connection with the whole contract and the subject-matter about which the parties were contracting. When so construed, there can be no doubt that the intention of the parties as gathered from the four corners thereof was that, if any landowner failed to convey to appellant by deed of general warranty free of all incumbrances, or other satisfactory conveyance, appellee would not be entitled to receive the difference between the optioned price and \$40 per acre as his compensation for that option. If the title was not good according to the covenants of appellee, the appellant might refuse to elect to take, and, in that event, appellee would not be entitled to receive the consideration or compensation provided for him in the optional agreement. Throughout the whole transaction, appellant knew that appellee did not own the coal lands, and only had the options to purchase them, and this is what he bargained for. When appellant, on March 15, 1901, notified appellee in writing of his election to take and accept the coal franchises and privileges, which had been granted by the landowners under the options, the optional agreement was exercised, and the rights and liabilities of the parties thereto were fixed thereby. He then became the equitable owner of the options, and could enforce his rights therein, not only against appellee, but also against the landowners. Frick's Appeal, 101 Pa. 485. If he failed to exercise his right to purchase after he became the owner of the options, the fault was his, not that of appellee. This being our construction of the contract, we can see no error in the submission of the case to the jury by the learned trial judge in the court below as to the measure of damages and all other questions involved in the controversy.

Judgment affirmed.

(217 Pa. 25)

WHITE v. TURNER.

(Supreme Court of Pennsylvania. Jan. 7, 1907.)

INTERPLEADER—STATUTORY SUBSTITUTE—ISSUES—BANKRUPTCY—ACTION BY TRUSTEE—FRAUDULENT PREFERENCES.

The contractors of a school building gave an order on the school board to a subcontractor, which was accepted by the board. Thereafter the contractors went into bankruptcy, and their trustee demanded the money represented by the order as an illegal preference. The money was paid into court. *Held* that, as the board by payment into court had declined to raise such questions between itself and the subcontractor, the only question before the court was whether the contractors were insolvent when they gave

the order, and whether the subcontractor knew it.

Appeal from Court of Common Pleas, Allegheny County.

Action by Scott A. White against A. M. Turner, trustee. Judgment for plaintiff, and defendant appeals. Affirmed.

At the trial it appeared that Jackson & Fulton were general contractors for the building of a schoolhouse, and that Scott A. White was a subcontractor for the roofing of the building. On October 7, 1901, Jackson & Fulton gave to Scott A. White an order on the school board for \$4,000. This order was accepted. Within four months from the giving of the order Jackson & Fulton went into bankruptcy, and A. M. Turner was appointed their trustee. The latter demanded the amount of the order from the school board, but was refused. The board paid the money into court. At the trial counsel for plaintiff offered in evidence the records of common pleas court, No. 3, at No. 286, February term, 1903, in the case of Scott A. White v. Homewood school board on this order, for the purpose of showing that the result of this conditional order was litigation against the Homewood school board. Objected to as incompetent and irrelevant. Objection sustained and bill sealed for defendant. Mr. Dalzell: "I propose to show by witness that he had a contract for the roofing of the Homewood school, and, further, that he completed that contract. That he received an order from the parties with whom he had the contract on the school board for the contract price of the roof; that the order was presented to the school board, and by it accepted. And I propose to offer in evidence the contract between this witness and Jackson & Fulton, the general contractors, as well as the accepted order. This for the purpose of showing Mr. White's right to the fund which has been paid into court." Objected to: First, as incompetent, irrelevant and immaterial generally. Second, it sets up a new contract between the school board and the plaintiff that is without consideration, and which by the pleadings has been the cause of litigation against the school board. The school board had no authority to make the contract, and its acceptance, therefore, was ultra vires and void. Third, because under the pleadings the offer raises a mixed question of law and fact, and is therefore too general. Objection overruled, and bill sealed for defendant.

Argued before MITCHELL, C. J., and FELL, MESTREZAT, ELKIN, and STEWART, JJ.

Robert B. Ivory, for appellant. R. H. Hawkins, for appellee.

PER CURIAM. This was a feigned issue to determine the right to a fund in court. The general contractors for a school building made a subcontract with plaintiff for part

of the work, and gave him an order on the school board which the board accepted. Subsequently the general contractors went into bankruptcy, and their trustee demanded the money for plaintiff's work on the ground that the order was an illegal preference. The board paid the amount into court. The questions of consideration and of a new contract by the board, ultra vires, argued by appellant are not in the case. The board by payment into court declined to raise them, and the appellant is not in position to do so. And the evidence as to litigation against the school board was irrelevant for the same reason. At the trial, therefore, there was nothing in issue but the alleged illegal preference. That depended on whether the contractors were insolvent when they gave the order, and whether plaintiff knew it at that time. The jury found these facts in plaintiff's favor.

Judgment affirmed.

(217 Pa. 20)

MAHONEY v. PARK STEEL CO.

(Supreme Court of Pennsylvania. Jan. 7, 1907.)

1. LIMITATION OF ACTIONS—AMENDMENT OF PLEADING—STATEMENT OF CLAIM.

A statement of claim may not be amended, where a new cause of action is thereby introduced, barred by limitations.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Limitation of Actions, § 545.]

2. PLEADING—AMENDMENT—CHANGING CAUSE OF ACTION.

In an action by a minor against his employer to recover for injuries received because of an alleged defect in a machine, plaintiff, after he has arrived at age, and more than three years after the accident, cannot amend his statement by charging a defect in a different machine, failure to instruct as to the dangers thereof, and failure to inspect.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, § 694.]

3. INFANTS—ACTIONS—ATTAINMENT OF MAJORITY PENDING SUIT.

A minor sued by his father, as next friend, for personal injuries, and pending the action came of age. Held, that the record could be so amended as to allow plaintiff to appear in his own right instead of through his father as next friend.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Infants, §§ 253, 254.]

Appeal from Court of Common Pleas, Allegheny County.

Action by Garrett Mahoney, for himself and as next friend of William Mahoney, against the Park Steel Company. From an order refusing motion to amend statement in case, plaintiff appeals. Affirmed.

The errors assigned were:

"(1) The court below erred in its conclusion, as follows: It is proposed now to amend the narr., and the amendments are herewith submitted. After an examination of the same we are of opinion that several new and distinct allegations of negligence are set up.

"(2) The court below erred in not allowing the amended statement to be filed.

"(3) The court below erred in not allowing William Mahoney to intervene as plaintiff."

Argued before MITCHELL, C. J., and FELL, MESTREZAT, ELKIN, and STEWART, JJ.

L. C. Barton, for appellant. John S. Wendt and Johns McCleave, for appellee.

ELKIN, J. This case is somewhat belated in coming here. The suit was instituted April 27, 1900, by the father in his own behalf and as the next friend of his minor son, who was injured while in the employ of the defendant company. The accident from which the injuries resulted for which damages are claimed occurred January 24, 1900. The original statement of claim was filed October 23, 1901, and the case came on for trial April 29, 1903, at which time a judgment of compulsory nonsuit was entered against the father, and the case was continued as to the son, for the purpose of permitting his counsel to move to amend the statement of claim. The bar of the statute of limitations could be interposed against any new cause of action after January 24, 1902. The minor son, appellant here, became of age April 27, 1903, and on May 2d following, through his counsel, moved the court for leave to intervene as a party plaintiff and to file an amended statement. This motion was refused on the ground that the amended statement set up new and distinct allegations of negligence after the statute of limitations had run. The case was still at issue as to appellant, however, on the original statement, when it came on for trial the second time, October 17, 1905. A jury was called and sworn, but no testimony was taken, whereupon the learned trial judge directed a judgment of compulsory nonsuit to be entered.

The first two assignments of error relate to the refusal of the court below to allow the amended statement of claim to be filed. It is conceded, as it must be under our authorities, that, if the amendment set up new causes of action, it was properly refused. An amendment to a declaration will not be allowed if a new cause of action is thereby introduced which is barred by the statute of limitations. *Wright v. Hart's Adm'r*, 44 Pa. 454; *Smith v. Smith*, 45 Pa. 403. A party cannot be permitted to shift his ground or enlarge its surface by introducing an entirely new and different cause of action, when, by reason of the statute of limitations, it would work an injury to an opposite party. *Trego v. Lewis*, 58 Pa. 463. To the same effect is *Fairchild v. Dunbar Furnace Co.*, 128 Pa. 485, 18 Atl. 444; *Grier v. Northern Assurance Co.*, 183 Pa. 334, 39 Atl. 10.

The real question to be decided on this branch of the case is whether the proposed amendment introduced new causes of action. In the original statement the negligence charged was that the defendant company had failed to maintain the rest or guide attached to the rolls at which appellant was working in

a reasonably safe and secure condition, but had allowed it to become loose so that when he stepped upon the guide, as was his duty, it turned or slipped by reason of which he was thrown upon the rolls which caught and crushed his leg and foot. The statement set out in detail the duties of the appellant in the performance of his work, the manner in which the accident occurred, and the defective machinery which caused it, charging in specific terms that the negligence relied on was the defective step or guide to the rolls. The proposed amended statement, not allowed by the court below, added four additional and distinct charges of negligence, to wit: (1) That the spanner, or handle, attached to the screw at the housen, was in a defective condition; (2) that the defendant company, through its employes, had proceeded to change the rolls while they were revolving, which was so dangerous as to make the attempt negligence; (3) that appellant had not been sufficiently instructed as to the dangers and risks incident to his employment; (4) that the defendant had neglected to properly inspect the rolls and machinery before appellant was put to work in operating the screw. It is quite apparent that the plaintiff was attempting to shift his ground by introducing new causes of action, which cannot be done. He was not willing to go to trial upon the negligence charged in the original statement; nor did he confine himself to a substantial restatement of the original cause of action, as in *Stoner v. Erisman*, 206 Pa. 600, 56 Atl. 77; nor did the amended statement specify and define what the original claim left general and indefinite, as in *Fricke v. Quinn*, 188 Pa. 474, 41 Atl. 737. An amendment may define or specify in different form the original cause of action, or one substantially and generally the same, but cannot shift or enlarge the ground by adding causes of action, substantially different from that originally specified. The only notice to the defendant company contained in the original statement was the defect in the rest or guide plate on the rolls. In the proposed amended statement defendant is charged with a defect in another and different machine, failure to instruct as to the dangers incident to his employment, and failure to inspect. These were not charged in the original statement of claim, and certainly new causes of action are set up on which the appellant now relies to recover. The amendment comes too late.

The third assignment of error relates to the refusal of the court to permit the plaintiff to intervene. We do not see that there was any necessity for a petition and formal order of court allowing him to intervene. Under the act of May 12, 1897 (P. L. 62), the right of action for such a wrongful injury accrues to the child, and also to the parent. It is therein provided that the "action shall be redressed in only one suit brought in the names of the parent and child." This action was properly instituted as provided by the act of Assembly.

Upon the arrival of the minor at full age, the action did not abate; but he had the right to move the court to amend the record, so that he could appear in his own right as a party plaintiff, instead of through his father as next friend, if he so desired. This could be done on motion, and the court should allow it when asked. It must not be overlooked, however, that, in this case, appellant was a party to the record from the date of the institution of the suit, and was a party at the time judgment of nonsuit was entered against him, and, since the entry of this judgment has not been assigned for error, it stands against him, and is the end of his case. At the time of the trial, he could have proceeded on the original statement; but, having failed to do so and the judgment of nonsuit having been entered and not assigned for error, he is precluded thereby.

Judgment affirmed.

(216 Pa. 316)

**OHIO RIVER JUNCTION R. CO. v.
PENNSYLVANIA CO.**

(Supreme Court of Pennsylvania. Jan. 7, 1907.)

INJUNCTION—REMOVAL OF SIDE TRACK.

A bill in equity alleged that plaintiff's railroad was built by defendant railroad company as a side track, partly on its own land and partly on a right of way of a firm for whose accommodation it was built. It was agreed that the road should be under the control of defendant, and removable at its option on 60 days' notice. The notice was given prior to the filing of the bill. Plaintiff had acquired the rights of a private firm to the property, and procured under Act April 4, 1868, a charter as a railroad, and applied for the appointment of viewers to fix the terms of a connection with defendant road, which proceeding had been pending for some time when the bill was filed. Defendant was enjoined from removing such siding. *Held* insufficient to sustain the bill, but on a finding by the court below that an immediate severance would cause injury to plaintiff the injunction would be continued for four months to allow plaintiff in its proceeding for the appointment of viewers to establish its rights.

Appeal of Court of Common Pleas, Beaver County.

Bill by the Ohio River Junction Railroad Company against the Pennsylvania Company. Decree for plaintiff, and defendant appeals. Modified and affirmed.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

James L. Hogan and John M. Buchanan, for appellant. William A. McConnel, for appellee.

PER CURIAM. Some very serious questions are suggested in this case, though they belong perhaps more properly for purpose of decision to another branch of the same controversy which is not yet before us. The plaintiff's railroad, or the contested part of it, was built by the defendant company as a side track of its own road, partly on its own land and partly on a right of way furnished by the Parks, a private firm for whose ac-

commodation and at whose instance it was constructed. By the agreement under which it was built it was to be and has continued under the management and control of the defendant, and subject to removal at its option at any time upon 60 days' notice. Such notice has been given, the time has expired, and, so far as any rights derived from the agreement are concerned, neither the Parks nor the appellee have any title available to sustain this bill. But the plaintiff has acquired the rights of the Parks in the property in question, and has procured a charter as a railroad under the act of April 4, 1868, P. L. 62. Claiming the right under the Constitution and the act of 1868 to make a connection with the defendant's railroad, it has filed a petition in the common pleas of Beaver county for the appointment of viewers to determine and fix the terms of the connection. The viewers were appointed more than three years ago, but, so far as we are informed, nothing further has been done, and the delay is not explained. It is in this proceeding that the questions alluded to supra will properly arise. Whether, under the circumstances, the plaintiff is entitled to the rights of a railroad as against the defendant; whether, conceding such title, a new railroad can, by simply inserting it in its charter route, take a siding which is the property and on the land of a senior railroad, these and other questions of a like character will apparently be involved in that proceeding.

So far as present rights are concerned the plaintiff has failed to sustain its bill, and in strictness it should be dismissed. But in view of the finding by the court below of the nature and extent of the injury that would be done by the immediate severance of the existing connection, we conclude to maintain the status quo by allowing the injunction to stand. The plaintiff, however, must push the other proceeding with diligence to have its rights determined. The injunction, therefore, is limited to four months from this date. So modified, the decree is affirmed.

(216 Pa. 331)

In re FORQUER'S ESTATE.

(Supreme Court of Pennsylvania. Jan. 7, 1907.)

1. WILLS—CONTINGENT CONDITIONS—CONSTRUCTION.

Testator stated in his will his intention to travel, and that, knowing the uncertainty of a journey, he bequeathed his real estate and personal property to his wife, and also all judgments owned by him and notes due, and, should anything befall him while away, all his estate and property of every kind, both real and personal, was set over to his wife for her sole benefit. *Held*, that the will was not merely contingent on testator's death during the journey, but continued operative after his safe return and his death thereafter.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, § 200.]

2. SAME—REPUBLICATION.

Where a will is contingent or conditional, and the contingency does not occur, its repub-

lication a few days before testator's death, in the presence of witnesses, relieved the will of the contingency expressed therein.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, §§ 200, 494-501.]

Appeal from Orphans' Court, Butler County.

In the matter of the estate of William A. Forquer. From a decree on appeal from the register of wills, Hugh J. Forquer and others appeal. Affirmed.

The following is the opinion of Galbreath, P. J., in the lower court. "William A. Forquer died on April 9, 1902, leaving to survive him a wife, Martha M. Forquer, the propo- nent, and two brothers, several sisters, and children of a deceased sister, who are the appellants. On November 10, 1882, which was about one year after his marriage to his said wife, being about to go on a journey to Montana to visit a sick brother, he wrote and signed a last will and testament, without attestation by subscribing witnesses. By profession he was an attorney at law, and for many years before his death was a prominent member of the bar of Butler county. The will, when made, was committed to the keeping of his said wife, while absent on the journey to Montana. On his return, according to the evidence, he made inquiry of his wife for the will, read it to her, and then placed it in his office safe, where it remained, except when taken out by him on occasion for examination, until a short time before his death, during his last illness, when, at his request, it was brought and read to him by his wife, in the presence of a young woman then residing in the house, and, after expressing satisfaction with its contents, he committed it to the custody of his wife until such time as it would be necessary to probate it. No question is raised as to its being his will duly executed at that time. The appellants contend, however, that the operation of the will was contingent on the testator's death during his said journey to Montana, and that, having returned in safety, it became inoperative, and was not therefore entitled to probate on his death occurring subsequently. The question, therefore, is whether the proposed journey, with its attendant dangers, was only the occasion which suggested the making of a will at that time, or was it, in the testator's mind, a reason for disposing of his property in a way not contemplated if he should return. In other words, was the will then made intended by the testator simply to bridge over the time of his journey, or did it look beyond that to the event of his death whenever and wherever it might occur?

"From the numerous cases cited by counsel, several principles or rules may be deduced which are to be observed in the construction of wills claimed to be contingent. These may be stated as follows: (1) If the contingency expressed in the instrument is referred to as the occasion of making the

will at that time, it is not, in that event, contingent; but, if it is referred to as a reason for disposing of the property in a certain way, and the disposition and the contingency are so related to each other that the one is dependent on the other, the will is, in that event, contingent. (2) If the language used in the will can by any reasonable interpretation be construed to mean that the testator refers to a possible danger or threatened calamity only as a reason for making a will at that time, such reasonable interpretation will prevail, and the will is not contingent. (3) To make a will contingent or conditional it must clearly appear from the language of the will that it was to operate only during a certain period or in a certain event.

"These rules, we think, are sustained by many authorities, among which the following may be cited: 'But if the condition is one that strikes into the essence of the whole will, affecting its status for probate and a valid operation, the main point to determine is whether so sweeping an effect was really intended. For one may state a contingency that he has in mind as the inducement for making his will, by way of narrative, so to speak, or he may, on the contrary, state it as the condition on which the will is to become operative. The question is which he intended, and the inclination, in case of doubt, should, we hold, be to the former and less injurious and impolitic conclusion.' Schouler on Wills, § 285. In the Goods of Porter, Law Reports, 2 Prob. & Div. 22, Lord Penzance held that, if the language used in the will can by any reasonable interpretation be construed to mean that the testator refers to a dangerous journey about to be taken, or a threatened calamity, only as a reason for making a will at that time, it is not a contingent will. In *Likefield v. Likefield*, 82 Ky. 589, 56 Am. Rep. 908, the rule is held to be that courts will not incline to regard a will as conditional if it can be reasonably held that the maker was simply expressing his inducement to make it, however inaccurate the language may be for that purpose, if strictly construed, and that, unless the words clearly show that it was to be temporary or contingent, it will be upheld. In *Cody v. Conly*, 27 Grat. (Va.) 313, the court says: 'The cases show that, while a person may make a conditional will, his intention to do so must appear very plainly on the face of the will, and, if such an intention do not so appear, the will must be regarded as unconditional. In order to render the instrument contingent in its operation, it should clearly appear by its language that it was not intended to remain an operative will, except in the event of the failure to return.'

"Reference to a few of the many cases cited by counsel will indicate how those rules have been applied by the courts. In *Todd's Will*, 2 Watts & S. 145, written in contemplation of a journey, as follows, 'My

wish, desire and intention now is that if I should not return (which I will, no preventing Providence) what I own shall be divided as follows,' etc., it was held that, on his return and subsequent death, the will was contingent. In *Hamilton's Estate*, 74 Pa. 69, the language, 'Should I die before the first of March, 1873,' etc., was held to be the expression of a contingency which prevented the operation of the instrument after the event failed to happen. In *Morrow's Appeal*, 116 Pa. 440, 9 Atl. 660, 2 Am. St. Rep. 616, *Morrow*, when about to go from home, wrote and signed a testamentary paper, beginning as follows: 'I am going to town with my drill and I aint feeling good and in case I shouldend get back do as I say on this paper,' etc. He returned, but died soon afterward in the same illness. The will was held to be contingent. In *Jeffries' Estate*, 18 Pa. Super. Ct. 439, the testatrix made a will giving all her estate to a trustee for her nephew, *George L. Stewart*, and subsequently on the same day she executed a second will, as follows: 'Know all men by these presents, that I, *Mary A. Jeffries*, of sound mind, am going on a trip from home with my nephew, *George L. Stewart*, do hereby direct that in case of the death of both of us that my estate shall be divided as follows.' Then follow certain dispositions, after which she adds: 'I declare the above to be my will and testament in case of the death as aforesaid of myself and *George L. Stewart*.' Both survived the journey, and the last paper was thereupon held inoperative. In *Magee et al. v. McNeill*, 41 Miss. 17, 90 Am. Dec. 354, the will of a soldier in the Confederate army contained the following expression: 'If I never return home I want all I have to be my wife's.' On his return and subsequent death the will was held to be contingent. In *Damon v. Damon*, 90 Mass. 192, the will contained the following: 'I, *J. W. D.*, being about to go to Cuba, and knowing the danger of voyages, do hereby make this my last will,' etc. 'First: If by casualty or otherwise, I should lose my life during the voyage, I give and bequeath to my wife, *A.*,' etc. He then went on to give other specific devises. Held, conditional as to first clause of the will. In all the foregoing cases it will be observed that the contingent character of the instrument or devise stands out clearly.

"Adverting to some of the cases in which wills claimed to be contingent have been held not to be so, the following may be noted: In the *Goods of George Thorne*, 4 Swab. & Trist. 36, the will, dated at the Gold Coast of Africa in 1863, contained the following: 'Be this known to all concerned: I request that in the event of my death while serving in this horrid climate or any accident happening to me, I leave and bequeath to my beloved wife,' etc. 'I consider that every person should be prepared for the worst and especially in such a treacherous climate as this, which is con-

sidered one of the worst in the world, which has compelled me to write this letter.' It was held not contingent on the death on the Gold Coast. In the *Goods of Dobson*, Law Reports, 1 Prob. & Div. 88, the following language, 'In case of any fatal accident happening to me, being about to travel by railway, I hereby leave,' etc., was held not to render the will contingent; the court, per *Sir J. P. Wilde*, saying: 'I am unwilling to refuse probate of a testamentary paper on the ground that it was contingent, unless it is clear that the testator intended that it should operate only in a certain event or during a certain period.' In the *Goods of Martin*, Law Reports, 1 Prob. & Div. 380, the will contained the following: 'I, *W. M.*, being physically weak in health, have obtained permission to cease from all duty for a few days and I wish during such time to be removed from the brig *Appellina* to the floating hospital ship, *Berwick Wall*, in order to recruit my health, and in the event of my death occurring during such time, I do hereby will and bequeath,' etc. The will was held not contingent. In the *Goods of Stewart*, 21 Law Reports, Ireland, 105, the will contained the following: 'As I am about to leave home for Bangor, should any accident take me out of this world,' etc.—which was held not to render it contingent. In *Tarver v. Tarver*, 34 U. S. 174, 9 L. Ed. 91, the will begins as follows: 'Being about to travel a considerable distance and knowing the uncertainty of life, think it advisable to make some disposition of my estate,' etc. Held not contingent. In *Ex parte Lindsay*, 2 Bradf. Sur. (N. Y.) 204, the following was held not to render the will contingent: 'According to my present intention, should anything happen me before I reach my friends in St. Louis, I wish to make a correct disposal,' etc. In *Skipwith v. Cabell*, 19 Grat. (Va.) 758, the language, 'In case of a sudden and unexpected death, I give the remainder of my property,' did not make the will a conditional one. In *Likefield v. Likefield*, 82 Ky. 589, 56 Am. Rep. 908, the language, 'If any accident should happen me that I die from home, my wife, *J. A. L.*, shall have everything I possess,' was held to render the will inoperative or contingent.

"These citations of general principles, and their application to concrete cases, seem to make it quite clear that, when the event which constitutes the contingency expressed in the instrument can be reasonably construed to have been the occasion for making the will at a particular time, rather than as the reason for making it in a particular way, it should be so construed; and, further, that, unless it clearly appear from the instrument itself that it was not to operate in a certain event, it will be entitled to probate.

"Applying these rules to the will of *William A. Forquer*, it may be observed, we think, that its first portion contains no hint that its provisions were in any way contin-

gent. It is as follows: 'Butler, November 10th, 1882. I intend starting to-morrow morning to Bozeman, Montana, to see my brother Joseph. Knowing the uncertainty and risk of the journey, know all persons that I do hereby will and bequeath all my personal property to my wife, Martha M. Forquer. And I do hereby devise my real estate to said Martha M. Forquer, which consists in the undivided one-half of the one-fifth of one hundred acres of land in Allegheny township, Butler county, the title to which is in Thos. Niggle, the deed for which is in the safe, which has never been delivered to him. There is also a paper in the safe signed by Thos. Niggle stating that I am the owner of the one-half of said one-fifth of said one hundred acres of land, I having paid the purchase money recited in the said deed. Also all judgments owned by me and notes due me are hereby bequeathed to my said wife.' Thus far there is nothing in the language of the will to render its operation contingent. The reference to the proposed journey seems but a statement of his reason for the making of his will at that time. It belongs to that class of phrases so often found in the introductory language of wills, such as: 'Knowing the uncertainty of life,' etc. And we think it may be safely said that, if the will had ended here, no doubt could arise as to its absolute character. But the language which follows seems to gather up all that has gone before, and to express it in another form. Did the testator intend that it should also have a different meaning? The dispositions thus far made carry his whole estate to his wife, without any suggestion of their being contingent in character. Did he intend by the language which immediately follows to undo the absolute disposition already made of his whole estate, and attach a condition which would make their efficacy contingent on his death occurring during the time of his contemplated journey?

"The language which immediately follows that already quoted, and on which is predicated the contention that the will is contingent, is as follows: 'And should anything befall me while away or that I should die, then in that event all my estate, money, notes, property of every nature and description, both real and personal, are hereby assigned, conveyed and set over to my wife for her sole benefit,' etc. Is this language merely a repetition in the form of a summary of what has gone before, or is it a disposition different in kind from that which had been already made? Can the will as a whole, by any reasonable interpretation, be made to speak as of the time of testator's death, whenever it might occur; or does it, on the other hand, clearly appear from the will itself that it was only intended to become of effect in the event of testator's death during his contemplated journey? Three reasons impel us to a conclusion in favor of the former proposition. These are: (1) Testator's

evident solicitude for his wife, apparent in the will. (2) We do not think that the contingency expressed in the will was intended to undo or destroy the absolute character of the dispositions already made therein. (3) The language used to express the contingency does not clearly lead to the conclusion that it was intended to render the will contingent in its operation. It may, on the other hand, be reasonably construed in favor of an absolute will.

"No Pennsylvania case has been cited in which the language of the contingency is at all similar to that of the case at bar, and the only case cited in which there is any proximate similarity is in the Goods of George Tborne, 4 Swab. & Trist. 38. The language there is: 'I request that in the event of my death while serving in this horrid climate, or any accident happening to me,' etc. The first part of this language expresses a clear contingency and, standing alone, would seem to render the will contingent, but the disjunctive clause which follows, 'or any accident happening to me,' without qualification as to time or place, seems to have relieved the will of its otherwise contingent character. In the case before us the language expressive of the contingency is, 'and should anything befall me while away or that I should die,' etc. The expression 'should anything befall me while away,' standing alone, is clearly contingent. It evidently refers to the possible death of the testator while away, as no other event could befall him which would give effect to the disposition of his estate which he was then making. The testator would have expressed the same thought had he said, 'and should death overtake me while away.' It clearly refers to his possible death while on his journey. We may well suppose that the testator, by the disjunctive expression which follows, 'or that I should die,' meant to add something to what he had already said. He had already provided for the contingency of death while on the journey. We may assume that he meant to add something by the use of the language which followed, and, if so, that he meant to make provision against the event of his death whenever it might occur. By the use of the disjunctive 'or,' the provision which follows excludes the thought that immediately preceded, and has, we think, the same force and meaning as if it stood alone. To give it the meaning contended for by the appellants, we would have to interpolate the qualifying expression, 'while away,' used in the preceding clause. But what warrant have we for doing this in order to give to the instrument a contingent character, which, if it exist, must clearly arise out of the writing as it stands? In other words, we conclude: (1) That it does not clearly appear from the will itself that its operation was intended to be contingent; and (2) that it can, by a reasonable interpretation of its language, be construed to be absolute rather than con-

tingent, and in either event, under the authorities, it is entitled to probate. This conclusion has been arrived at from a consideration of the language of the will itself, unaided by extrinsic evidence. The character of a will, as being contingent or not contingent in its operation, depends on the intention of the testator as expressed in the will itself, without the aid of extrinsic evidence in the form of subsequent declarations made by the testator in an incidental way, as to the disposition of his property. In *Wusthoff v. Draught*, 8 Watts, 240, it is said that: 'Courts of law have always leaned against extrinsic evidence to explain the intention of the testator. There is, in fact, but one case where it is permitted, and that is where the ambiguity is introduced by extrinsic circumstances, and in such case parol evidence is admitted from necessity.'

"When the subject-matter to which the language of the will is intended to apply is not clear, or where more than one person answers to the description of the object of the testator's bounty, or when the object is not well expressed, the court may invoke the aid of extrinsic circumstances in order to determine the testator's intent. Without doubt, too, the careful preservation of a regularly executed will up to the time of death is of importance in the construction of a subsequent paper of doubtful testamentary import, an instance of which is found in *Jacoby's Estate*, 180 Pa. 382, 42 Atl. 1026. But we have not been referred to any authority which holds that the character of a will, as being contingent or otherwise, may be determined, or any doubt thereof solved, by the introduction of extrinsic circumstances such as those referred to. The court, in a proper case, may be aided by evidence of the circumstances surrounding testator at the time of making his will, so as to put itself as nearly as possible in his place at the time the will was executed; but even this cannot be permitted to affect the construction when the language is clear and unambiguous. To be governed or even aided by the subsequent declarations of a testator, in determining his intentions as already written in his will, would be a precedent attended with much danger, tending to inject into the will an intent possibly not written therein, and thus to depart from the strictness of the rule which requires wills to be in writing. The meaning of the language of the will might thus be made to depend, in some degree, not on the intention of the testator at the time the will was executed, but on what he afterward said about it, under circumstances in which no testamentary import should be predicated of his words. All the evidence, therefore, in the case at bar, of the subsequent declarations of the testator, to

the effect that he had made a will and given his property to his wife, and which was received under objection, is excluded, and the objections thereto sustained. The question at issue is not whether a will had, in fact, been made, but what is the meaning of a will admittedly made. Whatever doubt exists as to its meaning is not introduced by extrinsic circumstances, but is from within. The court cannot, therefore, as we think, invoke the aid of extrinsic circumstances in order to its solution. This does not, however, exclude evidence of the republication of a will already made, but which has been rendered inoperative, revoked, or superseded by some subsequent will or circumstance. And such republication may be by parol. *Havard v. Davis*, 2 Bin. 406; *Jones v. Hartley*, 2 Whart. 103; *Campbell v. Jamison*, 8 Pa. 498; *Jack v. Shoenberger*, 22 Pa. 416; *Wallace v. Blair*, 1 Grant, Cas. 75.

"Having arrived at the conclusion that the will under consideration was absolute in character and not contingent, and there being no evidence of its subsequent revocation, it would seem unnecessary to determine the contention of proponent's counsel that the testator, a few days before his death, in the presence of his wife and another, did republish his will. The evidence, however, of what took place at that time is uncontradicted, and is sufficient to establish a republication of the will, and the will so republished is, we think, relieved of the contingency expressed therein; the event having been passed. This would seem not only reasonable, but to be supported by authority. In *Schouler on Wills*, § 287, it is said: "But where a will, written as though conditional upon a long journey, is re-executed and duly witnessed after the testator's safe return, the condition ceases, and the will may fully operate by remaining uncanceled.' We see no reason why this rule should not govern where, instead of re-execution of the will, there has been a republication of it, supported by the necessary evidence.

"We conclude, therefore, that the will of William A. Forquer was entitled to probate. The decree of the register of wills, admitting it to probate, is therefore affirmed, and the appeal therefrom is dismissed September 4, 1905."

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

S. S. Mehard, A. T. Black, and W. Z. Murrin, for appellants. T. C. Campbell, R. P. Scott, S. F. Bowser, and Lev. McQuistion, for appellee.

PER CURIAM. Decree affirmed on the opinion of the court below.

(6 Pen. 223)

TODD v. EVERY EVENING PRINTING CO.

(Superior Court of Delaware. New Castle. March 20, 1907.)

1. LIBEL—CHARGING DISHONESTY.

An article charging one with transferring his property to defraud creditors represents him as a dishonest or dishonorable man, and so is actionable per se.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Libel and Slander, §§ 4, 86½.]

2. SAME—MALICE—PRESUMPTION.

In case of publication of an article libelous per se, the law presumes malice.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Libel and Slander, §§ 111, 278.]

3. SAME—DAMAGES.

For publication of an article libelous per se damages may be recovered without proof of any special damages.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Libel and Slander, §§ 331, 342-351.]

4. SAME—EXEMPLARY DAMAGES.

Exemplary damages may be recovered for libel only where express malice is shown.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Libel and Slander, §§ 342-351.]

5. SAME—EXPRESS MALICE.

Express malice is shown by proof that publication of a libel was made wantonly, maliciously, and with intent to injure, degrade, or destroy one's reputation.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Libel and Slander, §§ 278, 329.]

6. SAME—PRESUMPTION.

Express malice in publishing a libel is never presumed, but may be proved by indirect, as well as direct evidence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Libel and Slander, § 278.]

7. SAME—COMPENSATORY DAMAGES.

The amount of compensatory damages for a libel should be such as to reasonably compensate the injured person for any wrong done to his reputation, good name, or fame, and for any mental suffering caused thereby.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Libel and Slander, §§ 342-354.]

8. SAME—DAMAGES—MITIGATION OF DAMAGES.

Facts or circumstances shown tending to show a libelous article was published with a proper motive, and without intent or desire to injure, may be considered in mitigation of damages.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Libel and Slander, §§ 315-324.]

9. SAME—INNUENDOS.

An innuendo does not enlarge the sense of the words used in a libelous publication, but such words are to be given a fair and reasonable interpretation.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Libel and Slander, §§ 205-208.]

Action by George Todd against the Every Evening Printing Company for libel. Verdict for plaintiff.

See '62 Atl. 1089.

Argued before LORE, C. J., and PENNEWILL, J.

Anthony Higgins and Horace G. Eastburn, for plaintiff. Thomas F. Bayard, for defendant.

PENNEWILL, J. (charging jury). This is an action brought by George W. Todd against

the Every Evening Printing Company, a corporation of this state, for the recovery of damages sustained by the plaintiff through the alleged publication by the defendant of a libel upon him.

It is true, as stated by the plaintiff in his prayers, that the owner or publisher of a public newspaper has no more right to print libelous matter than any one else. In order, however, to find a verdict for the plaintiff in a case of this kind, you must be satisfied that the elements necessary to warrant such a finding have been established by a preponderance of the evidence adduced in the case. In cases of this character one of the elements necessary to be established is that the defendant published the newspaper article complained of as being libelous. The publication of such article in this case is not denied. Indeed, it is admitted.

Another element of the charge against the defendant which the plaintiff must have established by the evidence is that the article or publication complained of contained a libel upon the plaintiff. This question, however, must be determined by the court in accordance with the law applicable thereto. It has been declared by this court, in the case of Rice v. Simmons, 2 Har. 429, 31 Am. Dec. 766, that to be actionable the writing complained of must impute something which tends to disgrace a man, lower him in or exclude him from society, or bring him into contempt or ridicule. It is not intended by this, the court said, that to make a publication libelous it must contain a direct and open charge. The publication must be judged by its general tenor; and if, taking the terms in their ordinary acceptation, it conveys a degrading imputation, however indirectly, it is a libel. If the article complained of represents the defendant as a dishonest or dishonorable man, it would be a libel, under the law as laid down by the court in the case of Rice v. Simmons.

The publication upon which this action is based is in the following language:

"Case against G. W. Todd. On Capias Issued to Counsel for Mary G. Todd Estate. An Alleged Claim of \$3,000. And a Charge of Transferring His Property. Philip Q. Churchman, Counsel for the Todd Estate, Who had the Capias Issued, Fixed the Bail at \$6,000. Action Taken under a Recent Statute.

"George W. Todd, who for many years has been prominently identified with the iron and steel industry in this city, was summoned, late yesterday, by Deputy Sheriff Cox, on a capias sworn out by Philip Q. Churchman counsel for the Mary G. Todd estate. Mr. Todd was taken to the sheriff's office at the county courthouse, and was accompanied by Anthony Higgins, his counsel. Mr. Churchman fixed the bail at \$6,000.

"According to the allegations of Mr. Churchman, Mr. Todd owes the Mary G.

Todd estate \$3,000, and had given his note in payment of it. The note is about to come due, and Mr. Churchman alleges that Mr. Todd has transferred four of his properties, and that the transfers were made for the purpose of evading payment of the note. Action was taken under a recent statute relating to such cases.

"It was some time before Mr. Todd could obtain a bondsman. City Councilman Howard D. Ross, his son-in-law, offered to become his bondsman; but Philip Q. Churchman, counsel for the heirs, refused to accept Mr. Ross. It was about 5 o'clock when Mr. Todd secured a bondsman and was released.

"The capias on which Mr. Todd was taken was issued by Superior Court, yesterday, and grew out of an action brought by Winfield S. and William M. Palmer, heirs of Mary G. Todd, against George W. Todd, trading as George W. Todd & Co. The suit was entered against Mr. Todd at the May term, to recover a note of \$3,000 alleged to be due the Palmers from Mr. Todd, with interest due for more than a year.

"On Thursday, in the office of Recorder of Deeds Billany, the conveyances were presented for record of the property of No. 1311 King street in fee from Mr. Todd to Thomas Lawrence Husbands; the property No. 214 Tathall street in fee simple from Mr. Todd to Jacob Hadley Lewis; a property on the east side of West street, 62 feet south of Eleventh street to Mrs. Minshall Hinkson of Brandywine Hundred; and a mortgage for \$2,000 on the property of Mr. Todd, at No. 1006 West street, to Thomas Lawrence Husbands. All of these were dated May 13, 1904, although the affidavit of the Palmers alleges that the conveyances are antedated to that time.

"The action was taken upon the representations made by the Palmers in an affidavit which in part is as follows:

"That the said defendant, George W. Todd, together with one Harriet J. Todd, his wife, made and executed a certain indenture under their hands and seals, wrongfully and fraudulently antedating the same the 13th day of May, A. D. 1904, as the said plaintiffs verily believe, and therein and thereby granted and conveyed in fee simple unto one Thomas Lawrence Husbands, a relative of the said defendant, George W. Todd, a certain lot or parcel of land in the city of Wilmington, New Castle county, and state of Delaware, owned by the said defendant George W. Todd, and known as No. 1311 King street, in said city, which said indenture was received for record in the office of the recorder of deeds, in and for New Castle county, at Wilmington, on the thirteenth day of July, A. D. 1905."

"The form of the remaining allegations is the same. One describes Jacob Hadley Lewis as a 'lifelong friend of the said defendant.' In conclusion the affidavit reads:

"That the said plaintiffs brought an ac-

tion in the Superior Court of the state of Delaware, in and for New Castle county, to the May term of said court, against the said defendant, and would have obtained judgment thereon at the adjournment of the said court for upwards of \$3,000, which said judgment would have been a lien on the lands so conveyed by the said Todd as aforesaid, and the said money could have been made, but for the said conveyances."

"It is signed by Winfield Palmer and William M. Palmer, and is sworn to before Harry P. Joslyn, notary public.

"Mr. Higgins, counsel for Mr. Todd, stated this morning that the property transfers were made in 1904, although they were only recently recorded."

Some of the prayers of the defendant are based upon the assumption that the alleged libelous publication was privileged under the law. We cannot, however, charge you in accordance with such prayer, because it has been held by this court in a demurrer filed in this case that such publication was not privileged. The court in their opinion said: "Counsel for the plaintiff claimed, however, that the filing of the affidavit with the prothonotary for the purpose of obtaining the writ, the issuance of the writ by the prothonotary, the subsequent arrest of the plaintiff by the sheriff, and the execution and delivery of the ball bond by the plaintiff to the sheriff did not constitute such a judicial proceeding as would warrant a report of the same under the protection of privilege, and that the publication of the contents of the affidavit, which included actionable allegations, was not privileged. We are therefore called upon to determine whether privilege extends to a report of a preliminary ex parte proceeding, such as is disclosed by this case. * * * We fall to see, after this discussion, how we can maintain the position contended for by the learned counsel for the defendant. However much publicity may have attended the proceedings, in the former suit against the plaintiff in this action, at the time of the filing of the affidavit and the issuance of the writ, or at the time of the arrest and holding to bail by the sheriff, such proceedings were, from their inception to the execution and delivery of the ball bond, wholly preliminary and ex parte, and afforded no opportunity to the plaintiff here to be heard in his defense to the charge contained in the affidavit; and after a careful consideration of this case we are constrained to hold that both upon authority and sound public policy the doctrine of privilege cannot be extended to the publication complained of in the declaration."

We think that the language of this article represents the defendant as a dishonest or dishonorable man, guilty of such disgraceful conduct as would bring him into public contempt, and say to you, therefore, that under the law of this state the said publication was a libel upon the plaintiff and actionable per se. In such case the law presumes malice,

and that the plaintiff has sustained damage from the publication of the libelous matter. The amount of such damage, however, is for the jury to determine.

It is not necessary to a recovery by the plaintiff that he should have proved special damages, if he has otherwise suffered an actionable wrong at the hands of the defendant; nor is it necessary that the plaintiff should have shown any actual intent or desire on the part of the defendant to injure the plaintiff by the publication in question. In other words, where the article complained of is a libel, and actionable per se, and there is no proof of express malice on the defendant's part, the jury may render a verdict in favor of the plaintiff, even though he has not proved any special damage. If the jury find that the plaintiff has established express malice, then they may award such exemplary or punitive damages as they think proper under the evidence, in addition to such damages as would compensate the plaintiff for the injury which he has sustained.

Exemplary damages are to be given only where express malice is proved. Such malice exists when, in addition to the publication of the libelous article, it is shown to the satisfaction of the jury that the publication was made wantonly, maliciously, and with intent to injure, degrade, or destroy one's reputation. In such case exemplary, vindictive, or punitive damages may be awarded by way of punishment in addition to compensatory damages. Express malice is never presumed, but must be proved by the plaintiff. It may, however, be proved by direct or indirect evidence. In determining whether there was express malice in this case, you should consider all the facts and circumstances disclosed by the evidence. You may therefore consider all the circumstances surrounding the publication of the article in question as disclosed by the evidence which tend to show the motive or spirit which actuated the publication, including any information or knowledge which the defendant possessed, or had the means at hand of obtaining, touching the truth or falsity of the charges made.

Having decided that the publication complained of was not privileged, but was a libel and actionable per se, we are bound to say to you that the plaintiff is entitled at your hands to a verdict for some amount, and whether that amount shall be nominal or substantial is for you to say, after carefully considering all the evidence in the case. If you should not be satisfied by a preponderance of the evidence that express malice has been shown, you cannot in your verdict include any sum for exemplary, punitive, or vindictive damages; and in such case, should you find a verdict for the plaintiff, it must be restricted to compensatory damages, which should be in such an amount, within the limits claimed in the declaration, as will compensate the plaintiff for the wrong done him, without respect to any question of

punishment. The amount to be awarded to the plaintiff should be such as would reasonably compensate him for any wrong done to his reputation, good name, or fame, and for any mental suffering caused thereby as shown by the evidence. If you should not be satisfied by a preponderance of the evidence that the plaintiff sustained or suffered any actual damage or injury, your verdict should nevertheless be in his favor, but only for a nominal sum.

We will say to you that, even though the article complained of is libelous and unjustifiable in law, you may, in reaching your verdict, take into consideration, in mitigation or reduction of damages, any and all facts and circumstances disclosed by the evidence which tend to show that the article was published with a proper motive, and not with any intent or desire to injure the plaintiff. And we further say, as requested by the defendant, that an innuendo does not enlarge the sense of the words used in the publication, and that the jurors should therefore be neither guided nor biased by the innuendo used in the amended declaration of the plaintiff, but must take the law in regard to the interpretation of the words of the publication as laid down by the court; i. e., a fair and reasonable interpretation as to what was meant.

Verdict for plaintiff for \$4,000. Counsel for defendant thereupon moved for a new trial on the ground that the amount of the verdict was excessive. After the motion was argued by the respective counsel, plaintiff's counsel agreed to a reduction of the verdict to \$3,000, and thereupon counsel for defendant withdrew his motion for a new trial.

(5 Pen. 572)

THOMAS v. MARINER.

(Superior Court of Delaware. New Castle.
March 15, 1905.)

1. JUSTICES OF THE PEACE—JUDGMENT—SUFFICIENCY.

A justice's judgment for a specified sum, with interest from a designated date, and costs taxed at a specified amount, is a judgment for a certain, definite, and ascertained amount.

2. SAME.

A justice of the peace, rendering a judgment in 1903 for the price of goods sold in 1902, may provide that the judgment shall draw interest from the date of the demand for the price, made in 1902.

Certiorari by Jacob Thomas against Mannie Mariner, administratrix of Joseph O. Mariner, deceased, to review a judgment rendered by Charles O. King, a justice of the peace, in favor of Mannie Mariner, administratrix, as plaintiff. Affirmed.

Argued before LORE, C. J., and PENNEWILL and BOYCE, JJ.

Charles B. Evans, for appellant. Reuben Satterthwaite, Jr., for respondent.

PER CURIAM. The record of the justice disclosed the following: "Cause of action:

Breach of contract, goods sold and delivered. Amount demanded, \$173.98, with interest on the same from August 29, 1902. Issued summons to Constable Anton Sadler December 7, A. D. 1903, made returnable on the 12th of December, 1903, at 2 p. m., with the following indorsement thereon, to wit: 'Served personally on Jacob Thomas on the 7th day of December, A. D. 1903.' And this return is verified by the oath of the constable in writing. Plaintiff and defendant appear according to notice, and after hearing the evidence of both parties, and carefully weighing the same, I gave judgment in favor of the plaintiff. And now, to wit, this 12th day of December, 1903, I gave judgment in favor of the plaintiff, Mannie Mariner, and against the defendant, Jacob Thomas, for the sum of \$173.98, with interest from August 29, A. D. 1902, and costs, \$2.75. Charles C. King, J. P."

The following exceptions were filed by the attorney for defendant below to the above record: "(1) That the justice of the peace has not rendered judgment for a sum certain. (2) That the justice of the peace has not rendered judgment for a definite, ascertained amount. (3) That the justice of the peace has rendered judgment for the sum of \$173, with interest thereon from a day prior to the day of entering said judgment."

Judgment below affirmed.

(79 Vt. 543)

EAST MONTPELIER v. CITY OF BARRE.

(Supreme Court of Vermont. Washington. Feb. 16, 1906.)

1. DOMICILE—LEGAL RESIDENCE—BOUNDARY LINES.

Where a line dividing a city from a town passed diagonally through a person's residence, so that about six-sevenths of the residence was in the town, the inhabitant was a resident of the town, and not of the city.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Domicile, § 4.]

2. PAUPERS—RESIDENCE—BOUNDARY LINE—CHANGE.

Where at the time a pauper moved into plaintiff city he was a resident of a town, his residence was not changed by the fact that after his removal the boundary of an adjoining city was so changed as to include the pauper's house in such town.

3. MUNICIPAL CORPORATIONS—ESTABLISHMENT—CLAIMS—STATUTES.

Acts 1904, p. 144, No. 165, creating the city of Barre, and providing for enforcement against such city of all claims and causes of action then existing against the town of Barre which was abolished, and for their subsequent apportionment and adjustment between the city and a new town of the same name, was ineffective to create a liability against the city for the support of a pauper who was not a resident of the city at the time the aid was required or furnished.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 86, Municipal Corporations, §§ 106-111.]

Exceptions from Washington County Court; Rowell, Judge.

Action by East Montpelier against city of Barre to recover for the support of certain paupers. A judgment was entered for de-

fendant to recover its costs on report of a referee, and plaintiff brings exceptions. Affirmed.

Argued before TYLER, MUNSON, and WATSON, JJ., and WATERMAN, Superior Judge.

Senter & Senter, for plaintiff. John W. Gordon, for defendant.

MUNSON, J. No. 165, p. 144, Acts of 1894, abolished the town of Barre, and formed from its territory the city of Barre and the new town of Barre, dividing them by a line which passed through North's house in the manner hereafter stated. This act took effect on the first Tuesday of March, 1895. North was living in this house on that day, and had lived there since 1890, supporting himself and his family. So North had acquired a legal residence in the old town of Barre, and, when that town was divided, he became a legal resident of the new town of Barre, or of the city of Barre, according as the location of his dwelling was determined by the dividing line. *Westfield v. Coventry*, 71 Vt. 175, 44 Atl. 66; *Wilmington v. Somerset*, 35 Vt. 232; *Mason v. Alexandria*, 3 N. H. 303.

The line passed diagonally through the house, leaving about six-sevenths of it in Barre town. The rear entrance was in Barre town, and the front entrance in Barre city. On the ground floor there was a kitchen, which was the general living room, a bedroom, a pantry, and a woodshed. The woodshed and pantry were wholly in Barre town, and all of the bedroom, except a small triangular section. The line ran diagonally through the kitchen, leaving a corner of the stove in Barre city. This is all we have regarding the construction and occupancy of the building.

This location of the house could not give the occupant a residence in both towns, and is not to be so treated as to leave him without a residence in either. As a place of residence, the building cannot be divided between the two towns, and must be held to be in one or the other. A man's dwelling house is the building in which he lives, and in a case like this the legal status of the building as a dwelling place must be determined by the location of that part of the structure most closely connected with the primary purposes of a dwelling. Upon this view, the facts reported place North's house in the new town of Barre. So the act of 1894 gave North a legal residence in that town. By No. 144, p. 105, Acts of 1896, which took effect November 24th of that year, was in form an amendment of the act of 1894, the dividing line was so changed as to include in the city of Barre all of the place that was allotted to the town of Barre by the original division; but North had not moved to East Montpelier the spring before, and was living there at this time. So the act of 1896 did not operate as a transfer of North's legal residence from the town to the city.

Barre. An annexation of territory will not effect a change of residence unless the person is then dwelling upon the land, actually or in legal contemplation. *Westfield v. Coventry*, 71 Vt. 175, 44 Atl. 68.

This matter is not controlled by the section of the act of 1894 which provides for an enforcement against the city of Barre of all claims and causes of action then existing against the town of Barre and their subsequent apportionment and adjustment between the city and the new town. There was no claim or cause of action until the aid was required and furnished. Until then there was only a general governmental obligation upon which a cause of action might subsequently arise. A liability of this nature is not within the provision.

Judgment affirmed.

(74 N. H. 599)

LANE et al. v. CITY OF KEENE.

CITY OF KEENE et al. v. LANE et al.

(Supreme Court of New Hampshire. Cheshire. March 5, 1907.)

MUNICIPAL CORPORATIONS — LAYING OUT STREET—APPEAL.

Citizens and taxpayers of the city have no right to appeal from the laying out of a highway by the mayor and board of aldermen.

Exceptions from Superior Court, Cheshire County; Peaslee, Judge.

Bill in equity by the city of Keene and another praying the dismissal of an appeal by Elisha F. Lane and others from the laying out of a highway by the mayor and aldermen. Decree for the city, and appellants except. Exceptions overruled.

Joseph Madden, for appellants Elisha F. Lane and others. Cain & Benton, for appellant Helen R. Colony. John E. Allen, for appellee city of Keene.

PER CURIAM. In the absence of a demurrer to the bill in equity, the only question raised by the exception to the decree for the city is as to the right of citizens and taxpayers of the city to appeal from the laying out of a highway by the mayor and board of aldermen, which was determined adversely to the right in *Bennett v. Tuftonborough*, 72 N. H. 63, 54 Atl. 700.

Exception overruled.

(216 Pa. 622)

WHITNEY v. HASKELL.

(Supreme Court of Pennsylvania. Jan. 7, 1907.)

1. ACTION—JOINDER OF CAUSES OF ACTION.

In assumpsit, there is no misjoinder of counts, where one alleged failure of consideration, and the other a right to rescind for false representations.

2. MINES AND MINERALS—SALES OF MINING CLAIMS—LOCATION.

In an action to recover the price paid for mining claims sold to plaintiff, on the ground that they were never legally located, the question whether there had been a discovery of a

vein or lode within the limits of the claim as required by act of Congress before its location is one of fact for the jury.

3. EVIDENCE—ADMISSIBILITY—SIMILAR EVIDENCE BY ADVERSE PARTY.

Where defendant offers a written agreement on the cross-examination of plaintiff, and witnesses are examined by defendant as to their understanding of it, and the court is not asked to construe it, plaintiff can submit to the jury his understanding of the agreement.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 445-458.]

Appeal from Court of Common Pleas, Allegheny County.

Action by Louis B. Whitney against Frank Haskell. Judgment for plaintiff, and defendant appeals. Affirmed.

On April 19, 1902, Frank Haskell sold to Louis B. Whitney as trustee, by a written contract, certain quartz lode gold mining claims in the Thunder mountain mining district, state of Idaho. Plaintiff alleges that he executed this contract upon the faith and representations made to him by the defendant and by William McKinley, the alleged agent of the defendant, that the mining properties were quartz lode gold mining claims, that they were duly located by discovery holes, and that 50 pan tests had been made showing gold running from \$3 to \$15 per ton. These representations the plaintiff alleged he subsequently discovered were false, and therefore claimed the right to rescind the contract, and demand the return of his money.

Plaintiff presented these points:

"(1) If no vein, lode, ledge, or rock in place bearing gold was ever found in the discovery holes of the Sunset or Sunset Fraction claims, the plaintiff had the right to rescind the contract for the purchase of these claims if he used due diligence to discover this fact, and rescinded it promptly on learning this fact. Answer: Affirmed.

"(2) In order to make a valid location of a quartz gold mining claim, a vein or lode filled with rock in place bearing gold must be discovered. It is not enough to discover detached pieces of quartz or mere bunches of quartz not in place. Answer: Affirmed."

Defendant presented these points:

"(1) That the plaintiff has joined in this suit two distinct incongruous causes of action, to wit: An allegation that defendant agreed to sell to plaintiff certain mining claims as described in the agreement between the parties, and that he had no such claims to convey, in which particulars no fraud or misrepresentation is alleged, but merely failure of consideration, and an allegation that plaintiff was induced to purchase the mining claims in question by false and fraudulent misrepresentations as to their richness in gold; that the first cause of action sounds in contract and the second is tort, and, therefore, cannot be joined, and plaintiff, therefore, cannot recover. Answer: Refused.

"(2) That under all the evidence in the

case the plaintiff is not entitled to recover upon the allegation that the consideration for the mining claims in question failed as between him and the defendant. Answer: Refused.

"(3) That the plaintiff has not shown any such failure of title in the defendant to the mining claims in question as would entitle him to recover on that ground. Answer: Refused."

"(9) That the only material fact (a) tending to show fraud given in evidence in this case is the allegation that McKinley, alleged to be defendant's agent, stated that 50 pan tests had been made, some showing gold at the rate of from \$3 to \$15 per ton, which statement is alleged to have been concurred in by the defendant at the closing of the contract as options of sale, and if the jury believe that the statement was not made as a fact within the knowledge of said McKinley, or of said defendant, but was a mere statement as to a report made by Saxman, then plaintiff cannot recover, even though the jury may find that only four pan tests were made by Saxman, yielding very small traces of gold, unless the jury further find that Saxman never made the statements to McKinley which it is alleged McKinley made to plaintiff. Answer: (a) If this statement were correct (namely, that there is but one material fact tending to show this fraud), it would be affirmed; but, as there are several matters of fact on the question of fraud to be passed upon by the jury, it is refused."

"(13) That there is no sufficient evidence of any false or fraudulent representations upon which the plaintiff is entitled to recover. Answer: Refused.

"(14) That under all the evidence the verdict must be for the defendant. Answer: Refused."

The court charged in part as follows:

"The plaintiff's right of action, or right of rescission and right of recovery, if he is entitled to recover as he claims, runs along two lines. One right upon which he claims the right to rescission is a right based upon the contract—the deed—which provided for a good title as to all parties except the government of the United States. That meant a good title, not to a mere bit of property out there, a mere waste piece of property, but to a property containing a quartz lode gold vein, or, in substance, that is the idea. * * * So that there are two lines, one line based upon the deed and allegation of fraud, the other based upon representations which sound in fraud."

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

John S. Ferguson and D. E. Mitchell, for appellant. William Watson Smith and George B. Gordon, for appellee.

POTTER, J. The statement of claim in this case avers two causes of action. First,

that the mining claims sold by defendant to plaintiff were never legally located, and therefore, were not owned by defendant, and consequently there was a total failure of consideration. Secondly, the plaintiff had been induced to enter into the contract by the false representations of one McKinley, who was alleged to be defendant's agent, and the plaintiff was therefore entitled to rescind the contract, and reclaim the purchase money paid.

It is urged by appellant's counsel that there was a misjoinder of counts. We do not think the point is well taken. Both counts here are in assumpsit. Plaintiff waives the tort and sues to recover, not damages for the deceit, but the amount of the consideration paid by him under the contract which he rescinded. In *Pearsoll v. Chapin*, 44 Pa. 9, a leading case, Chief Justice Lowrie, said: "The special count claims for a rescission provided for by a contract, and the other for a rescission because of the fraud; and this is something like a suit on a note, with a cautionary count for the goods sold and delivered being the consideration of the note, so that failing on the note the party may claim for the goods given for it. We cannot say that this is wrong. One count for damages for the fraud and one for a rescission would be repugnant. *Cooke v. Munstone*, 4 B. & P. 351. Nor was it erroneous in the court to say that the plaintiff may waive the action of tort for the deceit, and sue in assumpsit for the money which he paid on the contract, or which the defendant has received under it. * * * If he wants more than mere rescission, he must sue for damages for the deceit." In *Humbird v. Davis*, 210 Pa. 311, 59 Atl. 1082, our Brother Mestrezat said: "This was assumpsit for money had and received, and we think the action was properly brought. Under the finding of the jury the defendants unlawfully and fraudulently received the money of the plaintiffs, and hence have no right to retain it. The plaintiffs, waiving the tort, brought this action to recover the money of which they had been fraudulently deprived. The action lies on the implied promise to repay the sum unlawfully withheld"—citing 2 Greenleaf's Evidence, §§ 102, 120.

But in any event the objection comes too late. An objection to the inconsistency of two counts in a narr. must be taken advantage of by demurrer. It will not be inquired into on error. *Martin v. Stille*, 3 Whart. 337; *Schmidt v. Owens*, 10 Wkly. No. Cas. 5. In *Burkholder v. Beetem*, 65 Pa. 496, Justice Sharswood says: "There were several counts in the declaration, some in form ex contractu, and one in tort. At the opening of the cause the court required the plaintiff to elect on which counts he would proceed. The plaintiff then elected to proceed on the counts in assumpsit, and excepted to the ruling of the court. This is certainly a novel proceeding. I have looked in vain through

the books for any precedent or authority to justify it. The mode of taking advantage of misjoinder of counts is by demurrer in the first instance. * * * If the defendant chooses to plead in bar, and go to trial on such a declaration, there is no authority in the judge to strike out any count, or to put the plaintiff to his election between a count in assumpsit and another in tort." The first and fourth assignments of error cannot be sustained. The question whether there had been a discovery of a vein or lode within the limits of the claim, before its location, as required by the act of Congress, was one of fact for the jury and not of law for the court. In *Blue Bird Mining Co. v. Largey* (U. S. C. C., D. Mont.) 49 Fed. 289, it is said: "The first question for discussion is as to the dispute as to whether the Blue Bird vein, lode, or ledge is such a one as is referred to in the mining acts of Congress. * * * This is not a question of law, but of fact." In *Book v. Mining Co.* (U. S. C. C., D. Nev.) 58 Fed. 106, it is said: "It is always, in every case, a question of fact to be determined by a court or jury, whether a vein or lode has been discovered or exists within the limits of the particular claim or location in controversy."

The allegation that there had been no discovery of a vein, or of rock in place, bearing gold, upon the mining claim sold by defendant to plaintiff, was amply supported by evidence. There was also sufficient evidence to go to the jury of the allegation, also raising a question of fact, that the statute of Idaho, requiring the sinking of a shaft of specified dimensions upon the lode within 60 days of the location, had not been complied with. There was much conflict of evidence as to whether McKinley was the agent of Haskell, and this was properly submitted to the jury. The trial judge was of the opinion that the written agreement entered into between Whitney and McKinley was not in itself conclusive as to the question of agency, and in this we think, under the circumstances of the case, he was right. The agreement was offered in evidence by defendant as part of the cross-examination of plaintiff, and no attempt was made by defendant to stand upon it as a writing, which could not be varied or contradicted by parol evidence. The court was not asked to construe the contract as matter of law. Witnesses were interrogated by defendant as to their understanding of its form and effect, and as to what they meant by it when they executed it. The gate having been opened by the defendant, he has no right to object because the plaintiff also submitted to the jury his understanding of the agreement. The court left it to the jury to determine whether or not the compensation referred to in the agreement was for services already rendered in the purchase of the property, or was intended to cover future services in connection therewith. It is quite conceivable that, as is suggested, the defend-

ant was to receive the amount named as the purchase price for the mining claims, net, so that any commission received by McKinley for making the sale must have been paid by the purchasers. If so, such payment would not be inconsistent with his agency for the defendant in negotiating the sale from him to plaintiff.

In the opinion refusing a new trial the court below says: "There was ample testimony from which the jury was warranted in finding (1) that in the sale from Haskell to Whitney, McKinley acted not for Whitney but solely for Haskell; and (2) that the compensation to McKinley (to be paid by Whitney in stock of the corporation to be organized for purchasing, developing, and operating the properties, as stated in exhibit No. 8) was either (a) simply payment by Whitney for services rendered by McKinley for Haskell as the latter's agent in the sale to Whitney—for Haskell's price was to net him the full \$20,000 named in the contract of sale—or (b) for future services to be rendered in the business operations of said corporation." We can see no good reason why the court should have withdrawn the case from the jury because of this agreement, and no authorities have been found which, in principle, would require him to do so.

The assignments of error are overruled, and the judgment is affirmed.

(217 Pa. 34)

GRAHAM v. CARNEGIE STEEL CO. et al.
(Supreme Court of Pennsylvania. Jan. 7, 1907.)

1. REFORMATION OF INSTRUMENTS—MISTAKE—EVIDENCE.

A deed will not be reformed on the ground of mistake, except on the testimony of witnesses clearly remembering the fact that a mistake was made, and that the deed does not express the agreement.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Reformation of Instruments, §§ 160-164.]

2. SAME.

A bill to reform a deed, reserving a right of way, alleged that, by mutual mistake, the words "nine degrees" were used, instead of the words "nine per cent.," in describing the grade of the way. The evidence showed that the agents for the grantor were mistaken as to what a nine degree grade was, and did not show mutual mistake. *Held*, that the deed would not be reformed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Reformation of Instruments, §§ 69, 74-78.]

Appeal from Court of Common Pleas, Allegheny County.

Bill by Harry J. Graham against the Carnegie Steel Company and others to reform a deed. Decree for plaintiff, and defendants appeal. Reversed.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

Samuel McClay, for appellants. John M. Freeman, D. T. Watson, and Chantler, McGill & McClung, for appellees.

FELL, J. The bill filed in this case was to compel the removal of obstructions from the plaintiff's right of way over the land of the defendant. An amendment was allowed, in which it was averred that, by mutual mistake the parties to the deed reserving the right of way, the words "nine degrees" were used, instead of the words "nine per cent." in describing the grade of the way, and there was a prayer added for the reformation of the deed. In 1896 Mary Oliver conveyed to the Carnegie Steel Company, Limited, one of the defendants, a tract of about 89 acres of land, reserving the right to a private road, over the land granted, from a public street to other land of the grantor which was entirely surrounded by private property and had no other outlet. She also reserved the right to grant rights of way over the street, either at or above grade, to any electric railway. Her grantee was, "however, to have the right to change the grade of said road by filling or otherwise so long as said change of grade shall not prevent the ordinary use of said road or cause the grade of the same or any portion thereof to exceed nine degrees." It is averred in the bill that the company's object in purchasing the land was to secure a place of deposit for slag and refuse matter from its furnaces; that it had made large deposits on the right of way, which had been so placed as to obstruct and prevent its use; that in some places there are deep depressions, and in others there are embankments which extend above the maximum grade permitted by the stipulation in the deed. The decree entered after final hearing directs the reformation of the deed and the removal of slag and refuse deposited in excess of a 9 per cent. grade. This decree is based on the findings that the right of way is appurtenant to the complainant's land, and that the real intention and agreement of the parties to the deed was that the grantee should have the right to change the grade of the road, not to exceed 9 feet in 100, and that the words "nine degrees" were inserted in the deed by mutual mistake.

We have the bare findings on which the decree rests, without the advantage of any discussion of them, and are left to search the record for testimony to support them. The conveyance was made in pursuance of a written agreement executed four months before the deed, in which the words "nine degrees" were used to indicate the grade. The deed was delivered October 10, 1896. The deposit of slag was continuous and almost daily from 1898 to 1903, and, until the filing of the amendment to the bill in 1904, there was no suggestion of a mistake. The negotiations for the purchase of the property extended over a period of six months. The agreement and the deed were both drawn by the grantor's counsel, who, while unable to recall what instructions were given him in regard to the

grade, testified that all the instructions he received were from the grantor's sons, William and George Oliver, who represented her. The plaintiff's case rested wholly on the testimony of these two men. Neither knew at the time of the agreement that there was a difference between a 9 degree and a 9 per cent. grade, nor did either remember that there was a written agreement of sale, though both signed it. Their testimony is vague and indistinct. They could not recall what was said in relation to the grade, but only that there was an understanding that there was to be a reasonably easy grade of about 9 or 10 feet to the 100. One of these witnesses is directly contradicted by a witness who was present during a part of the negotiations, who testified that he explained to him that a 9 degree grade meant a rise of nearly 16 feet in 100, and that the road would be of little practical use. The company was represented in the negotiations by its chief engineer and by its vice president, who was in charge of its real estate department. They testified that no mistake had been made in naming 9 degrees as the grade agreed upon. Both of these witnesses knew what a 9 degree grade was, and how it would affect the property for the use for which it was bought. The vice president of the company, whose duty it was to affect the purchase, testified clearly and distinctly that it was agreed that the grade should be nine degrees; that he understood how a road of this grade would affect the property; that he consented to the reservation of the road at this grade as a concession, because it would not be a serious objection; and that he would not have agreed to a 9 per cent. grade, because a road of that grade would have involved a very heavy expenditure.

In order to reform a deed on the ground of mistake, it must clearly appear by the testimony of witnesses who distinctly remember the facts that a mistake was made, and that the writing does not express the agreement. The testimony must be clear, precise, and indubitable, and of such weight and directness as to carry conviction to the mind. *Edmond's Appeal*, 59 Pa. 220; *Boyertown Nat. Bank v. Hartman*, 147 Pa. 558, 23 Atl. 842, 30 Am. St. Rep. 759; *Highlands v. Railroad Co.*, 209 Pa. 236, 58 Atl. 560. The testimony on which the finding of the court is based fell far short of this standard. It established nothing except that the agents of the grantor were mistaken as to what a 9 degree grade was, not that there was a mutual mistake. The mistake shown was a mistake on their part in making the bargain, not a mutual mistake in making the deed.

The decree reforming the deed is reversed, at the cost of the appellee. We do not dismiss the bill, because the appellant may be required to make the road fit for ordinary use at the grade named in the deed.

(217 Pa. 10)

BOGGS et al. v. BOGGS & BUHL et al.
(Supreme Court of Pennsylvania. Jan. 7, 1907.)

1. CORPORATIONS—AGREEMENT OF STOCKHOLDERS—VALIDITY.

The stockholders of a corporation agreed that the majority of the holders of the common stock might declare that a stockholder had ceased to be a desirable associate, and thereupon take his stock at its cash value. *Held*, a valid contract.

[Ed. Note.—For cases in point, see *Cant. Dig.* vol. 12, Corporations, § 646.]

2. SPECIFIC PERFORMANCE — CONTRACT OF STOCKHOLDERS.

Where the stockholders of a corporation agreed that the majority thereof might appraise and take the stock of an undesirable associate, paying therefor its cash value, they may after appraisal enforce the specific performance of the agreement and compel the transfer at the appraisal value without any addition for good will.

3. CORPORATIONS—AGREEMENT OF STOCKHOLDERS—CONSTRUCTION.

Where common stock when issued had no value and the persons owning it were required to be actively engaged in the management of the corporation and the common stock had never been sold on the market and the preferred stock was subject to redemption at any time, the cash value of the assets of the common stock is shown by the value of the assets applicable to it when an appraisal of such stock was made.

Appeal from Court of Common Pleas, Allegheny County.

Bill by Russell H. Boggs and others against Boggs & Buhl and George B. Boswell. Decree for plaintiffs, and defendant Boswell appeals. Affirmed.

Russell H. Boggs and Henry Buhl, Jr., were partners carrying on a dry goods and notion business. On May 28, 1899, they organized a corporation under the laws of New Jersey under the name of Boggs & Buhl, which took over the property and business of the firm, and preferred and common stock was issued therefor. Messrs. Boggs & Buhl, who received all the stock, transferred certain portions of it to some of their principal employes, including the defendant, George B. Boswell. All of the holders of the common stock on April 20, 1899, entered into an agreement which is quoted below in the opinion of the court. On April 28, 1905, a meeting of the common stockholders was held at which all the common stockholders were present, except the defendant. At this meeting the following resolutions were offered and unanimously adopted: "Resolved that the stock of Mr. George B. Boswell be appraised and redeemed in accordance with the agreements signed by all of the holders of the common stock of said corporation dated April 20, 1899, on account of his incompetency in overbuying and otherwise mismanaging departments under his control, and because he by reason of his personal conduct has ceased to be a desirable associate. Resolved that the common stock of Boggs & Buhl Corporation held by Mr. George B. Boswell be appraised at \$149.71 cash per share, which is the gross value of the stock as shown by the books of

the corporation, and that said stock be redeemed and purchased at that price."

Other facts appear by the opinion of Frazer, J., in the court below, which was as follows:

"The agreement upon which this proceeding is based is a valid contract and binding upon all the parties to it. *Boswell v. Buhl*, 213 Pa. 450, 63 Atl. 56. The portion of the contract particularly applicable to the question here involved is as follows: 'If in the opinion of the holders of the majority of the common stock of said corporation a holder of any common stock of said corporation should cease to be a desirable associate either on account of incompetency or personal conduct or if a holder of any common stock of said corporation shall voluntarily resign from his or her position, the holders of the majority of said common stock shall be at liberty and they are hereby empowered to appraise the cash value of said stock and redeem or purchase the same from said party, and said stock so purchased shall be divided or distributed among the holders of said common stock in proportion to the amounts of stock held by each.'

"The clause quoted confers upon the holders of the majority of the common stock power to determine (a) whether the holder of common stock has ceased to be a desirable associate either on account of incompetency or personal conduct; and (b) to appraise and purchase the stock held by a stockholder who may become an undesirable associate. In this case, on April 28, 1905, after notice to all holders of common stock of the company, a meeting was held for the purpose of determining whether or not the common stock held by defendant should be appraised and taken under the agreement of April 20, 1899, defendant being at that time no longer 'actively engaged in the management' of the company either as an officer or employé. At that meeting it was unanimously resolved that defendant had ceased to be a desirable associate, and his stock appraised by more than a majority in interest of the stockholders at \$149.71 per share in cash. Whether the making of the agreement of April 20, 1899, was judicious is not a question for us to determine. The parties to the document had a right to make it, and, having executed it with full knowledge of its contents, its terms are the law of the case, and, as such, must be enforced against them, and be observed by them. *Boswell v. Boggs*, supra. The contract being a binding obligation upon the parties, it seems to us the sole question for determination is, did complainants act in good faith? If they did, defendant must acquiesce in and submit to the action taken by them. Whether a holder of stock shall retain his common stock in the company depends entirely upon the opinion honestly exercised by his associates. Defendant had been with the company since its organization, and the testimony shows no objection to him on the part of his associates.

until within the last two years of his association with them. During a portion of that time he was in ill health, which fact may have induced some of the acts his associates now complain of. However that may be, his associates by a unanimous vote determined that in their opinion he was no longer a 'desirable associate,' and that he should dispose of his stock in the manner provided by the agreement of 1899. Each stockholder called as a witness gave his reasons for voting as he did. The reasons given were in some respects trivial, but, as a whole were, in our opinion, sufficient to negative bad faith upon their part. While many of the reasons given by the witnesses to support their action were either refuted by defendant, or to some extent explained, it is apparent there was feeling among the small stockholders occasioned by defendant's conduct toward them, his absence from the store, and his refusal to acquiesce in the proposed transfer of the 1,500 shares of common stock by Messrs. Boggs & Buhl, and it is also apparent that the discontent of these stockholders, who were heads of the largest and most profitable departments of the store, would, if continued, act to the detriment of the company. All the stockholders were particularly interested in the success of the company, Messrs. Boggs & Buhl, not only on account of their large holdings, but also the pride they had in the business, and the other stockholders because of their investment in the preferred stock, which was no doubt large to them, and also in the future promise to them from the business. It was therefore vitally important to the interest of all that there should be harmony among the holders of the stock, and that all should be in constant attendance at the store and exercise their best efforts to extend and increase the business. Whether defendant was discharged from the company's service or quit voluntarily, we think is immaterial so far as this proceeding is concerned. He ceased to be actively engaged in the management of the company's business, and was, in the opinion of the other stockholders, deemed to be an 'undesirable associate.' They, therefore, had a right under the agreement of April 20, 1899, to appraise and redeem his stock.

"In the event of the stock of a member being appraised and taken, the agreement provides that the appraisement shall be made by the holders of the majority of the common stock 'and they are hereby empowered to appraise the cash value of said stock.' In this case the cash value was fixed at \$149.71 per share and was arrived at by ascertaining the value of the company's assets and deducting therefrom its liabilities and the par value of preferred stock; the difference representing the value of the common stock. The amount thus fixed was the value at the end of the fiscal year of the company, February 3, preceding. By bringing the statement down to date of appraisement the value was increased to \$159.20 per share, against

which was a claim of the commonwealth for bonus amounting to \$117,000, or about \$12 per share. Defendant's contention is that this appraisement is unreasonably below what it ought to be in view of the profits applicable to the stock, and also because it does not include any allowance for good will, which was valued at \$1,000,000 at the time of the formation of the corporation. At the organization of the company the common stock was not represented by any tangible property. It was valueless, and whether it should in the future have a value depended entirely upon an increase of the company's assets over and above the value of the preferred stock. This latter stock has preference at all times over the common stock, and in the event of the winding up of the corporation, no part of the funds realized from sale of the property can be applied to the common stock until all liabilities and the preferred stock and its accrued dividends have been fully paid. The testimony of both Mr. Boggs and Mr. Buhl is that the common stock represented nothing of value at the time it was issued and was given free of costs to the purchasers of the preferred. As the contract empowers a majority of the stockholders to appraise the value of a retiring holder's stock, and that having been done in this case, the appraisement must stand, unless the testimony shows bad faith on the part of those who made it. Owing to the conditions attached to the stock, it has no market value. No one outside of those actively engaged in the management of the corporation could be induced to purchase it, and, while the earnings of the company have been large, the value of the stock can hardly be based upon the dividends declared upon it, for the reason that dividends may be discontinued at any time and the earnings used for other purposes. While what was intended by the words 'appraise the cash value' of the stock is capable of more than one interpretation, it seems to us, taking the agreement as a whole, and also considering the fact that the stock must always be held by a person engaged in the management of the company's business, the intention of the parties to the agreement was that 'cash value' should be the sum shown by the value of the assets of the company applicable to the stock. This, it seems to us, is a fair and equitable standard for arriving at the common stock's value, and the rule which under all circumstances will most nearly do justice between the parties, in the event of an appraisement and redemption as in this case.

"Conclusions of Law.

"Under all the circumstances of this case, and viewing the testimony in its most favorable light to defendant, we conclude: (1) That plaintiffs in determining the advisability of continuing defendant as a business associate acted within the terms of the agreement of 1899, and in good faith. (2) The

value of \$149.71 per share placed upon the common stock in the Boggs & Buhl Company held by defendant, is, under the circumstances, the fair cash value of the same, and should be accepted by the defendant as provided in the agreement. Plaintiffs are entitled to a decree as prayed for."

Exceptions to the adjudication were dismissed by the court below; Frazer, P. J., filing the following opinion:

"We have examined the exceptions in connection with the testimony, and are not convinced that any of our findings or conclusions should be changed. All the findings and conclusions excepted to were fully considered at the time of their being prepared, and the argument of counsel has not satisfied us that any changes should be made. The exception most seriously argued was the one relating to the price per share at which the common stock was appraised. Whether we were right in finding that the value fixed by the stockholders at \$149.71 is correct, depends entirely upon whether \$1,000,000 for good will should be added to the value represented by goods and tangible property applicable to that stock. If that amount should be added, the appraisement is entirely too low; if not, in our opinion, it is not unfair. At the time of preparing our findings and conclusions, we carefully considered this question and concluded that the agreement of April 20, 1899, contemplated in the event of the stock of a member being purchased by the other members, the purchaser should only be required to pay for it according to its real value as represented by tangible property. We have not been convinced that we were in error in reaching this conclusion. At the time the stock was issued it was not represented by any property and had no value, and to-day its value depends entirely upon the value of the corporation's property over and above that necessary to pay debts and liquidate the preferred stock. As that surplus property fluctuates, so does the actual value of the common stock rise or fall. When we consider all the circumstances; that is, that the stock when issued had no value, that the persons owning it must be actively engaged in the management of the corporation, that it is never sold on the market, and that the preferred stock is subject to redemption at any time, it seems to us that its cash value is the price shown by the value of the assets of the corporation applicable to it, which in this case at the time of the appraisement was approximately \$149.71 per share. The argument that the offer of Messrs. Boggs & Buhl to sell 1,500 shares of their common stock holdings to employees at \$200 per share is evidence of a greater value than \$149.71, is not sound, in our judgment. In that offer Messrs. Boggs & Buhl agreed to sell with no other security for the purchase money than the stock itself, and to accept payment at such times and in such amounts as might suit the purchaser. Such terms would

not indicate a cash value. After giving full consideration to the agreement of 1899 and the testimony of the various witnesses we are unable to reach any other conclusion than that the value fixed at the stockholders' meeting is in accordance with the terms of the agreement, and is just. The remaining exceptions, it seems to us, are sufficiently answered in the argument which is a part of our findings of fact and conclusions of law. Exceptions dismissed."

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

William B. Rodgers, J. Rodgers McCreery, and Edwin S. Craig, for appellant. Willis F. McCook, J. S. Ferguson, and E. G. Hartje, for appellees.

PER CURIAM. Decree affirmed on the opinion of the court below.

(216 Pa. 641)

KERR v. KERR et al.

(Supreme Court of Pennsylvania. Jan. 7, 1907.)

DIVORCE—ALIMONY—LIEN.

Where a divorce has been granted a husband for cruel and barbarous treatment on the part of his wife, an allowance of alimony to the wife is not a lien on the husband's real estate.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Divorce, §§ 725, 726.]

Appeal from Court of Common Pleas, Allegheny County.

Bill by William A. Kerr against Robert J. Kerr and Rose C. Kerr. From a decree dismissing the bill, plaintiff appeals. Reversed.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

J. S. Ferguson and E. G. Ferguson, for appellant. William H. McClung and Thomas D. Chantler, for appellees.

BROWN, J. William A. Kerr, the appellant, obtained a decree of absolute divorce from his wife, Rose C. Kerr, on the ground of her cruel and barbarous treatment of him. The proceeding was instituted under the act of May 8, 1854 (P. L. 644), as amended by the act of June 25, 1895 (P. L. 308), and alimony was allowed the wife, fixed at \$720 per year. The decree of divorce, carrying with it the order for alimony, was made April 16, 1903, and was duly entered of record as a judgment against William A. Kerr in the judgment index of court on common pleas, No. 3, of Allegheny county. On August 25, 1905, the appellant entered into a written agreement with Robert J. Kerr, one of the appellees, to convey to him a certain lot of ground, to be free of all incumbrances. A deed was duly executed and tendered by the appellant to his vendee, who refused to accept it, for the reason that the land was incumbered by the said decree for alimony, and the single

question before us on this appeal is whether that decree became a lien on the real estate of the husband. The court below, having been of opinion that it was a lien, dismissed the bill for specific performance. It was really to enforce the payment of purchase money by a vendor, for which his proper remedy would be an action in assumpsit on the common-law side of the court; but the bill may be sustained for the reason that it was necessary to bring in the divorced wife to give her an opportunity to be heard in support of her claim that the order for alimony gave her a lien on the real estate of her husband. Without giving her an opportunity to be heard, a decree adjudging that the order was not a lien would not be binding upon her.

In the act of March 18, 1815 (6 Smith's Laws, p. 286), providing for the granting of divorces a vinculo matrimonii, no provision is made for alimony. In the supplemental act of February 26, 1817 (6 Smith's Laws, p. 405), providing for divorce from bed and board, there is a direction for the payment of alimony, but not that it shall be a lien on the real estate of the husband. By the act of April 15, 1845 (P. L. 455), a decree for alimony in favor of the wife, awarded under the act of 1817, is made a lien on the respondent's real estate; but in Groves's Appeal, 68 Pa. 143, the act of 1845 was strictly construed, and it was held that a lien for alimony not expressly granted by it did not exist. In that case the court below held that an order for alimony pendente lite was a lien; but this was reversed, because statutory authority would have to be shown to make it a lien, and, as the act of 1845 provided that an order for alimony became a lien only after a decree in divorce had been awarded, there was no authority to make the interlocutory order a lien. The act of 1845 was followed by the act of 1854, under which the appellant obtained his divorce. It is but an additional supplement to the act of 1815, and permits a husband to be divorced from his wife on the ground of cruel and barbarous treatment on her part. There is a direction in it that alimony shall be paid to the sinning wife by the wronged husband, but it is to be noted that nothing is said about the order for alimony being a lien. This is significant, and a natural conclusion is that, though less than 10 years before the Legislature had not only provided for alimony for a wronged wife, but directed that the order for it should be a lien, such provision may have been purposely withheld in the latter act, when the wife is the sinning respondent. Be this as it may, there is no statutory authority for making the order a lien against the husband's real estate, and, without such authority, it is not a lien. Groves's Appeal, supra. Proceedings in divorce are statutory throughout, and alimony, one of its features, is just what the statute makes it. It is a lien against real estate only when it is declared to be so by the statute. No reasoning by analogy nor

sentiment can make it a lien, and, if the wife of the appellant cannot point to the provision in the act of 1854 making the order for her alimony a lien against her husband's real estate, she does not have one.

It is contended by the learned counsel for the divorced wife that, under the authority of Hohman's Appeal, 127 Pa. 209, 17 Atl. 902, the decree for alimony to her ought to be a lien. In that case it was held that a balance due a committee of an habitual drunkard was within the provision of the act of March 29, 1859 (P. L. 289), making a decree in equity for the payment of money a lien upon real estate, and the order for the payment of the amount due by the estate of the habitual drunkard to his committee was declared to be a lien upon his real estate. The act of June 16, 1836 (P. L. 784), confers, in express words, chancery powers upon the courts of common pleas in "the care of the persons and estates of those who are non compos mentis." "The custody of lunatics and habitual drunkards, and of their estates, is committed by law to the court of common pleas, which is a court of record. That court appoints and removes the committee at pleasure (Black, In re, 18 Pa. 434), and settles and adjusts the accounts of the committee. Herein it acts as a court of chancery, exercising a jurisdiction which in England is committed to chancery, and exercising it in chancery forms of procedure. The final settlement of the committee's account is a decree in chancery, and is enforced by the usual remedies." Vincent v. Watson, 40 Pa. 306. Proceedings in divorce are not in chancery, and this order for alimony cannot be construed to be "a decree in equity for the payment of money." Groves's Appeal, supra. If it is not, it cannot be made a lien, under the act of 1859, and, having no statutory authority for its existence as a lien, it is no incumbrance on the real estate of the appellant.

The decree of the court below is reversed, and it is ordered, adjudged, and decreed that, upon delivery by the appellant to Robert J. Kerr of a deed for the premises mentioned in the bill, the latter pay the appellant \$37,550, with interest from August 29, 1905; the costs on this appeal and below to be paid by the appellees.

(217 Pa. 1)

HERON v. HOUSTON et al. (No. 1.)

(Supreme Court of Pennsylvania. Jan. 7, 1907.)

PARTY WALLS—POWER TO ERECT.

Under Act June 7, 1895, § 9 (P. L. 135), conferring on municipalities power to regulate party walls, every lot owner in the city has the right to make a party wall and may enter on the adjoining lot for that purpose, which right cannot be taken from him by the adjoining owner building exclusively on his own land either to the line or a short distance therefrom.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Party Walls, §§ 5-10.]

Appeal from Court of Common Pleas, Allegheny County.

Bill by John B. Heron, Jr., against James W. Houston and others. From a decree dismissing the bill, plaintiff appeals. Affirmed.

Bill to enjoin the removal or the cutting into a wall built wholly on the defendants' property. It appeared that plaintiff and defendants J. W. Houston & Co., are the owners of adjoining properties situate on Liberty avenue in the Ninth Ward of the city of Pittsburg, there being a three-story brick dwelling house erected upon plaintiff's lot, and a one-story iron-clad building on defendants'. Houston & Co., being desirous of improving their lot by erecting thereon a three-story brick warehouse, notified the superintendent of building inspection of the city of Pittsburg of their intention to construct a party wall on the division line between the two properties, and requested that officer to appoint a time for hearing the parties as provided in the ninth section of the act of June 7, 1895 (P. L. 135). Upon receipt of that notice the superintendent of building inspection fixed the time and place at which he would hear the parties, whereupon this bill was filed, denying the necessity for a party wall, averring irreparable damage in the event of such construction, and denying that the act cited confers upon defendants authority to require plaintiff to submit to the erection of a party wall. An injunction is asked to restrain Houston & Co. from proceeding in the matter, and also to restrain the superintendent of the bureau of building inspection from asserting jurisdiction under the act of June 7, 1895. The defendants demurred to the bill.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

J. S. Ferguson and E. G. Ferguson, for appellant. Magnus Pfau, for appellees.

STEWART, J. It is too late at this day to question abstractly the right of the Legislature to confer upon municipalities the power of regulating party walls. Never since we have been a state have we been without legislation of this kind; and every enactment on the subject has contained the fundamental feature here challenged—constitutional warrant for the appropriation, under municipal regulation, by one of two adjoining lot owners of a certain portion of the other's land, for the construction of a party wall for their common enjoyment and use. This legislation has not only been acquiesced in and acted upon until it has become a settled rule of property, which it would be most dangerous to public interest to disturb, but its constitutionality has been recognized by judicial authority in unmistakable terms. "There can be no available objection," is the language of the court in *Evans & Watson v. Jayne*, 23 Pa. 34, "to the principle upon which our laws as to party walls is based. * * * The principle is no in-

vasion of the absolute right of property, for that absolute involves a relative, in that it implies the right of each adjoiner, as against the other, to insist on a separation by a boundary more substantial than a mathematical line." The principle upon which these enactments rest is the general police power of the state. While it must be admitted that they are to a certain extent an interference with that exclusive enjoyment ordinarily incident to ownership of land, and are therefore to be strictly construed (*Hoffstot v. Voight*, 146 Pa. 632, 23 Atl. 351), yet our adjudication under them are but so many repeated recognitions of their correspondence with constitutional limitations.

Nor can the other question sought to be raised by appellant be regarded as an open one. A strict construction of the statute leaves the appropriation of appellant's property, for purposes of a party wall, within their legitimate operation according to our own adjudications. In appeal of the *Western National Bank*, 102 Pa. 171, it is said: "Every owner of a lot of ground in Philadelphia has a statutory right to make a party wall between himself and his neighbor, and may enter upon the adjoining lot for that purpose, not going beyond the prescribed limit. This right cannot be taken from him by the adjoining owner building exclusively upon his own land, either to the line or a short distance therefrom." What is true of the law relating to Philadelphia applies with equal force to the particular statute here under consideration. The fact that the erection of the party wall here complained of will involve the appropriation and possible removal of appellant's eastern wall, built wholly within his own line, and so contract the dimensions of his present hall or entry to his building, only furnishes another illustration of how general laws in their application may in individual cases result in apparent severity and injustice. Such apparent inequality necessarily results; but all are alike exposed to the chance, and the risk is part of the price which each pays for equal participation in all that is provided for the general safety and the common good.

The assignments of error are overruled. The decree affirmed, and the bill is dismissed, at the costs of the appellant.

(217 Pa. 4)

HERON v. HOUSTON et al. (No. 2.)

(Supreme Court of Pennsylvania. Feb. 18, 1907.)

PARTY WALLS—CONSTRUCTION OF AGREEMENT.

The owner of two lots executed deeds for the same to two separate parties. One deed provided that, if the building erected on the lot was over 25 feet in width and extended over the line of the other lot, the wall so extending over such line should be held a party wall, so that the grantee in the deed should not be compelled to take it down "past his own pleasure." The deed to the second lot provided that, if the building erected on the ad-

joining lot should extend over the line of the lot and onto the lot conveyed by the second deed, the wall should be held to be a party wall between the lot conveyed by such second deed and the adjoining landowner, so that such landowner should not be compelled to take down said wall "past his own pleasure." *Held* not an agreement between the respective vendees and their successors in title that the wall then existing should remain a party wall, not to be taken down except at the pleasure of the grantee of the first lot or those claiming under him.

Appeal from Court of Common Pleas, Allegheny County.

Bill by John B. Heron, Jr., against James W. Houston and others. From a decree sustaining demurrer to the bill, plaintiff appeals. Affirmed.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

J. S. Ferguson and E. G. Ferguson, for appellant. Magnus Pflaum, for appellees.

STEWART, J. A single circumstance distinguishes this case from *Heron v. Houston*, 66 Atl. 108, just decided. Here the two adjoining lots originally belonged to Thomas Melon, who had erected upon the one owned by appellant the three-story brick building now standing thereon. The deed for this lot from Melon to Kaye, the appellant's immediate predecessor in title, contained the following covenant with respect to this building: "And in case said building is over twenty feet in width and extends over the line of said lot next to Factory Street, the wall so extending partly over said line shall remain so and be held as a party wall between this and the adjoining lot owner so that Kaye, his heirs and assigns, shall not be compelled to take it down past his own pleasure." The deed from Melon for the adjoining unimproved lot to Ardary, the appellees' immediate predecessor in title, contained this covenant: "In case the building erected on the adjoining lot now owned by me should extend over the line of said lot and upon the lot herein described, the wall of said building so extending on said line shall remain so and be held as a party wall between this and adjoining lot owner, so that Kaye, his heirs and assigns, shall not be compelled to take down or remove said wall past his own pleasure."

Appellant's contention is that the covenant in the deed to Kaye, and the implied covenant or condition contained in the deed to Ardary, were in effect an agreement between the respective vendees and their successors in title that the wall then existing should remain as a party wall, not to be taken down except at the pleasure of Kaye, or those claiming under him.

The occasion for these covenants was the uncertainty in the mind of the original grantor as to whether or not the building erected on the lot now owned by appellant was wholly within the limits of that particular lot. His deed was one of general warranty. His evident purpose was to secure to his grantee

the right to maintain the wall as it was, even though it did encroach upon the unimproved lot now belonging to the appellees. The only effect of the covenants was to subject the appellees' lot to an easement of this extent. The provision that "the wall of the building so extending on said line shall remain so, and be held as a party wall between this and the adjoining lot owners, so that Kaye, his heirs and assigns, shall not be compelled to take down or remove said wall past his own pleasure," certainly affects the owners of the adjoining lot to the extent indicated; that is to say, they may not require the owner of the building to remove so much of it as encroaches upon their lot, but to give it the construction contended for would lead to the unreasonable conclusion that this wall, made a party wall, should always remain such as against any interference by the owners of the adjoining lot, but subject to removal at any time at the pleasure of Kaye or his successors in title. Evidently no such effect was understood or intended. Appellees, in taking down this wall, are proceeding under and in accordance with the provisions of the act of June 7, 1905. No covenant is being broken by such procedure; appellant is not being required against his own pleasure to take down the encroaching wall, but under authorization of the bureau of building inspection the appellees are proceeding with the work at their own expense, preparatory to the erection of a more adequate wall on the same site. The feature in the case to which we have adverted in no way exempts the wall in controversy from the provisions of the act. It is not necessary to refer to the other questions raised, since they were fully considered and decided in the opinion just filed in the case of *Heron v. Houston* (No. 1) 66 Atl. 108. The demurrer was properly sustained.

The appeal is dismissed at the cost of the appellant.

(216 Pa. 529)

In re SPRING'S ESTATE.

(Supreme Court of Pennsylvania. Jan. 7, 1907.)

1. TRUSTS—TESTAMENTARY TRUST—VALIDITY.

A will provided that the estate devised should be held in trust during the life of the trustee, the income to be paid to the beneficiary from time to time as his best interest should require; the trustee having the power to terminate the trust at his discretion. *Held* a valid testamentary trust.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 47, Trusts, § 9.]

2. SAME—SPENDTHRIFT TRUSTS—VALIDITY.

Where a will creates an active trust to protect the beneficiary because of his inexperience or inability to manage his estate, it is valid.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 47, Trusts, § 10.]

3. PERPETUITIES—ACCUMULATIONS.

Where testator placed the management of an estate in the hands of a trustee, with discretion as to the time of the termination of the trust and of the disposal of the accumula-

tions, the trust is not in violation of Act April 18, 1853 (P. L. 503), prohibiting the accumulation of income except during the minority of the beneficiary.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Perpetuities, § 70.]

Appeal from Orphans' Court, Allegheny County.

In the matter of the estate of Mary O'Hara Spring. From a decree declaring a trust at an end, Anna Melazina Spring, trustee, appeals. Reversed.

The trust was created by the sixth paragraph of the will of Mary O'Hara Spring, deceased, which was as follows: "(6) I do hereby give and devise one other of said parts or shares, being the one-third part of said rest and residue of my estate, to Guillelma Fell Alsop, Reese Denny Alsop, Mary Alsop and Elizabeth Febiger Alsop, children of my deceased daughter, Mary Lee Alsop, and their heirs and assigns forever, who shall take and hold the same share and share alike, subject, however, to the following conditions: The one-third share or part thus designated for the children of my deceased daughter, Mary Lee Alsop, shall be held in trust by my daughter, Anna Melazina Spring during the lifetime of my said daughter Anna Melazina Spring, she, the said Anna Melazina Spring, to have the sole control and management of said last mentioned one-third share of the residue of my real estate and to collect and receive the income therefrom, and to pay out, at her discretion, from said income to the said children of my deceased daughter, Mary Lee Alsop, or their heirs, according to their respective interests, such sums as she, the said trustee, may from time to time deem to be for their best interests; with power, however, to said trustee to terminate said trust with respect to any one or all of the said children of my deceased daughter, Mary Lee Alsop, at any time that she, the said Anna Melazina Spring may deem it for the best interests of my grandchildren, or their heirs, so to do. Any such termination of said trust to be evidenced by writing under the hand and seal of the said Anna Melazina Spring in the nature of a quit claim deed, or deed of release, declaring such purpose." Reese Denny Alsop, testatrix's grandson, one of the beneficiaries named in the above-quoted provisions, was the petitioner. Having attained his majority, he petitioned the orphans' court to adjudge as at an end as to him the trust created by his grandmother's will. The trustee, Anna Melazina Spring, daughter of the testatrix, filed her answer, denying the petitioner's contentions. The court held that the trust was terminated.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, ELKIN, and STEWART, JJ.

M. W. Acheson, Jr., and R. E. Stewart, for appellant, George C. Burgwin and George W. Guthrie, for appellee.

ELKIN, J. In disposing of the question raised by this appeal, it is important to keep in mind that the real estate devised being the subject-matter of this controversy belonged absolutely to the testatrix, who had the undoubted right to subject her testamentary gift to such conditions and limitations as she chose to impose, provided only that the limitations and conditions were lawful in purpose, and not restricted by statute. It is not for him who receives the gift to fix the quantum of the estate devised, the time when it is to vest absolutely, the method by which it is to be controlled or managed, or the conditions to which it is subjected. As was said by our present Chief Justice in Holbrook's Estate, 213 Pa. 93, 62 Atl. 368, 2 L. R. A. (N. S.) 545, 110 Am. St. Rep. 537: "In Pennsylvania the right of a man to do as he will with his own has always been liberally construed. Accordingly, a donor, not under any obligation to give, may give with such conditions as he pleases, subject only to the restriction that the conditions shall not be clearly illegal." That a benefactor has the power to restrict the enjoyment of his bounty through the medium of a trustee during the life of the beneficiary is the unquestionable law of this state. Rife v. Geyer, 59 Pa. 393, 98 Am. Dec. 351. If the trust can continue during the life of the beneficiary, it necessarily follows that it may be operative during the lifetime of the trustee named in the will and in being at the inception of the trust. It seems to have been conceded by the learned presiding judge in the court below that a valid active trust had been created by the express terms of the will of the testatrix, but it was held that the trust terminated when the beneficiaries became of age because of the statute which prohibits the permanent accumulation of income beyond the period of their minority. There is abundant authority to show that a valid active trust was created by the sixth paragraph of the will of Mary O'Hara Spring, deceased. Barnett's Appeal, 46 Pa. 392, 86 Am. Dec. 502; Rife v. Geyer, 59 Pa. 393, 98 Am. Dec. 351; Dodson v. Ball, 60 Pa. 492, 100 Am. Dec. 586; Marshall's Estate, 147 Pa. 77, 23 Atl. 391; Cooper's Estate, 150 Pa. 573, 24 Atl. 1057, 30 Am. St. Rep. 829. It is immaterial that the provisions of the will creating the trust follow an absolute devise of the estate to the beneficiaries. Sheets' Estate, 52 Pa. 257; Wilbert's Estate, 166 Pa. 113, 30 Atl. 1022; Boies' Estate, 177 Pa. 190, 35 Atl. 724; Krebs' Estate, 184 Pa. 222, 39 Atl. 66. Nor does the fact that there was no limitation over affect the validity of the trust, if, as in the case at bar, it clearly appears that it was the intention of the benefactress to create a trust, and thus guard her bounty with the protection of a trustee in whose judgment and discretion she evidently had the fullest confidence. It is a primary rule of our cases to give effect to the intention of the testa-

tor, and the presumption always is that the intent was lawful.

Applying this principle to the present case, there is presented an active trust created by apt words and a testamentary intent clearly expressed, which must be sustained, unless it can be shown that the trust thus created is in violation of an inflexible rule of law or of statutory restrictions. The burden is on him who undertakes to show the illegal purpose. It seems to have been assumed by the learned presiding judge in the court below, and is suggested by the eminent counsel for appellee here, that, in order to support a trust of this character, it must be a coverture trust, or a spendthrift trust, or a trust to support contingent remainders. We do not so understand the law. An active trust may be created as a protection to the beneficiary because of his inexperience, improvidence, inability to manage his estate, or for any other purpose, not illegal, which the benefactor may deem wise or expedient in order to carry out his intentions. *Perry on Trusts*, § 805. Or, as is stated in 2 *Pomeroy's Equity Jurisprudence*, § 991: "They [active trusts] may, except when restricted by statute, be created for every purpose not unlawful." We quite agree with the learned president judge of the court below in *King's Estate*, 210 Pa. 435, 59 Atl. 1106, wherein he announced the very sound doctrine that there is just as much reason for sustaining a trust *per autre vie* as an estate *per autre vie*.

There remains one question for our consideration in this case. Did the temporary placing of the control and management of the estate devised in the hands of the trustee with discretion as to the time of terminating the same and of disposing of the accumulations bring the trust within the meaning of the act of April 18, 1853 (P. L. 503), which prohibits the permanent accumulation of income except during the minority of the beneficiary? Was the trust under the provisions of the will for accumulation only, or was the accumulation of income an incident to the general purpose thereof? It is an accumulation designed as a permanent addition to the corpus of the estate beyond the statutory

period which is prohibited. It, however, has been frequently held that accumulation in the nature of the withholding of income temporarily and for the purpose of providing a fund in the interest of the judicious management of the trust is valid, and for such a purpose and to such an extent a testator may validly confer upon a trustee discretionary power over income. *Eberly's Appeal*, 110 Pa. 95, 1 Atl. 330; *Hibbs' Estate*, 143 Pa. 217, 22 Atl. 882; *Howell's Estate*, 180 Pa. 515, 37 Atl. 181. We think the case at bar belongs to this class of cases, and is controlled by the rule therein laid down. The trustee is vested with large discretionary powers, and, acting entirely within the authority contained in the will, can pay to the beneficiaries the entire income. The corpus of the estate, with all the incidents of improvements, insurance, taxes, repairs, is under the control and management of the trustee. The trustee is given the power to manage the estate, receive the income, pay out the whole or any part of it for the use of the beneficiaries, and to terminate the trust estate at any time when she shall deem it advisable for the best interests of the beneficiaries. Since the death of the testatrix these active duties have devolved upon the trustee and have been performed by her. She is now exercising her control and management of the estate as directed by the will, and we can see no sufficient reason why the intention of the testatrix should be disregarded. So far as the record discloses, there is no occasion to go into the question of the good faith of the trustee in either paying or withholding the income. The only income unpaid at the time of the filing of the petition was about \$600, which has been since that time voluntarily paid to the appellee. We doubt not that the trustee in the future will continue to pay the beneficiary such portion of the income—or all of it—as she shall deem expedient for his best interests.

Decree reversed and petition dismissed, costs to be paid out of the trust estate of appellee.

(74 N. J. L. 230)

REEVES et al. v. JONES.

(Supreme Court of New Jersey. April 5, 1907.)

1. JUSTICES OF THE PEACE—CERTIORARI—OBJECTIONS NOT RAISED BELOW.

Where, at a trial before the small cause court, the justice dismissed the action as to one of two defendants because there was no return of service upon the defendant by the constable, the plaintiffs will not be heard on certiorari to question the validity of such ruling, on the ground that defendant had appeared by asking an adjournment; it appearing that no objection was made to the ruling at the time by the plaintiffs or their counsel who was present.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 31, Justices of the Peace, § 776.]

2. CERTIORARI—LACHES.

No question of laches is involved upon the issuance of a writ of certiorari at any time during the period prescribed by the statute.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Certiorari, § 59.]

(Syllabus by the Court.)

Certiorari by M. William Reeves and J. Lewis Lane against Samuel Jones to review a judgment of a small cause court. Affirmed.

Argued November term, 1906, before HENDRICKSON, SWAYZE, and TRENCHARD, JJ.

Berry & Wiggins, for prosecutors. Townsend Godfrey, for defendant.

HENDRICKSON, J. This is a certiorari which has been brought to a hearing before a single justice of the Supreme Court, pursuant to section 5 of the certiorari act, approved April 8, 1903 (P. L. p. 844; Motts' Practice Act, p. 185). The writ in this case is directed to a small cause court to bring up the judgment, order, or proceedings in the suit for review. The record returned shows that the prosecutors on April 18, 1906, brought suit against Samuel Jones and Mary C. Jones jointly, in an action on contract to recover a sum claimed to be due for professional services rendered as physicians. The particular error complained of, and sought to be reviewed, is the action of the justice below, at the trial, in dismissing the suit as to Samuel Jones, on the ground that the return upon the summons showed no service on the latter. The transcript shows no actual judgment entered against the prosecutors after such order of dismissal for costs or otherwise. The question has not been raised by the defendant as to whether certiorari will lie to bring up such an order, and whether it will or not, is not considered or determined in this proceeding.

It is contended for the defendant, however, that the writ in this case should be dismissed as having been improvidently granted, on the ground of laches; it appearing that the prosecutors waited nearly 18 months after the action complained of before bringing their writ. But it appears they did bring their writ before the expiration of 18 months, which is the time limited by section 8 of the certiorari act. This being so, the ground of

laches must fail. It has been held that no question of laches is involved upon the issuance of a writ of certiorari at any time during the period prescribed by the statute. *Graff v. Smolensky*, 35 Ill. App. 264; 4 Enc. of Pl. & Pr. 137b.

The prosecutors urge, as ground of reversal of the order of dismissal, that, in point of fact, although the return upon the summons was defective in the respect named, the defendant, Samuel Jones, appeared, with Mary C. Jones, the other defendant, on the return day, and asked and obtained an adjournment of the cause for two weeks, and upon the adjourned day appeared again and asked and obtained a further adjournment, thereby submitting himself to the jurisdiction of the court and curing the defect complained of, citing *Honeyman on Small Cause Courts* (Ed. 1902) p. 514, with cases cited. But it is contended for the defendant that the action of the court below should not now be reversed on the ground alleged, because the same was not brought to the attention of the justice at the trial, and no objection was raised by the plaintiffs or their attorney, who was present, to the motion to dismiss. An inspection of the transcript of the justice shows these allegations to be true. This disclosure is fatal to a reversal on the ground named. The principle is well settled that questions not raised below, or alleged erroneous action as to which no objection was made, cannot be presented to or considered by the reviewing court. 6 Cyc. 821. The same principle finds support in the decisions of our courts. In *Cole & Taylor v. Cliver*, 44 N. J. Law, 212, it was held by the Court of Errors that objections to the sufficiency of the proof of a plea of privilege must be made at the trial, or they will be regarded as having been waived. This principle is further illustrated in *Shangnuole v. Ohl*, 58 N. J. Law, 557, 34 Atl. 755; *Jaques v. Hult*, 16 N. J. Law, 38; *Steward v. Sears*, 36 N. J. Law, 173.

My conclusion is, therefore, that the order of dismissal cannot be reversed on the ground stated. And since no other ground of reversal is shown in the reasons or in the brief of counsel of the prosecutors, the order and proceedings below must be affirmed, with costs.

(74 N. J. L. 439)

LIPPINCOTT v. LIPPINCOTT, Tax Collector, et al.

(Supreme Court of New Jersey. March 27, 1907.)

1. TAXATION—NATIONAL BANK STOCK.

The owners of national bank stock are to be taxed thereon at its true value.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Taxation, §§ 646, 647.]

2. SAME—VALUATION.

In ascertaining the true value of the shares of such stock for the purpose of taxation, the act approved May 11, 1905 (P. L. p. 457) does not require that the nontaxable property of the banks should be deducted from their assets.

3. SAME--DEDUCTIONS AND EXEMPTIONS.

The only effect of that act is to allow an individual taxpayer to claim the same deductions and exemptions as against the assessment of his shares of national bank stock as he might against the assessment of his other personal property.

(Syllabus by the Court.)

Certiorari by Heulings Lippincott against Isaac Lippincott and others to review an assessment for taxes. Assessment confirmed.

Argued November term, 1906, before HENDRICKSON, SWAYZE, and TRENCHARD, JJ.

French & Richards, for prosecutor. Joseph Kaighn and Daniel V. Summerill, Jr., for defendants.

TRENCHARD, J. This writ of certiorari brings up for review an assessment of taxes made by the township of Chester, in the county of Burlington, against the prosecutor, Heulings Lippincott, for 216 shares of stock of the National State Bank of Camden, at \$67.50 per share, making a value of \$14,580. The taxes were assessed for the year 1905. On May 20, 1905, the bank had as capital stock, surplus, and undivided profits \$529,348.99. Of this it had real estate \$85,685; stocks and bonds \$96,850; mortgages \$3,500; and United States bonds and premiums \$108,875. In ascertaining the value of prosecutor's shares, the assessor deducted from the assets of the bank the assessed valuation of the real property of the bank, and made no other deduction or exemption therefrom. It is conceded that the stocks, bonds, mortgages, and United States bonds and premiums in which the capital stock, surplus, and undivided profits were invested are nontaxable in the hands of individuals. If, in making the assessment, the stockholder was entitled to have the assessor deduct the nontaxable securities in which the assets of the bank were invested, the assessment was erroneous and excessive; if, on the contrary, he was not entitled to have such securities deducted, the assessment was right. The sole question therefore is whether the holder of shares of bank stock is entitled to have the assessor, when he values the shares, deduct from the assets, in addition to the assessed valuation of the real property of the bank, the value of the nontaxable securities held by the bank as a part of its assets.

It has been held by the Supreme Court of the United States that national bank shares are liable, under the acts of Congress, to state taxation, although the entire capital of the bank is invested in United States bonds; that bank shares represent proprietary interests distinct from that of the capital stock. *People v. Commissioners*, 4 Wall. 244, 18 L. Ed. 344; *Lionberger v. Rowse*, 9 Wall. 468, 19 L. Ed. 721; *Mercantile Bank v. New York*, 121 U. S. 138, 7 Sup. Ct. 826, 30 L. Ed. 895. In *Evansville Bank v. Britton*, 105 U. S. 322, 26 L. Ed. 1053, it was held

that, under certain limitations, national bank shares are taxable with exclusive reference to their value, and without regard to the nature of the property held by the bank as a corporation. In our own state it was held that owners of national bank stock were to be taxed thereon at its true value, and that, in ascertaining the true value of such shares for the purpose of taxation, our then existing laws (the tax act of 1869 [P. L. 1149] and the bank act of 1899 [P. L. p. 431]) did not require that nontaxable property of banks should be deducted from their assets. *Mechanics' Nat. Bank v. Baker*, 65 N. J. Law, 113, 46 Atl. 586, affirmed 65 N. J. Law, 549, 48 Atl. 582. But the prosecutor in this case contends that the reduction claimed is allowed by an act of the Legislature entitled "A supplement to an act entitled 'An act for the assessment and collection of taxes,' approved April eighth, one thousand nine hundred and three," approved May 11, 1905 (P. L. p. 457) which provides as follows: "Section 1. In assessing the shares of stock of banks or banking associations organized under the laws of this State or of the United States, the assessor shall allow all the deductions and exemptions granted by law from the value of other taxable property owned by individuals in this State, and the assessment and taxation of such shares of stock shall not be at a greater rate than is made or assessed upon other moneyed capital in the hands of individuals in this State. In making such assessment, the assessed valuation of the real property of such bank or banking association shall be deducted from the total valuation of the shares of stock assessed against the stockholders." Upon an examination, we find that the act above recited is in effect the same as the New York act of July 1, 1882; the chief difference being in the use of the word "exemptions" in our act, instead of the word "exceptions" used in the New York statute. The New York act was construed by the United States Supreme Court in *Mercantile Bank v. New York*, 121 U. S. 138, 7 Sup. Ct. 826, 30 L. Ed. 895. In that case the court held that, under the New York statute, the owners of national bank stock were not entitled to claim any deduction from the assessed value of their shares on account of United States securities owned by the bank. The conclusion there announced and the reasoning by which it is supported we regard as decisive of the present case. It will be observed that the language of our act is not apt language, if the intent was to allow the valuation of the bank stock to be reduced by deducting from the assets of the bank such securities as were exempt from taxation. The word "deductions" is not an apt word for such purpose. It is true the word "exemptions" is not an appropriate word in the view we take of the act; but, in matters of taxation, we must incline in favor of sustaining the tax, and he who sets up an exemption must be required to establish it.

Cooper Hospital v. Camden, 70 N. J. Law, 478, 57 Atl. 260. It will also be observed that the act of 1905 provides that, "in making such assessment, the assessed valuation of the real property of such bank or banking association shall be deducted from the total valuation of the shares of stock assessed against the stockholders." If the Legislature had intended that there should also be "deducted from the total valuation of the shares of stock assessed against the stockholders" the nontaxable securities held by the bank, it would, we presume, have said so in appropriate language. The fact that the act authorizes the deduction of real estate in making the assessment is an indication that nothing but real estate is to be deducted upon the principle that the expression of one thing excludes the other. The Constitution of our state requires that property shall be assessed at its true value, and shares of bank stock would not be assessed at their true value if the contention of the prosecutor prevails. In order, therefore, to sustain the legislation in question as constitutional, we are obliged to construe it as not allowing the deduction of the securities in which the assets of the bank were invested.

It is contended by the prosecutor, in view of the language of the act of 1905 that "the assessment and taxation of such shares of stock shall not be at a greater rate than is made or assessed upon other moneyed capital in the hands of individuals in this state," that the assessment under review is illegal, because it is alleged the tax act of 1903 provides for a less rate of assessment for trust companies than is imposed on shares of national banks. The Supreme Court of the United States, in construing section 5219 of the Revised Statutes of the United States [U. S. Comp. St. 1901, p. 8502], which contains a provision similar to that in our act, held that the "other moneyed capital" intended by this legislation is such capital as, in its use, comes into competition with the business of the national banks. *Aberdeen Bank v. Chehalis*, 166 U. S. 440, 17 Sup. Ct. 629, 41 L. Ed. 1069; *Mercantile Bank v. New York*, 121 U. S. 138, 7 Sup. Ct. 826, 30 L. Ed. 895. We know of no reason why the language of our act should not receive the same construction as was given the same words in the act of Congress, for it is evident that the words were inserted in our statute in order that it might be in harmony with the federal statute. The tax act of 1903 (P. L. p. 394) provides for the taxation of every trust company "upon the full amount of its capital stock paid in and accumulated surplus." The act concerning trust companies (P. L. 1899, p. 450) which was under consideration in *Mechanics' Nat. Bank v. Baker*, 65 N. J. Law, 549, 48 Atl. 582, and in *Fidelity Trust Co. v. Vogt*, 66 N. J. Law, 86, 48 Atl. 580, provides for the taxation of every trust company "upon the amount of its capital stock issued and outstanding," and it was held

both by this court and by the Court of Errors and Appeals that this meant that the assessment should be upon the full amount of the capital stock issued and outstanding, and that it should be assessed at its true value. In that view, as was said by Chancellor Magie, in *Mechanics' Nat. Bank v. Baker*, 65 N. J. Law, 549, 553, 48 Atl. 582, the assessment and imposition upon them is exactly equivalent to that upon shares of national bank stock.

We do not think that the change in the act of 1903 suffices to overcome this construction. If, however, the act of 1903 was intended to change the law as declared in *Mechanics' Nat. Bank v. Baker* and *Fidelity Trust Co. v. Vogt*, supra, the act was unavailing for that purpose, for the reason that it would, as was said by the Court of Errors and Appeals in *Mechanics' Nat. Bank v. Baker*, supra, be rendered invalid by the constitutional provision requiring assessment at true value. It does not appear in the present case that trust companies of this state have any assets invested in United States bonds to which the rule adopted in *Van Allen v. Assessors*, 3 Wall. (U. S.) 573, 18 L. Ed. 229 would be applicable; nor does it appear that the capital invested in trust companies is in fact assessed at a lower rate than is assessed upon the shares of national banks. *Mercantile Bank v. New York*, supra; *Covington v. First Nat. Bank*, 198 U. S. 100, 25 Sup. Ct. 562, 49 L. Ed. 963. We think, therefore, that the contention of the prosecutor cannot prevail. Our conclusion necessarily is that the only effect of our act of 1905 is to allow an individual taxpayer to claim the same deductions and exemptions as against the assessment of his shares of national bank stock as he might against the assessment of his other personal property.

The result is that the assessment under review should be confirmed, with costs.

(74 N. H. 138)

CLARK et al. v. TOWN OF MIDDLETON.
(Supreme Court of New Hampshire. Strafford.
March 5, 1907.)

1. TAXATION—UNEQUAL ASSESSMENT—VALUATION.

Where plaintiffs sought an abatement of taxes, alleging that the valuation of their property was not in proportion to the valuation of other property, and proved that the market value of plaintiffs' property, appraised at \$5,000, was \$2,000, but did not show the valuation of any other property or that the valuation of plaintiffs' property was disproportionate to the valuation of other property, plaintiffs' petition should have been dismissed.

2. SAME—APPRAISAL.

Under express provisions of Pub. St. 1901, c. 58, § 1, it is the duty of the selectmen of a town to appraise all property therein for taxation at its fair market value.

3. SAME—PRESUMPTIONS.

Where, in a proceeding for abatement of taxes, plaintiffs alleged that their property was assessed at $2\frac{1}{2}$ times its value, and proved by direct evidence that all other property in the town, as to which there was evidence, was appraised at the same rate, they were not entitled

to the presumption that the assessing officers had performed their duty in assessing at the fair market value, as required by Pub. St. 1901, c. 58, § 1, in order to show a disproportionate assessment.

4. TRIAL—OBJECTIONS—WAIVER.

The rule that an objection which may be cured at the time by further evidence or action is waived unless the ground of the objection is specifically stated applies to a motion to dismiss where the ground of the motion could have been obviated at the time if the objection had been known.

5. APPEAL—REVERSAL—JURISDICTION AFTER REMAND.

Where an order for abatement of taxes on plaintiffs' petition was reversed on exceptions and the cause remanded because of failure of proof, the trial court after remand had power to reopen the case and afford plaintiffs an opportunity to produce missing evidence.

Transferred from Superior Court, Strafford County; Stone, Judge.

Petition by Charles E. Clark and another against the town of Middleton for abatement of taxes. A decree was rendered in favor of plaintiffs after the denial of defendant's motion to dismiss the petition, and the case was thereupon transferred to the Supreme Court for hearing of defendant's exceptions. Case discharged.

George E. Cochrane and James A. Edgerly, for plaintiffs. John Kivel and George T. Hughes, for defendants.

PARSONS, C. J. The plaintiffs alleged as the ground upon which they asked an abatement of the tax assessed against them that the valuation of their property upon which the tax was assessed was not in proportion to the valuation of other property. Upon competent evidence, at the trial it was found that the fair market value of the plaintiffs' property, appraised at \$5,000, was \$2,000; but there was no evidence of the valuation of any other property, or that the valuation of \$5,000 placed by the selectmen upon the plaintiffs' property was disproportionate to the valuation placed by them upon other property. There was therefore a failure of direct evidence tending to establish a point made essential by the pleadings, and which was material as matter of law. *Winnipisseege, etc., Co. v. Laconia*, 74 N. H. 82, 65 Atl. 378; *Amoskeag Mfg. Co. v. Manchester*, 70 N. H. 200, 46 Atl. 470. The decree for the plaintiffs appears to have been based on the assumption, or finding, that other property in the town was appraised at its fair market value. In the absence of direct evidence upon this point, the decree cannot be sustained; and the motion to dismiss should have been granted unless there are facts in evidence from which such inference could properly be made. It was the duty of the selectmen to appraise all property at its fair market value. Pub. St. 1901, c. 58, § 1. If there is a presumption that public officers have performed their duty sufficient in the absence of any evidence to sustain the burden of proof in favor of one relying upon the regularity and validity of

their proceedings (*Cross v. Brown*, 41 N. H. 283, 289), such presumption will not aid the plaintiffs here, because they have by direct evidence established that all the property in Middleton, as to the appraisal of which there was evidence, was appraised at $2\frac{1}{2}$ times its value.

The appraisal of other property has heretofore become material in tax abatement cases upon the claim of the plaintiffs that such property was appraised at less than its value. In this case the plaintiffs appear to concede that such property was not appraised at less than its value. The question, therefore, is not material unless it is claimed by the defendants that the other property in the town, as well as that of the plaintiffs, was appraised in excess of its fair market value. It does not appear that the defendants, in making their motion to dismiss, made such claim, or stated the ground upon which they relied. It is a general rule that an objection which may be cured at the time by further evidence or action is waived unless the ground of the objection is specifically stated. *Blodgett v. Webster*, 24 N. H. 91; *Whitehouse v. Bickford*, 29 N. H. 471, 481; *Ossipee Mfg. Co. v. Canney*, 54 N. H. 295, 314, 315; *Hayward v. Bath*, 38 N. H. 179, 183; *Haines v. Insurance Co.*, 59 N. H. 199; *Edgerly v. Railroad*, 67 N. H. 312, 317, 36 Atl. 558; *Emery v. Railroad*, 67 N. H. 434, 435, 36 Atl. 867; *Matthews v. Clough*, 70 N. H. 600, 602, 49 Atl. 637; *Wheeler v. Railway*, 70 N. H. 607, 615, 50 Atl. 103, 54 L. R. A. 955. The principle has been applied in the cases cited to exceptions to evidence and to instructions to the jury; but it applies equally upon a motion to dismiss, where the ground of the motion could readily have been obviated at the time if the objection had been made known. *Baldwin v. Wentworth*, 67 N. H. 408, 36 Atl. 385; *Elwell v. Roper*, 72 N. H. 585, 587, 58 Atl. 507. Upon the plaintiffs' concession that other property was appraised at its full value, and the absence of claim that it was appraised at a higher rate, it may have been inferred that such was conceded to be the fact. Such conclusion may have been amply justified by the course of the trial, and, if well founded, would support the decree. If it were clear that the objection now insisted upon was not taken at the trial, the exception would be overruled; but, although the ground of the motion to dismiss is not expressly stated, the character of the findings has some tendency to show that the question now raised may have been presented at the trial. Justice, therefore, requires that the case should be discharged for judgment for the plaintiffs according to the decree, unless the defendants at the trial based their motion to dismiss upon the ground that the property in the town other than the plaintiffs' was appraised in excess of its true value. If this was the defendants' contention at the trial, the motion should be granted on the evidence re-

ported. Should the plaintiffs ask to reopen the case and for an opportunity to introduce evidence as to the appraisal of other property, the superior court has power to grant such request should justice require.

Case discharged. All concurred.

(74 N. H. 207)

GLIDDEN v. TOWN OF NEWPORT.

(Supreme Court of New Hampshire. Sullivan. March 5, 1907.)

1. TAXATION—LIABILITY OF PROPERTY—MONEY AT INTEREST.

Pub. St. 1901, c. 55, § 7, cl. 5, subjects to taxation money at interest, including money loaned on any mortgage, obligation, note, or other security. Plaintiff advanced money to the purchasers of real estate under a bond from the owner, under an arrangement whereby the land was deeded to plaintiff, on an understanding that he would convey to the purchasers under the bond, on the payment to him of the amount advanced and interest, and plaintiff gave a bond binding himself to convey, and those to whom the bond was given gave no note, but promised to pay plaintiff the amount advanced. *Held*, that the transaction amounted to a mortgage, and plaintiff was properly taxed on the amount advanced by him.

2. EVIDENCE—PAROL EVIDENCE AFFECTING WRITINGS.

Where plaintiff gave a bond to convey certain real estate to the obligees on repayment to plaintiff of moneys advanced by him, and thereafter he petitioned a town for abatement of a tax imposed on the sums advanced, if the provision of the bond did not amount to a promise by the obligees to pay the money and interest, as between plaintiff and the town parol evidence was admissible to show such a promise.

3. TAXATION—PROPERTY SUBJECT TO TAX—MORTGAGED REAL ESTATE.

Pub. St. 1901, c. 55, § 14, provides that real estate shall be taxed to the person claiming the same, or to the person who is in possession and actual occupancy, if such person will consent to be taxed. Chapter 55, § 7, cl. 5, imposes a tax on money at interest, including money loaned on any mortgage. *Held*, that where land was conveyed to one to secure an advancement, and he gave a bond for reconveyance, the transaction amounting to a mortgage, the real estate was properly taxed to him, notwithstanding that he was taxed for the amount of his advancement.

Exceptions from Superior Court, Sullivan County; Wallace, Judge.

Petition by Emery J. Glidden against the town of Newport for the abatement of taxes. Petition dismissed, and plaintiff brings exceptions. Exceptions overruled.

In November, 1903, Edson W. and Julius E. Harvey were in possession of a farm in Newport under a bond for a deed from one Fletcher. Fletcher was pressing them for the payment of \$1,350 due upon the bond, and they applied to the plaintiff for a loan of the money. The plaintiff agreed to loan them the money, he to have a deed of the farm and to give them a bond conditioned that he would convey the farm to them upon the payment of the \$1,350 and interest. November 25, 1903, the plaintiff took a deed of the farm from Fletcher, paid him \$1,350, and gave a bond to the Harveys, binding himself, his heirs, executors and administrators, in the

sum of \$5,000, as follows: "Whereas, the above bounden Emery J. Glidden has this day agreed to sell to the said Edson W. Harvey and Julius E. Harvey the following described tract of land [describing it], on condition that the said obligees shall pay the sum of thirteen hundred and fifty dollars in manner following, to wit, by yearly payments of fifty dollars, the first of said payments to be paid on or before the 25th day of November, 1903, and annual interest on the principal to be paid on or before the 25th day of November of each year: Now, the condition of this obligation is such that if the said Edson W. Harvey and Julius E. Harvey shall pay the said sum of thirteen hundred and fifty dollars and interest in manner above described, and shall in the meantime pay all taxes on said premises, keep the buildings reasonably insured for the benefit of the said Emery J. Glidden as his interest shall appear * * *

and the said Emery J. Glidden shall on the completion of the said payments and interest, and the performance of the other agreements and covenants by the said obligees to be performed, make, execute, and deliver, or cause to be made, executed, and delivered a good and sufficient warranty deed to the said obligees of said premises, and the said obligees shall carry on the said farm in a husbandlike manner and shall keep the buildings on said premises in reasonable repair, then this obligation shall be null and void, otherwise to remain in full force and virtue." In December, 1904, one Thatcher requested the plaintiff to loan him \$500 with which to purchase the Cutting farm in Newport. The plaintiff agreed to do so if Thatcher would convey the farm to him and allow him to retain two acres of it; the plaintiff to give Thatcher a bond for a deed of the remainder of the farm. Thatcher purchased and conveyed the farm to the plaintiff on December 31, 1904, for \$515 paid him by the plaintiff, who at once gave Thatcher a bond binding himself, his heirs, executors, and administrators in the penal sum of \$1,000 to convey said remainder to Thatcher upon the payment of \$500 and interest, etc. The condition of the bond is substantially like that of the Harvey bond, excepting that it contains a provision by which the obligor is to allow the obligee to have full possession and control of the premises while the payments are being made. The Harveys have been in possession of the farm mentioned in their bond ever since its date. Thatcher took possession of the farm described in his bond immediately upon its execution, and he and his assigns have been in possession since. Both farms were taxed to the plaintiff in 1905—the first one at \$2,000, and the last one at \$500—and he or the obligees paid the taxes. Payments of principal and interest have been made and have been indorsed upon the bonds. No note or other obligation was taken by the plaintiff from the obligees. One purpose of the plaintiff in taking the papers in the form described was

to avoid being taxed for the \$1,350 and \$500 paid by him. Another reason was his belief that this course gave him better security than a mortgage would give, and still another reason in the latter case was the obtaining of the two acres of land. The court found that these transactions were in effect mortgages, aside from the fact that in the last case the plaintiff obtained two acres of land for little or nothing. The plaintiff was also taxed in Newport in 1903 for \$1,500, money at interest. It was this portion of the tax that he asked to have abated.

Frank O. Chellis, for plaintiff. Jesse M. Barton, for defendants.

CHASE, J. It is assumed that the money at interest for which the plaintiff was taxed is a portion of the money which he paid when the farms were conveyed to him. Otherwise there would be no question of law before this court. One question for consideration, therefore, is whether this money was money at interest, within the meaning of the statute, which subjects to taxation "money on hand or at interest more than the owner pays interest for, including money * * * loaned on any mortgage, pledge, obligation, note, or other security, whether on interest or interest be paid or received in advance." Pub. St. 1901, c. 55, § 7, cl. 5. This statute makes money at interest a distinct class of taxable property. The court's finding that the transactions were in effect mortgages implies that the sums of money advanced by the plaintiff upon the conveyances of the real estate to him were in fact loans upon interest, and that the real estate was conveyed to him as security for the payment of the loans. This implication is confirmed by his dismissal of the petition, which necessarily shows that he found that the transactions were loans of money upon interest, or at least that the plaintiff, upon whom the burden of proof rested, had failed to make it appear that they were not such loans. Viewing the deed and the bond of each case in the light of the circumstances under which they were made, it is difficult to see how any other conclusion could be reached, so far as the question of taxation is concerned. Although the money was not loaned on a mortgage, strictly speaking, and no note was taken, it was loaned, according to the court's findings, upon a promise which, if only oral, was a legal obligation, and clearly comes within the provision of the statute above quoted. If it were held that the provisions of the bonds do not amount to promises by the obligees to pay the money and interest, as therein set forth, the bonds, as written evidences of the transactions, would not exclude other evidence in this action to which a third party is the defendant. *Libby v. Company*, 87 N. H. 587, 588, 32 Atl. 772; *State v. Davison*, 74 N. H. 10, 64 Atl. 761. "In this state, the taxability of money at interest is not an open judicial question. Whether the assessment of money

at interest is a process of ascertaining the lender's or the borrower's just share of the public expense, or an exceptional, double, or otherwise wrongful taxation of the borrower, * * * permitted, not required, by an erroneous constitutional construction established by legislative usage and judicial recognition, we need not inquire. If the assessment of a creditor for his interest-bearing loan of money is, in effect, either a double taxation of his debtor, or a taxation of the debtor for property which, by conveyance or destruction, has ceased to be his, * * * such taxation is sustained by the authority of precedent * * * too firmly established to be overthrown by any other authority than that of making laws." *Morrison v. Manchester*, 58 N. H. 538, 551, 552. It would seem that, by the transactions under consideration, the borrowers of the money (obligees) are not doubly taxed, in any sense, since the rate of interest they are to pay on the loans (apparently, that fixed by law) appears to have been agreed upon with the understanding that taxation of the money would be avoided. If the money escapes taxation, they will gain nothing by the fact, and, if it does not escape, they will lose nothing. Their interest charges will be the same in either event. The tax falls upon the plaintiff, where, according to law, it belongs.

The plaintiff further says the money is not taxable because the real estate he holds as security for its payment was taxed to him, and the taxation of the money would duplicate this tax. Real estate is also a distinct class of property specifically subjected to taxation. Pub. St. 1901, c. 55, § 2. It is taxable to "the person claiming the same, or to the person who is in possession and actual occupancy thereof, if such person will consent to be taxed for the same." Pub. St. 1901, c. 55, § 14. The taxes upon the real estate described in the plaintiff's bonds were properly assessed against him, as he held the title; but, as the obligees were in possession, the taxes might lawfully have been assessed against them with their consent. By the terms of the bonds, the obligees are bound ultimately to pay the taxes, and it is of little consequence to them or the plaintiff whether the assessment is made against the one or the other. If the taxes are assessed against the plaintiff, and he pays them, he does so, not on his own account, but on account of the obligees, and has a claim against them for reimbursement. He pays what are in reality their taxes, not his. His money was not merged in the real estate, but in the obligees' promises secured by conveyances of the real estate. Taxation of the real estate to him was not taxation of his money, nor was the taxation of the money taxation of the real estate. As found by the superior court, the relations between him and the obligees, so far as they concerned taxation, were in effect like those between a mortgagee and mortgagor in ordinary mortgages of real estate.

The taxation of mortgaged real estate and of the loan secured by the mortgage is not double taxation (*Nashua Savings Bank v. Nashua*, 46 N. H. 389, 399, 408; *Morrison v. Manchester*, 58 N. H. 538; *Sawyer v. Nashua*, 59 N. H. 404, 406; *Boston, etc., R. R. v. State*, 62 N. H. 648), and the reasons for this holding lead to the same conclusion when applied to the facts of this case. The plaintiff is not doubly taxed in fact, unless the taxation of money at interest is in all cases double taxation, in which case, as has been seen, the legality of the tax is not an open question. *Morrison v. Manchester*, *supra*. He is not in a position to set up the plea of double taxation on other grounds with any degree of legal or moral force.

Exception overruled. All concurred.

(74 N. H. 197)

O'NEIL et al. v. TOWN OF WALPOLE.

(Supreme Court of New Hampshire. Cheshire. March 5, 1907.)

1. HIGHWAYS—ESTABLISHMENT—STATUTE.

Under Pub. St. 1901, c. 67, § 12, a town situated on the Connecticut river may authorize its selectmen to contract with the officers of any contiguous town in Vermont for the purchase of the real estate, franchise, etc., of any bridge corporation if in their opinion the public good requires a highway to be laid over said property. *Held* that, in proceedings thereunder, a proposed highway is established when the selectmen enter into such contract and purchase such property; no further proceedings being necessary for the legal establishment of the highway.

2. SAME—APPORTIONMENT OF MAINTENANCE—EXPENSE.

Under Pub. St. 1901, c. 73, § 4, providing for the apportionment of the expense of repairing highways among towns greatly benefited by them, a town can have such an apportionment made on account of an existing highway and for future maintenance expenses.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Highways, § 357.]

3. SAME—PROCEDURE.

Though under the express provision of Pub. St. 1901, c. 73, § 4, the petition of a town for the apportionment of the expense of maintaining a highway among the towns benefited by it should be made directly to the superior court, and by it referred to the county commissioners, a filing directly with the commissioner will not necessarily invalidate the proceedings.

4. SAME.

Under the express provisions of Pub. St. 1901, c. 73, § 4, before the superior court may apportion the expense of maintaining a highway situate in one town among other towns benefited thereby, it must appear that the other towns are "greatly" benefited.

Transferred from Superior Court, Cheshire County; Pike, Judge.

Charles J. O'Neil and others petitioned for the establishment of a highway in the town of Walpole and appealed to the superior court from a denial of the petition, and the matter was transferred to the Supreme Court on an agreed statement of facts. Case discharged.

At the annual town meeting of Walpole, held March 8, 1904, resolutions were adopted.

under a proper article in the warrant, for the meeting, one of which authorized, instructed, and directed the selectmen to unite with the selectmen of the town of Rockingham, Vt., "and contract with them for the purchase of the real estate, easement, and franchise of the Tucker toll bridge, so called, owned by the Bellows Falls Canal Company, and to contract with said town of Rockingham as to the proportion of expense to be borne by each town in such purchase, and in the construction and maintenance of a highway over the Connecticut river at the place where said toll bridge is located, and as to the proportion which each town shall contribute toward payment of damages to third persons injured in the use of said highway." The town of Rockingham, at a meeting held March 1, 1904, under a proper article in the warrant, authorized and instructed its selectmen to unite with the town of Walpole in purchasing the real estate, easement, and franchise of the Tucker toll bridge at an expense to the town of Rockingham not exceeding \$6,666.66, nor one-third of the cost of the property, and to agree with the town of Walpole in respect to the portion of the cost and the future expense of keeping the bridge in repair, etc., to be borne by each town. Subsequently the Bellows Falls Canal Company conveyed to the towns of Walpole and Rockingham and their successors, by warranty deed, "the Tucker Bridge, so called, extending over the Connecticut river from the village of Bellows Falls in said Rockingham to said Walpole, with the abutments and the land upon which the same stand, and all the rights and privileges thereto granted by the state of New Hampshire or otherwise." At the October term, 1905, of the superior court, the plaintiffs' petition was referred to the county commissioners, who appointed January 25, 1906, as a day of hearing, and duly notified the parties thereof. January 4, 1906, the selectmen of Walpole presented to the commissioners a petition, setting forth that the expense of laying out and maintaining the highway described in the original petition would be excessively burdensome to Walpole, and that the towns of Alstead, Acworth, and Langdon would be greatly benefited thereby, and praying that a part of the expense of the highway be assigned to those towns, and that the commissioners adjudge what proportion of the expense of the future maintenance of the bridge and highway should be borne by each of said towns, if the highway was laid out. The commissioners appointed a hearing upon this petition, to be held at the same time and place as that upon the original petition, and caused due notice to be given to the towns of Rockingham, Alstead, Acworth, and Langdon. The three towns last named appeared at the hearing and objected to the commissioners considering the petition or any matter affecting their rights or interests, because, as they alleged, the commissioners had "no jurisdic-

tion or authority to determine any question affecting such rights or interests." At the April term, 1906, of the superior court, the commissioners filed their report, setting forth that Walpole filed a petition as above stated, that notice was given to Rockingham, Alstead, Acworth, and Langdon, and that the three towns last named appeared, etc. They laid out the highway as prayed for in the original petition. They further reported that "Walpole would be excessively burdened by the building and maintaining of said highway, and that Alstead, Acworth, and Langdon would be benefited thereby"; that the substantial part of the making of the highway is the maintenance of a bridge; and that they, therefore, found "that Walpole shall bear one-third of two-thirds of the expense, Alstead one-third of two-thirds, Acworth one-sixth of two-thirds, and Langdon one-sixth of two-thirds." They further reported that, inasmuch as the town of Rockingham owned one-third of the bridge and was ready and willing to enter into a contract to bear one-third of the expense of maintaining it, they made provision "only for two-thirds of the expense of such maintaining, leaving the one-third to be provided for by Rockingham."

Charles H. Hersey and John E. Allen, for plaintiffs. Thomas E. O'Brien, for town of Walpole. Edward M. Smith and Ira Colby & Son, for towns of Alstead, Acworth, and Langdon.

BINGHAM, J. "Highways are only such as are laid out in the mode prescribed therefor by statute, or as have been used as such for public travel thereon, other than travel to and from a toll-bridge or ferry, for twenty years." Pub. St. 1901, c. 67, § 1. One method prescribed by statute for laying out highways is by petition and hearing before the selectmen of the town in which the proposed highway is situated. Pub. St. 1901, c. 67, § 2; *State v. Morse*, 50 N. H. 9. This method is of general application, and includes within its scope the laying out of highways within the limits of any town in the state. Another and different method is provided for laying out highways in towns bordering on the Connecticut river and where the proposed highway crosses that river. Pub. St. 1901, c. 67, §§ 12, 13; *Stearns v. Hinsdale*, 61 N. H. 433, 435. By this method a town situated on the Connecticut river may, at any legal town meeting, authorize its selectmen to unite with the selectmen or other proper officers of any contiguous town or towns in Vermont, and contract with them for the purchase of any real estate, or the privilege, easement, or franchise of any bridge or ferry corporation, if in their opinion the public good requires a highway to be laid out over said property. Pub. St. 1901, c. 67, § 12. In a proceeding under this statute a proposed highway is laid out and established when the selectmen, acting in pursuance of a vote of the town,

enter into a contract with the officers of the adjoining town or towns in Vermont, and purchase the real estate, or the privilege, easement, or franchise of a bridge or ferry corporation, for the highway; and the questions of public good and the location of the highway are determined by the selectmen when they enter into the contract and purchase the necessary property. It was under this statute that the vote of Walpole was passed; and it follows as a necessary consequence that when its selectmen, in pursuance of the vote, entered into the contract with the selectmen of Rockingham and purchased the Tucker toll bridge property, the road over that bridge became a public highway, and nothing remained to be done by way of petition or hearing, either before the selectmen or the commissioners, for its legal establishment.

It seems, however, that after the contract was made and the bridge was purchased the plaintiffs filed a petition with the selectmen of Walpole, requesting them to lay out a highway over the bridge, and, upon its being denied, took an appeal to the superior court, that the court referred the petition to the county commissioners, and that, while the proceeding was pending before them, the selectmen of Walpole, in behalf of the town, petitioned the commissioners (in accordance with sections 11, 12, and 13, c. 69, of the Public Statutes of 1901) for an apportionment between it and the towns of Alstead, Acworth, and Langdon of the future expense of repairing and maintaining the highway; and it is contended in behalf of these towns that, inasmuch as the commissioners were without authority to lay out a highway where one already existed, they could not lawfully apportion the future expense of repairing and maintaining the bridge. But the fact that over the route petitioned for there was an existing highway does not preclude the town of Walpole from having an apportionment of the future expense of maintaining it. In section 4, c. 73, of the Public Statutes of 1901, it is provided that "when the expense of rebuilding or repairing a highway would be excessively burdensome to the town in which it is situate, and another town is greatly benefited by the highway, the Supreme [now superior] Court, upon petition and proceedings thereon as in the case of laying out a highway, may order a portion of the expense to be paid by such other town." This statute applies to existing highways (*Pittsburg v. Clarksville*, 58 N. H. 291); and, while it does not in express terms authorize an apportionment of the future expense of maintaining such highways, it has been construed to confer such authority (*Campton v. Plymouth*, 64 N. H. 304, 308, 8 Atl. 824). In proceedings under it the petition should be filed in the superior court and by it referred to the county commissioners, and not filed directly with the commissioners, as was done in this case. But the course here pursued

does not necessarily render the proceedings invalid. It would seem that the parties had been fully heard before the proper tribunal, and, if this is so, the petition of Walpole may be considered as though it had been filed in court in the first instance; at least, the superior court may so treat it if in its opinion justice requires that it should be.

There is one other matter that remains to be considered. In the report of the commissioners it is stated that Walpole would be excessively burdened by maintaining the bridge, and the other towns named benefited thereby. To give the superior court authority to award an apportionment, it should appear that the other towns are "greatly benefited." Pub. St. 1901, c. 73, § 4; *Langley v. Barnstead*, 63 N. H. 246. If the omission of the word "greatly" in the report is due to a clerical error in printing the case or in drafting the report of the commissioners, such steps may be taken in the superior court as will obviate this objection. It is further suggested that the contract between the towns of Walpole and Rockingham relating to the purchase of the bridge, and defining their rights and obligations as owners therein, should be reduced to writing and filed as a part of the record in this case.

When these things are done and an order is made allowing the above amendment, the report of the commissioners, so far as it relates to the laying out of the highway, should be dismissed; but so far as it pertains to the apportionment of the future expense of maintaining the bridge across the river it should be sustained and a decree entered accordingly.

Case discharged. All concurred.

(74 N. H. 123)

WELLS v. PARKER.

(Supreme Court of New Hampshire. Cheshire. March 5, 1907.)

1. EASEMENTS—PRESCRIPTIVE RIGHTS—OWNERSHIP OF LAND.

A prescriptive right to an easement cannot accrue while both the alleged dominant and servient tenements are owned by the same person.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Easements, § 20.]

2. SAME—PAROL GIFT.

A prescriptive right to an easement may arise by a parol gift.

3. SAME—EVIDENCE—QUESTION FOR JURY.

When C. defendant's predecessor in title went into possession of the property, an old spring was located on adjoining land subsequently conveyed to plaintiff, from which water to supply C.'s family was taken. Three years after C. acquired her property, she dug a well about two rods from the spring on the same land, and used the water from it until C. conveyed her land. She testified that the then owner of plaintiff's property gave permission to dig the well and use the water. *Held*, that the right so conferred did not constitute a mere revocable license as a matter of law, and that whether C. claimed an adverse right to the well was for the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Easements, § 94.]

4. SAME—ACTUAL NOTICE.

Where plaintiff's predecessor in title conferred on defendant's predecessor the right to use a well on the former's land, his knowledge that the use was claimed adversely need not be proved by actual notice in order to establish title by prescription, but may be inferred from the circumstances attending the original transaction.

Transferred from Superior Court, Cheshire County; Pike, Judge.

Trespass quare clausum by Wellington Wells against Samuel G. Parker for passing to and from a spring of water on plaintiff's land across the road from defendant's house, and for taking water therefrom. Defendant pleaded a prescriptive right to use the spring, and on a trial to a jury the court granted and directed a verdict for plaintiff, on the ground that there was no evidence that the use made of plaintiff's premises from 1864 to 1886 was adverse, to which ruling defendant excepted, and the case was transferred to the Supreme Court. Exception sustained.

Some time before 1850, one Willard owned both the Wells and the Parker land, and conveyed the Parker place to Mason, who built the house now occupied by the defendant. After various transfers, the title to this place was acquired in 1864 by Mrs. McCollister, who continued to own it until 1886, when the title passed from her and finally vested in the defendant in 1900. There was evidence tending to show that for 50 years or more the owners of the Parker place had used the spring in question. Mrs. McCollister testified that, when she went to live in the Parker place, the family got their water from the spring or well opposite the house; that some three years later they dug a well about two rods from the other one and on the same land, and used the water from it while she owned the place; that Willard, the owner of the Wells place, gave "us permission to dig it"; that "he gave me a right to use water there"; that he said: "You have a perfect right to use water from that well. I give you permission;" that she supposed she had a right to the new well, but did not claim a right to the old one.

John E. Allen, for plaintiff. Cain & Benton, for defendant.

WALKER, J. The evidence of adverse possession is not sufficient to show that a prescriptive right to the easement accrued before 1850, for up to that time for many years both places were owned by the same person. One cannot gain a title by prescription in his own land. *Stevens v. Dennett*, 51 N. H. 324, 330. Hence the adverse possession, if any, had not been maintained for the necessary period of 20 years in 1864, when Mrs. McCollister bought the Parker place; nor had it matured when she dug the new well, and ceased to use, or abandoned, the old one. In fact, it appears from her testimony that she made no claim of ownership in the old well, but con-

fined her claim to the new one. It is therefore unnecessary to consider the effect of her possession, or that of her grantors, in the old one. The defendant's position is that Mrs. McCollister entered into the enjoyment of the water easement in question under a claim of right which was inconsistent with a revocable license and adverse to the title of Willard, who then owned the servient estate; and that she persisted in that claim, in connection with her undisturbed possession, for more than 20 years. If the evidence is sufficient in law to authorize the jury to find the necessary facts involved in the defendant's position, the court erred in directing a verdict for the plaintiff, though the burden of proving title by adverse possession was upon the defendant.

It is argued, in behalf of the plaintiff, that, if the evidence authorizes an inference of fact that there was a parol grant of the spring or its use, it was in law merely a revocable license, which necessarily measures the extent of the grantee's claim, and proves that it was not of an adverse character. *Taylor v. Gerrish*, 59 N. H. 569, is relied upon in support of this proposition. That was an action of trespass *quare clausum*. One defense was that the defendant had acquired a right to the easement in question by prescription. The facts were reported by a referee, who found a verdict for the plaintiff, and the question was whether upon the facts the verdict could be sustained. It appeared that in 1833 the owner of the premises by parol gave the defendant's grantor the right to the spring, saying that, "if she would dig it out, and stone it up, and lay a pipe to convey water to her house, she might have it in welcome." She constructed the well and water course, and continued in the use and occupation of it till 1874. There was no direct evidence what her claim was as to the ownership of the spring, but her grantees insisted that, notwithstanding the verdict for the plaintiff, the facts showed that she acquired a title by prescription as a matter of law. The question was not whether there was sufficient evidence of adverse possession to sustain a verdict for the defendants, as in the present case, but whether it conclusively appeared that the referee erred in his application of the law in returning a verdict for the plaintiff. The arrangement between the parties in 1833, in view of the situation of the property and other competent circumstances, was evidence upon the question of the character of the possession. It might show to the trier of the fact that it was understood that the donee of the easement was to enter upon the enjoyment of it as an owner, though without a technical deed, and hence that her possession was adverse to the donor's title; or it might authorize a finding that she entered under a merely revocable license, and hence that it was not adverse, but in subordination, to the superior title. The verdict seems to establish the fact that her entry and possession were of the

latter character, from which it resulted as a matter of law that she acquired no title by prescription. The court say: "From 1833 to 1858, when Ladd parted with his title, the user was permissive, and therefore, down to 1858, neither the defendants nor their grantors had acquired a title by prescription." If the general finding had been for the defendants, it would have been proper to say that the user was, as a matter of fact, adverse, and not in accordance with, or in subordination to, the license, which was the legal effect of the arrangement. While no estate passed for want of a deed, the parties may have treated the transaction as having that effect; and, if they did, the donee's subsequent uninterrupted possession might reasonably be deemed to exist under a claim of ownership, with the knowledge and acquiescence of the donor. The legal effect of the transaction did not preclude the parties from claiming that it had a different effect, which, if persisted in for a sufficient length of time and attended with an uninterrupted possession, would give the donee a title equivalent to a title by deed. It is thus apparent that it was not decided in *Taylor v. Gerrish* that, when A. undertakes orally to give B. an undefined right to an easement in land, it would not be competent for a jury to find, in the absence of direct evidence, that B. entered claiming in fact to be the owner of the easement, with the knowledge or acquiescence of A.; but that, when it is found by the trier of the fact that B.'s entry was understood by both parties to be under, and by virtue of, A.'s license, and that no different claim had been entertained by them during the period of A.'s occupation, the latter acquired no prescriptive title—a holding that is in accord with the weight of authority. See cases cited in *Taylor v. Gerrish*; also, *Sumner v. Stevens*, 6 Metc. (Mass.) 337; *Stearns v. Janes*, 12 Allen (Mass.) 582; *Bus. Lim. § 267*; *Wood Lim. § 260*. The intention in accordance with which the possession was given and received, though different from the legal effect of the transaction, is the important thing; and, when it is evidenced by the testimony of witnesses from which different inferences may be drawn, it can only be found as a fact, and does not rest on legal presumptions.

In the present case, the question is whether the defendant adduced evidence sufficient to support a verdict in her favor. It is insisted by the plaintiff that Mrs. McCollister's testimony does not tend to show that she ever claimed to own the spring, or that Willard ever had notice that she made such a claim. She testified, in substance, that Willard gave her permission to dig the well and a perfect right to use the water at the well. Whether the parties intended that Mrs. McCollister should thereby enter and use the water as an owner, or as a tenant at sufferance, is not clear. The duration or extent of the right given is not defined. But the inconclusiveness of her testimony does not lead to the result

that, when weighed in connection with the circumstances attending the transaction, it would not warrant a finding that she entered, when she dug the well, claiming to be the owner of it, with the knowledge of Willard. If that is found to be the fact, her continued occupation for more than 20 years, without objection or interruption by Willard or his grantees, would perfect her prescriptive title. His knowledge of her claim need not be proved by actual notice, but may be inferred from the circumstances attending the original transaction. No reason is apparent why one may not as well claim to be the owner of land in his possession under a parol gift, as under a deed which for some defect in execution conveys no title. In both cases it might be held that the occupant was in law merely a tenant at sufferance; but that conclusion of law would not prevent his claiming to be the owner in the former case, any more than it would have that effect in the latter case. And when, as in this case, the parties employ language whose meaning is doubtful, unless considered in connection with all the attendant circumstances, the question of their understanding of its effect, or their mutual claims in regard to it, should obviously be left to the jury. A finding upon that issue does not qualify or contradict the legal effect of the transaction at the time, but it may establish the original fact from which title by prescription results, in the absence of any assertion by the grantor of his legal right during the prescribed period of 20 years. The ruling of the court was therefore incorrect, and the verdict must be set aside.

Exception sustained. All concurred.

(74 N. H. 190)

ROY v. HODGE.

(Supreme Court of New Hampshire. Hillsborough. March 5, 1907.)

1. MASTER AND SERVANT—ASSUMPTION OF RISK—PROMISE TO REMOVE DEFECT.

A servant cannot recover for injuries caused by the defective condition of the master's instrumentalities, merely because the master had previously promised to remedy the defect, where the servant's continuance in the employment was not induced by such promise.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 638-640.]

2. SAME—KNOWLEDGE BY SERVANT OF DANGER.

In an action for injuries to a servant by his hand coming in contact with a bench saw, in attempting to throw an edging upon a pile of the same, which had been allowed to accumulate to an unusual height, there being no evidence that plaintiff did not know that his hands would be cut if they came in contact with the saw, and that the unusual height of the pile of edgings increased the risk of something occurring to bring his hands in contact therewith, he cannot recover, since a servant injured by the condition of the master's instrumentalities cannot recover, unless the cause of injury was a danger which the master did, and the servant did not, know was incident to using them.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 574-600.]

Transferred from Superior Court, Hillsborough County; Pike, Judge.

Action by Fred Roy against Jeremiah Hodge. Case transferred from the trial term on defendant's exception to the denial of his motion for a nonsuit. Exception sustained.

The evidence tended to prove the following facts: The plaintiff, who was a man of ordinary intelligence and experienced in doing such work, was employed by the defendant to run a bench saw. He stood at the left of the saw to do his work, and threw the edgings he made on a pile at the right of the bench. This pile was 16 feet long and 8 feet wide, and was separated from the bench by posts extending about 54 inches above the top of the bench. About a week before, and again on the day before, the accident, the plaintiff asked the defendant to remove the edgings, because he feared they would fall on the bench and saw. On both occasions the defendant said he did not have time to attend to it then, but would do so "as soon as he got around to it." At the time of the accident, the pile was about 42 inches above the top of the bench at the front, and higher at the back. The plaintiff attempted to throw an edging on the pile. The end caught on its rough face, and in some unexplained way brought his hand in contact with the saw, thus causing the injury complained of.

Branch & Branch, for plaintiff. Burnham, Brown, Jones & Warren, for defendant.

YOUNG, J. There is no evidence that the plaintiff was induced to remain in the defendant's service by reason of the latter's promise to remove the pile of edgings. *Bodwell v. Company*, 70 N. H. 390, 47 Atl. 613. Consequently, the defendant's motion should have been granted, unless there was evidence from which it can be found that the plaintiff did not appreciate the risk of his hands being brought in contact with the saw, incident to the unusual height of the pile of edgings; for the cause of the plaintiff's injury was the condition of the defendant's instrumentalities (*McLaine v. Company*, 71 N. H. 294, 296, 52 Atl. 545, 58 L. R. A. 462, 93 Am. St. Rep. 522), and it is the rule in this state that servants whose injuries are caused in that way cannot recover from their master, unless the cause of their injuries is a danger which he did, and they did not, know was incident to using his instrumentalities. *Demars v. Company*, 67 N. H. 404, 40 Atl. 902. The first question, therefore, is whether there is any evidence from which it can be found that the plaintiff was not "chargeable with a knowledge of the material conditions which were the immediate cause of his injury"; or, if he is, that he did not appreciate "the danger produced by the abnormal conditions in question." 1 Labatt, M. & S. § 279a. He admits that he knew of the material conditions

which produced his injury, but claims he did not fully appreciate the danger incident thereto. *Demars v. Company*, supra. The test to determine that question is not to inquire whether he anticipated being injured in the precise way the accident happened (*Stevens v. Company*, 73 N. H. 159, 60 Atl. 848, 70 L. R. A. 119; *English v. Amidon*, 72 N. H. 301, 56 Atl. 548; *Slack v. Carter*, 72 N. H. 287, 56 Atl. 316; *Boyce v. Johnson*, 72 N. H. 41, 54 Atl. 707; *Lapelle v. Company*, 71 N. H. 346, 51 Atl. 1038; *Whitcher v. Railroad*, 70 N. H. 242, 247, 46 Atl. 740; *Lintott v. Company*, 69 N. H. 628, 44 Atl. 98), but whether he knew he was liable to receive a substantial injury because of the unusual condition, if it was permitted to continue (*Shaw v. Railway*, 73 N. H. 65, 58 Atl. 1073; *Murphy v. Railway*, 73 N. H. 18, 58 Atl. 835).

To apply that test to the facts in this case, it will be necessary to inquire whether there is any evidence from which it can be found that the plaintiff did not know that the unusual height of the pile of edgings increased the risk of his being injured by the saw. The only evidence on that issue is the fact that he asked the defendant to remove the edgings because he was afraid they would fall on the bench and on the saw. The question whether he appreciated the risk of his injury therefore resolves itself into one of what he feared when he asked the defendant to remove the edgings: Was it the pile of edgings, or the saw? It is clear that he feared the saw, for he must have known that he had nothing to fear from the edgings, even if they fell on the bench while he was working at the saw; but he knew that if one fell upon the saw, or if his hands were brought in contact with the saw in any other way, he would be injured. So, although he may not have known that, if the end of an edging caught against the rough face of the pile, his hands would be brought in contact with the saw, he knew the saw would cut his hands if they came in contact with it, whether the cause of their coming in contact with it was an edging falling from the pile, or the end of one he was trying to throw upon the pile striking its rough face. He also knew that the height of the pile of edgings increased the chances of something of this kind happening. So it cannot be found that the cause of the injury was a danger peculiar to the service, of which the defendant did, and the plaintiff did not, know; for there is nothing to show that the defendant either knew or ought to have known anything more in respect to the dangers incident to doing the work than the plaintiff did, or that the plaintiff did not know that the height of the pile of edgings increased the liability of something happening which would bring his hands in contact with the saw, even if he did not know just what that something might be. In other words, although the plaintiff did not antici-

pate being injured in the precise way the accident happened, there is nothing to show he did not know that his hands would be cut if they came in contact with the saw, and that the unusual height of the pile of edgings increased the risk of something occurring that would bring his hands in contact with the saw.

Exception sustained. Judgment for the defendant. All concurred.

(74 N. H. 201)

HOLBROOK v. HOLBROOK et al.

(Supreme Court of New Hampshire. Cheshire. March 5, 1907.)

1. TRUSTS—EXECUTION BY TRUSTEE—DISTINCTION BETWEEN CAPITAL AND INCOME.

A will provided that certain shares of bank stock should be held in trust, and that the income should be paid to testatrix's nephew during life. Upon the termination of the life estate the property was to pass to remaindermen. Five years after testatrix's death the directors of the bank declared a special dividend of 100 per cent., and the stockholders voted to double its capital stock, giving the stockholders the privilege of subscribing for the new stock at par and of paying for the same with the special dividend. The transaction constituted a distribution of surplus earnings, a part of which accumulated after the trust was created. *Held*, that the trustee should make such a division of the stocks or their proceeds as would give the life tenant such part as was equivalent to his interest in the surplus earnings that accrued subsequent to the creation of the trust, and that the balance should be added to the corpus.

2. SAME.

The trustee also held under the same trust shares in a bank which increased its capital stock one-half and gave its stockholders the right to subscribe, at \$300 a share, for one share of new stock for every two shares of the old owned by them. Surplus earnings to an amount greater than the value of all the rights had accumulated since the creation of the trust. *Held*, that the right to subscribe should be considered a distribution of income unless some part of the value of such right was due to surplus earnings that accrued prior to the creation of the trust or to natural growth and increase in the value of the corporate plant and business.

Transferred from Superior Court, Cheshire County; Peaslee, Judge.

Bill by William P. Holdbrook, trustee under the will of Susan J. Holbrook, praying for instructions as to the execution of the trust. Case transferred from the trial term. Case discharged.

John E. Allen and Edward F. Cate, for life tenant. Charles H. Hersey, for remaindermen.

BINGHAM, J. The petitioner is the trustee under a will and asks to be instructed as to the disposition to be made of certain trust funds. By the fifteenth clause of the will the testatrix provided that 46 shares of the capital stock of the Keene National Bank and 30 shares of the Park National Bank should be held in trust, and that the trustee should pay the income thereof as it became due to the testatrix's nephew during his life. The trustee was not to dispose of

any of the stocks comprising the trust fund, nor make any new investment from the proceeds of stock sold, without the written consent of the life tenant. It was further provided that in case any of the stocks were disposed of before the decease of the testatrix an amount equal to the proceeds should be invested by the trustee, with the written consent of the life tenant, and placed with the remainder of the original trust fund. Upon the termination of the life estate there was a provision disposing of the property to remaindermen. The testatrix died in 1900. February 14, 1905, the directors of the Keene National Bank declared a special dividend of 100 per cent., and on the same day its stockholders voted to double its capital stock, giving the stockholders the privilege of subscribing for the new stock at par and of paying for the same with the special dividend. It was the purpose of the bank to increase its fixed capital and thus enable it to make larger loans. All the stockholders, including the trustee, took the new stock. It was found that the above transaction constituted a distribution of the surplus earnings of the bank, a part of which accumulated after the trust was created.

The remaindermen contend that the transaction was in substance a stock dividend, and that, notwithstanding the foregoing finding, the new stock is capital, and not income; also, that the testatrix's will discloses that she intended the life tenant should receive as income only such earnings as were declared as ordinary dividends. But we are of the opinion that their contention cannot be supported. The votes of the corporation left the stockholders at liberty to take and retain the cash dividend, or to take the new stock and treat the dividend as payment for it; and, where such is the case, it cannot be said to be a stock dividend, either in form or effect. *Davis v. Jackson*, 152 Mass. 58, 60, 25 N. E. 21, 23 Am. St. Rep. 801. The testatrix made no distinction in her will between ordinary and extraordinary dividends in the distribution of the income. Whatever was income of the trust fund she declared should be paid by the trustee to her nephew during his life, without regard to the form in which it was distributed. Nothing was said showing that she intended that any of it should go to the remaindermen. As the dividend that was declared was a cash dividend and issued out of surplus earnings, the material question is: What constituted the trust fund, the earnings of which, upon a distribution to stockholders, belonged to the life tenant as income?

In *Lord v. Brooks*, 52 N. H. 72, this was the very question before the court; and it was held that the surplus earnings of a corporation that were not divided at the date of the trust deed belonged to the corpus of the trust as a part of the capital of the trust fund, and that dividends declared out of surplus earnings that had accrued since the

date of the trust deed were income for the life tenant. This result was reached by construing the trust deed and ascertaining the intention of the creator of the trust. The construction placed upon the deed in that case applies with equal force to the provisions of the will here under consideration. Moreover, the will furnishes additional evidence leading to the same conclusion, for it provides, in case of a sale of any of the stocks before the testatrix's decease, that an amount equal to the "proceeds from said stocks" shall be invested "and placed with the remainder of the original trust fund." This provision clearly indicates that the testatrix intended that profits representing earnings made prior to the creation of the trust should be added to and form a part of the corpus of the trust. While it is found that the bank's action constituted "a distribution of the surplus earnings of the bank, a part of which accumulated after the trust went into effect," it is not found what that part is. Upon a further hearing this fact may be ascertained. The trustee should then be directed to make such a division of the stocks or their proceeds as will give the life tenant such part of the stocks or proceeds as is equivalent to his interest in the surplus earnings that accrued subsequent to the creation of the trust. The balance should be added to the corpus. *Lord v. Brooks*, supra; *Peirce v. Burroughs*, 58 N. H. 302, 303.

We are also of the opinion that if the action on the part of the bank was a declaration of a stock, and not of a cash dividend, our conclusion would not be different, in view of the finding that a part of the dividend came out of surplus earnings which accumulated after the trust went into effect. As we have seen, the method pursued by this court in determining whether a given dividend is capital or income, there being no express provision as to the matter in the trust instrument, is to inquire into the actual nature and source of the dividend. If it is found to represent surplus earnings of the business that have accrued since the creation of the trust, it is to be regarded as income, and as belonging to the life tenant. If it is found to represent earnings that accrued prior to the creation of the trust, it is capital, and belongs to the corpus of the trust. *Lord v. Brooks*, supra. And if it is found, in whole or in part, to represent the natural growth and increase in the value of the corporate plant and business, whether that growth and increase took place before or after the trust was created, it is also to that extent capital. *Jones v. Railroad*, 67 N. H. 234, 241, 30 Atl. 614, 68 Am. St. Rep. 650; *Van Blarcom v. Dager*, 81 N. J. Eq. 783, 794; *Hite's Devisees v. Hite's Executor*, 93 Ky. 257, 267, 20 S. W. 773, 19 L. R. A. 173, 40 Am. St. Rep. 189. As the court in making the inquiry concerns itself with the substance of the transaction, and not the form in which the corporation has seen fit to clothe it, the

fact that a dividend is distributed in cash or stock is of little, if of any, importance in determining whether it is capital or income. The inquiry is largely one of fact, and the dividend is capital or income as the fact discloses into which of the above-enumerated classes it falls. This is the logic of the decision in *Lord v. Brooks*, and is supported by the great weight of authority in this country. *McLouth v. Hunt*, 154 N. Y. 179, 48 N. E. 548, 39 L. R. A. 230; *Ashhurst v. Field's Adm'r*, 26 N. J. Eq. 1; *Earp's Appeal*, 28 Pa. 368; *Smith's Estate*, 140 Pa. 344, 21 Atl. 438, 23 Am. St. Rep. 237; *Thomas v. Gregg*, 78 Md. 545, 28 Atl. 565, 44 Am. St. Rep. 310; *Hite's Devises v. Hite's Executor*, 93 Ky. 257, 264, 20 S. W. 778, 19 L. R. A. 173, 40 Am. St. Rep. 189; *Pritchitt v. Trust Co.*, 96 Tenn. 472, 36 S. W. 1064, 33 L. R. A. 836. If the decision in *Quinn v. Madigan*, 65 N. H. 8, 17 Atl. 976, so far as it relates to this question, cannot be supported on other grounds than those suggested in the opinion, it is in conflict with *Lord v. Brooks* and with the decision in this case, and is overruled.

In 1903 the Park National Bank increased its capital stock one-half, and gave its stockholders the right to subscribe, at \$300 a share, for one share of new stock for every two shares of the old owned by them. The right to subscribe for a share of the new stock was worth upwards of \$100, and surplus earnings to an amount greater than the value of all the rights had accumulated since the creation of the trust and before 1903. The trustee subscribed for the 15 shares of new stock to which the trust was entitled, took the certificate in his name as trustee, and borrowed the money to pay for the stock on a note signed by him as trustee. Three thousand dollars has been paid on the note out of the income belonging to the life tenant. This was done with the consent of the life tenant. The remaindermen contend that the rights to the new stock are capital and belong to the corpus. It has been held in this state that, in the absence of evidence showing the fact, there is a presumption that the right to take new stock, if of value, is capital, and belongs to the corpus (*Peirce v. Burroughs*, 53 N. H. 302; *Law v. Alley*, 67 N. H. 93, 29 Atl. 636; *Walker v. Walker*, 68 N. H. 407, 39 Atl. 432); also, that there is a presumption that dividends made payable in cash are income (*Walker v. Walker*, *supra*); and that stock dividends are presumptively capital (*Law v. Alley*, *supra*). Whether there is any reason for invoking a presumption in any of these cases, other than one of convenience, we need not inquire; for, if there is a presumption that the right to take new stock is capital, and belongs to the corpus, it is of no consequence in this case, since it is found that the rights in question represent surplus earnings that have accrued since the trust arose. By reason of this finding it would seem that the presumption was not only of no conse-

quence in this case, but that the value of the rights was not due to surplus earnings that accrued prior to 1900, or to actual growth and increase in the value of the corporate plant and business. If this interpretation of the case is correct, it is difficult to see why the giving of the rights to stockholders should not be considered a distribution of income, the same as the giving of stock is in the case of a stock dividend, provided it is shown that the rights represent net earnings that have accrued during the term of the life tenant. And, when the distribution is in the form of stock rights, the argument that it may be difficult to ascertain whether they in fact represent income or capital is of no greater weight than when the distribution is in the form of a stock dividend. The object of the inquiry in each case is to do justice by the parties and effectuate the intention of the creator of the trust. If this interpretation of the case is incorrect, and upon a further hearing it should be made to appear that some part of the value of the rights was due to surplus earnings that accrued prior to the creation of the trust, or to natural growth and increase in the value of the corporate plant and business, then the trustee should be directed to make such disposition of the stocks or their proceeds as will repay the life tenant for the sums advanced by him in purchasing the stock and such further sums as any value in the rights is due to surplus earnings that accrued between 1900 and 1903, and the balance should be held by him as a part of the corpus; otherwise, the trustee should be directed to deliver the stock to the life tenant upon payment of the balance due on the note.

We are aware that the conclusion reached on this branch of the case is not in accord with the decisions in many jurisdictions. *Atkins v. Albree*, 12 Allen (Mass.) 359; *Greene v. Smith*, 17 R. I. 28, 19 Atl. 1061; *Brinley v. Grou*, 50 Conn. 66, 47 Am. Rep. 618; *In re Kernochan*, 104 N. Y. 618, 680, 11 N. E. 149; *Smith's Estate*, 140 Pa. 344, 21 Atl. 438, 23 Am. St. Rep. 237; *Hite's Devises v. Hite's Executor*, 93 Ky. 257, 267, 20 S. W. 778, 19 L. R. A. 173, 40 Am. St. Rep. 189; 2 Cook, Corp. (2d Ed.) 559. But the principle involved in the equitable doctrine of looking at the substance rather than the form of the transaction is of general application, and logically includes within its scope the ascertainment of the rights of life tenant and remaindermen in corporate distributions when made in the form of stock rights, as when made in cash or stock. In Pennsylvania the courts have applied the equitable doctrine in determining the rights of life tenants and remaindermen in cash and stock dividends, but it would seem that they have failed to apply it in its integrity where subscription rights were involved. The decision in *Biddle's Appeal*, 99 Pa. 278, however, may be in harmony with the decision in this case; for, although the subscription rights there in controversy

were of value and represented surplus earnings, it was not shown that any of those earnings accrued between the date of the death of the testatrix and the granting of the subscription rights. In *Moss' Appeal*, 83 Pa. St. 268, the same finding was wanting, but the reasons advanced for holding the rights to be capital, and not income, were such as one would expect to find in jurisdictions where the courts look to the form, and not the substance, of the action of the corporation. The justice who delivered the opinion in that case seemed to think that the decision in *Earp's Appeal*, *supra*, proceeded upon the ground that the corporation recognized the transaction (the issuing of a stock dividend) as a "distribution of profits," and that that was the crucial distinction between that case and the one he was considering. But this is the argument of courts in jurisdictions that look to the form, and not the substance, of the act of the corporation. In *Wiltbank's Appeal*, 64 Pa. 256, 3 Am. Rep. 585, it was held that the value of the rights was income. This decision proceeded upon the ground that, if the value of the rights represented profits that accrued after the trust arose, the issuing of the rights was in substance a distribution of profits; and that, as the value of the old stock at the time the trust came into existence was not diminished by the issuing of the new stock, the rights necessarily represented profits, and were income. But it seems to us that this decision overlooks one important feature, and that is that, while the rights may represent profits since the trust arose, those profits are not necessarily surplus earnings, but may to some extent represent the natural growth and increase of the corporate plant, in which case, as we have seen, they would to that extent be principal, and not income.

Case discharged. All concurred.

(74 N. H. 180)

KIDD et al. v. NEW HAMPSHIRE TRACTION CO. et al.

(Supreme Court of New Hampshire. Rockingham. March 5, 1907.)

1. CORPORATIONS — DIRECTORS — QUALIFICATIONS — RELATION TO ANOTHER CORPORATION.

A contract dated December 28th provided for the sale by a construction company of securities, etc., to a trust company for cash, debentures, stock, etc., and that the trust company should furnish funds to complete work to be done in the construction company's name, and control that company for that purpose. Officers of the construction company were to be selected by the trust company. The contract should not bind the trust company until the other company's property was examined, and the report found satisfactory. Plaintiffs were preferred stockholders in the construction company without voting power, L. holding all the common stock. December 31st the directors of the construction company, L. being one of them, authorized officers to execute the contract, and immediately thereafter three of the five directors resigned, and were succeeded by nominees of the trust company. January 3d the trust

company wrote L., president of the construction company, that the examination of the property was satisfactory, and that the trust company would accept the contract if the construction company would pay certain construction expenses, and L. as president wrote the trust company that day that the company would do so. Plaintiffs sued the trust company for an accounting for the assets received, alleging actual and constructive fraud in the contract. *Held*, that the fact that the construction company's new directors were selected by the trust company did not as a matter of law disqualify them to act as directors upon matters pending between the company between their election and the acceptance of the contract, even if they would be so disqualified afterwards, the presumption being that they would act as directors in good faith and according to law, and that presumption was not weakened by the fact that they were lawyers.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, § 1364.]

2. SAME—BY-LAWS—POWERS OF DIRECTORS.

The construction company's by-laws providing that the affairs of the corporation should be managed by the directors who might exercise all such powers as were not by law required to be otherwise exercised, subject to the control of the common stockholders, but that no action of the common stockholders would invalidate any prior act of the directors, are in harmony with the law as to the power of directors.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, §§ 1274–1291.]

3. SAME—SALE OF ASSETS.

The construction company's certificate of incorporation recited that it was organized to construct railroads, etc., to hold, sell, or otherwise dispose of stocks, bonds, etc., of corporations and to cause the legal estate and interest in any property acquired to be vested in the name of any company to be formed, and either upon trust for or as agents or nominees of the corporation, or upon any other terms considered by the directors for the benefit of the corporation, and to carry out the objects as principals or agents or for the joint account of the corporation, and any company, etc. *Held*, that their powers were sufficiently comprehensive to include the making of the contract involved.

4. SAME—OFFICERS APPOINTED TO EXECUTE CONTRACT—AGENCY.

The officers appointed by the directors to execute the contract became agents of the corporation, and not agents of the directors.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, §§ 1585–1601.]

5. SAME—DIRECTORS.

The omission of the directors to take steps to reconsider the voting of authority to make the contract did not tend to prove bad faith on their part, or control of them by the trust company.

6. SAME—CHANGE IN DIRECTORS—EFFECT.

A change in directors did not as a matter of law abrogate the authority and direction to the officers to execute the contract.

7. SAME—CONTRACT—SUFFICIENCY OF EXECUTION.

Execution of the contract by the officers bound the construction company and rendered any other acceptance unnecessary.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, §§ 1796–1805.]

8. APPEAL—QUESTIONS REVIEWABLE.

Though the contract was delivered January 3d, at the same time the letters between L. and the trust company were exchanged, whether they form a single, indivisible contract is a question of law, depending upon the intention of the parties, the decision of which is reviewable in the Supreme Court.

9. CONTRACTS—SEPARATE AGREEMENT—INDIVISIBILITY.

The contract dated December 28th, and that formed by the letters exchanged January 3d, do not constitute a single, indivisible contract, but two separate agreements.

10. APPEAL—ISSUES DETERMINED IN LOWER COURT.

Where the trial court has decreed for plaintiffs on the theory of constructive fraud, and has not passed upon the issue of intentional fraud, the Supreme Court on reversing the decree will not determine the question of intentional fraud, but will leave it for the superior court to decide.

11. TRIAL—MOTION TO DISMISS BILL—TIME FOR MAKING.

Defendant's motion to dismiss the bill for want of sufficient evidence to support it should have been made at the close of plaintiff's evidence, and before the issues were submitted upon their merits.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Trial, §§ 370, 397.]

12. APPEAL—REVIEW—BASIS FOR DECREE.

The trial court having stated the facts found upon which the decree was based, and it appearing therefrom that the question of fraud in fact which was tried and submitted has not been decided, on appeal the Supreme Court will determine the question whether the facts stated authorized the decree, being unable to assume from the general decree that facts sufficient to authorize it were found, since the contrary appears.

13. CORPORATIONS—COMMON STOCKHOLDERS—TRUST RELATION TO PREFERRED STOCKHOLDERS.

The common stockholders having entire control of the corporation, the relation of trust between them and the preferred stockholders more clearly appears than in relation of majority to minority stockholders.

14. EVIDENCE—VALUE OF PROPERTY.

If required to account, a trust company being chargeable with the value of the property when taken, subsequent developments would be evidence, but not the only evidence of its value.

15. EVIDENCE—CONTRACTS—SEALED INSTRUMENTS—ALTERATION BY WRITING OF LESSEE DEGREE.

All stipulations by parol anterior to or contemporaneous with a written agreement are merged in the writing, which is conclusively presumed, in the absence of fraud or mistake, to contain the matter as to which the minds of the parties met, and where the final expression and purpose of the parties is by a writing under seal, all other matter in writing is parol and merged in the sealed instrument, which cannot be contradicted or altered by any anterior or contemporaneous writing of less degree.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 2030-2051.]

Young, J., dissenting.

Transferred from Superior Court, Rockingham County; Peaslee, Judge.

Bill by Charles G. Kidd and another against the New Hampshire Traction Company, the New York Security & Trust Company, and others. The bill was filed by two holders of preferred stock in the Massachusetts Construction Company, Incorporated, in behalf of themselves and all other stockholders of the corporation, alleging in part, in substance, that as a result of fraud all the assets of the corporation have passed into the possession and control of the New York Security & Trust Company, one of the defend-

ants, and praying for an accounting by the latter company. There was a trial by the court. A general decree was made in favor of the plaintiffs against the trust company, and the bill was dismissed without costs as to the other defendants. The facts and rulings upon which the decree was based, together with the defendants' exceptions thereto, were transferred from the superior court. Case discharged.

Roger F. Sturgis and Streeter & Hollis, for plaintiffs. William B. Hornblower, J. Norris Miller, and Sargent, Remick & Niles, for defendant New York Security & Trust Co. Storey, Thorndike, Palmer & Thayer, Samuel W. Emery, and Sargent, Remick & Niles, for defendant Hampshire Traction Company. Burnham, Brown, Jones & Warren, for defendants Massachusetts Construction Company, Incorporated, and Wallace D. Lovell.

CHASE, J. Wallace D. Lovell, a promoter and builder of street railways, doing business in the name of incorporated companies whose stock he owned and whose affairs he controlled, borrowed money of the plaintiffs from time to time, beginning in 1897, to such an extent that in the fall of 1901 he and his company were owing the plaintiff Kidd about \$179,000, and the plaintiff Whitcomb \$65,000. In October, 1901, the Massachusetts Construction Company, Incorporated (Connecticut Company) was formed under the general laws of Connecticut, and took the assets and assumed the liabilities of the Massachusetts Construction Company (Massachusetts Company), in whose name Lovell had previously conducted the business. The Connecticut Company's capital stock is \$500,000, of which \$250,000 is preferred, both as to the payment of dividends and the par value of the stock upon liquidation, and has no voting power, that being wholly lodged in the owners of the common stock. Lovell induced the plaintiffs to surrender the notes and collaterals which they held for their loans and to take in payment preferred stock of the Connecticut Company, Kidd taking 1,790 shares and Whitcomb 650 shares. The plaintiffs now hold this stock. Lovell borrowed of the defendant the New York Security & Trust Company (Trust Company) in 1900 and 1901 large sums of money upon notes secured by pledges of stocks and bonds of the railway corporations whose roads he and his corporation constructed. The Trust Company also purchased bonds of some of these railway corporations in the summer of 1900. By a contract, dated November 12, 1901, the Massachusetts Company and the Connecticut Company sold and conveyed to the Trust Company all their interests in large blocks of the stocks and bonds of the railway corporations. The contract provided that the Trust Company should organize, or cause to be organized, under the laws of this state, a holding corporation, to which the stocks and bonds received by the

Trust Company under the contract, with certain exceptions, should be sold upon the terms set forth in the contract, and that the Massachusetts Company and the Connecticut Company should be paid for their equity in the stocks and bonds so sold to the Trust Company, by portions of the stock and bonds to be issued by the holding corporation. The Trust Company thereupon caused the New Hampshire Traction Company (Traction Company) to be organized, and the sale was made to it as provided in the contract.

Another contract under seal, dated December 23, 1901, between the Construction Companies, the Trust Company, and Lovell, was prepared, by which the Construction Companies sold and conveyed to the Trust Company, and the Trust Company purchased of the Construction Companies, all their right, title, and interest in and to the stock and bonds of the Traction Company received under the contract of November 12, and in and to certain railway stocks, bonds, and claims, in consideration of \$639,163.75 in cash (to be used in the payment of the debts of the Construction and Railway Companies), debenture bonds of the Traction Company amounting to \$375,000, a certificate of the Trust Company providing that 2,375 shares of the Traction Company's stock should be delivered to the Connecticut Company, January 1, 1907, and certain covenants of the Trust Company. The Construction Companies covenanted that their indebtedness and that of the railway corporations together did not exceed \$639,163.75, and pledged the debenture bonds and interest in stock received by them under the contract to secure this covenant. The Trust Company agreed to furnish money to complete certain railways, and to cause Lovell to be retained in and about the construction of the same for the term of two years at an annual salary of \$8,000, and necessary disbursements. The Construction Companies agreed that all construction might be done in the name of the Connecticut Company—the Trust Company to pay all bills incurred with its consent, and to indemnify the Connecticut Company for all expenses, costs, and liabilities arising from any act, contract, or omission of that company, while its control was in the Trust Company as provided in the contract. The Trust Company further agreed to sell and assign to the Traction Company the stock and bonds received and to be received by it under the contract, upon certain terms. The contract also provided for the substitution of persons desired by the Trust Company for the officers and directors of the Construction Companies then in office, as is hereinafter stated—the officers and directors so substituted to have the right to make such changes in the by-laws as they might think desirable. Lovell was to furnish stock to qualify the officers and directors so substituted, and was to deposit with parties named certificates for all the common stock of the Connecticut Company, indorsed in blank, as

security for the faithful performance by him and the Construction Companies of all the covenants, terms, and conditions of the contract. By the twelfth article of the contract it was "expressly understood and agreed that in so far as the Trust Company is concerned this contract shall not take effect until the examination now being made by the representatives of the Trust Company of the properties, rights, privileges, and franchises of the various companies shall be completed, and shall not then take effect unless the report of the engineers and accountants making such examination shall be entirely satisfactory to the said Trust Company." This contract was laid before the directors of the Connecticut Company at a meeting held December 31, 1901, and the action was taken which appears later in this opinion. Immediately following this action, three of the five directors resigned, and Trust Company nominees were elected in their stead.

January 3, 1902, the Trust Company wrote Lovell, as president of the Construction Companies, as follows: "Referring to the agreement of December 23, 1901, between [naming the parties], we beg to advise you that the examinations made by us under article xii of said contract have been completed; that the results of said examinations are satisfactory to us; and that we are prepared to accept said contract upon the express understanding and agreement on the part of the Massachusetts Construction Company and the Massachusetts Construction Company, Incorporated that they will furnish and pay for the work, materials, and machinery necessary for the entire completion of the high tension service on all of the roads now constituting the New Hampshire Traction Company, including rotaries, wiring, etc., and that there shall be no claim whatsoever against the New Hampshire Traction Company * * * on account of the completion of said high tension service." To this the Construction Companies by their president, Lovell, replied in their corporate names under the same date "that the same is in all respects entirely satisfactory to the Massachusetts Construction Company and the Massachusetts Construction Company, Incorporated, the said companies agreeing to furnish and pay for all the work, materials, and machinery necessary for the said high tension service." There was no other acceptance of the modified contract, except by implication from action subsequently taken under it. The sale was of all the assets of the Connecticut Company. The Trust Company subsequently sold to the Traction Company the securities mentioned in the contract. These securities represented an outlay by the Trust Company of \$1,247,163.75, and it received therefor from the Traction Company its bonds, apparently worth at that time \$1,958,945.47. This shows a profit of \$711,781.72, and the Trust Company was required by the court's decree to account to the plaintiffs for this sum, so far as necessary to satisfy their

claims as holders of preferred stock of the Connecticut Company. It was also found that the value of these securities, if determined by subsequent developments, was never as much as the Trust Company paid for them.

The Trust Company's title to the securities in question depends upon this contract of December 28th. The company says it acquired a legal and absolute title to these securities by virtue of this contract, and its subsequent acts in fulfilment of the provisions of the contract. This claim must be sustained if the contract was duly executed, and is not void or voidable for any reason. The plaintiffs, in their bill, do not question the due execution of the contract, but allege that it is void because it was procured from the Construction Companies by means of a conspiracy to defraud the plaintiffs, in which the Trust Company was an active party. Briefly stated, the plaintiffs' claim as alleged in their bill is that, although the contract was executed—signed, sealed and delivered—by the parties, it is void because it is the product of conspiracy and fraud participated in by the Trust Company. The defendants, in their answers, deny the conspiracy and fraud, and the issue thus raised appears to have been the one that was tried. But in the view which the superior court took of the facts and the law applicable thereto, it was deemed by him to be unnecessary to pass upon the issue of intentional fraud, and he did not do so. He disposed of the case on the sole ground that the contract was voidable by the plaintiffs because of constructive fraud, or fraud in law. He made the following findings and ruling with reference to this matter: "From the time of its organization, the Traction Company was merely an agency controlled by the Trust Company. The same thing has been true of the Connecticut Company since December 31, 1901, at least. The so-called contract of December 28th, as modified by the Trust Company January 3d, if ever agreed to by the Connecticut Company, was so ratified after the Connecticut Company was controlled by the Trust Company. Taking the property in this way, the Trust Company is chargeable as trustee, and must account for the interest of the nonassenting preferred shareholders of the Connecticut Company." The Trust Company excepted to these findings of fact, because, as it alleges, the findings are not justified by the evidence. It also excepted to the ruling of law, and moved to set aside the decree in the plaintiffs' favor because of errors covered by these exceptions. The motion was denied, subject to exception.

As the court did not pass upon the question of intentional fraud, it must be regarded as a fact, for the present at least, that the Trust Company's apparent title under the contract of December 28th is not jeopardized or in any way affected by such fraud. If it is invalid, it must be wholly because of constructive fraud. The ruling of law excepted

to seems to be based upon the idea that all the contractual provisions set forth in the instrument of December 28th and in the letters of January 3d, together constitute a single, indivisible contract—the so-called contract of December 28th, as modified by the Trust Company, January 3d—which was never actually agreed to by the Connecticut Company, but, at most, was only ratified by the company by acquiescence and compliance with its provisions after it was supposed to be in effect, and this only after the company was controlled by the Trust Company. The Trust Company says the contract is not of this single, indivisible character, but is composed of a main contract evidenced by the instrument dated December 28th, and a supplemental or collateral contract evidenced by the letters. While it says that both contracts were executed by the Connecticut Company by agents thereto duly authorized, and denies that such execution was induced by its control of that company, it further says that any infirmity that may exist in the contract evidenced by the letters, whether arising from want of Lovell's authority to make the contract in behalf of the Connecticut Company or from the Trust Company's control of the company at the time, cannot invalidate the main contract.

It must be borne in mind that the control found by the superior court has existed only since December 31, 1901, "at least." If the qualifying words "at least" imply that the control may have existed from an earlier date, they certainly do not imply that it did exist earlier. That was the day when a majority of the directors of the Connecticut Company resigned, and Trust Company "nominees" were elected in their stead. It does not appear that the persons so elected were stockholders or officers of the Trust Company, or had any connection whatsoever with it other than being its nominees. Nor does it appear that they were hostile to the Connecticut Company, or had personal interests adverse to it or its stockholders. The significance of the term "nominees" appears from a consideration of the article in the contract of December 28th, by which it is provided that "the present officers and directors of the Construction Companies shall resign, and there shall be elected as their successors such persons as the Trust Company may desire, who shall remain in office, at the pleasure of the Trust Company, until the final completion and carrying out of all the matters and things provided for in and by this contract." There is nothing in this provision which requires the directors elected in accordance with it to disregard or wrongly perform the duties which, under the law, they would owe the Connecticut Company and its stockholders, as directors. If the contract had not then been executed and gone into effect, as seems to be admitted, this change in the directors was obviously made provisionally, in expectation that it would become the contract of

the parties. Another finding of the superior court is that by the contract of December 28th the control of the Connecticut Company was turned over to the Trust Company—evidently referring in part to the same provision of the contract. It appears from these findings that the control which the court made use of in applying the doctrine of constructive fraud to the case resulted from the contract. The contract did not arise from the control. Until the contract was understood to be in force, there was no control. If the contract was executed December 31st, the control begun on that day. If it was not executed until January 3d, the control would not begin until that date. In the latter event, the directors elected December 31st as "Trust Company nominees" did not hold their positions between that date and January 3d for the purpose of carrying the provisions of the contract into effect, for there was no contract. It does not follow, as matter of law, from the sole fact that they were "Trust Company nominees"—such persons as the Trust Company desired—that during this interval of time they were disqualified to act as directors upon matters pending between the Connecticut Company and the Trust Company, even if they would be so disqualified after the contract was executed and went into effect. The presumption, in the absence of all evidence to the contrary, is that they would act in the office of director in good faith, and according to law. This presumption certainly is not weakened by the fact that the "nominees" were lawyers, and, so far as appears, lawyers in good standing in their profession. If it appeared that they were elected for the purpose of controlling the Connecticut Company's discretion or will in the making of the contract, or that they were so far controlled by the Trust Company as to be subservient to its will, it might be that the law would regard them as disqualified, even to the extent of being counted as directors in matters pending between the two corporations. But nothing of this kind appears in the record. Furthermore, it does not appear that they took any part whatsoever in negotiating for, or executing, the contract.

Recurring to the record of the meeting of the Connecticut Company's directors held December 31st, it appears that the directors present at the meeting were Lovell, the president of the corporation, Pride, and Barter—a majority of the board of five members. It is not found that these directors or either of them were controlled by the Trust Company, or were directors or stockholders of the company. Lovell was the owner of the common stock of the corporation. His interests, like the plaintiffs', and more vitally than theirs, were adverse to those of the Trust Company; for his rights in the Connecticut Company, as the owner of its common stock, were subordinate to those of the plaintiffs. The record of the meeting, after setting forth the fact that Lovell had been in negotiation with the Trust Company relat-

ing to the matters, stated that he laid before the directors "an agreement dated the 28th day of December, 1901, by and between [the parties, naming them], being as follows." Then follows a copy of the agreement in full. Thereupon it was unanimously resolved by the directors that the officers of the company "be, and they hereby are, authorized and directed to make, execute, and deliver the said contract"; "that the execution of the said contract by the officers of this corporation in its name be, and the same is hereby, ratified and confirmed, and adopted as the valid and binding act of this corporation;" and "that the officers of this company be, and they hereby are, authorized and directed to do each and every and all of the things necessary or desirable in order to give full force and effect to the intention of the said contract, executing the transfers and delivery of the securities therein set forth." Thus it is seen that the corporation acted directly upon the contract through its directors. The directors themselves wholly exercised the discretion and will of the corporation in respect to the making of the contract. The only power or authority delegated by them to others was the authority to perform the ministerial acts of executing and delivering the contract. This authority did not include authority for an exercise of discretion by the officers to whom it was delegated, for they were expressly directed by the votes to execute and deliver the contract. It is difficult to imagine a more emphatic and complete execution of the powers of a corporation by its directors than was this action of the Connecticut Company. The by-laws of the corporation provided that "the property affairs and business of the corporation shall be managed by the directors, who may exercise all such powers of the corporation as are not by law or by the charter or by-laws required to be otherwise exercised, subject however to the control of the common stockholders; but no action by the common stockholders shall invalidate any prior act of the directors." There is no provision in the charter or elsewhere in the by-laws requiring the powers exercised in the making of contracts to be exercised otherwise than by the directors. The common stockholders could not by subsequent action, if they would, invalidate the directors' action in this case. In fact, Lovell, the owner of the common stock, appears from the record of the directors' meeting to have been the originating, moving, and guiding spirit in the transaction. These by-laws are in harmony with the law as to the powers of directors. Pub. St. 1901, c. 149, § 3; *Charlestown, etc., Co. v. Dunsmore*, 60 N. H. 85; *Wait v. Association*, 68 N. H. 581, 23 Atl. 77, 14 L. R. A. 356, 49 Am. St. Rep. 630, and authorities cited; *Goodwin v. Company*, 24 Conn. 591; 2 Cook, Stock & Stockh. §§ 708-712; 10 Cyc. 758; 21 Am. & Eng. Enc. Law (2d Ed.) 863.

It further appears that the authority and direction thus given the officers of the cor-

poration were exercised and followed. The contract is signed: "Massachusetts Construction Company, Incorporated, by W. D. Lovell, President. Attest: Edwin L. Pride, Secretary"—and a seal is attached to the signature. Pride was secretary of the corporation, and according to the by-laws had the custody of the corporate seal. That the corporation's power to make such a contract was ample distinctly appears from its certificate of incorporation, which, after setting forth that the corporation was organized for the purpose of constructing and equipping railroads, street railways, electric light and power plants, and other works of public and private utility, and of purchasing, holding, selling, pledging, or otherwise disposing of stocks, bonds, and securities of corporations, etc., contains the following provisions: "To allow or cause the legal estate and interest in any business or property acquired, established, or carried on by the corporation to remain, to be vested or registered in the name of, and carried on by, any individual, or by any foreign or other corporation or company formed or to be formed, and either upon trust for, or as agents or nominees of this corporation, or upon any other terms or conditions which the board of directors may consider for the benefit of this corporation;" and "to carry out all or any of the foregoing objects in any part of the world, as principals or agents, and alone or in partnership with, or for the joint account of the corporation and any corporation, company, firm, or association or person, and to do all such other things as are incident or conducive to the attainment of the above objects." These powers are sufficiently comprehensive to include the making of a contract like that under consideration, even if the contract constituted the Connecticut Company the agent of the Trust Company to complete and carry out all the matters and things provided for by it, as therein stipulated.

In view of these facts, it must be held that the contract of December 28th was made and executed by the corporation, even if, as the parties seem to agree, it was not in fact executed until January 3d, unless the change in directors December 31st, ipso facto, abrogated the authority delegated to the officers of the corporation just before the change, or unless the contract is so intimately and inseparably connected with the agreement contained in the letters of January 3d relating to the high tension service that any infirmity there may be in that agreement also exists in the sealed instrument. The officers appointed by the directors December 31st to execute the contract of December 28th became thereby agents of the corporation—not agents of the directors. It is true that the directors were at liberty, if they saw fit, to withdraw the corporation's assent to the contract any time before it was agreed to by the Trust Company, and to revoke the authority delegated to the officers of the corporation in respect to the execution and delivery of the contract. But, as has been previously sug-

gested, the mere fact that the new directors elected December 31st were Trust Company nominees did not, as matter of law, disqualify them from holding the office between that time and the execution of the contract, although the subject of making the contract was pending. There were five directors during this time—a full board—two whose independence of the Trust Company is not questioned, and the three Trust Company nominees. The corporation certainly was not disabled from acting by the want of a sufficient number of directors to constitute a quorum. Non constat, that the new directors, as well as the two holding over (Lovell and Pride), did not act in good faith and in fulfillment of their legal duties as directors, by omitting to take steps to have the action of December 31st reconsidered. The action of the majority of the old board of directors in resigning would justify the new directors in the belief that the corporation intended, at least, to give the Trust Company a reasonable time in which to act upon the contract, and not to withdraw its assent thereto in the meantime. It is a fair inference from the omission of the directors to take steps to reconsider the votes passed December 31st, that they, the same as the directors who passed the votes and the same as the plaintiffs after they learned of the contract, considered the contract advantageous to the Connecticut Company and its stockholders. There is certainly nothing in this omission having a tendency to prove bad faith on the part of the directors or control of them by the Trust Company. If the contract was not formally executed until January 3d, the corporation was then, and during all the intervening time, provided with directors capable of exercising its will and discretion, and, so far as appears, not disqualified to act. The change in directors December 31st did not, as matter of law, abrogate the authority and direction which the officers of the corporation had just received to execute the contract of December 28th; but such authority and direction continued in force until they were exercised and followed, whether on January 3d, or earlier. Such execution of the contract bound the Connecticut Company and rendered any other acceptance of the contract unnecessary.

The question remains whether the contract evidenced by the sealed instrument is so intimately and inseparably connected with the agreement contained in the letters of January 3d that it must fall if that falls. Assuming, as the parties practically agree, that the contract of December 28th was delivered completely executed and the letters were exchanged at one and the same time on January 3d, the question is whether they form a single indivisible contract. The answer depends upon the intention of the parties as shown by the terms and formal character of the documents which they used to express their intention, when read in the light of the circumstances under which the documents

were made. 4 Wig. Ev. §§ 2430 et seq., 2442. In other words, the court is called upon to interpret the documents. This is a question of law, the decision of which is reviewable in this court. Prescott v. Hayes, 43 N. H. 593; Kendall v. Green, 67 N. H. 557, 42 Atl. 178, and numerous authorities there cited. Referring to the formal character of the documents, the contract of December 28th is a sealed instrument—a specialty or deed—while the letters are not under seal, and the promise evidenced by them is a simple contract merely. If the letters had been exchanged prior to the execution of the deed, the presumption would be strong, if not conclusive, that the promise contained in them was finally merged in the deed. But if the deed and the letters were exchanged at one and the same time, this presumption is not so strong. If a merger had been intended, there would be no need of the letters. The fact that they were exchanged at the time the execution of the deed was completed has a strong tendency to prove an intention that they, as well as the deed, should have effect. Although the letters specifically refer to the deed, they do not purport to be a part of it, or to vary its provisions in any respect. The deed could be altered or modified only by an instrument of as high nature as itself. It could not be altered by a parol agreement such as the letters constituted. Wendell v. Bank, 9 N. H. 404, 419; McMurphy v. Garland, 47 N. H. 316, 321, and authorities. The Trust Company's letter, after stating that the results of its examinations were satisfactory to it, says, "We are prepared to accept said contract [deed] upon the express understanding and agreement" on the part of the Construction Companies that they will complete the installation of the machinery and appliances necessary for a high tension service on the railways of the Traction Company. The Trust Company was prepared "to accept" the contract—that is, to admit and agree to it, to accede to or assent to it. It was prepared to agree to the contract as drawn up—not in some modified form. The proposition was, not that the deed should be changed or modified in any particular, but that the Construction Companies should make an additional or supplemental agreement in consideration of the Trust Company's agreeing to the deed. It relates to the execution of the deed—not to the provisions contained in the deed. The plain import of the language of the letters is that if the Construction Companies would make the desired agreement relating to the instrumentalities for a high tension service, the Trust Company would become a party to the deed. It is immaterial whether this proposition of the Trust Company arose from dissatisfaction with the results of the examinations made under the provision of the deed, or whether the deed was not to take effect as to that company, unless the results were satisfactory, or whether it arose from some other cause. If it arose from this cause, and

the expression of satisfaction in the letters was intended to be conditioned upon the making of the promise proposed, the deed would have to be modified, or a supplemental contract would be necessary, to comply with the proposition. The deed itself did not provide for such contingency, otherwise than that in such case it should not be effective as to the Trust Company. This provision is in the nature of a condition subsequent, by which the deed might be defeated for the cause named. Anson, Cont. § 356 et seq. It does not provide for a change in the terms of the deed that will secure satisfactory results. That matter is left open for future negotiation and contract, if the parties would avoid a defeasance of the deed. Lovell, as president of the Construction Companies, assuming to act for them, made the proposed agreement, and the Trust Company executed the deed. It thereby agreed to accept the deed, and bound itself by its provisions.

Nor does the evidence tend to prove that the parties intended to merge the deed in a simple contract covering all the subjects contemplated by them, if the law would allow such merger—a point that has not been considered. Hydeville Co. v. Company, 44 Vt. 395; Canal Co. v. Ray, 101 U. S. 522, 25 L. Ed. 792; Bish. Cont. §§ 133, 136. If such had been the intention, it is inconceivable that the parties would take pains to execute the contract of December 28th by itself, as a deed. It would have been a simple matter to adopt in the letters the terms of that instrument, expressed in full or by reference, and thereby avoid the execution of the deed and consequent liability to a misunderstanding of their intention. The acceptance and execution of the contract as a deed is well-nigh, if not absolutely, conclusive evidence that it was not intended to be merged in a simple contract. If corroborative evidence were necessary, it is found in the fact that the persons who acted as agents of the corporations in executing the deed were different from the persons who took part in the correspondence—the agents of the Connecticut Company who executed the deed being Lovell and Pride, while Lovell alone signed the letter, and the agents of the Trust Company who signed the deed being O. W. Bright, second vice president, and L. Carroll Root, secretary, while the letter in behalf of that company was signed by A. M. Hyatt, vice president. This evidence has a strong tendency to prove that the acts were in fact several.

The deed is complete in and of itself. The plaintiffs challenge this proposition because of the provision by which the contract was not to take effect as to the Trust Company until the examinations in progress by the company's agents were completed, and not then, unless the report of the examiners should be entirely satisfactory to the company. This provision postponed the time when the contract was to take effect;

but it does not affect the completeness or validity of the contract. By it the Trust Company reserved the right to defeat the contract if the examiners' report was not satisfactory. It reserved no right to defeat it for any other reason. It could not exercise this right arbitrarily and without reasonable cause. But if, as seems agreed, the sealed contract and the letters were signed and delivered at the same time, the contract became complete at that time, according to the plaintiffs' theory, since the report had then been made, and the Trust Company's letter expresses its satisfaction therewith. The subject of the high tension service is not treated of or referred to in the deed. This subject is wholly independent of the subjects of the provisions therein contained. It seems to have been an afterthought, occurring after the preparation of the deed. The letters cover this subject completely, in and of themselves. It is true that a compliance by the Connecticut Company with the promise contained in the letters would reduce its net assets, after the satisfaction of its obligations, below what they would be if the deed had been the only contract between the parties; but this fact has no probative force in proving that the promise was intended to be included in the deed. Such would be the result, alike whether all the contractual provisions were incorporated in a single contract, or in a main and supplemental contract. Suppose the agreement relating to the installation of machinery and appliances for a high tension service had been made directly with the railway corporations, and the Trust Company had declined to accept the deed until it was made, could there be any doubt that such agreement would be collateral to the deed? It is not perceived how the fact that it was made with the Trust Company renders it any the less collateral in character.

The inherent natures of the documents, their terms, and the mutual independence of the subject-matters of their respective provisions have a very strong, if not conclusive, tendency to prove that the parties understood and intended the agreement evidenced by the letters to be supplemental to the deed. No evidence has been pointed out, or has been discovered, of sufficient weight to overcome this evidence. It is, therefore, held that the contracts together do not constitute a single, indivisible contract, as seems to have been held by the superior court, but they are two contracts—a main contract evidenced by the deed and a collateral or supplemental contract evidenced by the letters—the consideration of the latter being the execution of the former by the Trust Company. Contracts so associated and related are not unknown to the law, and are held to be valid. *Herson v. Henderson*, 21 N. H. 224, 53 Am. Dec. 185; *Quimby v. Stebbins*, 55 N. H. 420; *Hutt v. Hickey*, 67 N. H. 411, 29 Atl. 456; *Proctor v. Wiley*, 55

Vt. 844; *Carr v. Dooley*, 119 Mass. 294; *Durkin v. Cobleigh*, 156 Mass. 108, 30 N. E. 474, 17 L. R. A. 270, 32 Am. St. Rep. 436; *Rackemann v. Company*, 167 Mass. 1, 44 N. E. 990, 57 Am. St. Rep. 427; *Drew v. Wiswall*, 183 Mass. 554, 67 N. E. 686; *Chapin v. Dobson*, 78 N. Y. 47, 34 Am. Rep. 512; *Slughart v. Moore*, 78 Pa. 469; *Welz v. Rhodius*, 87 Ind. 1, 44 Am. Rep. 747; *American, etc., Ass'n v. Dahl*, 54 Minn. 355, 56 N. W. 47; *Morgan v. Griffith*, L. R. 6 Exch. 70; *Erskine v. Adeane*, L. R. 8 Ch. 756; *Angell v. Duke*, L. R. 10 Q. B. 174; *De Lassalle v. Guildford*, [1901] 2 K. B. 215; *Steph. Ev. art. 90*. In *Durkin v. Cobleigh*, supra—a case that may be taken as a fair sample of all the cases cited—the plaintiff took from the defendant a deed of land described as bounded upon a street on the defendant's land, referring to a plan which showed the street, but the deed contained no covenant that the defendant would build the street, or cause water to be introduced into it. The plaintiff alleged that to induce him to buy the lot the defendant orally promised to grade and build the street and to cause the city water to be put into it within a specified time. It was held that the alleged promise was an independent agreement, collateral to the deed, which, if proved, would entitle the plaintiff to recover damages for a breach of it. So, in this case, to induce the Trust Company to accept the contract of December 28th, Lovell, in the names and behalf of the Construction Companies, promised the Trust Company that they would complete the machinery and appliances necessary for supplying the railways of the Traction Company with a high tension service. For a breach of this promise, the Trust Company might maintain an action of assumpsit (*Hutt v. Hickey*, supra), but not an action of debt or covenant broken founded upon the deed.

The contract of December 28th having been duly executed by the Connecticut Company, and the agreement evidenced by the letters of January 3d forming no part of it, but being an independent, supplemental, or collateral agreement having no connection with it other than in the matter of consideration, and the Trust Company's title to the securities for which it is asked to account being dependent upon the validity of the main contract only, it is unnecessary to consider whether the collateral agreement is valid and binding upon the Connecticut Company or the plaintiffs. If this agreement is voidable by the Connecticut Company or the plaintiffs because Lovell had no authority to make it, or if it is void because of fraud, the fact does not affect the validity of the main contract and of the Trust Company's title. Nor is it necessary to consider the questions raised by the case relating to ratifications of the contract by the corporation or its stockholders, and relating to acquiescence therein by the plaintiffs or laches on their part, since its execution by the Con-

necticut Company through the agency of officers clothed with full authority in the premises renders all these questions immaterial. It may be remarked, however, in passing, that it appears the plaintiffs were informed of the contract of December 23th in the following January, and considered it advantageous to them, and they expected the Trust Company would carry it into effect. If they did not understand its scope, it was their own fault. They appear to be business men of sound minds, and it must be presumed that they understood the contract when they read it. Although they did not expressly consent to the contract, it would seem that they acquiesced in it, knowing that the Trust Company was relying upon and acting under it.

The question, what remedy, if any, the Trust Company would be entitled to if the Connecticut Company attempted to disaffirm the collateral contract on account of Lovell's want of authority to make it, or on account of fraud, is also immaterial. If by reason of fraud, or accident and mistake, the Trust Company would have a right in such case to rescind the main contract, on the ground that the consideration for the company's becoming a party to it had failed (*Dow v. Harkin*, 67 N. H. 383, 29 Atl. 846; *Rackemann v. Company*, 167 Mass. 1, 44 N. E. 990, 57 Am. St. Rep. 427), the Connecticut Company would have no such right, and the Trust Company might actively or passively waive its right. No attempt at rescission has been made; and it is extremely doubtful, to say the least, whether the Trust Company is now in a position in which it could exercise the right, if it ever had the right, the securities which it received under the contract having been converted into other property so that it cannot now restore them to the Connecticut Company and place the company in statu quo, actually or substantially. As before stated, the general decree in favor of the plaintiffs is based altogether upon the court's findings and rulings relating to constructive fraud. The Trust Company's exceptions to these rulings are sustained, and consequently the decree must be set aside.

After the decree and findings had been filed, the Trust Company moved that the decree be set aside as against the law and the evidence, and that the bill be dismissed because there is no evidence upon which a decree for the plaintiffs, or either of them, can be sustained. The motion was denied upon the ground that there was evidence to support the decree, and the Trust Company excepted. While the motion was sufficiently broad in its terms to include the proposition that there was no evidence of intentional fraud that would support a decree for the plaintiffs, it is obvious that the court did not take that view of the motion. He states in his findings that he had not found it necessary to pass upon the issue of intentional fraud, and the case conclusively shows that

his decree in favor of the plaintiffs is based altogether upon constructive fraud. He denied the defendants' motion, because he found and ruled that the evidence before him was sufficient to support the decree on that ground. Furthermore, a motion to dismiss the bill for want of sufficient evidence to support its allegations would properly come at the close of the plaintiffs' evidence, before the issues were submitted upon their merits. If it was denied and the defendants excepted, the decision would be reviewable upon its transfer to this court. But in this case the motion was not made until after the case had been submitted and decided, and it was not passed upon then. It would be a departure from the usual practice to take up and consider the question under these circumstances, and justice does not seem to require such course.

According to the record, the question of intentional fraud is still before the superior court undecided. It is not before this court.

PARSONS, C. J. (concurring). The decree for the plaintiffs rests upon the legal proposition that the defendants are bound to account as trustees to the plaintiffs for the property of the Massachusetts Construction Company, Incorporated, received by them. The defendants' main contention, under their exceptions to the decree, is that they received the property in question under and in accordance with the terms of a valid contract with the corporation in which the plaintiffs are stockholders, and therefore cannot be compelled to account except as provided in that contract. This question lies at the foundation of the plaintiffs' case, and is, briefly stated, whether there is error of law in the ruling of the trial court that upon the facts the defendants are bound to account as trustees for the property involved. The plaintiffs are preferred stockholders without voting power in the Massachusetts Construction Company, Incorporated, a corporation organized under the laws of Connecticut. The plaintiffs alleged in their bill that, through the fraudulent co-operation of all the defendants, all the assets of the plaintiffs' corporation were taken from it, and the plaintiffs' interest therein rendered valueless. Upon these allegations the parties went to trial, and a decree was ordered for the plaintiffs against the Trust Company. Upon request of the defendants the facts found upon which the decree was based are stated. It appears therefrom that the question of fraud in fact, which was, on the pleadings, the question tried and submitted to the trial court, has not yet been decided. The court adds to this statement, which would obviously, by itself, be fatal to the decree, other facts and rulings upon which the decree is based. In this situation the question is whether the facts stated authorize the decree, and it cannot be assumed by the general decree that facts sufficient to authorize it

were found, because the contrary appears. *Moyse v. Patrick*, 58 N. H. 618; *Concord Coal Co. v. Ferrin*, 71 N. H. 331, 51 Atl. 283, 93 Am. St. Rep. 496; *Allen v. Association*, 72 N. H. 526, 527, 57 Atl. 922; *Jaques v. Chandler*, 73 N. H. 376, 62 Atl. 713.

The bill charged that the defendants' fraudulent purpose was effected by means of two contracts between the Connecticut Company and the Trust Company, dated November 12 and December 28, 1901. The findings made relate entirely to the contract of December 28th. There is much evidence and findings are made as to transactions between the parties antedating the contract of December 28th and the formation of the Connecticut Company. But although these matters may be of great importance upon the question of actual fraud, in discussing the ground upon which, in the present posture of the case, the decree can be sustained, if at all, it is only necessary to consider the findings as to this contract. Although the bill alleged fraud in fact, it appears that at the trial the plaintiffs took a further position. They claimed "that the transfers by the Connecticut Company to the Trust Company, under the agreements dated November 12 and December 28, 1901, were fraudulent in fact; or, if not made with wrongful intent, were mere bargains of the Trust Company with itself, as represented by its agents, and therefore it must account." Upon the issue of fraud in fact, the character of the contract, whether fair or "grossly inequitable," would be material and important; but if the facts disclose a situation in which the law conclusively presumes fraud, the fairness of the contract would be no answer to the charge. As there is no finding on the issue of actual fraud made by the pleadings, no facts as to the character of the contract, whether inequitable or otherwise, are reported, and no question in relation thereto is involved in the case. The defendants deny the charge of fraud in fact; but the questions which might be presented upon this issue are not now before the court.

Upon the second claim, the defendants say that "all contracts were made between independent parties." They do not contend in argument that if the contract involved in the finding was a mere contract of the Trust Company with themselves, made by their agents on both sides, the plaintiffs would be bound. That the same person cannot at the same time be the buyer and the seller of property to which he holds a fiduciary relation is elementary. See authorities cited in *Pearson v. Railroad*, 62 N. H. 537, 13 Am. St. Rep. 590; *Fisher v. Concord R. R.*, 50 N. H. 205. The question, therefore, upon the primary issue of liability, is whether it is found that the contract of December 28th was a contract of the Trust Company with themselves. The formal execution of and subsequent action under this contract—an instrument under seal—by the parties there-

to, was alleged in the bill and admitted in the answers. By its terms, the interest of the Connecticut Company in certain securities and railways was sold and transferred to the Trust Company, and the parties entered into various engagements in relation to the securities and the construction and completion of the various railways. The plaintiffs do not claim anything under the contract; but the contention is that because of the invalidity suggested no title to the property purported to be conveyed thereby passed to the Trust Company, and that therefore they must account therefore as trustees, and cannot discharge themselves in accordance with the terms of the contract. The question, therefore, is merely whether the Trust Company acquired title to the property of the Connecticut Company by virtue of this contract.

The plaintiffs had no voting power in their corporation. The common stockholders having entire control of the corporation involving their own interests and those of the plaintiffs, the relation of trust between them and the preferred stockholders with an interest, but no voice, in the corporate management, more clearly appears than in the relation of the majority to the minority stockholders who have the right to take part in the meetings of the corporation. But in this respect it is said "the majority stand in much the same attitude toward the minority that the directors sustain toward all the stockholders." 2 Cook, *Stock & Stockh.* § 662; 1 Mor. Corp. § 529; *Farmers' L. & T. Co. v. Railway*, 150 N. Y. 410, 430, 431, 44 N. E. 1043, 34 L. R. A. 76, 55 Am. St. Rep. 689. The relation, therefore, between the two classes of stockholders in this corporation is plainly one of trust. Any transactions of the common stockholders in violation of the duty imposed upon them by the trust relation would be a fraud upon the preferred stockholders. The relation between the common stockholders and the other party to a contract attempted to be made by them in behalf of the corporation might be such that the law would conclusively presume the transaction to be a fraud upon the preferred stockholders, without any investigation of its fairness, as, for instance, if Lovell, owning all the common stock, had attempted, through directors chosen by him for the purpose, to transfer all of the corporate property to himself. Or such a transaction might be in fact a fraud upon the non-voting stock if the parties having control of the corporation, induced because of private advantage to themselves, attempted to contract on behalf of the corporation upon terms "grossly inequitable" to the corporation, as, for example, if Lovell, because of the \$6,000 salary secured to himself, attempted to transfer or have transferred the corporate property to the Trust Company for less than it was worth. A transaction of this character might be avoided for fraud; but the fraud

which would avoid it would be fraud in fact, such as the plaintiffs alleged in their bill, but which has not yet been found to exist. If the Trust Company, by their influence over Lovell, or by any means, induced him to fail in performance of his duty as trustee toward the plaintiffs, and to exercise his control over the corporation in the interests of the Trust Company instead of in behalf of the Connecticut Company, such a transaction would involve fraud in fact, which if it can be found on the evidence, has not been. Whether or not the evidence has any tendency to prove control in this way is not material to the present discussion.

The contract in question is set out in the record. It was drawn up on its date, but was executed "some days later." The precise date does not appear. It is not necessary to recite the contract in full. A brief reference to some of its provisions only will be sufficient. It provided, as already stated, for the sale of securities and railroad rights to the Trust Company. For these the Trust Company were to pay cash, and debentures of and stock in the New Hampshire Traction Company, a holding company organized and controlled by the Trust Company. The cash, debentures, and certificates were to be retained by the Trust Company. The cash was to be used to pay debts of the Construction Company which that company guaranteed did not exceed the amount of cash the Trust Company was to pay, and the debentures and certificates of stock were pledged to secure any excess indebtedness. The Trust Company were to furnish funds to complete the railways, and were authorized to carry on the construction in the name of the Construction Company, and were to have control of that company for that purpose. Such persons were to be chosen officers of the company as the Trust Company might desire, to remain in office at the pleasure of the Trust Company until the final completion and carrying out of all matters and things provided for in and by the contract, Lovell agreeing to furnish stock to qualify the directors, and that he would, pending the carrying out of all the terms and conditions of the agreement, deposit with parties named certificates for all the common stock of the company indorsed in blank, as security for the faithful performance of the terms of the contract by himself and the Construction Company. The contract also provided for the employment of Lovell in and about the construction of the railways for the term of two years at a salary of \$8,000 a year. It was further provided that the contract should not bind the Trust Company until an examination then being made by engineers and accountants representing the Trust Company was completed, and not then unless their report was entirely satisfactory to the Trust Company. December 31st the draft of the contract was laid before the directors of the Connecticut Company, at a meeting regularly

called and held. By formal vote, the officers of the company were authorized and directed to make, execute, and deliver the contract. The directors further voted that the execution of the said contract by the officers of the corporation in its name be and the same hereby is confirmed and adopted as the valid and binding act of the corporation. The officers were further directed by vote of the meeting to do whatever was necessary to give force and effect to the contract. None of the directors, or officers, or common stockholders of the Construction Company were, so far as the findings go, or so far as there is any evidence which has been pointed out, at this time stockholders, officers, or agents of the Trust Company. There is nothing in the findings or evidence establishing any fact which, in the absence of fraud in fact, invalidates, as matter of law, the assent of the plaintiffs' corporation given in this formal manner to the contract in question. The corporate assent, formally given without fraud, binds all the stockholders.

If the corporation in its entirety is not bound, it can only be because of something subsequent to the formal assent of the directors to a contract which, under the charter and by-laws of the corporation, they had power to make. It does not, as before stated, appear when the actual execution of the contract by the officers of the corporations took place. It appears to be conceded in argument that this was done January 3, 1902, when the result of the examination by the Trust Company's engineers and accountants was communicated to Lovell, as president of the Construction Companies. If it had not been understood that the formal execution would, or might, precede the completion of such examination, the provision of the contract that it should not be binding upon the Trust Company until then seems superfluous; but such provision may have been inserted out of abundant caution. Between the assent given by the directors and the passing of the letters of January 3d, it appears that December 31st three of the five directors of the Connecticut Company resigned, and Trust Company nominees were elected in their stead; and it is found that since December 31st, at least, the Connecticut Company was merely an agency controlled by the Trust Company. January 3, 1902, the Trust Company addressed to Lovell, as president of the Construction Companies, a letter stating that the examinations made under the contract have been completed, "that the results of said examinations are satisfactory to us, and that we are prepared to accept said contract upon the express understanding and agreement on the part of the" Construction Companies that they will pay the entire expense of the completion of the high tension service upon all of the roads now constituting the New Hampshire Traction Company. Lovell replied on the same day, as president of both companies, agreeing in behalf of the companies to bear

all the expense necessary for the high tension service. It was argued that none of the agreements entered into, or attempted to be entered into, between the corporations could become binding until January 3d, that, as it is found that at that date the Connecticut corporation was merely an agency controlled by the Trust Company, any contract consummated after December 31st is invalid as matter of law. But the finding must be construed in the light of the evidentiary facts upon which it is based, the use made of it, and the other findings in the case. It is clear it was not intended to find such control existed at the time the directors gave the corporate assent to the instrument dated December 28th, for no attempt is made to support the decree by any ruling that such votes were not effective in law as corporate acts. The finding "since December 31, 1901, at least," implies that if there was evidence tending to establish such relation at an earlier date, it was considered insufficient to establish the fact. The only fact reported as occurring subsequent to the vote of the directors and before January 1st, at which date the agency relation is found to exist, is the substitution of nominees of the Trust Company for a majority of the existing board of directors. The finding is clearly a statement of the legal result of this act, as understood by the trial court.

But, assuming that the three directors then chosen were so related to the Trust Company as to be incapacitated legally to represent the Construction Company in any dealings between the two corporations, there is no finding or evidence that these directors acted in any way as representatives of either party in the matter. If the corporation could not act through them, their dual relation did not prevent the corporations from acting. The remedy awarded in *Pearson v. Railroad*, 62 N. H. 537, 18 Am. St. Rep. 590, was not an injunction restraining the corporations from contracting with each other while the same persons remained as directors of both corporations, but was the appointment of a trustee to manage so much of the business of the plaintiff's corporation as the existing directors were disabled to conduct. The incapacity in such cases relates not to the corporations, but to the officers. That this was the understanding of the finding by the trial court is clear from the subsequent ruling. It was not ruled that the agreements entered into January 3d were void because of the control then had by the Trust Company over the Construction Company; but after setting forth the action of the directors December 31st and the letters, the court says "there was no other acceptance of the modified contract, except by implication from action subsequently taken under it," and the rule upon which the liability of the defendants is made to depend is further stated as follows: "The so-called contract of December 28th, as modified by the Trust Company January 3d, if

ever agreed to by the Connecticut Company, was so ratified after the Connecticut Company was controlled by the Trust Company. Taking the property in this way, the Trust Company is chargeable as a trustee." The only use made of the control found is to prevent acquiescence and action in carrying out the terms of the contract by the persons then in control of the Construction Company operating as a corporate estoppel, against the company. It is further found that "by the contract of December 28th, the control of the Connecticut Company was turned over to the Trust Company." It seems clear that the agency of the Connecticut Company for the Trust Company is found to result from the provisions of the contract of December 28th, and that it was not intended to find that the contract of December 28th or January 3d resulted from, or was tainted by, such control. The corporate assent to that contract was given by a board of directors legally capable of representing the corporation. The officers who performed the manual execution and delivery whenever that was done—Lovell, president, and Pride, secretary—were not incapacitated by any relation to the Trust Company. Their act in so doing was purely ministerial, and in so acting they represented the corporation; and having been legally authorized to perform the act, their power to do so as representatives of the corporation was not affected by any vacancy or change in the board of directors. 1 Mor. Corp. § 534. Taken by itself, it is clear that the agreement of December 28th, executed with due formality by both parties, is valid and binding upon the plaintiffs' corporation.

The sole remaining question on this branch of the case is whether the letters of January 3d rendered the agreements of either or both of the parties contained in the sealed instrument nugatory and void. By that instrument the Connecticut Company sold and the Trust Company bought the property for which the plaintiffs seek to charge the Trust Company as trustees. The defendants' title is valid under that instrument, and they cannot be compelled to account except according to its terms, in the absence of fraud in fact, only because of the legal effect of the letters exchanged January 3d between the vice president of the company on one side and the president of the companies on the other. The theory of the trial court appears to have been that these letters, with the agreements previously reduced to writing and at some time adopted under seal, constituted a new contract which Lovell, as president, had no power to make, and because of Lovell's want of power to bind the corporation as to the stipulation in reference to the high tension service, no contract was in fact made and no title passed; and that the only legal principle by which the Connecticut corporation could be held to be bound was that of ratification by subsequent action or acquiescence. It may be conceded that

the control found prevents, as matter of law, such corporate ratification as would otherwise result from the facts found, and that Lovell, as president, did not have power to bind the corporation to pay for the high tension service, as his letter of January 3d purported to do. The defendants do not assent to the latter proposition. In the view that has been taken, it is not necessary to decide the question of Lovell's authority in the matter, but it may be remarked that such authority does not attach to the office of president. *Waite v. Association*, 66 N. H. 581, 23 Atl. 77, 14 L. R. A. 356, 49 Am. St. Rep. 630. If there is evidence tending to show that the entire management of the corporation and of all its business had been intrusted to Lovell (*Jones v. Williams*, 139 Mo. 1, 39 S. W. 486, 40 S. W. 353, 37 L. R. A. 682, 61 Am. St. Rep. 436), there is no finding to that effect, and the evidence does not establish the fact as matter of law. Whatever authority Lovell might have had under the general vote of the directors of November 11, 1901, to which attention has been called, in the absence of the specific authorization of December 31st, the latter vote prescribed the terms upon which the officers were authorized to convey the property specified in the contract, constituting all the remaining assets of the corporation, and abrogated any authority to convey them upon other or different terms, if such authority could be found in earlier votes or other prior action. But, conceding that Lovell had no authority to bind the corporation by his promise that it should pay for the high tension service, and that he did not do so by his letter of January 3d, the conclusion of the trial court that for that reason there was no contract between the corporation and the Trust Company, and that the Trust Company took the property without any title, is nevertheless erroneous. Upon the whole transaction, giving full effect to the stipulations of the letters, it is clear the Construction Company agreed to sell and the Trust Company agreed to buy the property. In the negotiations the Trust Company attempted to secure an agreement from the Connecticut Company that that company would pay for the high tension service. The discussion is hampered by the paucity of the facts reported as to the execution and delivery of the sealed instrument dated December 28th, if this paper was executed and delivered, as might be inferred from its terms, in advance of the completion of the examination of the Trust Company's engineers and accountants, it became binding at once upon the Connecticut Company, and binding upon the Trust Company upon the completion of such examination, if the reports of such examination were entirely satisfactory to the Trust Company. In such situation, the contract became binding upon the Trust Company by force of the acknowledgment contained in the Trust Company's letter of January 3d that the examinations

provided for by the contract had been completed, and that the results of such examination were satisfactory to them. Upon such a state of facts, the attempt of the Trust Company to add an additional stipulation to a contract already completely executed and binding upon them would have been entirely ineffectual, and Lovell's assent thereto, if otherwise effective as the act of the corporation, would be invalid for want of consideration. But if the expression of satisfaction contained in the Trust Company's letter, because of the stipulation as to a further agreement by the Construction Companies, must be interpreted as a limited or qualified satisfaction which would not of itself render the contract binding upon the Trust Company, it nevertheless appears from the pleadings and admitted facts that the Trust Company did accept the contract, took the property thereunder, and proceeded to deal therewith in accordance with its terms.

It is to be noticed that the parties executing the sealed instruments in behalf of the several corporations (Bright, second vice president, and Root, secretary, for the Trust Company, and Lovell, president, and Pride, secretary, for the Construction Companies) are not the same individuals who represented the parties in the transactions of January 3d (Hyatt, vice president, for the Trust Company, and Lovell alone, for the Construction Company). This evidence would have a tendency to establish that the formal execution of the different papers was not contemporaneous. There is other evidence reported which, with the terms of the paper itself, tends to show that the formal execution of the sealed instrument was earlier than January 3d. If this were so, the contract became binding upon the Trust Company when they proceeded to act under it, whether their satisfaction with the reports of their engineers and accountants resulted entirely from the reports themselves, or from the additional fact that Lovell, as president of the Construction Companies, had agreed for them that they should pay the high tension expense. If the contract was executed and passed before the completion of the examinations, the Connecticut Company, upon proof of the completion of such examinations and that their results were "entirely satisfactory" to the Trust Company, could have required the Trust Company to take the property and proceed with the execution of the contract, or pay damages for the breach. But the Trust Company having taken the property and proceeded to execute the contract, the question of satisfaction by which it was to become binding upon them is entirely immaterial. But since it may have been found that the execution of the sealed instrument was contemporaneous with or subsequent to the letters, it must be concluded the fact was so found if such finding will tend to support the conclusion of the trial court, *Jaques v. Chandler*, 73 N. H. 376, 62 Atl. 713, and

authorities, *supra*. It is therefore necessary to consider the transactions upon the supposition that the contract dated December 28th was not executed by the Trust Company and exchanged between the parties until the time of, or after, the exchange of the letters of January 3d. The letter of the Trust Company expressed their willingness to accept the contract already drawn up and assented to by the Connecticut Company, "upon the express understanding and agreement" that the Construction Companies would pay for the high tension service. The argument appears to be that the Connecticut Company has never entered into a valid agreement to pay for the high tension service; hence the Trust Company has never accepted the contract, and therefore there was no contract and no sale. But even if the Trust Company proposed as a condition of its entering into the contract that the Construction Companies should by a valid agreement bind themselves to pay the cost of the high tension service, such a proposition did not necessarily prevent the Trust Company from accepting, becoming a party to, and attempting to carry out the contract without such agreement on the part of the other companies.

If the Connecticut Company never bound itself to meet the expense of the high tension service, it is equally clear that the Trust Company definitely accepted the contract of December 28th by formally executing the same, by affixing its seal and the signatures of the proper officers, and by proceeding to carry it into execution. If the Trust Company was misled into so doing by mistake or misrepresentation as to Lovell's authority in the premises, the contract of sale would not be void, even if it might be avoided by an election of the party misled to rescind the contract and return what it had received under it. But as under such circumstances the contract would not be void, the Trust Company acquired a valid title to the property, good until it should elect to rescind and return it. But it is difficult to find legal ground for such rescission. The Trust Company dealt with the plaintiffs' corporation through its president as its agent. They knew that as president, merely, he had no implied power to bind the corporation. While suggesting that they required the express agreement of the Construction Company as a preliminary to their acceptance of the contract, they did accept it upon the assurance of the president and waived the corporate action which was necessary to make the agreement asked for binding upon the corporation. In the shape matters then stood, it may be clear why, as a practical proposition, the assent of Lovell, the common stockholder, was considered sufficient; but nothing appears upon which it could be found that the Trust Company accepted the contract upon the mistaken belief that the corporate assent of the Construction Company had been given to the installation of the high tension service

at its expense. There is no suggestion of any representations by Lovell as to his power in the matter by which they could have been misled. If the Trust Company cannot rescind the contract because of the refusal of the Connecticut Company to recognize Lovell's authority to modify the terms of the sealed instrument, it is very clear the Connecticut Company cannot do so; and even if on any ground the Trust Company could rescind, until they did so the contract would be binding upon the other party. *Butler v. Northumberland*, 50 N. H. 33, 39; *Willoughby v. Moulton*, 47 N. H. 205, 208. "The right to abandon a contract vests only in the party who has been guilty of no default." 1 Chit. Cont. (5th Am. Ed.) 741; *Greeley v. Wyeth*, 10 N. H. 18; *Bryan v. Bancks*, 4 B. & Ald. 401; *Clough v. Railway*, L. R. 7 Exch. 26, 34. The Connecticut Company agreed to sell their property to the Trust Company upon the terms embodied in the sealed instrument. If they did not agree and are not bound to pay the high tension expense, they get full relief by a discharge from the obligations of that agreement.

In addition to what has been said, there is a technical reason fatal to the conclusion of the trial court, assuming that the exchange of letters was anterior to or contemporaneous with the execution of the sealed instrument. When parties engage in negotiations by parol, looking to the making of a contract, and do make such contract in writing, all stipulations by parol anterior to or contemporaneous with the written agreement are merged in the writing, which is conclusively presumed, in the absence of fraud or mistake, to contain the matter as to which the minds of the parties met. Where the final expression of the purpose of the parties is by specialty—a writing under seal—all other matter in writing is in parol and merged in the sealed instrument. Whatever the parties may have proposed orally or in writing as to the terms of their proposed treaty, the final expression of their agreement is the writing under seal, which cannot be contradicted or altered by any anterior or contemporaneous writing of less degree. This is not merely a rule of evidence, but a rule of substantive law. 4 Wig. Ev. §§ 2400-2455; *Stark. Ev.* (3d Am. Ed.) *995. The defendants suggest that an agreement which is collateral to, or independent of, the stipulations of the written or sealed instrument may be proved, even if the proof rests in parol. *Hutt v. Hickey*, 67 N. H. 411, 417, 29 Atl. 456; *Durkin v. Cobleigh*, 156 Mass. 108, 30 N. E. 474, 17 L. R. A. 270, 32 Am. St. Rep. 436; *Morgan v. Griffith*, L. R. 6 Exch. 70, and numerous authorities cited by them. The question in these cases is as to the proof or binding effect of the collateral agreement, which may be proved and enforced if collateral or independent, but if otherwise, is merged in the written agreement, which is not affected by a parol agree-

ment which is not capable of proof. If the defendants are wrong in their contention that the stipulation of the letters is independent of, or collateral to, the stipulations of the sealed instrument, the only result would be the legal conclusion that the sealed instrument contains the entire matter to which the parties finally agreed; while if they are right, and the matter of the letters is open, the evidence that the Connecticut corporation did not become bound thereby would establish one of the steps necessary to a rescission by the Trust Company, but would not, as has been seen, render the contract void or voidable by the Connecticut Company. Whether, therefore, the stipulations of the letters are collateral or independent is not material, for neither conclusion would render the sealed instrument void.

As legal assent binding upon the plaintiffs' corporation was duly given to the taking by the Trust Company of the property in question, the conclusion of the trial court that the Trust Company is bound to account as trustee for the property so taken cannot be sustained, and the decree resting upon that conclusion of law must be set aside, and the case stand in the superior court for a finding upon the undecided issue now before that court. The error in the finding lying at the foundation of the decree renders the consideration of the other objections urged by the defendants unnecessary at this time. If considered, the only decision that could be made would be as to their validity, or otherwise, as an answer to the decree upon the ground upon which it was placed. If the main question presented by the pleadings is decided in favor of the plaintiffs, the facts upon which such finding may be based may be material and important upon the other questions which have been suggested. It is not advisable to consider them at present, further than to say that the finding that if the defendants "are chargeable only for the value as determined by subsequent developments, then the property was never worth as much as they paid for it," is not understood to be a finding that the defendants paid full value for the property. If the defendants are obliged to account for the property, they would in any event be chargeable with its value when they took it. Subsequent developments would be evidence, but not the only evidence, on this question. Whether there is any evidence of actual fraud does not appear to be one of the questions transferred, and is not properly considered by this court while the question of fact remains open in the trial court, to which it was submitted without any objection of this character.

Case discharged.

WALKER and BINGHAM, JJ., concurred in the foregoing opinions. YOUNG, J., dissented.

(217 Pa. 22)

SCHOYER v. KAY.

(Supreme Court of Pennsylvania. Jan. 7, 1907.)

WILLS — NATURE OF ESTATE DEVISED — LIFE ESTATE.

Testator devised to his daughter-in-law the rents and profits of his warehouse for her natural life without power to sell or encumber the property, but with "power to devise the same by last will and testament." Held, that the daughter-in-law took a life estate only.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, §§ 1418-1430.]

Appeal from Court of Common Pleas, Allegheny County.

Action by Lucy O'Hara Schoyer against Frederick G. Kay. Judgment for defendant, and plaintiff appeals. Affirmed.

The plaintiff was a daughter-in-law of William Morrison. The latter by his will directed as follows: "(9) To my daughter-in-law, Mrs. Lucy Morrison, I devise and bequeath the rents, issues and profits of my warehouse and lot situate on Wood street in the city of Pittsburg, and now in the possession of J. R. Weldin & Company, for and during the term of her natural life. It is my will that she shall not have power to sell or encumber the said property, but that she shall have power to devise the same by last will and testament. The devise is in lieu and stead of the annuity which I am now paying to my said daughter-in-law, and which on her electing to accept this provision of my will shall cease and determine. If the warehouse should be destroyed by fire, insurance to be expended in the reconstruction of building. The insurance premium to be paid from time to time by my executors. On settling their final account the executors may invest enough money in the name of the Safe Deposit & Trust Company to keep the premiums paid." The plaintiff claimed an estate in fee simple under the will. The court held that the plaintiff took a life estate only, and entered judgment for defendant.

Argued before MITCHELL, C. J., and FELL, MESTREZAT, ELKIN, and STEWART, JJ.

John P. Hunter, for appellant. J. M. Shields, for appellee.

PER CURIAM. There is no room for resort to any rules of construction nor to any presumptions as to the testator's intent. What he meant is as plain as language can make it. The devise was "to my daughter-in-law, Mrs. Lucy Morrison, I devise and bequeath the rents, issues and profits of my warehouse and lot situate on Wood street * * * for and during the term of her natural life." If testator had stopped here, the devisee would have taken a life estate, and nothing more; but he did not stop there because he had not expressed his whole intent, which was that the devisee should have a power of appointment by will. Therefore he

added: "It is my will that she shall not have power to sell or encumber the said property, but that she shall have power to devise the same by last will and testament." The first clause of this sentence was superfluous, but did no harm, as it merely emphasized the intent that there should be no alienation except by will. If he had transposed the sentence so as to read, "She shall have power to devise the same by last will and testament but shall not have power to sell or encumber," there could have been no question about his intent, and yet the meaning would have been exactly the same. "It is a rule of common sense as well as law not to attempt to construe that which needs no construction." *Reck's Appeal*, 78 Pa. 432.

Judgment affirmed.

(217 Pa. 118)

SMITH v. CITY OF PHILADELPHIA.

(Supreme Court of Pennsylvania. Feb. 25, 1907.)

MUNICIPAL CORPORATIONS—DEFECTIVE STREETS—CONTRIBUTORY NEGLIGENCE.

In an action to recover for injuries received by an alleged depression in a street, *held*, that a nonsuit was properly entered on the ground of plaintiff's contributory negligence.

Appeal from Court of Common Pleas, Philadelphia County.

Action by Frank J. Smith against the city of Philadelphia. From an order refusing to take off a nonsuit, plaintiff appeals. Affirmed.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

Howard A. Davis and John T. Murphy, for appellant. Harry T. Kingston, Asst. City Sol., and John L. Kinsey, City Sol., for appellee.

FELL, J. A nonsuit was entered in this case on the ground of contributory negligence. The plaintiff, in daytime, was driving on Rising Sun Lane, which is a wide avenue and at the place of the accident unimproved as a city street. He was riding in a road cart at a slow trot, when one wheel of the cart ran into a depression, and in turning the horse abruptly to one side the cart was upset. The depression was 6 or 8 feet in length and about 10 feet in width, with sloping sides, and had a depth of 6 or 8 inches at its lowest point. It was near the edge of a car track, which curved from a cross-street onto the lane. There were no other vehicles, nor other objects on this part of the lane, to distract the plaintiff's attention or obstruct his view of the road in front of him. He testified that he could have seen the depression when 25 or 50 feet from it, and that he had last glanced in front of him two minutes before the accident, and then was looking for a car that might come from the cross-street.

It is evident from the plaintiff's testimony that he was not exercising the reasonable care that the law requires of every traveler on a public highway to look where he is going. If he had looked in front of him, he would have seen the depression in time to avoid it. There was no excuse for not looking. In *Quinlan v. Philadelphia*, 205 Pa. 309, 54 Atl. 1028, relied on by the appellant, the hole was in the asphalt surface of the street at a place where the passageway was narrowed by wagons backed against the curb in front of a market house, vehicles were passing in both directions, and the plaintiff could not see the hole because of the wagon immediately in front of her.

The judgment is affirmed.

(217 Pa. 120)

MCCAFFERTY v. CITY OF PHILADELPHIA.

(Supreme Court of Pennsylvania. Feb. 25, 1907.)

Appeal from Court of Common Pleas, Philadelphia County.

Action by Edward J. McCafferty against the city of Philadelphia. From an order refusing to take off a nonsuit, plaintiff appeals. Affirmed.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

FELL, J. This case arose from the same accident as that of *Smith v. City of Philadelphia*, supra, in which the opinion of the court has been filed. The cases were tried together, and the same question is involved in each.

The judgment is affirmed.

(216 Pa. 590)

CROOKS v. PITTSBURG RYS. CO.

(Supreme Court of Pennsylvania. Jan. 7, 1907.)

STREET RAILROADS—INJURY TO PEDESTRIAN—CONTRIBUTORY NEGLIGENCE.

Where a person attempted to cross defendant's street car tracks, and was struck by a car which he intended to take, and he could have taken but one or two steps from the time he entered on the line of the track until the car caught him in the space between the rails, he was guilty of contributory negligence barring recovery.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Street Railroads, §§ 204-220.]

Appeal from Court of Common Pleas, Allegheny County.

Action by Marie B. Crooks against the Pittsburgh Railways Company. Judgment for plaintiff, and defendant appeals. Reversed.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

James C. Gray, Clarence Burleigh, William A. Challener, and W. W. Smith, for appel-

tant. Rody P. Marshall and Thos. M. Marshall, for appellee.

POTTER, J. This was an action of trespass brought by Marie B. Crooks against the Pittsburgh Railways Company to recover damages for the death of her husband, Everett E. Crooks, who was run over and killed by one of defendant's cars on East street in the city of Allegheny about 10 o'clock on the evening of February 19, 1905.

Mr. and Mrs. Crooks had been spending the evening at the house of a friend on East street. It was their intention to return home by a trolley car running south on that street. It appears from the evidence that the cars made sufficient noise in passing to be plainly heard inside the house. When Mr. Crooks was about ready to leave the house, a car was heard to pass, and some remark was made about missing it. Hearing another car coming, Mr. Crooks went out of the house, followed first by his friend, Mr. Erhardt, and then by Mrs. Crooks. The Erhardt house was on the east side of the street, while the single track traversed by defendant's cars was laid about three feet from the curb on the other or west side of the street. From the steps of the house to the rail was a distance of about 17 feet. It was Mr. Crooks' intention to stop the car at the corner of an alley, almost opposite the house, and, in order to do this, he attempted to cross in front of the approaching car, as the opening to admit passengers was at the rear platform, upon the other side of the car. While in the very act of stepping or leaping across the track, Mr. Crooks was struck by the car, and killed. Mr. Erhardt who was close behind, sprang backwards, and saved himself. Plaintiff produced a number of witnesses, who testified that the car was running very rapidly, and did not come to a stop until it reached a point about 200 feet beyond the place of the accident. It was also shown by plaintiff's witnesses that there was no headlight on the front of the car. But the car was lighted upon the inside, and the light shone through the windows, and a great deal of noise was made by the car as it ran, so that it could be heard at some distance.

It is clear from the testimony that the deceased heard the car while he was in the house, and saw it after he came out upon the street, as it approached, and then attempted to cross in front of it, for the purpose of stopping and boarding that particular car. The railway consists of a single track, and the space between the rails was about five feet. Two, or at most three, steps, would have cleared it entirely; and as Mr. Crooks was struck while he was between the rails, it is apparent that he could have taken but one or two steps from the time he entered upon the line of the track until he came in contact with the car. In other words, his stepping within the line of the rail and the coming of the car to that particular spot

must have been practically instantaneous. Where a foot passenger walks or steps directly in front of an approaching car, and is struck at the instant he sets his foot between the rails, there is but one inference which can reasonably be drawn from that fact, and that is the inference of contributory negligence. It is idle to estimate and suggest, as did some of the witnesses in this case, that a car can travel 100 or 150 feet in the fraction of a second which passes while the foot is being rapidly raised and set to the ground in taking a step. If there had been any appreciable distance between him and the car, a foot passenger walking rapidly or running, as was Mr. Crooks in this case, would have crossed the line before it could reach him. The deceased was a tall, agile man, and, as one of the witnesses said, the rapidity of his movements was such that a leap or two would take him across. If, then, as is shown by the testimony, the car caught him in the space between the rails, while he was crossing thus rapidly, it must have been almost within touch as his foot left the ground to take the one fatal step that put him in the way of danger.

The testimony is undisputed as to the manner in which this most unfortunate accident occurred. As we have seen, one step, or at the most two, carried the deceased from a point outside the line of the track into collision with the car. It must have occurred in less than a second of time. The facts speak for themselves. The action of the deceased can only be characterized as contributory negligence, and the judgment is reversed.

(217 Pa. 53)

HAYS v. COLONIAL TRUST CO.

(Supreme Court of Pennsylvania. Feb. 4, 1907.)

PARTNERSHIP—CONTRACT—CONSTRUCTION.

Plaintiff and defendant had agreed in writing that plaintiff should take up options on certain stock at \$10 a share. He was to be paid \$100 a month, and if he sold the stock at a price satisfactory to defendant, was to receive a commission of 25 per cent. of the profits, and if he determined to take up the option himself, he was to have a salary, and his investment was to be repaid with interest, and he was also to have 25 per cent. of the profits of the sale. *Held*, not to constitute a partnership, so that defendant was not bound to consult plaintiff as to a sale of the stock.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Partnership, § 23.]

Appeal from Court of Common Pleas, Allegheny County.

Bill by Milton D. Hays against the Colonial Trust Company. Decree for plaintiff. Defendant appeals. Reversed.

The following is the statement of facts and opinion of Shafer, J., of the court below:

"On September 15, 1900, the plaintiff and defendant entered into an agreement in writing, by which it was provided that the plaintiff should take up options on the capital

stock of the Pittsburg & Castle Shannon Railroad at \$10 per share, and that if the defendant should determine to take up these options, the plaintiff was to have 25 per cent. of the profits of the sale of the stock of the road, after the defendant should receive the full amount of his money invested, with 6 per cent. interest, 'and a salary also for his time given to same,' and that the defendant should have full control of the stock of the road. The plaintiff was also to have \$100 per month, and that the defendant might terminate the agreement at any time by giving 10 days' notice in writing, which was done in February, 1901. The agreement contains other provisions which are not now in question. The plaintiff had by this time procured from the owners of the stock options at \$10 a share, and procured such options on 5,225 shares of the stock, and delivered them to the defendant, who exercised the rights therein granted and purchased the stock, and the shares were transferred to the defendant and other persons at his direction on the books of the company.

In March, 1901, the defendant pledged to the German National Bank as collateral security for a loan of \$40,000, about 4,900 or 5,000 shares of this stock, and these shares were transferred partly to J. W. Friend and partly to F. N. Hoffstott, who were each officers of the national bank which made the loan. A supplemental agreement was made between the parties in August, 1900, which recites that the defendant has purchased a majority of the stock of the railroad company, and is about to dispose of the same at a profit to John S. Scully of Pittsburg, and agrees that the profits of the sale so to be made shall be reinvested in a proposed railway company. In August, 1901, the defendant being then the owner of the majority of the stock, purchased from Mr. Bailey the greater part of the remainder of the stock for \$25 per share, and the stock was delivered to him in November, 1901. In December, 1901, 2,446 shares of the stock were transferred on the books of the company to Mr. Hoffstott and 2,430 to Mr. Friend, these transfers being made on the books of the company for the purpose of electing directors at the next meeting of the railway company. In January of 1902, the bank called upon Jutte to pay the loan for which the stock was pledged, and he replied that he could not do so, and that he was willing to sell the stock at \$12 per share, and this was done and the loan was canceled by Mr. Friend and a check for \$20,000, being the difference between the price of 5,000 shares at \$12 per share and the note, was sent to Mr. Jutte. The testimony as to this sale was only that of Mr. Jutte, examined by the plaintiff as for cross-examination, and that of Mr. Friend, who was claimed to have taken part in the collusive sale, and other parties connected with the defendant. The conduct of Jutte in his negotiations with Mr. T. A. Noble, a proposition

made by him shortly before the actual sale to Mr. Friend and some other matters, which appear in the evidence, together with the very contradictory and unsatisfactory account given by these parties of their transactions, undoubtedly throw grave suspicion upon the bona fides of the sale by Jutte. There is not enough, however, in the evidence to justify the court in finding that Jutte received, or was to receive, more than \$12 per share for the stock, or that he was guilty of positive bad faith in selling at that price, and the exceptions relating to the bona fides of the sale are therefore dismissed.

"We have carefully considered the exceptions of the plaintiff and the findings of fact upon which it was founded filed herein. The exceptions are numerous, and cover almost every item of the account. The first exception is to the charge of proceeds of sale of 5,000 shares at \$12 a share, the plaintiff's claim that the accountant should be charged with this stock at a much higher price. The other exceptions are to two items of credit claim, and are all dismissed, the items of credit being sufficiently discussed in the opinion heretofore filed. The finding in regard to the charge for stock sold to which plaintiff excepts is that there is not sufficient evidence to justify the court in finding that Jutte received or was to receive more than \$12 per share for the stock, or that he was guilty of positive bad faith in selling at that price; and the charge against Jutte of the stock sold at the rate of \$12 per share only was thus put solely upon the ground that it did not positively appear that he in fact received a greater price than that for the stock. As suggested in the opinion filed, the evidence in regard to the sale of the stock, all of which came from Jutte and the purchaser from him, was highly unsatisfactory. In the first place the defendant stated the account of the number of shares sold by him and the price at which they were sold as if from his books, in a way which could hardly be correct, but which he stuck to in his testimony until it became evident that it could not be correct, when his counsel asked leave to amend his account. The statement of the account thus made was such as to show that nothing at all was coming to the plaintiff. It further appeared that upon negotiation for sale of the same stock six months before, he insisted upon the stock being put in along with other property at the price of \$12 a share, and the other property put in at a price higher than was asked for it by the seller, so as to cover the difference between \$25 a share and \$12 a share. He afterwards bought other stock at \$25 a share. When in the winter of 1902 the stock was actually sold for \$12 a share to an officer of the bank who was practically in charge of the defendant's affairs, the transaction has a very artificial appearance, being carried on by correspondence in writing between the parties practically in the same office. Considering these circumstances, and

the numerous contradictions and inconsistencies in the testimony of the parties to the transaction, we cannot help seriously doubting its good faith and suspect very strongly that the sale was merely a pretended one for the purpose of depriving the plaintiff of his share of the proceeds of the purchase of the stock. We would not, however, feel justified in finding the fact to be so.

"There is, however, another view of the case which we believe was not heretofore sufficiently considered. The defendant was as to this stock a partner with the plaintiff. It is true that the contract between them provided that the defendant should have 'full control of the stock of said road,' but that does not mean that he should sell when and as he pleased without consultation with the plaintiff or notice to him, and perhaps does not refer to the sale of it at all, nor does it mean that he should pledge it for his own individual debt. The duty of the defendant under the contract was to sell the stock, if he sold it all, in the usual way, upon the open market, and to procure for it the best price that could be had. What the defendant did, was to pledge it for his own debt, and thus to put the control of it more or less out of his own hands, and then without notice to the plaintiff, who was entitled to receive one-fourth of the profits, without notice to the public, and without notice to or consultation with any of the several parties who had been negotiating for the stock from time to time and whose offers had been rejected, to sell it for less than one-half of what he had paid for similar stock not long before and less than one-half of what he had been offered for it not long before, to the officer in control of the bank which held it as collateral, and in whose name one-half of it actually stood at the time upon the books of the company. And this sale was made of the whole of the 5,000 shares, although only two-thirds of the amount supposed to be received was required to pay the note for which it was pledged. It is true that no sales of the stock were made upon the open market by anyone before this transaction, but we have no hesitation in finding from the evidence that the stock was worth \$25 a share at the time it was sold by the defendant at \$12 a share. We think that the defendant having sold the stock under the circumstances above stated, is not in a position to complain that he is charged with the last price at which any of the stock was actually sold. The exceptions to the findings as to the charge for the stock are therefore sustained to the extent above stated, and the account stated in opinion heretofore filed is to be modified by charging the defendant with 5,000 shares of stock at \$25 per share, instead of \$12 per share. This adds \$65,000 to the debit side of the account and increases the same to be divided between the parties by that amount, making the same \$69,206.46, instead of \$4,206.46. Of this amount 75 per

cent. belongs to the defendant and 25 per cent., or \$17,301.61, to the plaintiff, from which is to be deducted \$911.86, leaving a balance in favor of the plaintiff of \$16,389.75.

"Let a decree be drawn that there is due from the defendant to the plaintiff the sum of \$16,389.75 upon the account between them, which amount the defendant is ordered and directed to pay the plaintiff, and that the costs be paid, one-fourth by the plaintiff, and three-fourths by the defendant."

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

Samuel McClay, for appellant. S. S. Robertson, for appellee.

MITCHELL, C. J. In September, 1900, plaintiff and Jutte, appellant's decedent, made an agreement in writing by which plaintiff was to take up options on certain stock at \$10 a share. He was, to be paid \$100 a month, and in case he sold the stock at a price satisfactory to Jutte he was to have 25 per cent. of the profits. If, however, Jutte determined to take up said options himself then Jutte was to have a salary for his time, his investment was to be repaid with interest and then plaintiff was to have 25 per cent. of the profits on the sale of the stock. Jutte was to have "full control" of the stock. A subsequent agreement was made in August, 1901, relating to the investment of the profits in a proposed coal and railroad company, but not materially affecting the provisions of the first contract. The learned judge below, though apparently after much doubt and hesitation, came to the opinion that the parties as to these transactions were partners, and that Jutte was bound to consult, or, at least, notify plaintiff, and "to sell the stock if he sold it at all, in the usual way upon the open market." We cannot, however, concur in this construction of the agreement. It overlooks at least one attribute of partnership, the community of liability for losses. The case belongs rather to that class where compensation may be measured by a proportion of profits without making a partnership. *Haines & Co.'s Estate*, 176 Pa. 354, 35 Atl. 237.

Jutte was to be the owner of the stock throughout the transactions. The sales by plaintiff under the options he took were to be "at a profit satisfactory to" Jutte; no such provision as to the satisfaction of plaintiff was made as to sales by Jutte; the latter was "to have full control of the stock;" and he could terminate the agreement on ten days' notice in writing. It is clear that Jutte was the owner, the principal, and plaintiff only an agent to purchase, and within limits to sell. He was, however, an agent with an interest in the proceeds of the sales which entitled him to an account and to the exhibition of good faith on the part of Jutte in getting the best price obtainable. For mistakes by which he missed sales at higher

prices than he could subsequently obtain, or other errors of judgment Jutte was not liable; but he was bound to good faith towards plaintiff. At the first adjudication the learned judge below stated the account on these principles, and found a balance due of only \$139.51. But on the second adjudication upon exceptions filed to the first, he raised the amount to \$16,389.75. The difference arises from the different views of a sale of a large block of the stock at \$12 a share. This sale was attacked as fraudulent and collusive with the purpose of defrauding plaintiff. On this the court said: "Considering these circumstances and the numerous contradictions and inconsistencies in the testimony of the parties to the transaction, we cannot help seriously doubting its good faith and suspect very strongly that the sale was merely a pretended one for the purpose of depriving the plaintiff of his share of the proceeds of the purchase of the stock. We would not, however, feel justified in finding the fact to be so." He did, however, find that as there was a partnership the sale by Jutte was such a failure of duty to plaintiff as his partner as to make him liable for the price that the stock was actually worth and had been sold for within a comparatively short time.

But, as already said there was no partnership; Jutte had three times the amount at stake in the profits that plaintiff had, and he not only had the right as owner to determine when and upon what terms he would sell, but the agreement shows that plaintiff trusted Jutte's judgment on that subject. The latter can only be held liable for actual bad faith. This was the basis, moreover, on which plaintiff's bill was filed. The learned judge below, having in his opinions on both hearings explicitly refused to find actual fraud, the decree cannot be sustained.

Decree reversed, and decree on first hearing reinstated, with leave to appellee to file exceptions de novo.

(217 Pa. 63)

HOLMES v. STANHOPE.

(Supreme Court of Pennsylvania. Feb. 4, 1907.)

WILLS—CONSTRUCTION—ESTATE DEVISED.

Testator in his will directed that his interest in certain property described, or any other that he might own, should be divided between S. and J., with the provision that, if S. or J. should die, their share was to go "to the one remaining, if both to E., or his mother if living, then to him." *Held*, that S. and J., on surviving testator, took a fee; the contingency of the death of S. or J. being referable to the time of testator's death.

Appeal from Court of Common Pleas, Philadelphia County.

Action by Sallie B. W. Holmes against John B. Stanhope. Judgment for defendant, and plaintiff appeals. Affirmed.

Case stated to determine title to real estate. The real estate in question belonged

to Elizabeth P. Powell, who died leaving a will as follows:

"* * * It is my wish that after all my debts and funeral expenses are paid, and that all my interest in the Third street property, or any other I may own, be equally divided between Sallie A. Swayne and John P. Howell. For Gertrude H. Stanhope I leave the Bond John now holds and to Willie at her death. I think the prospects of the rest of my nieces and nephews are brighter, and what I have to leave is not worth dividing between so many.

"I would like so much to leave them something more than love, but I see nothing now but bright prospects for them all, and mine would be such a mite. * * * If Sallie or John should die, their share is to go to the one remaining, if both to Edward Wilson Holmes, or his mother if living, then to him."

The plaintiff claimed that the devise to Sallie A. Swayne and John P. Howell gave a life estate only, and that as they were both dead she took an undivided interest in the land under the will as Sallie A. Swayne. Defendant claimed a fee as the successor in title to the interest of Sallie A. Swayne and John P. Howell.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

Charles Markill, Hood Gilpin, and Gans & Haman, for appellant. Frederick C. Newbourg, Jr., for appellee.

PER CURIAM. The language of the will is: "It is my wish * * * that all my interest in the Third street property or any other that I own be divided between Sallie A. Swayne and John P. Howell." This, under our statute, carries a fee, unless a contrary intent of the testatrix appears. An estate in fee plainly given is never cut down to a lesser interest without clear evidence of intent to do so. *Flick v. Forest Oil Co.*, 188 Pa. 317, 41 Atl. 535. So far is this will from showing such intent that, in addition to the presumption from the general rule, the testatrix in the same paragraph expressly indicates her actual intention to give the named devisees her whole estate by an apology or explanation to her other relatives: "I think the prospects of the rest of my nieces and nephews are brighter, and what I have to leave is not worth dividing between so many."

But in the next paragraph of her will testatrix directed, "If Sallie or John should die, their share is to go to the one remaining, if both to Edward Wilson Holmes, or his mother if living, then to him," and appellant argues that this reduces the first gift to a life estate. But here, again, we have not only the established presumption in such cases that testatrix meant death of the devisees in her own lifetime, but a clear expression of her actual intent. She knew, of course, that the devisees must die at some time, and

when she used the word "if" she must have referred to some definite time or occurrence. Her words do not admit of any other meaning, and the period or occurrence indicated was her own death, when the estate as given would vest in possession. In this latter paragraph, therefore, she was providing, not for a reduction of the estate in fee to one for life, but for a failure of the devise itself, partly or wholly, by the death of one or both the devisees before her own death had made it effective. Had she meant to reduce the first estate to one for life only, her natural and almost only reasonable expression would have been not "if," but "when," Sallie or John shall die.

Judgment affirmed.

(327 Pa. 37)

DONNER v. DONNER.

(Supreme Court of Pennsylvania. Jan. 21, 1907.)

1. TRUSTS—ACCOUNTING BY TRUSTEE—INVESTMENT IN CORPORATE STOCK.

On the organization of a corporation, only one-tenth of the capital stock was paid in in cash. One of the organizers sold to a brother a portion of his stock at par, paying for it with money which he had received from his brother for investment. The promoters of the company developed it by means of money borrowed on the company's notes with their indorsement, and not by paying up the balance of the capital, and thereafter the company property was sold at a very large profit. *Held*, that the promoter who sold stock to his brother must account for the profits in proportion to their respective holdings of the capital stock, and not in proportion to the funds furnished by his brother to all the money invested in the enterprise, whether borrowed on the company's notes or paid on account of the stock.

2. APPEAL—REVIEW—FINDINGS OF MASTER.

Where a master found as a fact that defendant sold certain bonds at par, and such findings were confirmed by the court below and were based on evidence, they will not be disturbed on appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4015-4018.]

Appeal from Court of Common Pleas, Allegheny County.

Bill by Frank Donner against William H. Donner. Decree for plaintiff, defendant appeals. Affirmed.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

James H. Beal, William A. Stone, Reed, Smith, Shaw & Beal, and Robert J. Dodds, for appellant. John C. Bane and D. F. Patterson, for appellee.

POTTER, J. This case was here before on an appeal from the interlocutory decree of the court below, ordering an accounting. *Donner v. Donner*, 211 Pa. 409, 60 Atl. 1036. In that decree it was determined that the plaintiff was entitled to $\frac{4}{11}$ of the interest of the defendant in the various companies named in the bill. We were of the opinion that the principle upon which the accounting

was ordered was sound, although we did not agree with the calculation by which the exact fractional interest was ascertained; but as no exception had been filed by the plaintiff, and no appeal taken by him, that feature of the case was not considered, and the decree was affirmed as it stood. Upon the return of the record, the court below ordered defendant to state and present to the court his account as trustee of the plaintiff, with leave to plaintiff, to file exceptions thereto. In pursuance of said order an account was filed by defendant, to which plaintiff filed exceptions. Thereupon the court appointed Joseph M. Swearingon, Esq., master "to state the account of Wm. H. Donner as trustee of Frank Donner in accordance with the findings of fact and law and the decree of this court and the opinion and decree of the Supreme Court therein, and to make report thereof to the court." The present appeal is taken by defendant from the dismissal of exceptions filed by him to the report of the master, and to the final decree, which confirmed the master's report, with a single modification.

Counsel for appellant have argued at considerable length substantially the same questions with regard to the basis of the proportionate interests of the appellant and the appellee which were decided on the former appeal. Due respect for the ability and force with which the argument in this particular was presented has led us to carefully re-examine the basis of our former decision; but, as a result, it has not appeared that we were under any material misapprehension as to the facts in reaching our former conclusion. Nor can we see anything wrong in the theory upon which the main question in the former appeal in this case was decided. The argument of counsel and our own investigation have tended to emphasize the fact, which appears clearly in the evidence, that the parties in control of the Union Steel Company did not pursue the ordinary and sound business policy of paying into the treasury of the company, in cash or its equivalent, the capital stock of the company. Instead of paying in the required funds as capital, they chose to put their contributions to it, into the form of a loan to the company, and took the demand notes of the company therefor. The result was that, instead of being amply provided with capital of its own, the company was placed in the position of being heavily in debt to its own stockholders. It matters not whether the notes thus taken from the company were discounted in bank or not. That is wholly immaterial. The notes were given to W. H. Donner and the Messrs. Mellon, and afterwards the payment of this indebtedness was made the excuse for the creation of an immense bonded indebtedness, which would have been wholly unnecessary for the purposes of the company, if the cash which had been paid in had been applied to capital stock. Strange as it may appear, there is no evidence that, of the

immense issue of \$20,000,000 of capital stock, anything more than an insignificant fraction was ever paid into the treasury of the company. The total investment in the properties was \$17,853,534.34, so that the amount of the capital stock finally issued, which was \$20,000,000, would have been, if it had been paid up in cash or its equivalent, considerably more than enough to cover the entire amount. Or, to put it in another way, if the funds which were actually advanced by W. H. Donner and his associates, the stockholders of the company, had been paid into the treasury of the company as capital stock, there would have been no indebtedness, and no occasion for an issue of bonds to provide the necessary capital for the company, and the questions in dispute in this case would not have arisen. It was the deliberate withholding from the company of the proceeds of the capital stock which made occasion for the bond issue. As a matter of fact, while the business was carried on under the corporate name of the Union Steel Company, the formalities of corporate management were dispensed with, and the methods followed were entirely those of a partnership. In his answer, W. H. Donner says: "No meetings of the stockholders, and no meetings of the directors as such (except for organization) of said Union Steel Company were ever held until after the arrangement for the sale of its capital stock to the United States Steel Corporation, as hereinafter described. The business affairs of said enterprise were carried on by Mr. A. W. Mellon, Mr. R. B. Mellon, and myself." The matter of the organization of the company and the peculiar methods adopted by its promoters to supply it with funds, by lending the money to it, and taking its notes instead of its certificates of stock, is not directly before us; but it has been brought into the case, and we have felt obliged to take note of it, by reason of the zeal of counsel in rearguing questions which were considered and disposed of on the former appeal. We see no reason whatever to change the conclusions we then reached.

When the case was here before, it was admitted that, for the sale of the properties by W. H. Donner and the Mellons, they received bonds of the total par value of \$25,214,288.41, and that the total investment in the Union Steel Company and its subsidiary corporations was \$17,853,534.34. If the bonds be considered as worth par, this left a profit of \$7,360,754.07, of which one-fourth belonged to W. H. Donner, and this amount, or \$1,840,188.52, was paid or set over to him in bonds of the Union Steel Company, guaranteed by the United States Steel Corporation. These profits only arose or appeared after the payment of the indebtedness of the company. That these profits were actually made, and paid over in the shape of bonds, to W. H. Donner, appears over and over again from the records of this case. It appears

clearly from the admissions of the defendant in his answer, and it is also shown by the account filed by him, and by the statement of the settlement between him and the Mellons. The defendant admitted, in his statement, exhibit No. 53, offered in evidence upon the trial before the court, that his profits were \$1,840,188.52. He testified that he had this statement prepared, showing accurately the profit made by the Messrs. Mellon and himself. In a prior statement rendered May 1, 1908, identified as exhibit No. 37, he had already admitted a total profit on the transaction of \$7,816,229.27, of which his one-fourth would be \$1,829,057.32. That the profits of the defendant, embodied in bonds, were actually in his possession or control, was not disputed on the former appeal. The dispute was as to the proportions only, into which these profits of defendant should be divided in the settlement with his brother. Now, in the present appeal, it appears that, for the first time in the history of the case, W. H. Donner set up before the master the claim that, instead of the Union Steel Company being allowed par for the bonds taken from it by its stockholders in payment of the funds advanced to it, there was an arrangement made between themselves by which he and the Mellons took the bonds from the company at a valuation of about 70 cents on the \$1. This claim is entirely inconsistent with the theory of the case when it was tried upon its merits in the court below, and when presented here before. If it is correct, the defendant could not have made the profit of \$1,840,188.52 which he then reported and admitted over and over again. Whether they did or did not take the bonds from the company at this reduced rate, instead of receiving them at par, is a question of fact; and both the master and the court below have found this fact against the contention of appellant, and have found that the bonds were issued and accepted at par. The master, in his report, after referring to the fact that the attempted distribution of the bonds into capital and indebtedness by the defendant was arbitrary, and not in accord with the actual transaction, says: "I cannot find from the evidence that of the investment of \$17,853,534.34, \$2,106,596.19 was capital stock and the remainder, \$15,746,938.15, indebtedness, and that the bonds received were distributed accordingly; nor can I find that the price at which the bonds were taken was \$708.0721 [on each \$1,000 bond]"—thus squarely negating the contention of appellant.

We can find nothing in the facts of the case, or in the details of the transaction, from start to finish, to indicate that the bonds of the company were not considered as worth par, by its stockholders, when they accepted them in exchange for the properties of the company in what was to them a most profitable deal. It must be remembered that the bonds were not sold or offered for sale by the company in the open market, but were

placed by the defendant and his associates upon what was at the time their own property, and issued for the express purpose of enabling them to make sale of that property on satisfactory terms. Under such circumstances, the bonds were presumably worth much more to the stockholders than they would be to the outside public. Especially was this the case, when the transaction did not call for new funds from these stockholders, but involved only the sale of properties in which their funds were already invested to a very large amount, and in an enterprise which they would be compelled to carry to a successful issue, in order to save themselves from heavy loss. In other words, if the investment was for any reason undesirable, they were already committed to it, and to a very large extent. The defendant never set up in his answer any claim that the bonds were accepted at less than par. Nor does his statement of accounts contain any such claim; but throughout it constantly and consistently treats the bonds as being worth par. The statement upon which settlement was made between W. H. Donner and the Mellons also treats the bonds throughout upon the basis of par, and contains no indication that any part of them was taken, or was regarded, as worth less than par. That statement, shown as Exhibit No. 4, contains a note as follows: "Note C. Profits shown are based on bonds at par."

A further bit of corroborative evidence appears in the fact that the defendant gave to the plaintiff a rough statement Exhibit No. 36, in which he then estimated that plaintiff was entitled to a profit of 60 per cent. upon the transaction. In this statement no distinction is made between the bonds at par and cash. Frank Donner's investment had been \$25,000 in cash, and it was upon this amount that W. H. Donner then desired to make a settlement, on the basis of 60 per cent. profit. This would be \$15,000, which, added to the \$25,000 of original investment, made \$40,000; and, in pursuance of this calculation, W. H. Donner actually sent his brother 40 \$1,000 bonds, which had a total par value of just \$40,000. This shows that at that time, March 10, 1903, which was only a few days after the bonds had been received, with the guaranty of the United States Steel Corporation upon them, the defendant regarded them as worth par, and used them at that valuation in attempting to discharge an admittedly just and valid obligation payable in cash or its equivalent. And another incident, showing the view then held as to the value of the bonds, is this. The bonds were received by W. H. Donner and the Mellons early in March, 1903, and on April 9th, within a month thereafter, the defendant wrote to Frank Donner offering to send him \$1,000 for one of his bonds, thus indicating in a very practical way that he then considered them worth par. Again, on June 6, 1903, 10

days before this bill was filed, the defendant sent to counsel for plaintiff a paper, identified as Exhibit No. 37, which is entitled a "general statement, showing selling price, investment, and profits," and in this statement the bonds are treated throughout as if they were taken as cash at their par value. That these bonds were as a matter of fact issued and accepted by all parties concerned, at the par value, is strongly evidenced by the agreement with the United States Steel Corporation, and by the proposition of T. Mellon & Sons to the directors of the Union Steel Company, by which they agreed to purchase, and did purchase, at par and accrued interest, \$3,000,000 of the bonds. Everywhere throughout the transaction it appears that the bonds were considered as worth par and as the equivalent of that much in cash. It is difficult to see any reason why this should not have been the case. The bonds were issued by the Union Steel Company, and payment of them is guaranteed by the United States Steel Corporation, one of the largest, richest, and most powerful corporations in the world. They are of the denomination of \$1,000 each; are dated December 1, 1902; are payable at the expiration of 50 years after their date; are free of taxes; are redeemable after December 1, 1907, at 110 and interest; and bear interest from December 1, 1902, at the rate of 5 per cent. per annum, payable semiannually. They are secured by a first mortgage and collateral trust deed upon all the property of the Union Steel Company, including the stocks and after-acquired property, and said mortgage provides for an annual sinking fund of 2 per cent. of the bonds outstanding and unpaid. The suggestion of counsel for appellee seems to be well founded that it was an afterthought on the part of the appellant to claim that these bonds were issued in payment of the indebtedness of the company at a valuation of a little more than 70 cents on the \$1. The master finds that the position taken by the accountant in this respect was untenable, and the court below was much more emphatic in rejecting the suggestion that the accountant should have the benefit of the bonds at 70 cents on the \$1, and we see no reason to differ with its conclusion in this respect.

Several of the assignments of error raise questions as to certain credits claimed by accountant, and disallowed by the master and the court below, and as to the charge of \$1,818.18 against the accountant in the matter of the Union Improvement Company. These were all purely matters of fact, and there was sufficient evidence to sustain the findings of the master, which are affirmed by the court, and we will not disturb them.

The assignments of error are all overruled, the decree of the court below is affirmed, and this appeal is dismissed, at the cost of appellant.

(217 Pa. 65)

**In re MULHOLLAND'S ESTATE.
Appeal of DA COSTA.**

(Supreme Court of Pennsylvania. Feb. 4, 1907.)

1. WILLS—DEVISAVIT VEL NON—REFUSAL OF ISSUE.

The orphans' court refused an issue devisavit vel non, where there was some evidence of a want of memory and childishness on the part of testatrix, but the undisputed evidence showed that the will was drawn at her instruction by an attorney, and executed in his presence without any party in interest being present. The testatrix knew the nature of the act, what she wanted done with her property, and the person naturally the subject of her bounty. *Held*, that the decree would be sustained.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, §§ 742-745.]

2. SAME—CAPACITY OF TESTATRIX.

Where testatrix, shortly after having made her will, was declared a weak-minded person under the acts of June 20, 1895 (P. L. 300), and June 19, 1901 (P. L. 574), the decree operated prospectively only, and did not change the burden of proof as to the will, and while the decree should have been considered in a contest over the will, its effect was defeated, where it was shown to have been secured at the instance of the contestant against the will.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, §§ 104-110, 138-147.]

Appeal from Orphans' Court, Philadelphia County.

In the matter of the estate of Margaret Mulholland. From a decree refusing an issue devisavit vel non, Margaret W. Da Costa appeals. *Affirmed*.

The register of wills directed a precept for an issue devisavit vel non to the court of common pleas to determine the question of the validity of the will. On appeal to the orphans' court evidence was heard and the court filed an opinion reversing the order of the register of wills, and directed the latter to admit the will and codicil to probate.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

Edward A. Anderson and Edwin S. Ward, for appellant. Wm. H. R. Lukens, for appellee.

MITCHELL, C. J. There is no evidence in this case which would justify any court in allowing a jury to set aside this will. The circumstances under which it was drawn are undisputed. A member of the bar while on a business visit to the testatrix's granddaughter was informed that testatrix with whom he was not personally acquainted desired to see him. He went into the next room and was introduced to testatrix who told him she wanted to make a will. He requested the granddaughter to leave the room, and then testatrix said she had made a will at the instigation of her daughter, Mrs. Da Costa, of which she did not approve, leaving the total sum and substance of her estate to that daughter, that she desired to equally divide her property, and that she wished the children of her dead daughter to have

a share of her estate. The will was then written in accordance with this expressed desire, read carefully to testatrix, and approved by her, witnesses were brought in, and in their presence the will was read again to testatrix, and then executed, no one being present but testatrix, the witnesses, and the attorney. The will bequeathed her gold watch to one of the granddaughters, and the residue of her estate to her children and grandchildren. We thus have affirmative and practically undisputed evidence that testatrix knew the nature of the act she was performing, knew what property she had, what she wanted done with it, and also knew the persons whose relationship to her would make them naturally the objects of her consideration. These are the essential elements of testamentary capacity. On the other side, there is the usual neighborhood gossip about want of memory, acts of childishness, inability to take care of herself, etc. Opinions unfortified by specific facts are a very unsafe basis on which to deprive any person of control of his property. In the evidence in this case, facts to sustain the opinions as to mental weakness are notably absent. A whole volume of such testimony would be of little weight against the clear affirmative proof of testamentary capacity already shown, and what there is of it is discredited by the explicit finding of the learned judge below that "the contestant and most if not all of her witnesses, either on cross-examination or while testifying in chief, state facts which are utterly in conflict with their assertions of imbecility."

One feature of the case requires further notice. Shortly after the making of the will now in contest, the contestant apparently having learned of it and apprehensive that the prior will under which she would take the whole estate would be thereby revoked, filed a petition in the court of common pleas under the acts of June 25, 1895 (P. L. 300), and June 19, 1901 (P. L. 574), to have her mother declared of weak mind, and after a hearing that court "reached the conclusion that the testatrix was not able, owing to weakness of mind, to take care of her own property," and appointed a guardian. The operation of this decree was prospective only, and, therefore, it did not change the burden of proof in regard to the will. Owing, however, to the shortness of the interval between the execution of the will and the decree of the common pleas, the latter is proper evidence for consideration in a contest over the former. Apart, however, from the fact that such weak-mindedness as might lead to improvidence in the care of property is not necessarily inconsistent with testamentary capacity, the decree in the present case is entitled to very little weight in view of the forcible suggestion of the learned judge of the orphans' court: "Whether the conclusion would have been reached had the fact been disclosed that the petitioner had

recognized the capacity of the mother to take care of her property by obtaining the will of May, 1901, which she then held in her possession, by which she would succeed to the exclusive possession of the estate, may well be doubted; but the fact was not only not disclosed, but the petitioner, in testifying in the proceeding, positively denied that such a will had been executed."

This case is a fresh illustration of the unwise and dangerous character of the act referred to in *Hoffman's Estate*, 209 Pa. 357, 58 Atl. 665, and the necessity for great care and circumspection in its administration. In particular, the relationship of the petitioner not only to the accused but to the accused's property, with a view to the uncovering of any secret or selfish motive in the proceedings, should always be made a specific point for the keenest and most searching judicial inquiry. Had the real facts been disclosed in the hearing in the common pleas, it is not probable that the learned judge there would have appointed a guardian at the instance of a grasping daughter with such a plain interest in taking the mother's property out of her control.

Decree affirmed, with costs.

(217 Pa. 69)

HARDING v. PHILADELPHIA RAPID TRANSIT CO.

(Supreme Court of Pennsylvania. Feb. 4, 1907.)

CARRIERS—INJURY TO PASSENGERS—CONTRIBUTORY NEGLIGENCE.

One riding on the running board of a summer car, outside of a lowered bar is negligent per se, and cannot recover for injuries received whether he could have got a safer position or not.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, § 1379.]

Appeal from Court of Common Pleas, Philadelphia County.

Action by Frank V. Harding against the Philadelphia Rapid Transit Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

John McConaghy, Jr., for appellant. Russell Duane and Thomas Leaming, for appellee.

PER CURIAM. There was no evidence of defendant's negligence. The plaintiff had no recollection of the accident and the witnesses on his side who saw it only said in general terms that when the two cars passed each other the running board of the one on which plaintiff stood was crowded and several men jumped, fell or were pushed or brushed off.

A witness for the defense testified that as the cars passed, a man on plaintiff's car extended his hand, grasped the other car, and was thrown backwards against the men behind him, including plaintiff. This is the most plausible account that was given, and apart from it there is nothing to show that plaintiff on the approach of the car did not lose his nerve and jump or fall from the car. Under the circumstances there was no presumption of negligence on the part of defendant, but even if it had been clearly shown, it would have been altogether immaterial. Plaintiff was riding voluntarily in a place of manifest danger, and in so doing he assumed all the risks of the situation. It is settled law that it is contributory negligence which will bar recovery, to stand on the platform, or the running board of a car, when a place can be reached inside. *Thane v. Traction Co.*, 191 Pa. 249, 43 Atl. 136, 71 Am. St. Rep. 767; *Bumbear v. Traction Co.*, 198 Pa. 198, 47 Atl. 961. And it is equally clear that one who takes a position of manifest and imminent danger assumes the risk of his position whether he could have got a safer place or not. *Bard v. Traction Co.*, 176 Pa. 97, 34 Atl. 953, 53 Am. St. Rep. 672; *Malpass v. Pass. R. R. Co.*, 189 Pa. 599, 42 Atl. 291.

It is argued by appellant that he was not warned by the conductor of the danger or his position. But the lowered bar was sufficient warning in itself. It was notice that the running board on that side was a place of danger, and that passengers were not expected, nor so far as the company could control the situation, permitted, to use it, even for the limited purpose of getting on or off the car for which the running board is intended. The alternative offered by plaintiff of having to wait for another car and thus being late in getting home is no justification. In any other country than this, plaintiff would have been forcibly prevented from getting on the car at all after the number of passengers had reached the limit of safety or even of convenience. To attempt the enforcement of such a regulation here would certainly lead to continual quarrels and breaches of the peace. A reasonable amount of concession, therefore, to the American's impatience of control and confidence in his own ability to take care of himself should not be visited with punishment by the infliction of penalties on the company for the passenger's own fault. It must be definitely recognized that one who undertakes to ride on the running board outside of a lowered bar, is negligent per se, and cannot recover for injuries incident to his position, whether he could have got a safer position or not.

Judgment affirmed.

(117 Pa. 37)

NORTH BRADDOCK BOROUGH v. MONONGAHELA ST. RY. CO.

(Supreme Court of Pennsylvania. Jan. 7, 1907.)

1. MUNICIPAL CORPORATIONS—BRIDGES—CONTRACT WITH RAILWAY COMPANY.

A street railway company agreed with a borough to build a bridge, with approaches, so that they would be a part of a municipal street, paved and curbed. A sufficient surface could be obtained only by extending the base of the embankment beyond the limits of the street, so as to encroach on private property, or, if the base was restricted to the street limits, by the building of a retaining wall. The city had not acquired any land for any extension of the width of the street; but the railroad company constructed retaining walls only a part of the distance, and for the remainder widened the base so as to encroach upon private land. On refusal of the railroad company to construct the retaining walls any further, the city finished the work. *Held*, that the railway company was bound to build such retaining walls, and the borough was entitled to recover the cost of constructing the same from the railway company.

2. SAME—CONTRACT—CONSTRUCTION.

Where a railway company and borough agreed to build a bridge and the necessary approaches, the question whether the company was to construct a sewer drop on the bridge approaches under the contract was a question of the intent of the parties, and was for the jury, in an action by the city to recover the cost of completing the unfinished work.

Appeal from Court of Common Pleas, Allegheny County.

Action by North Braddock borough against the Monongahela Street Railway Company. Judgment for plaintiff. Defendant appeals. Affirmed.

Argued before MITCHELL, C. J., and FELL, MESTREZAT, ELKIN, and STEWART, JJ.

James H. Beal and Geo. W. Herriott, for appellant. William Yost, for appellee.

STEWART, J. There can be no dissent from a number of the positions taken by the appellant in the argument of this case. The rights and duties of the appellant are those of a contractor. The same rules of construction apply to contracts with boroughs as with individuals. The acts of the parties during performance have the same weight in determining questions of intention, estoppel, etc. This concession, however, advances us but little in determining the real questions in this case.

Appellant, by the acceptance of the borough ordinance and in consideration of the privileges granted, engaged to build a new bridge over Tasseys Hollow which would connect Hawkins avenue with Swissvale, and to reconstruct an old bridge, known as "East" or "Sixth Street" Bridge, forming part of Hawkins avenue. The ordinance indicated, specifically enough to avoid dispute, the work required to be done in the construction and reconstruction of these bridges. It stipulated, in addition, that appellant should also build the approaches to the bridges, but did not specifically state how or in what manner

these were to be constructed. Embankments were necessary, and these were constructed of sufficient height, supported laterally by concrete retaining walls, running back an average of some 40 feet from the abutments of the East Street Bridge, with an average height of about 20 feet. These walls were adequate so far as they extended, but they did not extend along the entire embankment. Beyond where the retaining walls stopped the required support was obtained by enlarging the embankment at the base. This extended it beyond the limits of the street, and was an encroachment upon private property at the side. Appellant left the work in this condition, and, upon its refusal to construct the retaining walls any further, the plaintiff proceeded to finish the work. If this supplemental work done by the plaintiff fell within the appellant's engagement under the accepted ordinance, the recovery in this behalf was proper, since the actual amount expended in connection therewith is not questioned; nor is the necessity for the work questioned, if the embankment was to be otherwise maintained than by the extension at the base over and upon private property.

It is not denied that the approaches as constructed by appellant afforded a surface space corresponding to Hawkins avenue in the condition it then was, and the contention of the plaintiff is that this was all that was required under the contract. The provisions of the ordinance with respect to the construction and maintenance of the company's road, both on bridges and highway, and the situation generally, show conclusively enough, we think, that the improvement of Hawkins avenue, so as to make it a municipal street, curbed and paved, was in contemplation, and that the parties contracted with that in view. In construing the contract, the situation of the parties at the time is to be considered, and the object in view. If the latter is evident, and we think it clearly is in this case, the law will imply that the party engaging to do the work engaged to do what was within the common intent with respect to it, and that it made such agreement as under the circumstances disclosed it ought in fairness to have made.

No other conclusion is warranted than that the parties here were contracting for the kind of approaches that would be suitable under the improved conditions of the avenue. Adequacy of surface could only be secured in one of two ways, either by extending the base of the embankment beyond the limits of the street, or, if the base was to be restricted to the street limits, by building a retaining wall for lateral support. While it is true the plaintiff had the right to acquire by condemnation the private property adjoining for purposes of the bridge, it had not acquired it, had taken no steps looking to its acquisition, and nothing in the ordinance gave any reason to suppose that such proceeding was contemplated. Under such cir-

circumstances it is idle to contend that the embankment, as built, was full compliance with appellant's obligation. It is not denied that the continuation of the retaining wall was necessary to meet conditions as they existed. It could, therefore, be fairly and legitimately required of the appellant under its contract. The learned judge might very properly have so ruled upon the admitted facts in the case. That he submitted it as a question of fact gave appellant company a larger advantage than it had a right to expect. What we have said disposes of the first and second assignments of error.

Exception is taken to the answer to the plaintiff's fourth point, which was as follows: "At the time the contract was made, Hawkins avenue had no surface sewerage system and no sewer drops had been constructed, and therefore the defendant was not bound to construct sewer drops on the bridge approaches." The answer was: "That point is affirmed as matter of law. Defendant was not bound to construct sewer drops there; but, as I have charged you, the defendant was bound to construct an approach which would not contain the elements of its own destruction. If it became necessary to take care of water that came on that street, then it was the defendant's duty to do so." The point, as stated, should have been refused. It is not correct to say as matter of law that, because at the time the contract was made Hawkins avenue had no surface sewerage system, no obligation rested upon appellant to construct sewer drops. As we have said already, this contract was made in contemplation of certain proposed changes in the street, and it is to be construed accordingly. The obligation of appellant was to so construct the approaches as to meet the end in view. The only question with respect to the sewer drops is whether they fell within the common intent and understanding. In deciding this, regard is to be paid to the object to be accomplished and the method of construction. In the state of the evidence with respect to the matter it was a question for the jury, and it was properly submitted.

It was argued that the work was done without objection from any source, or intimation that any other kind of material or mode of construction was intended or expected, and that therefore the plaintiff was concluded. The argument fails to make the proper distinction. The plaintiff's contention is, not that the work was defectively done in the sense that it was unworkmanlike, or that the materials were insufficient, or that the general scheme was departed from, but that the work was not completed. Can any reason be suggested why the plaintiff had not as much right to expect appellant to construct a retaining wall, where it omitted to do so as where it did construct such wall? It is not pretended that the plaintiff acquiesced in this incompleteness. It was evidently contemplated, so says the court in a portion of

the charge not challenged, that whatever provision was to be made for carrying off the water was to be made after the construction of the bridge by appellant, since it had put in a drain to take the water off the tracks. If the fact be as here stated, here again is an incompleteness, not defectiveness in another sense. There was no acceptance of the work by the plaintiff; and, if incomplete and unfinished, nothing short of such acceptance would constitute a waiver.

The assignments of error are overruled, and the judgment is affirmed.

(BY Pa. 60)

COMMONWEALTH v. BEINGO.

(Supreme Court of Pennsylvania. Feb. 4, 1907.)

1. CRIMINAL LAW—EVIDENCE OF CHARACTER—INSTRUCTIONS.

Evidence of good character is positive, and entitled as such to go to the jury as a fact in favor of the accused, and, if the jury is so instructed, accused cannot complain because the judge did not state such fact in any particular or set form of words.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1838-1845.]

2. SAME.

Where counsel desire an instruction to be given in a particular form of words, they should make a request to that effect.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1896, 2005.]

Appeal from Court of Oyer and Terminer, Luzerne County.

Joseph Beingo was convicted of murder, and appeals. Affirmed.

At the trial it appeared that the prisoner shot and killed his father-in-law, Raphael Marsicano. The defendant claimed that the shooting was in self-defense.

The court charged in part as follows: "In addition to the various facts testified to, which you will recall, and some of which I have narrated to you, the defendant has put upon the witness stand a number of people who have known him for many years, and they testify that, from the speech of the people in communities in which he has lived, his reputation as a law-abiding, peaceable citizen before June 28, last, was good. Now, that is what is known as character testimony. Ordinarily it is offered where there is a denial on the part of the defendant that he has committed the crime with which he is charged. Ordinarily it comes to the court when there is a general denial. But it is none the less important, and none the less pertinent in a case of this kind where the defendant admits the killing, as bearing upon the question of whether the killing was, as the commonwealth contends, a deliberate, willful, premeditated, felonious killing, or whether, as the prisoner contends, it was done in self-defense. This kind of testimony is not to be made light of. It is not a mere makeweight thrown in to fill out a case. It is affirmative, substantive testimony to be considered by

you fairly in connection with all the other evidence in the case, as bearing upon the question of whether the commonwealth has not established the guilt of the prisoner as he stands charged in the indictment, beyond a reasonable doubt."

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

Frank A. McGuigan and James P. Costello, for appellant. Evan C. Jones, Asst. Dist. Atty., B. R. Jones, John M. Garman, and James P. Gorman, for the Commonwealth.

PER CURIAM. The first assignment of error complains that the judge did not charge the jury that "evidence of good character, in itself, by the creation of a reasonable doubt, may work the acquittal of the defendant." But the trial judge is under no obligation to use any particular or set form of words. All that the prisoner is entitled to, even on trial for murder, is that the jury shall be accurately instructed as to the law applicable to every material phase of the case which the jury may under the evidence be authorized to consider. The substance of the law as to good character is that it is not a mere makeweight, but positive and substantive in itself and entitled, as such, to go to the jury as a fact in the prisoner's favor. If the jury is so instructed, the duty of the judge is correctly performed, and, if counsel for the prisoner want instruction in some preferred form, they should request it in the usual way. The judge's attention being thus directly called to the subject, he may adopt the form suggested, or modify his own expression, or stand on the latter as it is. The question for this court will then be, not whether any particular form would have been more satisfactory to either party to the issue, but whether the charge as given was substantially an accurate guide to the jury. That is the whole purpose of a charge in homicide as in other cases. The law of Pennsylvania as to the weight of good character is more favorable to the accused than the common law or the law of most other states, but it has not gone so far as to give it any special prominence or superiority to the other facts in evidence in the case.

The learned judge charged that evidence of character "ordinarily comes to the court when there is a general denial. But it is none the less important, and none the less pertinent in a case of this kind, where the defendant admits the killing, as bearing upon the question of whether the killing was, as the commonwealth contends, a deliberate, willful, premeditated, felonious killing, or whether, as the prisoner contends, it was done in self-defense. This kind of testimony is not to be made light of. It is not a mere makeweight thrown in to fill out a case. It is affirmative, substantive testimony to be considered by you fairly in connection

with all the other evidence in the case, as bearing upon the question of whether the commonwealth has or has not established the guilt of the prisoner as he stands charged in the indictment, beyond a reasonable doubt." He thus, in immediate connection with the reiteration of the duty of the commonwealth to prove guilt beyond a reasonable doubt, charged the jury that good character was an affirmative and substantive fact to be considered on the whole question of guilt, including reasonable doubt. Only a lawyer racking his ingenuity to find a flaw could say that this was not an adequate, as well as accurate, statement of the law.

Judgment affirmed.

(217 Pa. 46)

JONATHAN CLARK & SONS CO. v. CITY OF PITTSBURG.

(Supreme Court of Pennsylvania. Jan. 21, 1907.)

1. MUNICIPAL CORPORATIONS—CONTRACTS—VALIDITY.

A contract of a city of the second class for the construction of a reservoir, providing that the contractor shall do such extra work as the director of public works shall require and shall be paid a reasonable cost, plus 10 per cent. for profits, and the use of tools, etc., was not in violation of Act May 23, 1874 (P. L. 230), and Act March 7, 1901 (P. L. 20), requiring contracts of cities to be awarded to the lowest responsible bidder.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, § 862.]

2. SAME—EXTRA WORK.

The directors of public works of a city may order extra work done which is clearly incidental to the general work, and which has been recommended by the engineer in charge after the cost thereof has been ascertained by an understanding with the contractor.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, §§ 886, 892.]

3. SAME.

A municipal contract provided that any dispute as to the work or materials or any pay for extra work should be referred to the director of public works, whose decision should be final. *Held*, that the decision of such director was conclusive on the city, in the absence of fraud, accident, or mistake.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, § 892½.]

4. SAME—DELAY—LIABILITY FOR DAMAGES.

Where a contract for a city improvement authorized the director of public works to pass on any dispute as to any matter pertaining to the contract, a decision of such director that the contractor was not liable for liquidated damages for delay is binding on the city.

Appeal from Court of Common Pleas, Allegheny County.

Action by the Jonathan Clark & Sons Company, for the use of the Mercantile Trust Company, against the city of Pittsburgh. Judgment for plaintiff. Defendant appeals. Affirmed.

At the trial the court refused binding instructions in favor of defendant as to certain items of extra work. Defendant presented, *inter alia*, this point: "(6) If the

foregoing points are refused, the court is respectfully requested to charge the jury that, unless the jury finds that the items of extra work and materials referred to above in the second, third, and fourth points were merely incidental to the work, such items or so much thereof as found not to be incidental cannot be recovered in this case. Answer: Refused."

The court charged, in part, as follows: "As I said a moment ago, gentlemen, as we understand the law, this award if made by the director is binding upon the parties. They having agreed to submit any differences or disputes that arose between them to the director of the department of public works, it was their duty if any differences arose to submit them to that officer, and, if the director heard the parties and made his award, they would be bound by it, unless the award was fraudulent in some respect, or was made by accident, or there was some mistake in it, something like an error in adding up the figures, or something of that kind; but, so long as there was no fraud, accident, or mistake in arriving at the amount due by the director, the parties would be bound by the award. Of course, if there was fraud upon the part of the director, or upon the part of either of the parties to the contract, the award would be invalid; but in this case, as there is no evidence of fraud, accident, or mistake, as we understand the law, if the director of the department of public works made an award under the agreement and found in favor of either of the parties, both parties would be bound by it, so that is practically the question you have to determine in this case: Was Dr. McCandless the director of the department of public works of the city of Pittsburgh on February 24, 1903? If he was the director of the department of public works at that time, were the disputes arising under the contract submitted to him? Did he act upon them, and did he make the award admitted in evidence and read to you? The uncontradicted testimony is that he was the director, and that he heard the parties, or one party, after affording both an opportunity to appear, and that he made an award. If you find this is his award, made under these circumstances, the plaintiff is entitled to recover. The sole question, as I said a moment ago, is: Is that award the award of the director of the department of public works of the city of Pittsburgh, and was it made in accordance with the terms of the contract between the parties? The testimony is that it was, and, if you believe the testimony, plaintiff would be entitled to a verdict in its favor and entitled to recover, first, the sum of \$102,232.30, with interest from December 4, 1902, and also the sum of \$56,960.86, with interest from February 18, 1903, and the balance of \$28,334.65, with interest from December 4, 1903. If the award is not an award of the director of the department of

public works, the verdict should be for the defendant."

Verdict and judgment for plaintiff for \$219,018.08.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, ELKIN, and STEWART, JJ.

A. M. Thompson, Asst. City Sol., T. D. Carnahan, Asst. City Sol., and W. B. Rodgers, City Sol., for appellant. Wm. A. Stone and Stephen Stone, for appellee.

BROWN, J. Jonathan Clark & Sons Company, a foreign corporation, entered into a contract with the city of Pittsburgh, for the construction of a reservoir in Highland Park. The Mercantile Trust Company became surety for the contractor for the faithful performance of its contract. The work was abandoned by the contractor, and the surety, with the consent of the city, undertook to complete it. Upon its completion this suit was brought to recover the balance alleged to be due. The chief contention of the city is as to the amount recovered for extra work, and the reason assigned for asking that it be disallowed is that it had not been awarded to the lowest responsible bidder, as required by Act May 23, 1874 (P. L. 230), and Act March 7, 1901 (P. L. 20).

It is not pretended that the contract for the construction of the reservoir was not awarded to the lowest responsible bidder. On March 18, 1897, public notice was given to contractors that sealed proposals would be received until April 6th following for furnishing materials for it and for its construction in accordance with the plans and specifications on file in the office of the bureau of water supply and distribution. On May 13, 1897, after due advertisement, the contract was awarded to Jonathan Clark & Sons Company. One of its provisions was that the contractor would do such extra work as might be required by the director of the department of public works for the proper construction and completion of the reservoir and its appurtenances; that it would not be entitled to payment for extra work unless the same should be done in obedience to a written order from the director; that all accounts for extra work done in any month should have the original order attached to them and be filed in writing with the director before the 10th day of the following month; and that the compensation to be paid for all extra work should be its reasonable cost to the contractor for labor and materials actually used, as determined by the director, plus 10 per cent. for profit, use of tools, etc. This provision, limiting the compensation to be paid for extra work, was known to all bidders, from the lowest responsible one to the highest, and was, of course, taken into consideration by them in submitting their proposals; and it contravenes neither the let-

ter nor the spirit of the act of 1874 or 1901. The contract itself was awarded to the lowest responsible bidder, and having been for the construction of a reservoir more than likely to require, from time to time, necessary extra work not definitely provided for in the contract, because not to be foreseen when it was executed, it would have been improvident on the part of the city not to have inserted the provision limiting the amount to be paid to the contractor for the same. By fixing the limitation on the amount to be paid for extra work that might be required the city did about all it could have done to protect itself from imposition by the contractor in doing such work. It announced to the bidders, through its advertisement, what would be the definite basis of compensation for the same, and in bidding on the general work they knew exactly what profit there would be in the incidents to it, designated as extra work. If a city should not be permitted to insert in a contract for municipal improvements a provision for the payment for extra work becoming necessary as the general work progresses, but must always award the same to the lowest responsible bidder, after advertisement for proposals, there would be inevitable delay in the completion of the work called for in the contract, with no certainty of any saving to the city, but with likelihood of greater cost than if the extra work were done under a provision similar to the one in this contract; and, if each item of extra work should be awarded to a separate bidder, the confusion to follow in the general work may be well imagined, even if the imagination of the distinguished counsel for appellee is stretched in likening it in his brief to "the confusion of tongues that occurred in the construction of the Tower of Babel."

It is conceded by appellant that the director of the department of public works had authority to direct minor and incidental changes which became necessary in the construction of the reservoir. As he undoubtedly had such authority, did he exceed it in ordering the extra work, to the payment of which the city now objects? The three items were for strengthening a concrete layer by the insertion of ribs, for increasing the thickness of a cement finish, and for drainage for the protection of the embankment and slopes. These were required only after the engineer in charge of the construction of the reservoir had formally recommended each of them to the director, and after that officer had satisfied himself that the recommendations were proper; but even then the contractor was not directed to do this extra work until there was a definite understanding as to what it was to cost, in accordance with the terms of the contract providing for its payment. The items were clearly incidental to the general work. The appellant made no attempt to prove that they were not, but asked the court

to instruct the jury that the appellee could not recover for such items of extra work as were not incidental. *Prima facie*, they were all incidental, and, without proof to rebut this, the jury ought not to have been allowed to find otherwise.

By one of the clauses in the contract it is provided: "In case any question or dispute shall arise between the party of the second part hereto and the said city of Pittsburg, party of the first part hereto, under the said plans, specifications or terms of this contract, respecting the quality, quantity or value of the work or labor done or materials furnished, or to be done or to be furnished, or any of the terms, stipulations, covenants or agreements herein contained, or respecting any pay for extra work, or respecting any matter pertaining to this contract, or any part of the same, said question shall be referred to the director of the department of public works of the city of Pittsburg, whose decision thereon shall be final, conclusive, and binding upon all parties without exception or appeal, and all right or rights of any action at law or in equity under and by virtue of this contract, and all matters connected with and relative to the same are hereby expressly waived by the party of the second part." Under the authority conferred upon him by this clause the director found the amount due the appellant for extra work; and his finding was "final, conclusive, and binding," in the absence of fraud, accident, or mistake. As to this feature of the case, the instruction to the jury was so manifestly correct that we need say nothing in its vindication.

Another complaint of the appellant is that the director had no authority to pass upon the claim of the city for \$100 per day for delay in completing the work. One of the provisions of the contract was that the city might retain from the contractor, as liquidated damages for the noncompletion of the work within the time stipulated for its completion, the sum of \$100 per day for each day's delay. The arbitrator found that neither Jonathan Clark & Sons Company nor the Mercantile Trust Company had unduly delayed the construction of the reservoir, and that neither of the said parties should be charged the sum of \$100 per day, nor any sum whatsoever, as liquidated damages for delay in completing the work. The delay may have been caused by the extra work required by the city; but, be this as it may, this claim was disputed by the appellee, and its settlement came within the very broad powers conferred upon the director, authorizing him to pass upon "any question or dispute * * * respecting any matter pertaining to" the contract. In *Chandley Brothers & Co. v. Cambridge Springs Borough*, 200 Pa. 230, 49 Atl. 772, cited by the appellant, the engineer attempted to go beyond the limited powers conferred upon him. Here the arbitrator did what he was expressly authorized to do, for

he passed upon a question or dispute respecting a matter pertaining to the contract.

The assignments are all overruled, and the judgment is affirmed.

(217 Pa. 71)

In re SNYDER'S ESTATE.

Appeal of GEORGE.

(Supreme Court of Pennsylvania. Feb. 25, 1907.)

1. WILLS — CONSTRUCTION — AMBIGUITY — EVIDENCE.

Testatrix bequeathed a certain amount of stock in a bank, designated as the "Second National Bank of M." to a legatee. There was no such bank of that name in the town of M. The second national bank established in that town was the "Farmers' & Mechanics' National Bank of M.," which bank was known to testatrix and many persons in the town as the "Second National Bank." *Held*, that evidence of such fact was admissible to explain a latent ambiguity.

2. SAME—SPECIFIC LEGACY.

A specific legacy is a gift by will of a specific article of testator's estate distinguished from all other things of the same kind, and which can be satisfied only by the delivery of such particular thing.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, §§ 1939-1944.]

3. SAME—GENERAL LEGACIES.

Testatrix gave \$600 of the stock of a certain bank to S., and to her brother \$2000 of the stock of the same bank. Testatrix, at the time of the execution of the will, was the owner of 26 shares of the stock of such bank, which shares, after the execution of the will, she changed for stock in a trust company. *Held*, that the legacies were general, so that the legatees were entitled to an amount equal to plaintiff's 26 shares of bank stock at its market value.

Appeal from Orphans' Court, Mercer County.

In the matter of the estate of Ann Eliza Snyder, deceased. From a decree dismissing exceptions to the auditor's report, Winfield S. George appeals. Affirmed.

Argued before MITCHELL, C. J., and FELL, BROWN, POTTER, and ELKIN, JJ.

M. N. Baer and J. G. White, for appellant.
Q. A. Gordon, for appellees.

BROWN, J. At the time the testatrix, Ann Eliza Snyder, executed her will, she was the owner of 26 shares of the capital stock of the Farmers' & Mechanics' National Bank of Mercer of the par value of \$100 each. Among other bequests are the following: "I also give and bequeath to the said Ina Stuart six hundred dollars of bank stock of the Second National Bank of Mercer, said bank being located in Mercer, Mercer County, Pa. * * * I give and bequeath to my beloved brother Peter Myers two thousand dollars of the bank stock of bank referred to above." It is admitted that there did not exist at the time the will was written, or at any other time, a bank in Mercer under the corporate name of the "Second National Bank of Mercer." From this misdescription of the stock, there arose a latent ambiguity in the will, and evidence dehors it was properly admitted to explain it and to show what stock was the

subject of the bequests. *Best v. Hammond*, 55 Pa. 409. Under the admissions before the auditor and the testimony offered, there can be no doubt that she meant by the "Second National Bank of Mercer" the Farmers' & Mechanics' National Bank of Mercer. The first national bank to be established in that place was the First National Bank of Mercer, organized in 1864, and carrying on business ever since. The second national bank to be established in the town was the Farmers' & Mechanics' National Bank of Mercer, organized in 1874. It was at this bank, of which the testatrix was a stockholder, that she transacted all of her banking business. She acquired the stock in it from her husband, Jacob Snyder, deceased, who gave it to her by his will dated April 14, 1879. In it he calls the stock "the capital stock of the Second National Bank stock of Mercer, said bank being located in Mercer, Mercer County, and state of Pennsylvania." The Farmers' & Mechanics' National Bank undoubtedly, and naturally, too, was known and designated by the testatrix and others as the "Second National Bank," because in point of time it was the second national banking institution to be organized in the town. It is therefore clear that, when she referred to bank stock as stock of the "Second National Bank of Mercer," she meant stock of the "Farmers' & Mechanics' National Bank" of that place. After she executed her will, the testatrix exchanged her 26 shares of the Farmers' & Mechanics' National Bank stock for stock in the Mercer County Trust Company, and, as she did not have the bank stock at the time of her death, the appellant, her residuary legatee, insisting that the legacies to the appellees were specific, contends that they were adeemed, and that the sums awarded to them should have passed to him.

The law leans against specific legacies, and to general ones. *Blackstone v. Blackstone*, 3 Watts, 335, 27 Am. Dec. 859; *Ludlam's Estate*, 13 Pa. 188; *Balliet's Appeal*, 14 Pa. 451. "A specific legacy or devise is a gift by will of a specific article or part of the testator's estate, which is identified and distinguished from all other things of the same kind, and which may be satisfied only by the delivery of the particular thing." 18 Am. & Eng. Ency. of Law (2d Ed.) 714. By these two bequests, the testatrix does not give to the legatees specific shares of bank stock belonging to her, but gives to each of them, in general terms, a certain amount of stock, without identifying any particular shares or distinguishing those given from all others of the same kind of stock. Under all the authorities these are general legacies. In *Blackstone v. Blackstone*, supra, the words of the bequest were: "I give and bequeath all my two hundred and fifty shares of capital stock which I hold in the Union Bank of Pennsylvania." Gibson, Chief Justice, in holding that this legacy was specific, said: "The remaining question is whether the lega-

cy before us is a specific one. The bequest is of 'all my two hundred and fifty shares of capital stock which I hold in the Union Bank of Pennsylvania.' The words 'which I hold' certainly individuate the stock as a corpus with as much precision as would the words 'standing in my name,' which made the bequest specific in *Sleech v. Thornton*, or the words 'all the stock which I have in the three per cents,' which was allowed to have the same effect in *Humphreys v. Humphreys*, and it is even more specific than the words in *Drinkwater v. Falconer*, 'to be paid out of my dividends of 400 1, in the joint stock of South Sea annuities, now standing in the company's books in my name,' which were held to be sufficiently so, though the stock was described as a fund for payment, because the residue was given in nearly the same terms, and charged with the preceding bequest. It is certainly true that the presumption of intention is favorable to general legacies in the first instance and that it requires clear proof of a restrictive intention to repel it; but the word 'my,' prefixed to the word 'annuities' or stock, has always been held sufficient of itself to do so, though the mere possession of such annuities or stock at the date of the will, without words of reference to fix its identity as the subject of bequest, has come short of it." The bequest in *Ludlam's Estate*, supra, as taken from the opinion of Judge King in the court below (1 *Parsons' Select Equity Cases*, 116), was: "One thousand dollars of the United States six per cent. stock or loan of the year 1812, standing in my name on the books of the loan office, Pennsylvania, as per certificate No. 269." Of this bequest it was said, by Coulter, J.: "We come, then, to the question whether this was a specific legacy or not. If it was specific (of the very corpus of the United States stock held by the testator), then it was adeemed, because the corpus of that stock was extinguished and paid to the testator before his death. The words of the bequest would seem to leave little doubt on this subject: 'One thousand dollars of the United States six per cent. stock of the year 1812, standing in my name in the loan office, Pennsylvania, as per certificate No. 269.' It is not a bequest of \$1,000, payable out of stock held by him; but \$1,000 of stock which stands in his name in the loan office, by certificate 269. It is the very thing itself, the corpus of the stock, that is bequeathed. In *Blackstone v. Blackstone*, 3 *Watts*, 335, 27 *Am. Dec.* 359, where the bequest was 'of all my 250 shares of stock which I hold in the bank, together with such interest as may have accrued thereon,' and where it appeared that testator sold the stock in his lifetime, and took a bond for the same, although there was evidence that the testator declared the bond should be in lieu of the stock, it was ruled that the legacy was adeemed. There the change of the corpus of the legacy was from

bank stock into a bond. Here the change is from government stock into money, which mingled itself with the other money of the testator. There it was 'my bank stock which I hold.' Here it is 'my government stock, standing, in my name, on the books,' etc., 'as per certificate 269.' One does not individuate the corpus of the gift more distinctly than the other, and each is so definite as to defy mistake. These very words, to wit, 'stock standing in my name' were held, in *Barton v. Cooke*, 5 *Ves.* 461, to make a legacy specific." But such are not the legacies here. There is nothing on the face of the bequests to show that any particular shares of the bank stock should pass to the legatees. The testatrix does not refer to them as "my bank stock," or as stock "which I hold." The bequests are simply of twenty six hundred dollars of bank stock. In *Sponsler's Appeal*, 107 *Pa.* 95, the testator had, at the time of the execution of his will, and at his death, but 15 shares of second preferred Cumberland Valley Railroad stock. A bequest to Alice Rheem of "fifteen shares of second preferred Cumberland Valley Railroad stock" was held to be a general legacy; *Gordon, J.*, saying: "Any 15 shares of the preferred stock of the Cumberland Valley Railroad Company would meet and fulfill the donation."

The rule as to legacies of stock is thus laid down in *Hawkins on Wills*, *301, and these bequests are strictly within it, for the testatrix had 28 shares of the stock of the bank worth, at par, \$2,600: "A legacy of stock, of whatever denomination, is not prima facie specific, but is a general legacy, although the testator may have had stock of the description mentioned sufficient to answer the bequest. *Simmons v. Vallance*, 4 *Bro. C. C.* 345; *Purse v. Snaplin*, 1 *Atk.* 414; *Sibley v. Perry*, 7 *Ves.* 522. Thus, if the testator, having 1,000 £3 per cents., or long annuities, bequeaths that sum to A., the gift is not adeemed by the sale of the stock in his lifetime, but operates as a direction to the executor to purchase the stock for A. out of the general assets. The rule is the same whether the gift be of '1,000 £3 per cents.,' or of '£1,000 in the 3 per cents.' *Webster v. Hale*, 8 *Ves.* 410." In *Robinson v. Addison*, 2 *Beav.* 515, a testator owning 15½ shares of stock in the Leeds & Liverpool Canal Company, bequeathed 5½ shares of stock in that company to A., 5 shares to B., and 5 shares to C. There was no description or reference in the will to show that he intended to give the particular shares which he held at the date of his will. At his death he possessed no shares in the said canal company, and it was held that the legacies were general, and not specific. The stock of that company was seldom sold in the market, and it was urged for that reason, apart from the disposal of the precise number of shares held by the testator, that he must have intended to give these specific shares, and not

that his executor should purchase them for the legatees out of the general assets of his estate. The court held the legacies to be general, saying: "It is, however, clear that the testator, if he had meant to give only the shares which he had, might have designated them as 'his'—that the mere circumstance of the testator having, at the date of his will, a particular property, of equal amount to the bequests of the like property which he has given without designating it as the same, is not a ground upon which the court can conclude that the legacies are specific. * * * There is no description or reference to show that he meant to give the particular shares which he had at the date of his will, nor any trust from which it can, as it appears to me, be concluded that he must have meant only such shares as he had at the respective times of making his will and of his death. * * * The shares, though not frequently sold, are nevertheless occasionally bought and sold, and may be had for money." Authorities need not be multiplied to sustain the correctness or the view of the court as to the character of these legacies.

The testatrix did not intend to give money, for, if she had so intended, she would have simply made pecuniary bequests to the legatees. What she intended to give them was a certain amount of bank stock, measured by its par value, and what they are entitled to get from her estate is the market value of the same. *Johnson's Estate*, 170 Pa. 177, 32 Atl. 636. The awards to them were upon this basis.

The assignments are all overruled, and the decree is affirmed, at appellant's costs.

(217 Pa. 127)

BRUNER v. FINLEY et al.

(Supreme Court of Pennsylvania. Feb. 25, 1907.)
JUDGMENT—RES JUDICATA.

Where, in ejectment, it is shown that in a previous equity suit, in which the parties and property were the same and the equity set up against the legal title was the same, a decree was entered against plaintiff, it constitutes *res judicata*.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, § 1158.]

Appeal from Court of Common Pleas, Philadelphia County.

Action by Meta N. Bruner against Annie B. Finley and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

A. J. H. Frank, for appellant. Jas. Aylward Develin and Monaghan & Phillips, for appellees.

FELL, J. This was an ejectment against the heirs of Thomas Finley, and the question was whether he took title subject to a trust 28 years before the action was brought. The

plaintiff in her declaration based her right to recover on two written declarations of trust, one by Browning, who conveyed to Finley by deed absolute, and one by Finley. Neither was proved, and the case might have been ended on this ground. If the declarations alleged had been proved, they would not have made out the plaintiff's case, for the reason that under the terms of the trust declared upon she was not entitled to a conveyance. The whole subject in dispute was, however, finally adjudicated in a proceeding in equity in 1898. See *Bruner v. Finley*, 187 Pa. 389, 41 Atl. 334, in which a bill for an account was filed. In that proceeding the precise question here raised was decided adversely to the plaintiff by a court of competent jurisdiction, the parties were the same as in this action, the same properties were in dispute, and the equity set up against the legal title was identical. An accounting was refused for the reason that no trust had been established, and in dismissing the bill it was said that "the plaintiff had no possible claim in equity or at law against these defendants." The binding effect of that adjudication set at rest the rights involved in this action.

The judgment is affirmed.

(217 Pa. 102)

CLIFTON et ux. v. CITY OF PHILADELPHIA.

(Supreme Court of Pennsylvania. Feb. 25, 1907.)
MUNICIPAL CORPORATIONS—DEFECTIVE STREETS—EVIDENCE.

Where a woman while alighting from a street car stepped into a rut in a dirt road and fell, which rut was such as was ordinarily made by wagons, and was only a few inches deep, and extended along the edge of Belgian blocks used for a pavement of about a foot in width outside the rail of the street railway, the city was not liable.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, § 1623.]

Appeal from Court of Common Pleas, Philadelphia County.

Action by Jacob H. Clifton and Rebecca W. Clifton against the city of Philadelphia. Judgment for plaintiffs, and defendant appeals. Reversed.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

Charles W. Boger, Joseph W. Catharine, Asst. City Sol., and John L. Kinsey, City Sol., for appellant. A. S. L. Shields, for appellees.

POTTER, J. This was an action of trespass by husband and wife to recover damages for personal injuries to the wife. There was a verdict in favor of the plaintiffs and judgment entered thereon. Defendant has appealed, and assigns as error the refusal to give binding instructions in its favor, and the overruling of the motion for judgment, *non obstante veredicto*. The single question

raised by the appeal is as to the sufficiency of the evidence to justify the submission of the case to the jury.

It appears from the testimony that on the evening of June 3, 1902, at about 10 o'clock, Rebecca W. Clifton, one of the plaintiffs, in alighting from a trolley car at Pulaski and Hunting Park avenues, stepped into a rut in the roadway and fell forward, bruising her face, spraining her ankle, and otherwise injuring herself. Pulaski avenue, north of Hunting Park avenue, was not a paved street, but was merely a dirt road, except as to that portion upon which the street railway tracks were laid. The grade of that portion was raised five or six inches above the level of the remainder of the road, and the space between the tracks, and for a distance of one foot outside, was paved with Belgian block. The wife testified that she did not know the character of the road at the spot where she fell, nor did the husband make any examination of it at the time. He went back the next day, and says he saw a rut, five or six inches deep, and about three inches wide, extending along the edge of the Belgian blocks, caused by wagon wheels as they left the stone paving. It is apparent that the depth of five or six inches referred to by this witness must include the step from the Belgian blocks to the general level of the roadway.

Another witness, who lived just opposite the place where the accident occurred, testified that Pulaski avenue, north of Hunting Park avenue, was not paved. South it was paved with Belgian block. The cars usually stopped where you could step out on the dirt. The surface there was ashes and different things, and was graded five or six inches below the level of the cartway. At the time of the accident there was a hole in the street a couple of inches below where the track was down off the Belgian blocks. It was made by heavy wagons. On cross-examination, this witness said that the rut was two or three feet long. The cinder side portion of the road was five or six inches below the grade of the track. It was never level with the track. The hole was a slight rut where the wagons—ice wagons—would pull off the track. Witness estimated that he had seen as many as 500 people step off the car at that point in one day, and 100 or 200 after dark, but never saw any accident occur. There was an arc light about 15 feet away from the place of the accident, which was burning and threw light all over. There was a good illumination there that night. He admitted, however, that there was a trolley pole between the light and the spot where the plaintiff stepped into the rut, and the husband also testified that the trolley pole cast a strong shadow where his wife fell.

It appears clearly from the evidence that Pulaski avenue was an old country road, which had been used by the public for many

years and had been adopted by the city as a street. As noted above, with the exception of the space between the railway tracks and for a distance of perhaps a foot outside, it was still a dirt road, filled in from time to time with ashes, cinders, and oyster shells. So far as we can gather from the evidence, the locality is a suburban one, on the outskirts of the city. The road was much traveled, and the place where plaintiff alighted was the usual stopping place for the cars, where many persons got on and off, both by day and night. The rut into which plaintiff stepped was only that which was worn by wagon wheels as they left the edge of the Belgian block along the outside of the street car track. It does not appear to have been anything more than an ordinary rut, such as is constantly made by the wheels of heavy wagons in all dirt roads when soft or muddy, or when the soil of the roadway is not closely packed. As one of the witnesses explained, these ruts are temporary in their nature, and are shifted from place to place in the roadway, being liable to be filled by a passing wheel, which makes a new rut, in turn, adjacent to the line of the old one.

It would be imposing a very great and burdensome degree of care upon a municipality to hold it to the duty of keeping dirt roads free from ruts of the nature and character of this one in question. The same degree of smoothness is not to be expected upon a dirt road as is to be looked for on an asphalt street. It would hardly occur to a highway commissioner that a rut worn by wagon wheels in soft ground could be in any way dangerous to the public. In *Osterhout v. Bethlehem*, 55 App. Div. 198, the court said: "I doubt if upon country roads a rut caused mainly by the ordinary travel of wagon wheels in wet weather has ever been deemed a necessary subject of repair. Those defects cure themselves with the advance of the season, and such conditions the farmers learn to anticipate in the use of the highway at that time of year." No roadbed has ever been invented or used which is not subject to wear and to some degree of displacement when used by heavy vehicles, and this effect cannot be prevented. When an accident happens by reason of some slight defect, from which danger was not reasonably to be anticipated, the municipality is not chargeable with negligence. The duty which the law imposes upon a municipality is only to exercise ordinary care to see that the highway is safe for travelers. *Kelchner v. Nanticoke Borough*, 209 Pa. 412, 58 Atl. 851. We can see nothing in the evidence in this case sufficient to sustain the charge of negligence against the defendant, or to justify the submission of the case to the jury.

The assignments of error are sustained, the judgment is reversed, and is here entered for defendant.

(79 Conn. 644)

NICHOLS v. NICHOLS.

(Supreme Court of Errors of Connecticut.
April 11, 1907.)

1. ACCOUNT—PROCEEDINGS FOR RELIEF—PARTIES.

Plaintiff joined with six of his brothers and sisters in executing, without having received any consideration therefor, a deed of two parcels of real property held by them as tenants in common; the grantees in the deed being all the brothers and sisters named as grantors, but one, and the title being placed in them as joint tenants. Subsequently the joint tenants conveyed through an intermediate grantee the property to three of their number as joint tenants, among whom was defendant. One parcel of land was then sold by the last-named grantees, and after the death of the other two grantees the defendant sold the second parcel. *Held*, in an action by plaintiff for an accounting of the proceeds of the sale of the parcel made by defendant alone, and of the rents and profits received by defendant from both parcels, on the ground that the execution of the deed by plaintiff was procured by undue influence and while plaintiff was mentally incompetent, that the other brothers and sisters, or their representatives, were not necessary parties to the action.

2. LIMITATION OF ACTIONS—COMPUTATION OF PERIOD OF LIMITATION—DISABILITY.

The rule that courts of equity ordinarily apply rules of limitation which will bar remedies at law is not applicable where the person seeking relief has no knowledge of the necessity of taking action to protect his interest, and is not chargeable with negligence, and the rights of third parties have not been prejudiced.

[*Ed. Note.*—For cases in point, see Cent. Dig. vol. 33, Limitation of Actions, §§ 473, 474.]

3. EVIDENCE—SELF-SERVING DECLARATIONS.

In an action to set aside a deed because of mental incapacity of the grantor, and for an accounting, declarations on the subject of the grantor's mental capacity by the grantees, made in his absence, were inadmissible.

[*Ed. Note.*—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 1068-1104.]

Hamersley, J., dissenting.

Appeal from Superior Court, Fairfield County; George W. Wheeler, Judge.

Action by John J. Nichols against Susan W. Nichols. From a judgment for plaintiff, defendant appeals. Affirmed.

Action for an accounting for rents and proceeds of the sale received by the defendant of certain property in the state of New York, in which the plaintiff owned an interest; for the rents and profits and use received by the defendant of certain property in this state, in which the plaintiff owned an interest; for a judgment for the amount found due upon such accounting; for the setting aside of a deed of the plaintiff to the defendant of said property in this state; and for damages. Brought to the superior court in Fairfield county, where the court (Elmer, J.) overruled the defendant's demurrer to the complaint, and the case was afterward tried upon the issues raised by the pleadings before George W. Wheeler, J., and judgment rendered for the plaintiff, from which the defendant appeals. No error.

Goodwin Stoddard and Alfred S. Brown, for appellant. Stiles Judson, for appellee.

HALL, J. (after stating the facts). The plaintiff, John J. Nichols, who brings this action through his conservator, Wallace M. Bulkley, appointed in 1903, is one of nine children of the Rev. Samuel Nichols and Susan N. Nichols. His brothers and sisters were George, Effingham, William, Charles, Samuel, Alexander, Maria, and Susan W. Nichols, the defendant. Their mother, Susan N. Nichols, died in 1872, and by her will, after giving to her husband the use and income during his life of all her real and personal estate, devised to eight of her said children, not including Charles, two pieces of real estate in New York City, one known as the "Cedar Street Property" and the other as the "Malden Lane Property," and to the plaintiff and his sisters Maria and the defendant the homestead on Greenfield Hill, in this state, consisting of a dwelling house and about two acres of land, together with the personal property thereon, and in her will charged George, Effingham, William, Samuel, Alexander, and the plaintiff each with the payment of the sum of \$2,500, amounting in all to \$15,000, to five of her said children named as executors of her will, to be held by four of them in trust for the support of her son Charles, and upon his death, without issue, to be paid to his surviving brothers and sisters. William conveyed his interest in said property to Alexander in 1875. Rev. Samuel Nichols died July 17, 1880, and Charles died November 22, 1892, without issue.

The complaint contains two counts. The first alleges, in substance, that on March 1, 1877, the plaintiff, when from "infirmary of mind and mental impairment" he did not understand the purport or legal effect of the instrument he was signing, was induced by the request of his brother Effingham and the defendant, and by the undue influence exerted by them for the purpose of excluding the plaintiff from his said interest in said estate, and for the purpose of wrongfully obtaining his said interest for their own advantage, to join with his brothers and sisters, excepting Charles, in executing, without having received any consideration therefor, a deed releasing and conveying, subject to said life estate of the Rev. Samuel Nichols and to said charge of \$15,000, his and their respective interests in said New York property as tenants in common, to George, Effingham, Alexander, Maria, and the defendant, as joint tenants; that the plaintiff's interest so released was of the value of about \$40,000; that on May 10, 1882, said five joint tenants through an intermediate grantee conveyed said New York properties to Effingham, Alexander, and the defendant as joint tenants; that on February 21, 1883, said last-named grantees conveyed said Cedar Street property to the Mutual Life Insurance Company of New York; that said Effingham died November 4, 1899, and Alexander died June 14, 1900; that the title to said Malden Lane property thereupon vested in the defendant by operation of the law of

joint tenancy; that from July 17, 1880, to February 21, 1888, Effingham and the defendant collected and appropriated to their own use the rents of the Cedar Street property, and from July 17, 1880, to November 4, 1889, the rents of the Maiden Lane property; and that the defendant from November 4, 1889, to September 30, 1902, collected and appropriated to her own use the rents of the Maiden Lane property, and also appropriated to her own use the sum of \$140,000, which she received for the sale of the Maiden Lane property on September 30, 1902.

The second count alleges, in substance, that on the 21st of September, 1885, when the plaintiff was in the same weak and impaired mental condition described in the first count, and when he did not understand the purport or legal effect of the instrument he was signing, he was induced, by the request of his brother Effingham and the defendant, and by their undue influence exerted for the purpose of depriving him of his one-third interest in said Greenfield Hill property, of the value of about \$3,500, and of obtaining said interest for their own advantage, to release to his sister Susan W. Nichols, the defendant, all his interest in said Greenfield Hill real and personal property without having received any consideration therefor; and that the defendant has ever since used and possessed said property.

The complaint asks: (1) For a judgment for an accounting for the proceeds of the sale of the Maiden Lane property and for the rents and profits of that property and of the Cedar Street property; (2) judgment for the amount found due on such accounting; (3) that the deed of the Greenfield Hill property be set aside, and the plaintiff be restored to his interest therein, and in said personal property; (4) for an accounting for the rents and profits of the Greenfield Hill property and the value of the use of the personal property; and (5) for \$50,000 damages. The defendant's demurrers to the complaint and to the first and second prayers for relief, presenting questions which were also made and decided under the subsequent pleadings, were overruled by the trial court.

The answer admits the execution by the plaintiff and others of the deeds described in the complaint and the plaintiff's transfer to the defendant of his one-third interest in the Greenfield Hill property, and that the defendant and her brother Alexander have received and appropriated the rents and profits of the New York City property, and that the defendant has received and appropriated the avails of the sale of the Maiden Lane property and has used the Greenfield Hill property as alleged; but denies that said conveyances were without consideration, that they were procured in the manner and for the purpose alleged in the complaint; that the plaintiff's mind was at that time infirm and impaired, as alleged, and that the values of the plaintiff's interests in said proper-

ties were as great as alleged, and alleges affirmatively that the causes of action set forth in the first count did not accrue to the plaintiff within 6 nor within 20 years, and that those described in the second count did not accrue to the plaintiff within 6 nor within 15 years next preceding the commencement of this action, that since the dates of the execution of said deeds the position of the parties thereto has been changed, and "that the plaintiff is barred by his own negligence and acquiescence, by lapse of time and want of equity from maintaining this action."

The plaintiff's reply denies said affirmative allegations of the answer, and alleges that the Maiden Lane property was conveyed to an innocent purchaser in another state, and that it cannot be annulled; that, at and ever since the time of the execution of said deeds by him, the plaintiff had been of unsound mind and incapable of understanding their meaning and effect, or of taking any intelligent action to revoke them or to require an accounting; and that said conveyances were procured by the defendant and her brother Effingham with full knowledge of the plaintiff's said mental condition. These averments of the reply were denied by the defendant.

Upon the questions thus raised by the pleadings as to the mental condition of the plaintiff at the time and since the conveyances were made, the consideration which he received for them, and the manner in which, and the purpose for which they were procured, the trial court has found, in substance, these facts:

The plaintiff is now 69 years of age and unmarried. From an early period of his life, he has been weak and deficient in intellect, and on March 1, 1877, and for a long time prior thereto, although not entirely bereft of mental capacity, judgment, and discretion, he was, and ever since has been, incapable of understanding or managing business or property affairs of any consequence, intricacy, or importance, or which required the exercise of discretion or judgment. He has been during said period, and still is, so deficient in mind as to be unable to understand any of the papers relating to the inheritance from his mother, and has had an appreciation only of the most simple affairs of life. He is not now, and has not been prior to March 1, 1877, of sound mind. By reason of mental infirmity he had no appreciation or understanding of the meaning and effect of the conveyance, in which he joined, of the New York City property on March 1, 1877, or of the conveyance of his interest in the Greenfield Hill property of December 21, 1885, but has always since supposed that said properties were still owned by the surviving members of the family in equal shares. He has never by himself had sufficient understanding to enable him to consider the effect upon his property rights

or his future needs of said transactions, nor to rescind said conveyances, nor to take any appropriate steps to protect his interests in any manner. He had no understanding of the transaction in which he and all of his brothers and sisters signed an instrument acknowledging that they had received their respective shares of the \$15,000 given by their mother's will for the support of Charles, and he never received any part of said sum. He had no knowledge of the sale of the Cedar Street property. The plaintiff's brothers Charles and Samuel have been inmates of insane retreats, and his sister Maria is of weak intellect.

There was no consideration given to the plaintiff, or agreed to be given to him, for the transfer of his interest in said New York City and Greenfield Hill properties. So far as he was concerned, they were voluntary transfers of which he knew nothing. No agreement was ever entered into with him by the defendant or Effingham for the acquiring of the plaintiff's interest, and no agreement for his support or maintenance has ever been made by the defendant or any one else. During the argument of the case in the trial court, counsel for the defendant offered to have executed a written agreement binding the defendant and her estate for the plaintiff's support. Since his father's death, the plaintiff has always lived at the homestead on Greenfield Hill as one of the family, consisting of Alexander, Samuel, the defendant, and himself. After the death of his father, Alexander purchased and conveyed to the defendant 25 acres of land contiguous, and a new house has been built upon it. Maria conveyed her interest in the homestead under the will to the plaintiff and the defendant in 1882. The family have lived comfortably and well, and always in entire harmony, and have been kind, considerate, and affectionate toward each other. Since his mother's death, the plaintiff has been cared for by the defendant, and also by Alexander and Effingham until their deaths. The defendant, who has had general charge of the place and household, has looked well to the comfort of the plaintiff, and he has enjoyed the same home comforts that she has. He has paid nothing for his board, clothing, or necessities, has never earned, or tried to earn, a livelihood, and has no property or means other than his interest in the property which he has conveyed away, and is dependent for his support upon the bounty of the defendant. The plaintiff's proportionate share of the income received from the New York property was largely in excess of the reasonable value of his maintenance at the homestead by his brothers and sisters. The plaintiff has been paid no part of said income, nor has there been any accounting to him, which he was capable of understanding, of the income or proceeds of said property. He received no part of the proceeds of the sale of the Cedar Street property.

The plaintiff executed the deeds of the New York City and Greenfield Hill properties because requested to sign his name by Effingham, or the defendant, or some one acting for them. He was led to execute them through the paramount influence of Effingham acting for himself and for the defendant, and through the undue influence of Effingham, who was for many years a practicing lawyer in New York City, and had assumed the management of the New York real estate, and was looked up to by all his brothers and sisters as the family guide and business adviser, and in whom the plaintiff had implicit confidence, and to whom, as well as to the defendant, though in a lesser degree, he was obedient. All the parties to said deeds, who had sufficient capacity to understand them, were aware of the plaintiff's mental infirmities.

The purpose of the conveyances in question was to exclude the plaintiff and Samuel from their interest in said real estate, and to vest the legal and beneficial title to it in said grantees as joint tenants, so as to vest the family property in the surviving grantee. It was the further purpose that the family homestead on Greenfield Hill should be maintained from the income of all the property by the defendant and Alexander, as a home for themselves and the plaintiff and Samuel, and where the two last named should be supported; and for the benefit of the other grantees who might desire to visit there. Subject to these uses, it was intended that said income should be enjoyed by said grantees or the surviving grantees. Effingham believed this disposition of the property "would provide a home for those members of the family who could not care for themselves, Samuel and John, and leave the management of the property in the hands of those likely to live the longest and those best able to take care of it, and in the end be for the best interest of the family." The defendant had knowledge of this purpose and approved of it. In all Effingham did in this matter he acted for the defendant, as well as for the other grantees. The plaintiff never heard of said purpose or arrangement, and never knowingly acquiesced in it.

The plaintiff and defendant and Maria are the only survivors of said nine brothers and sisters. Maria has for many years resided in Albany, N. Y. Heirs of Effingham and William reside in New York City. Thorn, to whom the Maiden Lane property was sold, resides in New Jersey.

On March 1, 1877, the market value of the Maiden Lane property was in excess of \$59,000 and the Cedar Street property in excess of \$39,000. The consideration of the sale of the Cedar Street property in 1888 was \$80,000.

The plaintiff was a witness at the trial. The defendant, from old age and ill health, did not testify. The conservator of the plaintiff was appointed upon the application

of a daughter of the plaintiff's deceased brother, William.

Upon these facts, the defendant claimed, generally: (1) That the plaintiff could not maintain the action on account of the want of necessary parties; (2) that the statute of limitations was a bar to the action; (3) that the plaintiff is prevented by laches from maintaining the action; (4) that the deeds in question should be sustained as parts of a family arrangement; (5) that the facts show that the plaintiff had sufficient capacity to make the deeds in question.

The court rendered judgment only for an accounting under prayers for relief 1, 2, and 4, and that judgment be rendered for the plaintiff for the amount due on such accounting.

Questions relating to the transactions described in this case were decided in *Wentz's Appeal*, 76 Conn. 405, 56 Atl. 625, in which we held that a conservator was properly appointed over Samuel Nichols, and in *Nichols v. Wentz*, 78 Conn. 429, 62 Atl. 610, in which it was held that Samuel Nichols was qualified to make a will.

In the case at bar the plaintiff was not required to make the other grantors of the deed of March 1, 1877, parties defendant. The reason for requiring all the parties to voidable instruments like those here in question to be brought into court, in an action in equity to set them aside, is that the court may be enabled to make a final determination of the matter in controversy, and to do complete justice to all the parties concerned. *Shields v. Barrow*, 17 How. (U. S.) 130, 15 L. Ed. 158. "The general rule in equity requires that all parties interested in the subject of the action should be made parties in order to prevent a multiplicity of suits and secure a final determination of their rights." *Mahr v. Norwich Union Fire Ins. Society*, 127 N. Y. 452, 28 N. E. 391. "The governing motive of equity in the administration of its remedial system is to grant full relief, and to adjust in the one suit the rights and duties of all the parties which really grow out of or are connected with the subject-matter of that suit." *Pomeroy's Equity Jurisprudence*, § 114. Courts of equity will not permit one seeking to repudiate a deed or contract to gain any undue advantage over other innocent parties to it, but in setting it aside will endeavor to restore them to their original positions. *Pomeroy's Equity Jurisprudence*, § 915. As a general rule, a deed will not be set aside on the ground of the grantor's incompetency when the grantee was ignorant of it and has acted "fairly and in good faith, unless the consideration received be refunded or the grantee restored to his original position, and injustice thus avoided." *Coburn v. Raymond*, 76 Conn. 484, 489, 57 Atl. 118, 119, 100 Am. St. Rep. 1000. But these rules do not make all the other grantors of the deed of March 1, 1877, necessary parties to this action, for the reasons that it

neither appears that the plaintiff has received anything which he can restore to these parties; nor that any of said other grantors were induced by the plaintiff's conveyance to change their title from that of tenants in common to that of joint tenants; nor that any of them has suffered any loss or disadvantage by reason of such change in their title which would entitle him to be restored to his original position; nor that said other parties to the deed have any interest in the funds which the defendant is charged with having received, which can be injuriously affected by an adjudication of the respective rights of the parties in court. *Russell v. Clark*, 7 Cranch, 69, 3 L. Ed. 271.

There was no consideration, either concurrent or executory, for the plaintiff's deed of March 1, 1877. He neither received nor was promised anything for it. The maintenance which he afterward received was paid from the net income of interest in the New York property which he conveyed away, and the judgment of accounting contemplates a proper allowance to the defendant for the cost of such maintenance. It nowhere appears that the six grantors, other than the plaintiff, of the deed of March 1, 1877, or any of them, were induced by the plaintiff to execute the various deeds by which they parted with their interests in the New York property and which resulted in the sale of all of it. It only appears that the plaintiff at the request of six of his brothers and sisters, conveyed to five of them as joint tenants his one-eighth interest as tenant in common in that property by the same deed by which they conveyed to the same grantees their respective interests as tenants in common in the same property. It was clearly the intention of the other grantors of the deed of March 1, 1877, and the deed called the deed of May 10, 1882, the grantors in which were the same as in that first named, with the omission of John and Samuel, to make such conveyances of the New York property, and so divest themselves of all title to it, that while Effingham, Alexander, and the defendant, the joint tenant grantees in the last-named deed, or any of them, lived, they could give a good title to any purchaser, and that upon the death of Alexander and Effingham, before that of the defendant, the title to such part of it as had not then been sold should vest absolutely in the defendant. The deeds for carrying out this purpose were executed by said other grantors with full knowledge, on the part of those of sound mind, of the plaintiff's mental infirmities. These purposes of these grantors have been fully accomplished. The Cedar Street property was sold by Effingham, Alexander, and the defendant in 1888, and the Maiden Lane property by the defendant in 1902. None of these conveyances are sought to be set aside by this action, and the effect of them is that none of said other parties to the deed of 1877, and none of their representatives, have any such in-

terest in the rents or the proceeds of the sale of the New York property appropriated by the defendant, in accordance with the purpose of said other parties, as renders them necessary parties to this action. Maria, the only survivor of said nine children except the plaintiff and defendant, as well as the representatives of those who have died, reside without this jurisdiction. None of the brothers and sisters except the plaintiff and defendant and Maria, ever had any interest in the Greenfield Hill property under the will, and none but the plaintiff and defendant were parties to the plaintiff's conveyance of his interest in that property in 1888. Although it is found that Maria is of weak intellect, and that Samuel's intellect was impaired, it was not necessary to join them or their representatives as parties in order to prevent multiplicity of suits, upon the theory that they are also entitled to an accounting by the defendant. Samuel gave all his property by will to the defendant, and the finding does not clearly show that either Samuel or Maria was of such impaired intellect as to be entitled to an accounting from the defendant.

It is urged that the defendant ought not to be required to account, because the deed of March 1, 1877, was a part of a family arrangement which has been observed by all the brothers and sisters for a long period of years. Courts of equity have looked with favor upon family arrangements and settlements, fairly entered into, and tending "to the peace and security of the family, to the avoiding of family disputes and litigation, or to the preservation of family property," even where there has been no question of doubtful or disputed rights, when it appeared that the "motive of the agreements was to preserve the honor or peace of families or the family property." *Hoghton v. Hoghton*, 15 Beav. 278; *Good Fellows v. Campbell*, 17 R. I. 402, 22 Atl. 307; *Edwards v. Edwards*, 32 Conn. 112, 114. But the defendant is not holding the rents and the proceeds of the sale of the New York properties under the arrangement shown by the deed of March 1, 1877. It is by the deed of May 10, 1882, to which the plaintiff was not a party, that the defendant becomes the surviving joint tenant. Had that deed not been executed, Maria would still be a co-joint tenant with the defendant, and the latter could not alone have sold the Malden Lane property or have appropriated to herself the avails of a sale of it.

Again, the trial court has not by its judgment set aside the entire so-called family arrangement, but has treated it as operative excepting as the judgment requires the defendant to now pay to the plaintiff a sum to be determined by an accounting for the receipts from the plaintiff's interests in said properties under the will. In view of the fact that the plaintiff from mental infirmity did not understand the nature and purpose of the so-called family arrangement, that it de-

prives him of all his property without his consent, and without making any provision for his support in case he survives the defendant, which is certainly by no means impossible, the trial court correctly held that the defendant was not entitled under the claimed family arrangement to continue to hold the avails of the plaintiff's interest in said properties. An unfair feature of a family arrangement may be set aside without destroying the entire settlement. *Hoblyn v. Hoblyn*, 41 Ch. Div. 200; *Turner v. Collins*, L. R. 7 Ch. 329.

The plaintiff is not barred by lapse of time from maintaining this suit. The relief asked for is equitable, and the effect of the judgment is to require the defendant to account as a trustee *ex maleficio* or trustee of a constructive trust, for the funds which she may properly be regarded as having received from his interest in the properties in question. The New York City property having been sold to innocent purchasers, she had the right to pursue the proceeds of the sale without attempting to disturb in any way the deeds to third persons. *Gardner v. Ogden*, 22 N. Y. 327, 78 Am. Dec. 192; *Murphy v. Whitney*, 140 N. Y. 541, 35 N. E. 980, 24 L. R. A. 123. While the statutes of limitations referred to do not in terms extend to suits in equity, it is true that equitable remedies must be sought without unreasonable delay, and that in analogy to such statutes courts of equity ordinarily apply rules of limitation which will bar remedies in equity that are barred at law. But this rule is not applicable when the person seeking such relief has no knowledge of the necessity of taking any action to protect his interests and is not chargeable with negligence, and the rights of third parties have not been prejudiced by the delay. *Jeffery v. Fitch*, 46 Conn. 601, 605. The finding of the trial court regarding the plaintiff's mental condition, and his entire ignorance of the necessity of taking any steps to protect his rights, relieve him from any charge of laches, and the facts before us fail to show that the rights of the defendant have been so prejudiced by the delay that the present action should not be allowed to be maintained.

The said deeds of the plaintiff executed before the appointment of a conservator over him were voidable, but not void. *Coburn v. Raymond*, 78 Conn. 484, 488, 57 Atl. 116, 100 Am. St. Rep. 1000. They were voidable because under the finding the plaintiff was "non compos mentis," within the legal meaning of that term as applied to the capacity of a person to make valid contracts. The test of his mental capacity to make the deeds in question was whether at the time of executing them he possessed "understanding sufficient to comprehend the nature, extent, and consequences" of them. 1 Swift's Dig. 173; *Hale v. Hills*, 8 Conn. 38, 44. The trial court has very clearly found he did not, and that he was "not of sound mind." The trial judge saw and heard the plaintiff upon the witness stand. There was evidence that his mental

condition had been the same since his early manhood as it then was. Upon the facts found and the evidence before us we cannot say that the trial court erred in reaching the conclusion it did upon this question. The trial court properly excluded the evidence offered by defendant of the declarations upon the subject of the plaintiff's competency, made in the absence of the plaintiff, by some of his brothers and sisters, among whom was the defendant, who were present at the time Maria executed the deed conveying her interest in the the Greenfield Hill property to the plaintiff and defendant, and also the evidence offered by defendant of the declarations of Effingham and William upon the same subject. That those of his brothers and sisters who were themselves of sound mind knew the actual mental condition of the plaintiff can scarcely be questioned. It was evidently the view of the trial court that the defendant and Effingham and others could not upon the facts proved be regarded by the law as having acted in good faith, and that the deeds must in law be regarded as having been procured by undue influence, although it appeared that none of the parties had acted with actual fraud or from corrupt motives. This view was correct. The opinion of the defendant and the others named, if properly proved, that the plaintiff was legally capable of executing a deed, might tend to disprove actual fraud or corrupt motives, which the court has not found, and which are not alleged in the complaint; but it would not relieve them from the charge that in law they were to be regarded as having acted as the court held they did.

Other rulings adverse to the defendant upon questions of evidence, not noticed in defendant's brief, are sustained without discussion. There was no error in refusing to correct the finding as requested. We cannot say that certain facts, of which there was perhaps no direct evidence, and of which it is claimed there was no proof, were not justly inferable from the other facts proved. Evidence of the transfer to, and use by, the defendant of the personal property at Greenfield Hill, was unnecessary, as those facts were admitted by the pleadings. To detail the evidence supporting the finding as to the facts referred to in the motion to correct would unduly extend the limits of this opinion.

There is no error. The other Judges concurred, except HAMERSLEY, J., who dissents.

(79 Conn. 617)

GRANT v. STIMPSON et al.

(Supreme Court of Errors of Connecticut.
April 10, 1907.)

1. PERPETUITIES—FUTURE ESTATES.

A testator bequeathed corporate stock to a trustee, to pay the income thereof to a grandson and granddaughter for life, and at their death the same to be distributed to their respective "legal heirs," except that, if the "legal

heirs" of the grandson should be the granddaughter, the trusteeship should continue and the income paid to the granddaughter for life. *Held*, that the words "legal heirs" were used in their primary sense, and the attempted gifts of the remainders on the termination of the life estates were violative of the statute against perpetuities, and void.

2. WILLS—VOID DEVISE—INTESTATE PROPERTY—DISTRIBUTION.

Where attempted gifts of remainders over on the termination of life estates were void, the remainders not otherwise disposed of became intestate property, and vested at testator's death in those persons entitled to receive them as distributees ascertained as of the time of his death.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, §§ 2165-2171.]

3. SAME—GIFT TO WIDOW—ACCEPTANCE—EFFECT.

A testator gave his wife absolutely a deposit in a bank and the household furniture and effects in the homestead, and gave her a life interest in the residue of the estate left after the payment of specified legacies to grandson and granddaughter for life, with a remainder over on their deaths to their respective legal heirs, etc. The wife accepted the provisions of the will. *Held*, that she was barred from sharing in the intestate estate arising from the invalidity of the gifts over on the termination of the life estate of the grandchildren.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, §§ 2074-2076.]

4. BASTARDS—LEGITIMACY—PRESUMPTIONS.

A testator gave corporate stock to a trustee, to pay the income thereof to a grandson for life, and directed that the same should be distributed on his death to his legal heirs, except that, if his legal heirs should prove to be a granddaughter, the trusteeship should continue, and only the income of the stock should be paid to the granddaughter. The grandson married, and his wife gave birth to a child three months thereafter. *Held*, that the law, in the absence of other facts, would presume that the child was born in lawful wedlock, and was the legal heir of the grandson, and deprived the granddaughter of any rights under the will.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Bastards, §§ 4, 5.]

Case reserved from Superior Court, Tolland County; Joel H. Reed, Judge.

Action by Andrew M. Grant, administrator of Jared Wentworth, deceased, against Mary E. Stimpson and others for the construction of the will of the deceased. Reserved by the superior court on the facts stated in the complaint for the advice of the Supreme Court of Errors. Form of judgment directed.

Samuel B. Harvey, for plaintiff. William A. King, for executor of Sophia C. Wentworth. George E. Hinman, for administrator of estate of Frank J. Wentworth. Charles F. Thayer, for Mary E. Stimpson. Huber Clark, in pro. per.

THAYER, J. The testator executed the will in question in 1885 and died in 1887, leaving surviving him his wife, Sophia C. Wentworth, to whom he was married in 1865, and two grandchildren, Frank J. Wentworth and Mary E. Stimpson, his sole heirs at law. His estate was inventoried at \$19,481, and consisted of a homestead valued at \$600, which was all the real estate of which he

died seised, 100 shares of the capital stock of the Pittsburg, Ft. Wayne & Chicago Railroad Company, appraised at \$15,000, a deposit in the Willimantic Savings Institute of nearly \$1,500, bonds valued at \$1,100, household furniture and effects and other articles of personal property.

By the first item of his will he gave to his wife absolutely the deposit in the savings institute; by the ninth item he gave to her absolutely the household furniture and effects in the homestead; and by the tenth item he gave her the use for life of the remainder and residue of his estate left after the payment of all the other legacies. All the other legacies were of shares of said railroad stock to different persons, a designated number to each. The residue included the homestead and more than \$8,000 in personal property. The widow accepted her legacies and enjoyed them until her death in 1906.

The fourth, fifth, and tenth items of the will, to which the questions before us particularly refer, were as follows:

"Item 4. I give and bequeath to the Willimantic Savings Institute of Willimantic, in the state of Connecticut, in trust however, ten (10) shares of the Pittsburg, Fort Wayne and Chicago Railroad, the income thereof to be paid to Frank Jared Wentworth (my grandson) during his life, and at his decease the same shall be distributed to his legal heirs, except his legal heirs shall prove to be his sister, Mary Evelyn Stimpson, then said trusteeship shall continue and only the income of said stock shall be paid to the said Mary Evelyn Stimpson.

"Item 5. I give and bequeath to the said Willimantic Savings Institute, in trust however, ten (10) shares of the Capital Stock of the Pittsburg, Fort Wayne and Chicago Railroad, the income thereof to be paid to my granddaughter, Mary Evelyn Stimpson, during her life, and at her decease the same to be distributed to her legal heirs."

"Item 10. I give to my wife, Sophia C. Wentworth, the use and income of the remainder and residue of my estate, including twenty-five (25) shares of the Capital Stock of the Pittsburg, Fort Wayne and Chicago Railroad, and all other personal and real estate of which I may die seised and possessed, and at her decease the estate which she has received and enjoyed the income from by this will is hereby given to the Willimantic Savings Institute, in trust however, the income of the same to be paid in equal shares to my grandson, Frank Jared Wentworth, and my granddaughter, Mary Evelyn Stimpson, and at the decease of either of said grandchildren the respective share of said deceased shall be distributed to the legal heirs of said deceased forever. Except in the event of my granddaughter becoming the legal heirs to my sd. grandson's estate by this will, then all of said estate shall remain in the hands of the sd. Willimantic Savings Institute and the entire income shall be paid to my said granddaugh-

ter, and the sd. estate at her decease shall be distributed to her legal heirs forever."

Our advice is asked upon the following questions: "(a) Whether any of the provisions of items 4, 5, and 10 of said will are void, and whether the estate named in said items is finally disposed of by the provisions of said items. (b) If the estate named in said items is not therein disposed of except as to the life uses therein created, then in such case whether the distributees are to be ascertained as of the time of the decease of the testator or at the termination of said life uses. (c) Whether the widow of said testator had at any time a vested interest in and to one-third of the personal estate named in items 4, 5, and 10 of said will, and whether her estate is entitled to the same. (d) Whether said Mary E. Stimpson is entitled to the life use of all the estate named in items 4 and 10 after the termination of the life uses to said Frank J. Wentworth and Sophia C. Wentworth."

It is clear that the testator in the items of his will above quoted used the words "legal heirs" in their primary sense; for in the fourth and tenth items he provides for the contingency of Mary E. Stimpson becoming the legal heir of her brother Frank. It has been determined in this state by a long and uniform line of decisions, of which *Gerard v. Ives*, 78 Conn. 485, 62 Atl. 607, is the latest, that a devise to the heirs of a living person (unless it appears that his children are intended) violates the statute against perpetuities, which existed at the date of the decease of the testator, because until the death of such person his heirs cannot be ascertained, and it is possible that they may be the issue of children yet unborn at the testator's death. The attempted devises of the remainders over dependent upon the life estates of Frank J. Wentworth and Mary E. Stimpson were therefore void, and the estate mentioned in the fourth, fifth, and tenth items of the will was not finally disposed of by the will, but remained (subject to the life estates therein created) intestate estate. As intestate estate, it vested at the testator's death in those persons entitled to receive it, and the distributees, therefore, are to be ascertained as of the time of the decease of the testator. As the testator was married prior to 1877 and left descendants of a child surviving him, the widow, in addition to her dower, would be entitled under the statute of distributions to one-third of the intestate personal estate unless in some way debarred from claiming it. It is established law in this state that a widow may by accepting a provision in lieu of dower made for her by her husband's will debar herself from claiming dower; and, if such provision is clearly intended to be in lieu of all claim on his estate, she will by accepting it debar herself from claiming under the statute of distributions her share in any intestate personal property. This is upon the equitable doctrine

of election that a person will not be permitted to hold under and against the same deed or will. In *Evan's Appeal*, 51 Conn. 435, *Nelson v. Pomeroy*, 64 Conn. 257, 29 Atl. 534, and *Bennett v. Packer*, 70 Conn. 357, 39 Atl. 739, 66 Am. St. Rep. 112, each a case where a widow had accepted a provision made for her by will in lieu of dower, it was held that by accepting the testamentary provisions the widows were debarred of dower, but were not debarred of their shares of the intestate personal property under the statute. In each of those cases the intestacy appeared on the face of the will, and, so far as appeared, was voluntary on the part of the testator, and it was held that upon the facts in those cases the widows might justly claim that they accepted the testamentary provision in substitution of the dower right only. But in *Nelson v. Pomeroy* it was suggested in the opinion that, where such a provision is made in lieu of all claim on the husband's estate and accepted, the widow "will be estopped from claiming any share even of intestate property." In *Walker v. Upson*, 74 Conn. 128, 49 Atl. 904, where the dispositions in favor of the widow were plainly in lieu of dower, it was held that her acceptance of them debarred her from claiming under the statute of distributions any share in so much of the estate as was intestate, upon the ground that, having chosen to accept a benefit under the will, "she must renounce every claim inconsistent with the accomplishment of the intent manifested by its provisions." That was a case, like this, where the testator intended and attempted to dispose of his entire estate, but some of the provisions of the will were void, leaving a partial intestacy. *Leake v. Watson*, 60 Conn. 498, 21 Atl. 1075, presented a similar question and was decided in the same way.

Whether the widow in the present case, having accepted the provisions of the will in her favor, was debarred of the intestate estate, depends, therefore, upon the construction of the will and the testator's intention as manifested thereby. It is not expressly stated in the will that the provisions in favor of the widow are in lieu of dower or other claims, but the authorities agree that this is not necessary. It is enough if from the whole will it is demonstrated by clear and manifest implication that such was the testator's intention. *Bennett v. Packer*, 70 Conn. 357, 39 Atl. 739, 66 Am. St. Rep. 112. Reading the whole will in view of the situation of the parties, it is entirely clear that the testator intended the provision in favor of his wife to be in lieu of dower and all claim upon his estate. He intended that no part of his estate should be intestate. He gave nearly half of his property to others than his wife and heirs at law. The will mentions

the chief items of which the estate consisted, and shows a clear apprehension on the part of the testator of what he had to give, and of the items which he was giving to others and to his widow and heirs at law. He gave his wife the use for life of the entire homestead and of nearly a third of his personal property, besides absolute gifts of the household effects and \$1,500 in bank, evidently intending to provide her a home and the means of supporting herself in it. But the life use of the entire homestead under the will was inconsistent with the life use of one third of it as dower. "Of necessity this is in lieu of dower. The use of the whole displaces the use of part and renders the latter impossible." *Evan's Appeal*, 51 Conn. 440. Having accepted this provision and enjoyed it during her life, she was debarred of all further claim on the estate, and took no vested interest (except such as the will gave her) in one third of the personal estate named in items 4, 5, and 10 of the will, and her estate is not entitled to any share of the same as intestate estate.

Mary E. Stimpson could claim a life estate in the remainders over after the termination of her brother's life estate in the property mentioned in the fourth and tenth items of the will only as his legal heir under the provisions of the will above held to be void. But it appears also that her brother married in 1890, that his wife gave birth to a child three months after marriage, and that the wife and child survived him; his death occurring in 1891. Whatever claims have been or may be made as to this child's relation to him, in the absence of further facts than above stated touching them, and there are none before us, the law presumes that having been born in lawful wedlock she is his child. Mary E. Stimpson, therefore, did not become the legal heir of her brother, the only condition upon which she could claim a life estate in remainder in that portion of the testator's property which was given to her brother for life, and, if she became such heir, the provision giving her such life use was void. She is not therefore entitled to a life estate in all the estate named in items 4 and 10 after the termination of the life uses to Frank J. Wentworth and Sophia C. Wentworth.

As to the question raised upon the amendment to the complaint, we give no advice. That question was properly before the superior court in the interpleader suit mentioned in the amendment, to which the plaintiff was a party, and is not properly before this court.

The Superior Court is advised to render judgment in conformity to the foregoing opinion. No costs will be taxed in this court. The other Judges concurred.

(79 Conn. 524)

BOARDMAN et al. v. MANSFIELD et al.
(Supreme Court of Errors of Connecticut.
April 10, 1907.)

1. WILLS—CONSTRUCTION—DESCRIPTION OF PROPERTY—DIVIDENDS, RENTS, AND PROFITS—TRUST FUND.

Testator devised to his executors in trust for the benefit of his widow for life \$200,000, the "dividends, rents and profits" thereof to go to and belong to the widow, to her sole and separate use during her natural life, with reversion after her death to the uses and appointments recited in the will. *Held*, that the words "dividends, rents, and profits," as so used, were synonymous with "net income," and hence the accretions to the fund during the widow's life, determined on the basis of the market value of the securities in which the fund was invested, passed to the remaindermen on the termination of the life estate, and not to the estate of the widow.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, §§ 1246-1251.]

2. SAME—CHANGE OF SECURITIES—PROFITS—CORPORATE STOCK.

Testator bequeathed the dividends, rents, and profits of a trust fund of \$200,000 to his widow for life, remainder to the uses and appointments set forth in his will. During the widow's life, through a change in the investments, profits were added by the sale of securities or increase in valuation amounting to \$53,575.77. There were also certain rights to participate in new stock issues of corporations in which the trust fund was invested, which were sold by the trustees for \$15,753.41, and in other instances the trustees elected to take new stock, a part of the price being paid by appropriations of surplus by the corporation, realizing profits amounting to \$50,849.45. *Held*, that none of such amounts constituted income belonging to the life tenant, but they were all an increase in the corpus of the estate which passed to the remaindermen.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, §§ 1614-1624; vol. 47, Trusts, §§ 383-385.]

Case Reserved from Superior Court, New Haven County; John M. Thayer, Judge.

Suit by William J. Boardman and others, as executors of the estate of William W. Boardman, deceased, against Burton Mansfield and others, as executors of the estate of Lucy H. Boardman, deceased, to determine conflicting claims to funds held by a trustee under William W. Boardman's will. On reservation from superior court. Judgment advised for plaintiffs.

William W. Boardman, a resident of New Haven, made and executed his will, drafted by himself, on March 19, 1870. He died August 27, 1871, leaving that instrument as his last will and a large estate comprised of both real and personal property. He also left a widow, Lucy H. Boardman, who survived until March 29, 1906. Item third of said will reads as follows: "Item Third. I further give and devise to my executors hereinafter named, and the survivor of them, in trust, for the use and benefit of my dear wife, Lucy, during her natural life, two hundred thousand dollars, to be taken from such part or parts of the property as I may own at my decease, not hereinbefore devised to her, as she, the said Lucy, may desire and select,

at the appraisal in the inventory, the dividends, rents and profits to go to and belong to my beloved wife, to her sole and separate use during her natural life, with reversion over after her death to the uses and appointments set forth in my last will and in the codicils thereto, if any. My intention and object was and is to make abundant provision for the support and comfort of my dear wife by the three preceding items, in lieu of dower or share in my real or personal estate." Said widow and a nephew, William J. Boardman, were named in the will as executors, and both qualified and acted as both executors and trustees as long as Mrs. Boardman lived. William J. Boardman is now the surviving executor and trustee. December 29, 1871, the widow, acting under said provision of the will, selected stocks and bonds from the estate of her husband to the appraised value of \$200,000, and made return to the court of probate. The investments of the fund thereafter changed from time to time, but always remained in dividend-paying or interest-bearing securities. The corporations whose stocks were included in the fund issued at various times new stock which the stockholders were privileged to take pro rata upon terms prescribed. The rights to take new stock which thus accrued to the fund were in some instances sold and the proceeds added to it, and in other instances exercised and the new stock carried to it. Mrs. Boardman during her life received the net proceeds of all cash dividends and interest payable to the fund. At her death its market value had increased to \$327,683.07. During Mrs. Boardman's life, she unsuccessfully asserted to her co-trustee her right to benefits from the fund beyond those conceded to her, and these claims are made the basis of the present proceeding. The nature of them and the other facts contained in the complaint which are involved in their determination are sufficiently stated in the opinion.

Henry Stoddard and Boardman Wright, for plaintiffs. Burton Mansfield and James E. Wheeler, for defendants.

PRENTICE, J. (after stating the facts). The trust fund in question has always been comprised of personal estate and of a kind which was either dividend paying or interest bearing. Mrs. Boardman, the life beneficiary, received from time to time during her life the entire net income of the fund accruing from cash dividends upon stocks and the interest upon all other investments. The executors of her will, hereinafter referred to as the "executors," pursuant to its provisions, now assert the right to have from the assets of the trust an amount or amounts in addition to those which she thus received in her lifetime. The market value of the fund upon the termination of the life estate was \$127,683.07 in excess of its market value

at the time of its creation. The major claim presented by the executors, which is comprehensive of all others, is for this amount. The contention thus made, it will be observed, is that the remainder interest is only entitled to have the fund kept intact to the extent of its original market value, and that the life tenant is entitled, not only to have all else which may have flowed from or accrued to it, but also to have both the existence and amount of its accretions determined upon the basis of market value, and that, too, whether or not there have been changes in its investments. It is manifest that this claim is in direct contradiction of the general principles governing the rights of life tenants and remaindermen in and to trust funds which have been repeatedly affirmed and reaffirmed by this court, and that it cannot be supported unless there is something in the terms of the will creating the trust which takes it out of the operation of those accepted principles. *Brinley v. Grou*, 50 Conn. 66, 47 Am. Rep. 618; *Spooner v. Phillips*, 62 Conn. 62, 24 Atl. 524, 16 L. R. A. 461; *Mills v. Britton*, 64 Conn. 4, 29 Atl. 231, 24 L. R. A. 536; *Smith v. Dana*, 77 Conn. 543, 60 Atl. 117, 60 L. R. A. 76, 107 Am. St. Rep. 51; *Boardman v. Boardman*, 78 Conn. 451, 62 Atl. 339; *Bulkeley v. Worthington Eccl. Soc.*, 78 Conn. 526, 63 Atl. 351; *Green v. Bissell*, 79 Conn. 547, 65 Atl. 1056. This is conceded. Two matters, however, are relied upon as indicating the direction of the testator that the general rule should be departed from in the present case, and that Mrs. Boardman's estate should have what is now claimed in its behalf, to wit, (1) the language of the will giving to her the "dividends, rents, and profits" during her life; and (2) the presumed intent of the testator arising from certain circumstances in the light of which it is claimed that the will should be construed. The words "dividends, rents, and profits," upon which reliance is thus sought to be placed, are no more comprehensive as applied to personality than would have been "net income" used in their stead. *Guthrie v. Wheeler*, 51 Conn. 207, 213; *Beers v. Narramore*, 62 Conn. 13, 23, 22 Atl. 1061; *Spooner v. Phillips*, 62 Conn. 62, 66, 24 Atl. 524, 16 L. R. A. 461. "Whether the testator makes use of the expression 'dividends,' or 'dividends and profits,' or 'dividends, interest and profits,' or [as in this case] 'interest, dividends, profits and proceeds,' I look upon all of them to come to the same thing, and that this is too nice a circumstance to found any distinction on." *Hooper v. Rossiter*, 1 McClell. 536.

The argument advanced by the executors in support of the presumed intent which they seek to bring to their aid in the construction of the will is substantially as follows: In 1870, when Mr. Boardman made his will, drafted by himself, a lawyer by profession, although a business man by practice, the

courts of this state had not declared the law of this jurisdiction. Decisions, however, had been made in other states, including Pennsylvania, New York, and New Jersey. These decisions in these states had been in consonance with the views now urged by the executors. One of the Pennsylvania decisions rendered shortly before the execution of the will involved the interests of the parties thereto in stock of the New Haven Gas Light Company, of which the testator was president, and of the New York & New Haven Railroad Company, with whose transactions he had been familiar for many years. It must therefore be presumed that he was familiar with these decisions, or with the latter one at least, and it ought to be presumed that he used the language of his will with the purpose of accomplishing the result thus judicially outlined. So it is said that ambiguous phrases in it should be interpreted in accordance with those principles of law which the testator most probably had in mind when he used them. See *Earp's Appeal*, 28 Pa. 368; *Wiltbank's Appeal*, 64 Pa. 256, 3 Am. Rep. 585; *Clarkson v. Clarkson*, 18 Barb. (N. Y.) 646; *Simpson v. Moore*, 30 Barb. (N. Y.) 637; *Van Doren v. Olden*, 19 N. J. Eq. 176, 97 Am. Dec. 650.

Before assent were given to this argument, it would be wise to inquire whether any of the decisions referred to had, in fact, gone to the extent necessary to support the present claim, and to examine the foundation of the alleged presumption that the testator knew and acted upon the faith of them, and did not know and act upon the faith of, for example, *Minot v. Paine*, 99 Mass. 101, 96 Am. Dec. 705, to discover what of substance it possesses. Upon the first inquiry, see *Moss' Appeal*, 83 Pa. 264, 270, 24 Am. Rep. 164; *Smith's Estate*, 140 Pa. 344, 21 Atl. 438, 23 Am. St. Rep. 237; *Thomson's Estate*, 153 Pa. 332, 26 Atl. 652, 653; *Graham's Estate*, 198 Pa. 216, 47 Atl. 1108; *Parker v. Johnson*, 37 N. J. Eq. 366; *Matter of Gerry*, 103 N. Y. 445, 9 N. E. 235. But we have no need to turn aside for any such purposes. It is enough that the language of the will creating the trust neither is nor was when used ambiguous or uncertain in meaning or effect. The more recent decisions which have declared the law of this jurisdiction as to the legal effect of certain language when used in creating a situation and the legal consequences of a situation created did not make that law. It was as much the law before as after them, and this Connecticut will must be read, interpreted, and given legal effect pursuant to that law.

The executors present, in addition to the comprehensive claim thus far considered, certain subordinate ones, which, when added together, total said sum of \$127,683.07. The first of these is one to the profits, whether by sale or increase, in valuation of the securities which have made up the fund, amounting, it is said, to \$53,575.77. An adverse disposition

of this claim is necessarily involved in our conclusions already stated. Among the securities which the fund has held have been stocks of certain corporations which during the period of the trust ownership voted to increase their capitals, and give to their shareholders the right to subscribe pro rata at par for the new shares. Some of the rights thus accruing to the fund were sold by the trustees for sums amounting to \$15,758.41; others were exercised and new stock taken by the trustees. From these transactions it is said that there were profits amounting to \$50,849.45. These two sums are now specifically claimed as belonging to the life tenant. The precise question thus presented was decided adversely to the contention of the executors in *Brinley v. Grou*, 50 Conn. 66, 47 Am. Rep. 618, and the underlying principle there asserted has been consistently maintained through the line of subsequent cases already cited. That principle is that until there has been some action by a corporation setting apart from the body of its assets some portion of them to become the property of its stockholders, and thus to pass out of the dominion of the corporation into that of the stockholders, there is nothing in existence to which the right of the latter can attach otherwise than as it attaches to the corporate interest as a whole—nothing which can as to them be regarded as partaking of the nature of profits from the corporate investment. *Green v. Bissell*, 79 Conn. 547, 65 Atl. 1056; *Bulkeley v. Worthington Eccl. Soc.*, 78 Conn. 526, 532, 63 Atl. 351. Applying this principle to situations where new stock is issued and the right to subscribe therefor is accorded to shareowners pro rata, whether that issue be based solely upon surplus assets thus capitalized or upon surplus assets in part and payments by subscribers in part, or wholly upon subscription payments, we find that it is always true that no asset of the corporation is set apart to become the shareowners'. The corporation parts with nothing. The shareowner gets nothing which was before a part of the corporate property. He not only gets nothing in the way of tangible property, but he gets nothing in the way of intangible value. All that he acquires is some evidence of his ownership in the corporation, for which he perhaps pays more or less, or perhaps pays nothing. If he receives new stock and pays nothing, as in case of a pure stock dividend, he owns no more and no less than he did before the transaction took place. He, to be sure, has more shares, but his proportionate interest in identically the same corporate assets remains unchanged. If he exercises his right to subscribe for his pro rata share, and pursuant to the terms of that right pays into the corporation the full par value of his subscription or some lesser sum supplementing a part payment from surplus assets thus capitalized, the result is again the ownership of more shares than before, but his total owner-

ship represented by them forms a no greater proportion of the corporate assets than he formerly held, and those assets are precisely what they were, save as they have been increased by the subscription payments to which he has made his proportionate contribution. If the true book value of the stock before the increase was more than par, that value after the increase becomes diminished by the fact that the surplus assets, which are incapable of appreciation, have to be distributed over a larger amount of outstanding stock. So if, instead of exercising his right to subscribe, the stockholder sells it for its true value, and his assignee steps into his place, the seller will, indeed, when the transaction has been closed, find himself with a sum of money in his pocket which he can call his own, but the certificate of stock which has remained in his strong box while bearing the same figures as formerly will represent as much less of true value as is measured by the money received. It is true that the new conditions created by the stock issue may for some artificial reasons so appeal to investors or speculators as to influence market values so that they will not express the true situation, but that situation as revealed upon the books of the corporation will nevertheless exist, since it must remain as true of corporate management as of other things that something cannot by human agency be created out of nothing. Of course, there may be declared contemporaneously with a stock increase a cash dividend, the proceeds of which the recipient may, if he chooses, appropriate toward the satisfaction of his subscription obligation. This dividend may even be planned so that he may thus take advantage of it. But such dividend, if one in truth, would be an incident complete in itself, and wholly independent of the stock issue transaction, and would not change that transaction's real character and consequences. Whenever, therefore, as the result of a stock issue of whatever form, nothing is by the corporation separated from the corporate assets to pass out, or which at the option of the shareowner may pass out, from the dominion of the corporation into that of the shareowners, no condition is created which permits of a life tenant receiving anything in hand which is not inevitably subtracted from that which, in the possession of the trustee, represents ownership in the corporation and nothing else, from that, therefore, which under our law is the corpus of the trust estate. What the life tenant thus received would come from somewhere. It would not come from the corporation. It could only come from or at the expense of the fund held by the trustee before the transaction had its inception and result in the fund's depletion as its consequence. The executors cannot therefore have either the proceeds of sale of or profits derived from the utilization of the rights under consideration.

In Massachusetts and Rhode Island, where

views upon the general subject of the rights of life tenants and remaindermen similar to those held by us are entertained, similar conclusions upon the incidental question now under discussion have been reached. *Atkins v. Albree*, 94 Mass. 359; *Daland v. Williams*, 101 Mass. 571; *Rand v. Hubbell*, 115 Mass. 461, 15 Am. Rep. 121; *Brown, Petitioner*, 14 R. I. 371, 51 Am. Rep. 397; *Greene v. Smith*, 17 R. I. 28, 19 Atl. 1081. The inequity of any other conclusion has led courts holding other views than ours upon the general subject of the rights of life tenants to agree that the ownership of rights such as are under consideration attaches to the corpus of trust funds. *Moss' Appeal*, 83 Pa. 264, 270, 24 Am. Rep. 164; *Biddle's Appeal*, 99 Pa. 279; *Eisner's Estate*, 175 Pa. 143, 84 Atl. 577; *Walker v. Walker*, 68 N. H. 407, 39 Atl. 432; *In re Kernochan*, 104 N. Y. 618, 11 N. E. 149; *Hite v. Hite*, 93 Ky. 257, 20 S. W. 778, 19 L. R. A. 173, 40 Am. St. Rep. 189. See, to the same effect, *De Koven v. Alsop*, 205 Ill. 309, 68 N. E. 930, 63 L. R. A. 597; *Beach v. Sproule*, L. R. 12 App. 385; *In re Barton's Trusts*, 17 Law Times Rep. N. S. 594. In three instances there were new issues of stock, according to the terms of which the stockholders were permitted to have their pro rata share upon the payment of less than the par value thereof. The balance was made up out of the surplus of the corporation. In one case the vote was in substance to appropriate from the undivided profits or surplus for this purpose \$25 for each new share of stock; in another that each subscriber be credited \$10 per share out of the surplus; and in the third that each stockholder be credited with a dividend from the surplus of \$18.75 on each share of the new stock. The amounts so appropriated or applied, being in the whole \$7,499.44, are made the subject of the final claim by the executors. The answer to the question thus presented is involved in the discussion already had, unless it be that the sums under consideration are to be regarded as cash dividends. It will be noticed that in no one of the three cases was the stockholder entitled to receive anything in hand. He was given no option to receive a dollar. Whatever form of words was used the only thing which could result was a capitalization of surplus to the extent of the appropriations or credits allowed. No asset could by any possibility pass out from the control of the corporation. Some were to be given a new character, but all were to be retained in the corporation.

The superior court is advised that no one of the claims presented by the executors of the last will and testament of Mrs. Lucy H. Boardman, deceased, to a share of the trust fund now in the hands of William J. Boardman, trustee, is well founded; that all of said fund as it was constituted at the death of said Lucy H. Boardman belonged to the corpus thereof; and that judgment be rendered accordingly. No costs in this court will be taxed in favor of either party. All concur.

(79 Conn. 624)

SMITH v. MILLER et al.(Supreme Court of Errors of Connecticut.
April 10, 1907.)**CONTRACTS—MODIFICATION—VALIDITY.**

After the execution of a written contract, whereby plaintiff undertook to build a barn and shed for defendants, the parties attempted to change the contract by an oral agreement. There was a misunderstanding as to the terms of the agreement, and, before the parties had agreed upon what changes were to be made, the plaintiff had nearly completed the work, and, the defendants declining to accept his offer to change the plans, he finished the work in compliance with the written contract. *Held* that, there being no meeting of the minds in the proposed substituted oral agreement, the written contract was not abandoned or modified.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 11, Contracts, § 1123.]

Appeal from Court of Common Pleas, Hartford County; John Coats, Judge.

Action by J. A. Smith against Bernard Miller and another upon a written contract to recover the agreed price for construction of a barn. Judgment was rendered for plaintiff, and defendants appealed. Affirmed.

Bernard F. Gaffney, for appellants.
George W. Klett, for appellee.

HAMERSLEY, J. The trial court found that on August 10, 1905, the plaintiff and defendants entered into a written contract, whereby the plaintiff agreed to build for the defendants a barn and shed, as shown on the plan, and the defendants agreed to pay the plaintiff for the same the sum of \$275; that the plaintiff built the barn and shed in full compliance with the terms of said contract; and that the defendants had refused to pay said sum, or any part thereof. Thereupon the court rendered judgment for the plaintiff to recover \$283, damages (being the amount of contract price with interest) and his costs. Upon the trial the defendants claimed to have proved that, shortly after the execution of the written contract, the parties made an oral contract which was a substitute for the written contract and abrogated that contract, and that the building constructed by the plaintiff was not in accordance with the substituted contract, and claimed as a matter of law that the plaintiff could not recover on the original contract because it had been abandoned, and could not recover on the substituted contract because he had not performed it, and could not recover in this action anything for the reasonable value of any services and materials he had actually furnished in the construction of the building. The court found as a fact that the parties had not made an oral agreement, as claimed by the defendants. This finding disposed of the claims of law.

In view of this finding, the reasons of appeal contain no assignment of an error in law, except the general one that the court erred in not rendering judgment for the defendants on the facts found. From the testimony produced in respect to an oral sub-

stitute agreement, the court found that, after the plaintiff had commenced the construction of the barn, the defendants asked for a change in the written agreement in respect to the size of the shed, which by that agreement was to be 12x24 feet; that the defendants understood the proposed change to increase the size of the shed from 12x24 feet to 40x17 feet, and to increase the price for the whole work from \$275 to \$325; that the plaintiff understood the proposed change to increase the size of the shed to 40x15 feet, and the price for the whole work to \$325; that there was no meeting of the minds of the parties as to the attempted change of the agreement in writing; that shortly afterward the parties discovered their mutual misunderstanding, and negotiations for some change were renewed; that the plaintiff offered to build the shed 40x17 feet if the defendants would pay \$325 and do some necessary excavating and enter into a written agreement embodying the new terms; that, while these negotiations were pending, the plaintiff had nearly completed the construction of the barn, and then renewed his offer to the defendants, informing them that if it were not accepted he should construct the shed under the existing agreement; that the defendants refused to accept the plaintiff's offer, and he finished the barn and shed in full compliance with the agreement between him and the defendants. From these facts the court drew its ultimate conclusion of fact that the written agreement between the parties had not been abandoned nor modified by any oral agreement, and that the plaintiff had fully performed the contract on his part. The error assigned, therefore, is in effect a claim that the court, in reaching its ultimate conclusion from the subordinate facts found, has clearly violated the plain rules of reason, and so committed an error in law. This claim is manifestly without foundation. The conclusion of the court from the facts found, if regarded as a conclusion of fact, was warranted; if regarded as one of law, is correct.

There is no error in the judgment of the court of common pleas. The other judges concurred.

(79 Conn. 630)

CITY OF WATERBURY v. O'LOUGHLIN
et al.

(Supreme Court of Errors of Connecticut.
April 10, 1907.)

1. TAXATION—ACTIONS FOR UNPAID TAXES—COMPLAINT—SUFFICIENCY.

Gen. St. 1902, § 2299, provides that any interest in real estate listed for taxation shall be set by the assessors in the list of the party in whose name the title stands on the records. *Held*, in a suit for the collection of taxes, that, where the real estate listed for taxation was not set by the assessors in the lists of the persons in whose names the title stood on the records, but in a list which they made out as the taxable property of "the heirs" of a deceased owner, and the complaint failed to show that

the defendants were heirs of decedent, it was insufficient to entitle plaintiff to any relief, and, it not being alleged that the heirs of decedent were the actual owners of the real estate, it was not aided by the validating Pub. Acts 1903, p. 190, § 206, purporting to cure irregularities in assessing taxes upon property actually owned by the person against whom the tax is assessed.

2. SAME—MODE OF ASSESSMENT—LIST BY TAX-PAYER.

Gen. St. 1902, § 2298, provides that the taxable property of every married woman shall be listed in her name, if she shall give in a list of the same to the assessors according to law, or if her husband shall within the time required by law give to the assessors written notice that he requests her taxable property to be listed in her name, and particularly specifies it. Pub. Acts 1893, p. 367, c. 219, provides that assessors shall publish a notice requiring all persons liable to taxes to bring in written lists of the taxable property belonging to them. *Held* that, where the agent of a married woman filed a tax list in her behalf in which she was represented as the sole owner of certain real estate, she was estopped to deny that the title was wholly in her.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Taxation, § 562.]

Appeal from District Court of Waterbury; Frederick M. Peasley, Judge.

Action by the city of Waterbury against Margaret O'Loughlin and others. From a judgment for defendants, plaintiff appeals. No error as to the first count. Error as to the second count, and as to that count judgment set aside and cause remanded.

William E. Thoms, for appellant. Charles G. Root and Charles W. Bauby, for appellees.

BALDWIN, C. J. This is a suit for the collection of taxes assessed in the grand lists for the years 1901 and 1902, against the defendants as owners of a lot of land in Waterbury, formerly belonging to one Hannah Coss. She died testate in 1893, and in 1895 a certificate of distribution was duly filed for record in the land records of Waterbury, showing that the title to the lot had become complete in Thomas Coss, Katie Coss, Margaret O'Loughlin, and Margaret O'Loughlin, as trustee for Frank Quinn, to whom it had been devised by Hannah Coss. Katie Coss died testate in 1896, and devised her interest to Daniel Coss. In this state of things, the assessors put the land in the grand list of 1901 in the name of the heirs of Hannah Coss, and the first count of the complaint was based upon the assessment made upon that list. It was not alleged that any of the defendants were heirs of Hannah Coss. In November, 1901, Thomas Coss conveyed his interest in this lot to Margaret O'Loughlin, and she mortgaged the land to the Hillman Brewing Company, which is one of the defendants. In 1902, before the making of the grand list of that year, the husband and agent of Margaret O'Loughlin signed and swore to an assessment list which he filed with the assessors, in which it was stated that this lot was a portion of the taxable property belonging to Margaret O'Loughlin, whereupon they set the lot in her list, and made out the grand list

accordingly. The assessment based upon it was the subject of the second count.

The taxes for neither year were paid, and the collector filed proper certificates of lien for record. Gen. St. 1902, §§ 2298, 2299, provide that "any interest in real estate listed for taxation shall be set by the assessors in the list of the party in whose name the title to such interest stands on the land records of the town in which such real estate is situated"; and that "the taxable property of every married woman shall be listed in her name, if she shall give in a list of the same to the assessors according to law, or if her husband shall, within the time required by law for giving in lists of taxable property, give to either of the assessors written notice that he requests her taxable property to be listed in her name, and particularly specifies it." At the time when the tax lists for 1901 were made up, the land records showed that the title to the lot in question had passed from the estate of one Hannah Coss, deceased, to Thomas Coss, Katie Coss, Margaret O'Loughlin, and Margaret O'Loughlin as trustee. Instead of listing the land in their names, or in the names of any persons, the assessors set it in a list which they made out as the taxable property of the heirs of Hannah Coss. If we are to assume that lands can ever properly be listed as the property of those designated simply as heirs of another, there is not only nothing to show that the defendants were heirs of Hannah Coss, but it is expressly alleged that she died testate. A duty to pay taxes is always the creation of statute, and arises only where the requirements of the statute have been strictly fulfilled. *Meyer v. Trubee*, 59 Conn. 422, 426, 22 Atl. 424; *New Britain v. Mariners' Savings Bank*, 67 Conn. 528, 532, 35 Atl. 505. No case for relief of any sort, therefore, is made out under the first count. It gains no help from the general validating act of 1903 (Pub. Acts 1903, p. 190, c. 206), which purports to cure errors and irregularities in assessing taxes upon "property actually owned by the person or corporation against which such tax is assessed," since it is not alleged that the heirs of Hannah Coss were the actual owners of the lot in question.

Under the second count, relief is sought only against Margaret O'Loughlin. When the lot was set in her list, the land records showed that she owned an undivided half interest in it, individually, and also an undivided fourth interest as trustee for another of the defendants, Frank Quinn; the other fourth interest being the property of Daniel Coss, who is not a defendant. The demurrer admits, however, that her agent filed a tax list in her behalf, in which she was represented as the sole owner. Under the allegations of the complaint and the provisions of our statutes (Gen. St. 1902, § 2298; Pub. Acts 1893, p. 367, c. 219), he must be regarded as her duly authorized agent. *Martin v. N. Y. & N. E. R. R. Co.*, 62 Conn. 331, 344, 25 Atl.

239. She is therefore estopped from denying that the title was wholly in her. *Union School District v. Bishop*, 76 Conn. 695, 697, 58 Atl. 13, 66 L. R. A. 939. It follows that the second count was sufficient to support a recovery against Margaret O'Loughlin, under Gen. St. § 2407, for the full amount of the tax due on the list of 1902, and, in default of its payment, for the foreclosure of the tax lien as to her half interest in the lot.

There is error in the judgment on the second count, and, as respects the disposition of that count, the judgment is set aside, and the cause remanded for further proceedings according to law. The costs taxed in this court for the appellant will not include the \$20 fee "for all proceedings." The other Judges concurred.

(79 Conn. 626)

HOPKINS v. MERRILL.

(Supreme Court of Errors of Connecticut.
April 10, 1907.)

EVIDENCE—PAROL EVIDENCE TO VARY INDORSEMENT.

An unqualified indorser of a note cannot vary her contract of indorsement by parol evidence that the indorsee at the time of the indorsement agreed to keep her fully advised as to the conduct of the maker of the note respecting its payment, and failed to do so.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 1807-1812; vol. 7, Bills and Notes, §§ 1791-1799.]

Appeal from City Court of Hartford; Herbert S. Bullard, Judge.

Action by Georgiana E. Hopkins, the indorsee, against Hattie H. Merrill, the indorser and payee, of a negotiable promissory note. The plaintiff having died pending the action, her administrator, A. C. Hopkins, entered to prosecute. The plaintiff's demurrer to a second defense was overruled, and the case afterwards tried to the jury upon an answer denying certain allegations of the complaint. Verdict and judgment for plaintiff, and appeal by defendant. Affirmed.

Joseph P. Tuttle, for appellant. Albion B. Wilson, for appellee.

HALL, J. This is an action against the defendant as indorser of the promissory note of one Anna M. Hotchkiss for \$1,500 dated January 8, 1904, payable to the defendant's order in monthly installments of \$25 on the 10th of each month, to recover three of said installments, due, respectively, May 10, June 10, and July 10, 1905; due notice of the non-payment of which is alleged to have been given to the defendant. The note was indorsed by the defendant to the plaintiff on the 22d of July, 1904. The second defense alleges, in substance, that when the note was indorsed to the plaintiff six of the installments had been paid; that it was so indorsed in payment of the difference between the equities in certain properties exchanged between plaintiff and defendant, and was secured by a second mortgage upon land of the maker

of the note, which was of sufficient value above the first incumbrance to pay the note in suit; that the plaintiff at the time of the indorsement agreed with the defendant to keep her fully advised as to the conduct of the maker of the note, respecting the payment of the installments, "and with respect to any action of hers touching the value of said security"; that the plaintiff failed to do so, and failed to give the defendant notice of the failure of the maker to pay several installments prior to May 9, 1905, and to give notice to the defendant of an action for the foreclosure of said first mortgage by the owner thereof against both the plaintiff and the maker of said note, until after said second mortgage had become extinguished by foreclosure; and that had the defendant been notified of said action she "would have been able to redeem said property and save said security." The plaintiff's demurrer to this defense stating, in substance, as grounds of demurrer, that the plaintiff owed the defendant no duty or obligation to notify her of said foreclosure suit, nor to defend said suit, was sustained by the trial court.

We shall treat the demurrer, as it has been by counsel and probably by the trial court, as raising among other questions that of whether parol evidence was admissible to prove such agreement as varying the terms of the contract of indorsement. The trial court correctly overruled the demurrer. Under section 4233, Gen. St. 1902, the defendant is liable as an indorser. His contract of unqualified indorsement is described in section 4236. One of the elements of such contract is a promise that if the note shall not be paid upon due presentment, and the necessary proceedings upon its dishonor are duly taken, the indorser will pay the amount of it to the holder. That parol evidence is not admissible to vary this contract is too well settled to require discussion. *Dale v. Gear*, 38 Conn. 15, 9 Am. Rep. 353. The answer does not expressly state that to the defendant's contract of indorsement, as defined by statute, there was added by the parol agreement the further condition that she should be fully advised by the plaintiff as to the conduct of the maker of the note regarding payment of the installments, and as affecting the value of the mortgage security. If such is the effect to be given to the agreement pleaded, it varied the contract of an unqualified indorsement and parol evidence was not admissible to prove it. If the agreement pleaded did not vary the contract of indorsement by imposing a new condition upon the liability of the defendant, then it was not a part of the contract of indorsement, and the defendant's promise to pay upon due notice of dishonor remained unchanged and enforceable. If such a valid agreement as is alleged in the answer was entered into between the indorser and indorsee, it at the most created a collateral obligation upon the part of the plaintiff to

keep the defendant advised as alleged, the breach of which might enable the defendant after having been compelled to pay the note to maintain an action for damages, or to recoup by a counterclaim when sued upon her indorsement. *New Haven Mfg. Co. v. New Haven Pulp & Board Co.*, 76 Conn. 126-130, 55 Atl. 604. But no counterclaim is pleaded in the present case; and the agreement is pleaded only as a defense, for which purpose it is wholly insufficient.

The facts pleaded by the second defense do not show any such relation, antecedent agreement, or state of facts between the plaintiff and defendant as renders an attempt to enforce the contract of indorsement inequitable or fraudulent under the decision of this court in *Dale v. Gear*, supra. They show either an attempt to change by parol evidence an unrestricted into a restricted indorsement, or to prove as a defense a collateral agreement which could only be the basis of a separate action or a counterclaim.

The trial court correctly ruled that the failure of the plaintiff to notify the defendant of the nonpayment of other installments did not affect his right to recover the three which are the subjects of this suit. *Fitchburg Ins. Co. v. Davis*, 121 Mass. 121.

There is no error. The other Judges concurred.

(72 N. J. Eq. 805)

O'GRADY v. McDONALD.

(Court of Chancery of New Jersey. March 28, 1907.)

1. TRADE-NAMES — RIGHT TO USE SIMILAR NAMES.

The proprietor of a hotel managed as "The Hotel Dominion" is entitled to restrain another from operating a new hotel under the name of "The New Dominion," as against the objection that the owner of the new hotel as tenant of the old improved its reputation by reason of his labors.

2. SAME — INJURIES FROM USE OF TRADE-NAME.

The proprietor of a hotel managed as "The Hotel Dominion" is entitled to an injunction restraining the use by another proprietor of a hotel of the name "The New Dominion" on the ground that the name of the new hotel will aid in procuring guests theretofore patronising the old one.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trade-Marks and Trade-Names, § 64.]

Suit by Michael O'Grady against Clara McDonald. Heard at the return of an order to show cause for a preliminary injunction on bill, answer, and affidavits. Preliminary injunction issued.

Complainant is the owner of a hotel on Arkansas avenue, in Atlantic City, known as "The Hotel Dominion," and seeks to restrain defendant from using the name "The New Dominion" for a hotel which defendant has recently erected on that avenue within a few hundred feet from the hotel owned by complainant. The theory of the bill is that de-

fendant is violating rights which complainant has acquired by prior appropriation of the trade-name stated.

Heard, at the return of an order to show cause for a preliminary injunction, on bill and affidavits, and answer and affidavits.

Thompson & Cole, for complainant. Bourgeois & Sooy, for defendant.

LEAMING, V. C. (after stating the facts). There can be no doubt of the power of a court of equity to restrain the improper use of a trade-name. The principles involved are in many respects analogous to those arising in the protection of trade-marks. *Busch v. Gross* (N. J. Ch.) 64 Atl. 754; *International Silver Co. v. Wm. H. Rogers Corporation*, 67 N. J. Eq. 646, 60 Atl. 187, 110 Am. St. Rep. 506; *Eureka Fire Hose Co. v. Eureka Mfg. Co.*, 69 N. J. Eq. 159, 60 Atl. 561. Complainant's hotel has been conducted under the name "The Hotel Dominion" for upwards of 12 years. That name has necessarily become so associated with the hotel that complainant is clearly entitled to protection against the use of the same or a similar name in such manner as to be likely to deceive or mislead the public. Defendant claims, however, that she was a tenant of complainant's hotel from March 1, 1896, to March 1, 1897, and during that time gave the hotel of complainant a high standing under its old name, which name, she claims, was of little value prior to that time. I think this fact wholly immaterial. Defendant leased the hotel for one year furnished and ready for occupancy. Her lease described the property as "The Hotel Dominion." If during the year of her tenancy the reputation of the hotel was improved by reason of her labors, that fact cannot properly be held to entitle her to the use of the name for an opposition hotel at the end of her term. Had the name been one of her own adoption, as in *Willcoxon v. McCray*, 38 N. J. Eq. 466, and not one which she only became entitled to use because she was a tenant of the property of complainant, an altogether different condition might exist.

The more difficult question is whether the name "The New Dominion," as used by defendant, is likely to operate to deceive or mislead the public. A question of this nature necessarily depends largely upon the special circumstances of the individual case. In *Weinstock, Lubin & Co. v. Marks*, 109 Cal. 529, 42 Pac. 142, 30 L. R. A. 182, 50 Am. St. Rep. 57, the proprietors of a store known as "Mechanics' Store" were awarded an injunction against the use, by an opposition concern, of the name "Mechanical Store." In *Gamble v. Stephenson*, 10 Mo. App. 581, the proprietor of "What Cheer" restaurant was awarded relief against the name "New and Original What Cheer Restaurant." In *Colton v. Thomas*, 2 Brewst. (Pa.) 308, the name "Colton Dental Association" was protected against the use of the name "Colton Dental

Rooms." In *Cady v. Schultz*, 19 R. I. 193, 32 Atl. 915, 29 L. R. A. 524, 61 Am. St. Rep. 763, the name "United States Dental Association" was protected against the use of the name "U. S. Dental Association." In each of these cases various circumstances existed of more or less force to control the decisions rendered; but the essential inquiry in all cases is: Is the new name, as used, calculated to deceive or mislead? In the present case no reason is suggested by defendant for her desire to use the name "Dominion" in her new enterprise; but the inference is present that she finds in the name adopted some aid to the procurement of guests who have heretofore patronized the old hotel. I am unable to believe that this will not be the effect of the use of the name if that use is permitted.

I will advise that a preliminary injunction issue pursuant to the prayer of the bill.

(72 N. J. Eq. 607)

WAHL V. STOY.

(Court of Chancery of New Jersey. March 5, 1907.)

1. COVENANTS — USE OF PROPERTY — RESTRICTIONS—CONSTRUCTION.

A husband and wife owned adjoining lots in severalty. As a part of a sale of the husband's lot he and his wife executed an agreement, reciting that one of the considerations of the conveyance was that no building should at any time be erected on the wife's lot nearer than five feet of the dividing line. The contract was originally intended to be signed by the husband alone, but the wife's name was subsequently interlined in ink, as a party of the first part, though the other changes necessary to make the agreement conform to such change were not made, so that the covenants as written appeared only to bind the husband. *Held*, that the contract, construed in accordance with the intent of the parties, was sufficient to bind the wife.

2. HUSBAND AND WIFE—CONTRACTS OF WIFE—CONSIDERATION.

Where a husband and wife owned adjoining lots in severalty, and, as part of a sale of the husband's lot, the wife joined in a contract restricting the use of her lot by prohibiting an erection thereon less than five feet from the division line, her dower interest in her husband's lot constituted a sufficient consideration for her agreement, and was sufficient to bind her property by such restriction.

3. VENDOR AND PURCHASER — VENDEE WITH NOTICE—RECORDS.

Where an agreement imposed a building restriction on defendant's vendor, such restriction might be enforced by injunction against defendant who took with notice, though the agreement was not recorded.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Vendor and Purchaser, § 498; vol. 14, Covenants, § 91.]

4. SAME—NOTICE—EVIDENCE.

At the time defendant purchased his lot, which adjoined plaintiff's property, the vendor's husband informed him that there was a restriction on the lot covering about five feet. Defendant then asked if the restriction prevented him from building a bay window, and was informed that it related only to the body or wall of defendant's house. Defendant took no steps to ascertain the nature of the restriction from complainant, which in fact prohibited the construction of any part of a building nearer than

five feet of complainant's west line. *Held*, that defendant was charged with notice of the restriction as it in fact existed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Vendor and Purchaser, §§ 477, 484-493.]

5. SAME—NEW DEED.

Where defendant had notice of a covenant binding his lot, prohibiting the erection of a building within five feet of complainant's line, a new deed procured by defendant from his vendor for the purpose of curing an alleged mistake as to such restriction in the original deed, reciting that the restriction only restrained the erection of the main wall of defendant's building nearer than five feet from the line, was ineffective to alter the original restriction.

Bill by Martha F. Wahl against Franklin P. Stoy for an injunction to restrain defendant from violating a restriction in a deed. Decree for complainant.

Thompson & Cole, for complainant. Godfrey & Godfrey, for defendant.

BERGEN, V. C. Alfred C. McClellan was the owner of a lot of land 50 feet in width fronting on Pacific avenue in the city of Atlantic City, and his wife, Mary, of a lot 40 feet in width, adjoining on the west her husband's lot. By their deed dated February 2, 1904, in consideration of the sum of \$35,000, they conveyed to the complainant the husband's lot. On the same day an agreement was drawn, signed and acknowledged in due form by McClellan and his wife as parties of the first part, by the terms of which, after, among other matters, reciting the conveyance to the complainant, and that one of the considerations of that purchase was that no building should at any time be erected nearer than five feet of the westerly line of the lot that day conveyed to complainant, the party of the first part agreed that no building to be thereafter erected on the adjoining lot should be erected nearer than five feet from the westerly line of complainant's lot. On September 1, 1904, Mary A. McClellan and her husband conveyed her lot to the defendant. This deed contained the following stipulation: "Subject nevertheless to the condition and restriction that no building, or any part of a building, shall be erected within five feet of the easterly line of the above described premises." And on the 13th day of June, 1905, a deed was executed by the grantors last named to the defendant, which, after reciting that the above restriction was inserted in the former deed by inadvertence and mistake, and declaring that it was not the purpose and intention to restrict the five feet mentioned as to the eaves, bay window or similar projections of any building to be erected on said land, granted, conveyed, released, and confirmed to the defendant the premises described in the former deed subject to the restriction "that the main wall of no building shall be erected within five feet of the easterly line of the above-described premises." The defendant has so placed his building that the eaves and a bay window occupy a part of the five feet which

the complainant insists her agreement forbids, and this bill is filed to compel the defendant to remove these incumbrances.

The first point raised by the defendant is that the covenants in the contract restricting the use of the wife's land all run in the name of the husband, and cannot bind the wife, the owner of the property sought to be restricted, even if it was an effective agreement in other respects. As the agreement is the foundation of complainant's claim, this question must be first met and disposed of. The original contract has been put in evidence, and an examination of it shows that the draftsman, at the time of its preparation, must have been under the impression that the title to the land sought to be restricted by the agreement was in the husband, and that he alone was to execute it, for the paper is typewritten, and the name of the wife, as a party of the first part, interlined in ink, while other changes necessary to make the agreement conform to the change in the first clause were not made, and the executed contract stands precisely as it was first drafted, with the exception that the name of the wife is inserted as one of the parties of the first part. There was but one purpose sought to be accomplished by this agreement, and that was a covenant that the owner of the lot referred to in it would not erect on it any building nearer than five feet of the westerly line of the lot sold to the complainant, and it is a rule of construction that if the court, with knowledge of the situation in which the contracting parties stood at the time of executing the agreement, and with a full understanding of the force and import of the words, can ascertain the meaning and intention of the parties from the language of the instrument, it is its duty to determine the right of the parties in accordance therewith. *Culver v. Culver*, 39 N. J. Law, 574.

The contract, in which the wife is one of the parties of the first part, recites that Alfred C. McClellan and Mary A., his wife, had conveyed to the complainant a lot of land 50 feet front, located at the northwesterly corner of Pacific and States avenues, and that one of the considerations which induced the complainant to purchase that lot was that no building should at any time thereafter be erected nearer than five feet of the westerly line of the lot so conveyed to her, and also that the party of the first part was the owner of the land immediately adjoining such westerly line, for a distance of 40 feet along Pacific avenue. Following these recitals, "the party of the first part, for himself, his heirs and assigns, in consideration of the premises, and of the sum of \$1, to him duly paid by the party of the second part, and also for the benefit of the land retained by him, as well as that conveyed as aforesaid, hereby covenants and agrees to and with the party of the second part, her heirs and assigns, that no building to be hereafter erected on the lot adjoining on the west the lot hereinabove and

in said deed described, shall be erected nearer than five feet from the westerly line of said described lot, and that said restriction shall attach to and run with the land, and bind all future owners of the lot immediately adjoining on the west to lands so as aforesaid conveyed; and the said Alfred C. McClellan, for himself and his heirs and assigns, covenants and agrees to and with the said Martha F. Wahl, her heirs and assigns, that he and they shall in every deed of conveyance of said adjoining lot hereafter to be made by him, them, or any of them, insert and include a covenant, condition, agreement, and restriction in all respects the same as the above." The reasonable interpretation of the agreement is that it was intended by the parties that the owner of the adjoining lot, the title to which was vested in the wife, should be bound as stipulated therein, and it is the duty of this court to give effect to that intention. The words "himself, his heirs and assigns," cannot be permitted to overcome the intention of the parties, to be fairly gathered from the agreement, that the wife should be bound by its covenants, for if the contract admits of two inferences, it is to be interpreted in the sense in which the promisor had reason to suppose it was understood by the promisee. *Potter v. Berthelet* (C. C.) 20 Fed. 240.

Certainly the complainant understood that the wife as owner was binding herself according to the terms of the agreement, and that it was the intention of the wife, as one of the parties to the agreement, to contract with reference to the land which she owned, is strengthened by the fact that otherwise no reason is apparent why she should be a party to a contract which had no purpose other than the placing of a restriction on her land for the benefit of the adjoining landowner in part consideration of the purchase price for the land sold by the husband and wife to complainant. The construction of an agreement should "be favorable, and as near the minds and apparent intents of the parties as it possibly may be, and the law will permit." *Shep. Touch. c. 5, p. 85*; *Sisson v. Donnelly*, 36 N. J. Law, 432; *Rue v. Melrs*, 43 N. J. Eq. 377-383, 12 Atl. 369, 372. I am satisfied that this written agreement is the contract of the wife, according to which there was not to be erected on her land any building within five feet of the westerly line of the lot conveyed by her and her husband to the complainant; a stipulation which the defendant has disregarded.

The next objection is that the contract is not binding on the wife because she was not the owner of the land, for the benefit of which the agreement was made, and also that it was without consideration. I take it to be well settled that equity will compel the observance of a covenant, founded upon a valuable consideration, by which the owner of land imposes upon it limitations as to its use which are reasonable in character, and shall hold

that the wife, having an interest in both parcels, could legally impose upon her land for the benefit of the land sold, the restriction contained in her agreement, if there was a valuable consideration to sustain it. It appears by the testimony and the recitals in the agreement that the husband, by a deed in which the wife joined, had conveyed to the complainant a lot of land on which there was then erected a dwelling, the westerly side line of which, including the eaves of the building, extended to the boundary line between the lot conveyed and that owned by the wife, and, for a part of the consideration paid, the wife and her husband agreed in a writing separate from the deed, executed at the same time, and as a part of the transaction, that no building should be erected on the wife's lot within five feet of the westerly line of the lot conveyed to the complainant. The interest of the wife in the lands conveyed to the complainant was an inchoate dower which our courts have recognized to be a valuable interest. *Wheeler v. Kirtland*, 27 N. J. Eq. 534. It follows therefore that, if the covenant which she entered into with the complainant tended to enhance the purchase price, and the presumption is that it did, her inchoate dower was increased in value thereby, and such increase undoubtedly is a sufficient consideration for the agreement sought to be enforced, and, in my judgment, if the wife was erecting the building complained of, it would be the duty of this court to require her to stand by her bargain. If this agreement binds the wife, it will be enforced against any other person into whose hands the land passes, with notice of the covenants, although not recorded. The complainant insists that the defendant before taking title to the land had notice of the covenant, or sufficient notice thereof to put him on inquiry. The defendant testifies that on the day he agreed to purchase the lot he had an understanding with Mr. McClellan, who was acting for his wife in the negotiations of sale, that there was a restriction on five feet of the land, but was not told about it until he had paid \$100 on account of his contract of purchase. The pertinent evidence on this point is as follows: Q. You had an understanding about a restriction on the five feet? A. Yes. Q. When did you have that? A. On the day I purchased the lot; let me see, it was after I had paid my first money. Q. After you paid your first money? A. Yes. Q. Then he told you that there would have to be a restriction? A. Mr. McClellan, after receiving my money and writing me a receipt, which I have brought here, came back to me and said: "By the way, there is some little restriction on this lot; it is about five feet." And he said: "Of course I don't suppose that you want to build closer than five feet." I said to him: "Mr. McClellan, I am a little surprised at this; if you had told me that before I paid you, we might have considered the matter a little differently." But I said:

"However, I would like to know what these restrictions are, and whether they prevent me from building a bay window." He said: "They do not. It is simply the five feet from Mr. Wahl's line, to your house; that is, the body of your house or wall."

It further appears that at that time defendant knew that the complainant was in possession of the adjoining property, but did not go and see her with reference to this restriction. The defendant paid the consideration for his lot to a title company in Atlantic City, with the expectation that the company would get the deed and put it on record, which it did. This deed contained a restrictive covenant in the precise words of the agreement between Mrs. McClellan and the complainant, and is dated the 1st day of September, 1904. On the 13th day of June, 1905, Mary A. McClellan and her husband executed a new deed to the defendant, reciting that the restrictive covenant was inserted in the original deed by "inadvertence and mistake," and contained a modification of the restriction in the words hereinbefore set out, but the later deed can have no effect upon this controversy if, as a matter of fact, the defendant, before he completed his purchase, knew, or was chargeable with notice, of the character of the contract between his vendor and the complainant. The recital in the second deed does not conform to the truth, because the vendor knew the character and nature of her covenant, and was careful to have it inserted in the earlier deed, and it is incredible that by "inadvertence and mistake" she inserted in her deed a covenant which she had so solemnly agreed to insert. Nor am I disposed to accept the statement of the defendant that the first deed, as drawn and recorded, did not conform to his understanding; for, a long time after the deed came to his possession, and after he was aware of the nature of the restriction, he went to the husband of the complainant and stated that he had gone to considerable expense preparing his plans and specifications, and found that there were restrictions covering five feet, which would require him to build nearer Pacific avenue than he wished to, and desired that the complainant should by deed relieve three feet of the five of the restriction, which he would hardly have done if he thought the restriction claimed to have been improperly inserted could be removed by the explanatory deed of his vendor which he afterwards procured.

As to actual notice not proved by direct evidence, but to be inferred in part from circumstances, the rule is laid down in *Pom. Eq. Jur.* § 597, that if the party obtains knowledge or information of facts tending to show the existence of a prior right in conflict with the interest which he is seeking to obtain, and which are sufficient to put a reasonably prudent man upon inquiry, then it may be a legitimate inference that he acquired the further information which con-

stitutes actual notice. This inference is not a conclusive presumption of law; it may be defeated by proper evidence. Yet, if it appears that the party obtains knowledge or information of such facts, which are sufficient to put a prudent man upon inquiry, and which are of such a nature that the inquiry, if prosecuted with reasonable diligence, would certainly lead to a discovery of the conflicting claim, then the inference that he acquired the information constituting actual notice is necessary and absolute; for this is only another mode of stating that the party was put upon inquiry, that he made the inquiry, and arrived at the truth. And the same result follows if the party has sufficient knowledge to require him to make the inquiry, if he neglects to do it, or, having begun it, fails to prosecute it in a reasonable manner. The information need not be so full and detailed as to communicate a complete description of the opposing interest. It is sufficient if it asserts the existence of a right or interest as a fact. If a vendor informs the vendee that the subject-matter is subject to an outstanding lien or equitable claim, such information is sufficient. It need not state all the particulars or impart complete knowledge. It is enough if he has reasonable ground to believe that a conflicting right exists as a fact. Whenever the information given by the grantor would constitute notice, the same information communicated by the representative of the vendor will operate with equal force, provided the party represented was prevented by absence or disability from making the communication on his own behalf. To what extent the purchaser is charged with notice of the incumbrance and its character, is regulated by the interest of the person making the communication. Information given by a third person having no interest in the matter, who, after stating the charge upon the subject-matter, also declares that it has been abandoned or no longer exists, the purchaser may generally rely upon the whole communication, and unless there is some special reason for believing the statement regarding the incumbrance, and rejecting that which relates to its discharge, the purchaser may rely upon the whole statement; but a different rule prevails where the representation is made by the vendor or person parting with an interest in the subject-matter, and where such person admits some outstanding claim upon, or equity in the property, his further declaration that the defect has been cured or the equity destroyed, will not warrant the purchaser in relying upon this explanation or contradiction, for the informant is under a strong personal interest to misrepresent or conceal the real facts.

The testimony in this case shows that, at the conclusion of the negotiations between the McClellans and the defendant, he was informed by the vendor that there was some little restriction on the lot covering about

five feet, and the defendant testified that the vendor said, "Of course, I don't suppose that you want to build closer than five feet," to which the defendant replied that he would like to know what the restrictions were, and whether they prevented him from building a bay window, and was informed: "They do not. It is simply the five feet from Mr. Wahl's line to your house; that is, the body of your house or wall." In my judgment, it then became the duty of the defendant to inquire from the person, in whose favor the restriction was made, regarding its character and extent, and is chargeable with notice of all the facts which an inquiry properly pursued would have revealed. The defendant knew that the complainant was in possession of the adjoining lot; that there was a building standing on that lot substantially on the boundary line between complainant's lot and the lot which the defendant was purchasing, and he knew that the restriction related to his right to build some part of his dwelling within five feet of complainant's line. This was sufficient information regarding a restriction, or an equity, in favor of the complainant, attached to the vendor's title, to charge him with the duty of inquiring regarding it from the person for whose benefit it had been created. In addition to this, I am not disposed to credit the testimony of the defendant that the vendor made the statement in the language used by defendant; for it is entirely at variance with the agreement imposing the restriction, and as set out in the deed which was afterwards executed and delivered to the defendant.

I am satisfied from the evidence in this case that when the defendant purchased this lot he was informed by the vendor that the deed to him would contain a covenant preventing him from building upon his lot within five feet of the complainant's line, and that the deed to him originally made by the vendor contained the restrictive covenant precisely as he had understood it should; but, if I am wrong about this, I am very clear that he had sufficient notice to put him upon inquiry, and that he is chargeable with the knowledge which he would have obtained if he had applied to the person in whose favor the restrictive contract was made, and that upon inquiry of the complainant, an inquiry, in my judgment, he was bound to make, the contents of the written agreement would have been disclosed to him. This case falls within the first rule laid down by Vice Chancellor Wigram, in *Jones v. Smith*, 1 Hare, 43, which is that, where the party charged has had actual notice that the property in dispute was in fact charged, incumbered, or in some way affected, the court binds him with constructive notice of facts and instruments, to the knowledge of which he would have been led by an inquiry relating to the charge, incumbrance, or other circumstances affecting the property, of which he has had no-

tice. See, also, *Hoy v. Bramhall*, 19 N. J. Eq. 563, 97 Am. Dec. 687.

The conclusion which I have reached is that the complainant is entitled to the relief prayed for in her bill of complaint, with costs, and I will so advise.

(71 N. J. Eq. 771)

CHELSEA LAND & IMP. CO. v. ADAMS.

(Court of Errors and Appeals of New Jersey.
Feb. 2, 1907.)

DEEDS—BUILDING RESTRICTIONS—ABANDONMENT.

Complainant and his predecessor owned certain city property, subject to a restriction that no building should be constructed nearer than 20 feet from the street line. This restriction was incorporated in the deeds of over 150 purchasers; but, though 99 or 100 had violated the restriction, no steps had been taken to enforce the same, except in one case, in which a bill was filed in 1898, which was permitted to rest without trial until 1905, when suit was brought to enforce the restriction against defendant. *Held*, that such facts were sufficient to show an abandonment of the original plan with reference to restrictions, and estopped complainant from enforcing the same against defendant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 16, Deeds, §§ 542, 545.]

Swayze, Reed, and Trenchard, JJ., dissenting.

Appeal from Court of Chancery.

Bill by the Chelsea Land & Improvement Company against Charles R. Adams. From a decree in favor of defendant, complainant appeals. Affirmed on the opinion of the Chancery Court.

The opinion of *BERGEN, V. C.*, is as follows:

"I will dispose of this case now. It appears that the Chelsea Beach Company purchased a large tract of land near Atlantic City, for the purposes of development, and caused it to be surveyed and divided into streets, avenues, lots, and blocks, and then began the sale of the property under certain restrictions. The important restriction to be considered here is that, in building on these lots, no building should be placed nearer the street in front than 20 feet, or nearer the side line of the lots than 5 feet. This court has, in an opinion by Vice Chancellor Reed, which has been read here, although it does not appear to have been reported, determined that the restriction as to 20 feet applied to the sides of a corner lot, as well as the front, so that a building on the corner of a lot must be placed not only 20 feet from the front, but also 20 feet from the side street. In that situation, the property remaining in the Chelsea Beach Company has been transferred to the present complainant, the Chelsea Land & Improvement Company. The defendant here obtained his title through mesne conveyances from the complainant. The deeds in that chain of title contained the restriction with the exception of one deed, but even that deed made a reference to the restriction sufficient to put the purchaser on notice. So that, when the de-

fendant bought this property, he bought it subject to the condition that he would not put on that lot a building nearer the street in front of the lots than 20 feet. It is admitted that he has violated that restriction; that he at first contemplated building a structure to be used as a bath house, in connection with a sun parlor, to be built flush with the street; that, after the proceedings in this cause were instituted, he determined to, and did, build the front of the building further back from the street, although it yet is beyond the restricted line.

"His defense is that, while his deed contained this restriction, the same restriction was incorporated in the deeds of other purchasers to the number of 150. Of that number 99 or 100 have violated the restriction contained in their deeds, and that this complainant, who is occupying substantially the position of the original company (having taken over all the property and undertaken to dispose of it subject to the same conditions), has stood by and permitted all these violations without complaint. Some of them were trivial, but others were important. Certainly the violation as to the Chelsea Hotel property is an important one, and I think there are two other dwellings of considerable importance and value, whose owners have been permitted to violate this agreement, and the defendant insists that, having abandoned the general scheme, the complainant now has undertaken to enforce the restriction against this defendant, without taking any steps to compel other people to observe their covenants, except in the single instance where a bill was filed in 1898, which suit it appears has not been prosecuted, and that such conduct is inequitable. While the president of the corporation testified that he had recently seen counsel and urged him to proceed with the case, I do not feel justified in saying that the filing of a bill in 1898, without further proceedings, was an indication that it has been the intention to preserve the plan. The suit has not been diligently pursued. No result has been reached, and no steps taken between 1898 and 1905. The ordinary litigant, determined to assert its right, would probably have employed other counsel, if he could not get his case to a hearing through the efforts of the one employed. Upon the case as presented, I feel that I would not be justified in enforcing this restriction against this defendant. There have been a great many violations of these restrictions. They have been violated by two-thirds of the people who bought land from this company. Large hotel properties, and wealthy people have built, some on the very street where defendants' property is located, and their buildings have been so erected that their foundations are beyond the restricted line, and yet not a word has been said by this complainant. It may be that, in the judgment of the officers of this company, they thought it prudent to allow these people to

violate these restrictions, because they were putting in this locality large and valuable buildings, which enhanced the value of the land remaining in the hands of the company. That may be a wise thing to do. I am not criticising them. But I think that all the persons occupying these lands are entitled to be treated alike, and this complainant company cannot undertake to waive violations of these restrictions in so universal a manner, as it is proved, has been done here, and then undertake to enforce it against one other of their purchasers. Such a general consent to the nonobservance of restrictive covenants amounts to an abandonment of the original intention and design with regard to restrictions. If the original grantor of 150 lots by deeds, with a restriction as to building lines, allows two-thirds of the grantees to violate it without protest, it cannot enforce it against a single grantee, for the purpose of benefiting its remaining lands, for the grantee thus assailed is entitled to the common privileges accorded to other purchasers who are subject to like restrictions. It appears in this cause that the complainant obtained from certain of the purchasers of a part of the tract a release as to the restrictions, so far as a portion of the whole was affected, and thereafter, as to that part, changed the character of the restriction, and materially altered the scheme of the original plan, not only as to size of the lots, but as to the building lines. This change affected all the lot owners, and cannot be confined by the original holders to a portion of the property, especially as, in this case, the changes relate to a part of the street upon which defendant's lands are located. This bill is not filed by individual lot owners, but on behalf of the holding company, owners of unsold portions, and because of its laches in so many instances is presumed to have abandoned the original plan as to restrictions.

"A decree will be advised dismissing the bill of complaint."

William M. Clevinger, for appellant.
George A. Bourgeois and J. Morten Adams, for respondent.

PER CURIAM. The decree appealed from will be affirmed, for the reasons stated in the opinion delivered in the Court of Chancery by Vice Chancellor BERGEN.

SWAYZE, REED, and TRENCHARD, JJ., dissent.

(72 N. J. Eq. 487)

BROWN v. CITIZENS' ICE & COLD
STORAGE CO. et al.

(Court of Errors and Appeals of New Jersey.
Feb. 2, 1907.)

CORPORATIONS — POWERS — RIGHT TO BORROW
MONEY.

A corporation, empowered by its charter to do any act in connection with its business, and

to issue bonds secured by mortgage, and to sell the same to raise money with which to erect machinery, etc., has authority to borrow money and execute a mortgage to secure the same; the clause having reference to the issuing of bonds not preventing the corporation from borrowing money and securing it by mortgage.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, §§ 1775-1777, 1818.]

Appeal from Court of Chancery.

Suit by James Brown against the Citizens' Ice & Cold Storage Company and another to foreclose a mortgage. From a decree for complainant, defendant the Pennsylvania Iron Works Company appeals. Affirmed.

The opinion of Bergen, V. C., is as follows:

"The defendant company gave two mortgages, one for \$10,000 to the complainant, another for \$7,235 to Annie Lisle Ballingall, which she assigned to the complainant. There is no dispute about the amount of the loans, nor that they represent debts due by the company, but the defendant insists that under the terms of defendant's charter, as expressed in the following words: 'And the doing of any other act or acts, thing or things, incidentally to grow out of, or connected with said business or any part or parts thereof; to issue bonds secured by mortgage or mortgages upon the property, and franchises of said corporation, and to sell the same for the purpose of raising money, with which to erect machinery, and otherwise to improve said lands'—the corporation had no authority to mortgage its property, other than for the purposes above stated, and as the money, to secure which the two mortgages were given, was not applied to the payment of debts due for 'machinery and otherwise to improve said lands,' the mortgages are ultra vires, and cannot stand as incumbrances on the land. In my opinion, the general power given a corporation, under our act, to mortgage its property, is not restricted by the terms of the charter invoked. That clause has reference alone to the issuing of bonds in the usual commercial form, of a negotiable character, to be sold and passed by delivery, and was not intended to, and does not, prevent the corporation from securing to a creditor its debt by way of mortgage, in common form; and the power to do so is fully conferred by the clause in the charter, which authorizes the company 'to do any act or thing incidentally to grow out of or in connection with said business,' implying the right to borrow money and pledge its property as security.

"The complainant is entitled to a decree."

Norman Grey, for appellant Pennsylvania Iron Works. E. A. Armstrong, for respondent.

PER CURIAM. The decree appealed from in this case is affirmed, for the reasons stated in the opinion filed in the Court of Chancery by Vice Chancellor BERGEN.

(72 N. J. Eq. 797)

MARR v. MARR et al.

(Court of Chancery of New Jersey. March 23, 1907.)

1. CORPORATIONS—OFFICERS—DEALING WITH CORPORATION.

A director of a corporation may purchase the corporation property sold under an execution on a judgment obtained by him against the corporation, and the sale will not be set aside because of his trust relationship, unless some undue advantage has been secured by reason of that position.

2. SAME—EVIDENCE—SUFFICIENCY.

In an action by a stockholder of a corporation to set aside a sale of the corporate property under an execution on a judgment obtained by a director against the corporation to the director, that notice of the sale, other than the statutory notice, was not given to all the stockholders, was insufficient to show that the director had taken any undue advantage.

Bill by Phineas B. Marr against William B. Marr and another. Decree advised dismissing the bill.

The bill is filed by complainant, as a stockholder of Beacon Land Company, in behalf of himself and other stockholders, to set aside a sale made by the sheriff of Ocean county to defendant William A. Marr under an execution issued on a judgment held by defendant Marr against the land company. The land company having ceased the transaction of business, and having no organized board of directors, complainant seeks to enforce such rights as could have been appropriately enforced at the instance of the company in behalf of its stockholders.

In the year 1898 the Beacon Land Company was indebted to defendant Marr for money which he had prior to that time loaned to it. On failure of the company to make payment, defendant Marr brought suit and recovered judgment. On an execution issued on that judgment the sheriff of Ocean county made sale of the hotel property now in question, known as "Beacon-by-the-Sea." The property consisted of the hotel lots, buildings, and furniture, and comprised all of the property of the land company. At the sale the property was purchased by defendant Marr as plaintiff in execution. At that time defendant Marr was president and a director of the land company. The theory of complainant's suit is that by reason of the trust relationship at that time existing between the land company and defendant Marr, as its president and one of its directors, the title which he received by that purchase will be decreed to be held by him in trust for the benefit of the stockholders of the land company and an accounting ordered. Final hearing has been had on bill, answer of defendant Marr, replication, and proofs.

Bleakly & Stockwell, for complainant. T. B. Hall, for defendant Marr.

LEAMING, V. C. (after stating the facts). It is a general principle of equity, firmly established and frequently applied in this court, that, if a trustee becomes the pur-

chaser of the trust property, such act is voidable at the instance of the cestui que trust. The rule is adopted from wise considerations of public policy, with a view to remove from transactions by trust agents the danger attendant upon the existence of personal interests inconsistent with trust duties. In *Staats v. Bergen*, 17 N. J. Eq. 554, 559, the learned Chief Justice, speaking for the Court of Errors and Appeals, said:

"I think, upon correct principle, a trustee in no case, nor in any crisis, can become the purchaser of property, when the fact of his making such purchase has a tendency to promote his own interest, at the expense of his cestui que trust. This, it is conceived, is the groundwork of the decisions in England and in this country."

The rule has been uniformly applied in this state to purchases by a trustee at public sales, and also at judicial sales to the same extent as to sales made by the trustee, in cases where the purchaser has a duty to perform in reference to the sale inconsistent with the character of a purchaser. *Staats v. Bergen*, supra; *Marshall v. Carson*, 38 N. J. Eq. 250, 48 Am. Rep. 819; *Romaine v. Hendrickson's Ex'r*, 27 N. J. Eq. 162; *Orevelling v. Fritts*, 34 N. J. Eq. 134; *Porter v. Woodruff*, 36 N. J. Eq. 174; *Deegan v. Capner*, 44 N. J. Eq. 339, 15 Atl. 819.

A director of a corporation is not a trustee in the strict sense. The title to the corporate property is in the corporation. But the duties which a director is required to perform for the corporation which he represents are in many respects similar to the duties of a trustee, and his relation to the corporation is, in general, essentially that of a trustee. He is not, in consequence, allowed that freedom to contract with his corporation which a stranger could enjoy. In *Stewart v. Lehigh Valley R. R. Co.*, 38 N. J. Law, 522, it is shown that his trust relationship to his corporation is such as to render his contracts made with it voidable to the extent that such contracts cannot be enforced, as express contracts, against the will of the corporation. He may loan money to his corporation or perform personal service for his corporation and the obligation for the repayment of the money loaned, or for the payment of reasonable compensation for the service performed, will arise by operation of law, but cannot exist by force of the express contract. *Gardner v. Butler*, 30 N. J. Eq. 702, 721.

In the present case defendant Marr, while a director, loaned to his corporation money which was at that time needed by the corporation, and which was used by it in its regular business. After repeated efforts upon the part of defendant Marr to induce the corporation to repay the money due to him, he was compelled to bring suit and to issue execution on the judgment procured and make sale of the property of the corporation. It is now contended upon the part of com-

plainant that the trust relationship which existed between the corporation and defendant Marr, as its president and one of its directors, denied to him the right to become a purchaser at the sale made under his execution.

I have not been able to reach the conclusion that the principles already stated can be properly extended to render such a sale invalid at the mere option of the corporation or its stockholders. Conditions may easily exist to justify a decree setting aside such a sale, for the purchase of the property of a corporation by its director, even under the circumstances named, may appropriately subject the transaction to the closest scrutiny in all its aspects as to fairness and good faith; but I entertain the view that something more is necessary to set aside such a sale than the mere exercise of a purpose to do so upon the part of the corporation or its stockholders. To deny to the judgment creditor the privilege to buy at such a sale is to deny to him a substantial right which may be essential to the effective enforcement of his judgment. His attitude of hostility to his corporation has, in such a case, become a necessity which has been brought about and made necessary by the wrongful conduct of the corporation. I find it difficult to recognize the undoubted right of a director to occupy the attitude of hostility to his corporation which arises in the enforcement of his claim by an action at law to compel payment, and to deny to him the right to enforce the judgment procured with all the privileges which are incident to the judgment. In the exercise of that attitude of hostility which is made necessary for the enforcement of his just claim against his corporation, it would seem that he should be entitled to the full privileges of a stranger, not only in the prosecution of his action, but as well in the enforcement of his judgment. If the evidence discloses that he has in fact exercised no other privileges, I think the sale should stand. It is urged by complainant that he should first resign, and thus render himself free to act. Such a course would ordinarily be empty and fruitless, and equally subject to judicial investigation. When the facts disclose that he has not used his office to his own advantage, I cannot recognize the necessity or propriety of the application of a principle which operates, in such a case, to render the sale invalid at the mere instance of the corporation. In treating such sales as voidable, I think they should be so treated only to the extent that other judicial sales are so treated. If an inadequate amount has been bid, the law court from which the execution issued can afford an adequate remedy. *Palladino v. Hilpret* (N. J. Ch.) 65 Atl. 721. If unfair advantage has arisen attributable to a trust relationship, this court can appropriately grant relief.

I have found but little assistance in the

adjudicated cases upon the subject. The case of *Twin-Lick Oil Co. v. Marbury*, 91 U. S. 587, 23 L. Ed. 328, which is frequently cited in support of the right of the director creditor to purchase, goes no further than to support the right in the case of a sale made by the trustee of a mortgage deed given by the corporation to secure a debt due to the director; and the suggestion is there made that the trustee making the sale is appointed by the corporation for the purpose and to that extent represents the corporation. *Saltmarsh v. Spaulding*, 147 Mass. 224, 17 N. E. 316, is to the same effect as *Twin-Lick Oil Co. v. Marbury*, supra. The case of *Lucas v. Friant*, 111 Mich. 426, 436, 69 N. W. 735, expressly holds that a director who is a judgment creditor may buy at the execution sale; but the decision is based on *Twin-Lick Oil Co. v. Marbury* and *Saltmarsh v. Spaulding*, supra, and other cases which do not fully support the text. The case of *Hoyle v. Plattsburgh & Montreal Ry. Co.*, 54 N. Y. 315, 329, 13 Am. Rep. 595, after holding that a director, who is not a judgment creditor, cannot purchase the property of his corporation at a judicial sale, proceeds as follows:

"Vilas, however, was not only a director. He was also the plaintiff in a judgment against the railroad company, and had a clear right to sell, upon execution on his judgment, the personal property of the corporation which was liable to sale on execution. Whether in this right he might not, at a sale under his own or under prior executions, purchase in protection of his own right as judgment creditor, and hold property so purchased absolutely against the company, need not be determined in this case."

The subsequent case of *Preston v. Loughran*, 58 Hun (N. Y.) 210, 214, 12 N. Y. Supp. 313, 316, refers to *Hoyle v. Plattsburgh & Montreal Ry. Co.*, supra, and proceeds as follows:

"He [the director of a corporation] is not absolutely excluded from the right of dealing with it. He can loan money to it and become its creditor, and he can receive by the act of the corporation security for his debt. If he has a mortgage security, he may foreclose the mortgage, and it follows, almost of necessity, that, if he can foreclose, he may protect himself by bidding at the sale. Of course, if he takes any undue advantage, another question arises. But when his acts are fair and open they are not invalid."

In *Hallan v. Indianola Hotel Company*, 56 Iowa, 178, 9 N. W. 111, the same view is taken, and in *Re Iron Clay Brick Mfg. Company*, 19 Ont. 113, 33 Am. & Eng. Corp. Cas. 277, the contrary view is adopted.

I think that both reason and authority must be said to support the view already stated that a director in the enforcement of his execution against his corporation is privileged to purchase at the execution sale, and

that the sale will not be set aside because of his trust relationship arising from the fact that he is a director, unless it appears that some undue advantage has been taken by him by reason of the position which he occupies.

It is urged in behalf of complainant that the conduct of defendant Marr was not fair and open, in that he should have given notice of the sale to all the stockholders. I am unable to concur in that view. From the evidence adduced at the hearing, I am satisfied that defendant Marr must be regarded in this case as the victim of the corporation rather than as one who has received undue advantage. The corporation had but few stockholders, and was essentially the enterprise of a brother of defendant Marr, now deceased, whose stock complainant now holds by inheritance. Defendant Marr originally advanced a small amount of money to the corporation, and also became a stockholder at the instance of and as a favor to his brother. As more money was needed by the corporation from time to time, defendant Marr was induced to make further advances, because no other person identified with the enterprise appeared to be able to do so and because of his desire to help the enterprise along on account of his brother's active interest in it. The advances thus made finally aggregated over \$10,000, and over \$2,000 had in the meantime, in like manner, been advanced by the mother of complainant Marr. After the death of his brother defendant Marr, at a meeting of the stockholders in December, 1897, stated that he must have the money due to him, and that he would proceed unless something was done. He also urged the stockholders to contribute, and also offered to turn over his claim to any one who would supply the money. Again, at a meeting of the stockholders in February, 1898, he urged payment, and stated that he would proceed to collect unless paid. At one of these meetings a committee was appointed to make public sale of the entire property of the company. The sale was undertaken by a Philadelphia auction house in April, 1898, and no bids were received. Mrs. Marr had in the meantime brought suit for the money due to her, and recovered judgment for \$2,088.15. In October, 1898, defendant Marr brought suit for the money due to him and recovered judgment for \$10,318.30, and in December, 1898, made sale of the property in question under an execution issued on that judgment. The judgment recovered by his brother's wife had in the meantime been assigned to him. While no notice of the sale was given to the several stockholders other than the statutory notice, I am entirely satisfied that it would have been utterly futile to have given such notice. Defendant Marr had earnestly tried to get the stockholders to interest themselves in raising the money due to him, and had found it impossible. It is entirely clear to me that, had each stockholder been personal-

ly notified of the day of sale, no attention whatever would have been given to the matter by any of them. Defendant Marr did not want the property. He was judge of a court in Pennsylvania and did not wish to be burdened with the ownership of a seashore hotel property, and especially one which had been found from the beginning to afford insufficient revenues to maintain it. His instructions to the attorney whom he employed to make the sale were to let the property be sold for less than was due on his judgments if a purchaser could be found. I am satisfied that the only reason that all parties in interest were not especially notified of the sale was because it was useless to do so. The property was purchased by defendant Marr at the sale because, and only because, no other purchaser could be found. No bid was made except that of defendant Marr. Since the purchase defendant Marr has found it necessary to continue to add to the investment in the hope of making the property remunerative, and at this time it stands him in about \$40,000. I am unable to find any circumstance from which I can conclude that defendant Marr has not performed his full duty to the corporation.

Touching the value of the property purchased, I think that, in the proper hands, a purchaser could have probably been found for more than the amount of the judgments of defendant Marr. Witnesses at the hearing believe that the property at the date of the sale, was worth at least \$25,000. At the sale attempted in Philadelphia \$18,000 was fixed as the price at which it should be sold. There was due to defendant Marr at the sale about \$12,500. His bid was but \$3,850. The small amount was bid because there were no other bidders, and it was sought to save sheriff's commissions. The bid was, in effect, from the standpoint of defendant Marr, the amount of the judgments, as the corporation had no other assets. If the property was in fact worth \$25,000 at the date of the sale, it is entirely clear that neither defendant Marr or any one else connected with the corporation had any such idea of its value. It is not improbable that subsequent developments have given an enhanced idea of values in the retrospect. But, as already stated, I do not conceive it to be the duty of this court to disturb this sale, under the circumstances of this case, on the ground of inadequacy of price.

The bill is filed at this late date—seven years after the sale—by the heir of the brother of defendant Marr on reaching his majority. At the time the transactions here occurred complainant had a guardian who attended the stockholders' meetings referred to at which proceedings were threatened to enforce the Marr claim. While I am not inclined to deny relief upon the ground of laches, the evidence clearly shows that the guardian of complainant had ample notice to apprise him that the Marr claim would

probably be enforced by judgment. He testified: "I inferred that there would be a suit by the judge and a sale of the property."

I will advise a decree dismissing the bill.

(23 N. J. Eq. 686)

STEVENSON v. MARKLEY et al.

(Court of Chancery of New Jersey. March 7, 1907.)

1. EQUITY — PLEADINGS — ORDER ALLOWING AMENDMENT.

An amendment to a bill, intended only to strengthen matters alleged in the original bill, is not permissible under an order granting complainant leave to amend by inserting in the bill allegation excusing the delay in the bringing of the suit.

2. SAME—MOTION TO STRIKE—DISCRETION OF COURT.

Whether a court will strike out a bill on the allegation of laches is a matter of discretion, and the court will generally permit the proving of the facts excusing laches and determine whether such facts excuse.

3. GUARDIAN AND WARD—SUIT FOR ACCOUNTING—JURISDICTION.

A suit by the representative of a deceased ward against the representative of the deceased guardian for an accounting is not properly cognizable in the orphans' court, and is within the jurisdiction of a court of equity.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Guardian and Ward, §§ 477, 479.]

4. SAME — RELATIONS — TERMINATION—RUNNING OF LIMITATIONS.

A guardian receiving property of a ward becomes a trustee for the ward until a proper accounting is had, and the fact that the ward acquires the right to call for an accounting at a particular time does not fix such time as a period from which either the statute of limitations or equitable principles in analogy thereto apply.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Guardian and Ward, §§ 483, 491.]

5. LIMITATION OF ACTIONS—STATUTES—EQUITABLE SUIT FOR ACCOUNTING.

Gen. St. p. 5, gives a right of action for an account against a guardian, and page 1974, § 8, provides that an action of account shall be commenced within six years next after the cause of action shall have accrued. *Held*, that a suit in equity to compel a guardian to account is not barred by the statute. The fact that a court of law acquired jurisdiction by the statute did not apply to the jurisdiction of equity previously existing.

6. SAME.

A ward attaining her majority in 1883 died in 1885, before the guardian had rendered an account. The guardian died in 1905. In 1906 an administrator of the deceased ward was appointed, who, in the same year, sued the representative of the deceased guardian for an accounting. *Held*, that the suit was not barred by limitations, though the cause of action accrued on the ward's death, since limitations did not begin to run until the appointment of her representative.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Limitation of Actions, § 427.]

Suit by Richard G. Stevenson, administrator of Mary Markley, deceased, against Paul H. Markley and another, executors of Mary Josephine Markley, deceased. On motion to strike out, bill denied.

F. D. Weaver, for complainant. H. M. Cooper and H. A. Drake, for defendants.

GARRISON, V. C. (orally). This is a hearing upon a motion made by the defendants for leave to withdraw their answer to the original bill, and to move to strike out the bill for want of equity, and various parts of the bill for specific reasons stated.

Upon a hearing had on the 10th day of December, 1906, it appeared to the court that the face of the bill disclosed a cause of action so old that, in default of explanation, the court would be inclined to dismiss the same for laches if the defendants had so moved the court. The court, not finding among the reasons or objections of the defendants any one based upon laches, and the complainant moving for leave to amend by setting up facts explaining the laches, the latter motion was granted, and an order of the 10th of December, 1906, was entered. That order, in so far as it is now material, provided that the complainant "have leave to amend his bill by inserting therein such charges as he may be advised or able to do concerning the reasons for the delay in the bringing of his suit." And it was further therein ordered that all other proceedings should remain in statu quo. Thereafter the complainant filed amendments, which he has numbered 14a and 14b, and upon the amended bill the defendants have now moved, under rule 213, to strike out this bill and various parts thereof. I am inclined to the opinion that the amendment numbered 14a is not within the permission of the order of the 10th of December. It does not seem in any way to set forth, or could it be considered as giving, a reason for the delay. It apparently is some additional allegation concerning some of the previous matters alleged in the bill, and is evidently intended to strengthen the charges of the bill in these respects. That was not within the purview of the order made on the 10th of December, and the complainant, under that order, cannot claim the right to make this amendment. If he has the right, it must be asserted in a proceeding where that matter comes directly under consideration. I will therefore grant the motion to strike out the amendment numbered 14a.

The other general heads are that the bill does not show equity; that because the thing sued for is a sum of money due the representative of a deceased ward by the representative of a deceased guardian, and is therefore an action of account, it is claimed by the defendants that suit must be brought thereon within six years under the statute of limitations. It is also claimed that the complainant is in laches unexplained, and that there is therefore no equity in the bill. It is further claimed that by the amendment 14b the complainant sets out another cause of action than that previously pleaded, and an incongruous one with respect to the latter. I do not find that the complainant has changed his prayer in the least, nor that he prays any relief with respect to this matter as al-

leged in this paragraph. That matter seems to have been inserted wholly under the permission of the court as a reason or explanation of his delay in bringing suit upon the cause of action which is urged in the bill, and for which appropriate relief is prayed in the prayer thereof. With respect to the matter of the statute of limitations applying, I have examined this matter with great care, and have read most, if not all, of the authorities, and considered them very carefully. The matter is an open one in New Jersey, and is in grave doubt. I am rather inclined to think that our courts should follow the English and New York courts in holding that the relation of guardian and ward is a continuing trust, and that until the guardian settled with the ward or the ward's representatives it must be held to be a continuing, direct trust, which is not affected by the statute of limitations. This, of course, is in a case where the guardian has not denied the ward's right and has not taken a position of antagonism, from the time of which open expression of antagonism the statutes of limitations or imputations of laches are always held to run. Therefore I am not going to strike this bill out either for want of equity or because barred by the statute of limitations, or because the allegations of the amendment 14b are incongruous with the main cause of action set up in the original bill. The defendants have answered so much as was in the original bill, and their answer may stand, if they so desire, or they may make a totally new answer to this bill as amended.

I do not wish by this decision to be understood as determining that the matter in 14b which is permitted to stay in the bill as an amendment is a satisfactory answer to the charge of laches, or that the court may not, on final hearing, reach the conclusion that there was laches; but I am disinclined to absolutely deprive the complainant of his day in court upon the ground of laches, in the face of a charge in the bill that there was some sort of an agreement or understanding between him and the person whom he seeks to hold as trustee concerning the subject-matter of the trust, which, when disclosed in detail, may explain or excuse the delay. Whether a court will strike out a bill, or sustain a demurrer—which is the same thing—upon the allegation of laches, is, of course, a matter of discretion, and I do not think it would be discreet, legally speaking, to prevent this complainant from proving the facts, after which it will be entirely open to the court to determine whether such facts excuse or fail to excuse the long delay which has ensued in the asserting of his rights. I do not mean his rights as administrator, but his right as husband of the deceased wife to take all her personality and to have administration. He had this right from the date of her death in 1885, and did not actually take out letters until 1906. It may be that upon final

hearing the court will hold that his delay in this respect defeats his right. But, as just said, I think it more appropriate to consider and decide this upon final hearing, and after he has had opportunity to make proof of the excuses for delay that he offers. The above was the oral deliverance of the court at the time of disposing of the motion at the argument. Having been notified that an appeal has been taken by the defendants, I think it due the reviewing court that a more extended statement of facts and law be given with respect to the important question disposed of.

The essential facts are as follows: Mary Josephine Markley was the mother of Mary Markley, and was appointed her guardian by the orphans' court of Camden county about October 6, 1876, and, as such guardian, there was paid to her for the ward the sum of \$4,087.14. Mary Markley, the ward, came of age on the 18th day of January, 1883. She married Richard G. Stevenson on the 26th day of March, 1885. She died on the 25th day of December, 1885. There was no accounting between her and her guardian. Her mother, the guardian, died on the 26th day of February, 1905. Richard G. Stevenson, the husband of the deceased ward, was appointed her administrator on March 1, 1906. This suit is for an accounting, and was brought by Richard G. Stevenson, the administrator of the deceased ward, against the executors of the deceased guardian, some time in the summer of 1906.

It is the contention of the defendants that this suit is barred, either directly by the statute of limitations or by the application by a court of equity of principles in analogy to the said statute. It should first be observed that there are two periods to be considered and two different sets of parties, and that different principles are therefore applicable. First, there is the period between the coming of age of Mary Markley, the ward, on the 18th of January, 1883, and the time of her death on the 25th of December, 1885. During that period the parties concerned were the ward and the guardian. If the statute of limitations had begun to run then, the death of the ward would not toll the same. This is too well settled to require citation. After the last-named date, and up until the death of the mother, the guardian, on the 26th of February, 1905, there was no one in existence in whom was vested the rights of the deceased ward against her guardian. Such a person did not exist until the 1st of March, 1906, when an administrator was appointed for the estate of the deceased ward. At that time the guardian had also died, so that the parties had completely changed, and the parties were, as above stated, an administrator of a deceased ward on one side, and the executors of a deceased guardian upon the other. If the statute began to run at the death of the ward notwithstanding that no administrator was appointed, then this

suit is barred. There are certain well-settled principles of equity which it is only necessary to refer to briefly.

A court of equity undoubtedly has jurisdiction over the accounts of guardians under the general jurisdiction over trustees; a guardian being held to be a trustee in the fullest sense of the word. In *re Hannah Barry*, 61 N. J. Eq. 135, 47 Atl. 1052 (Emery, V. C., 1900); *Sleeman v. Wilson*, L. R. 13 Eq. 36; *Perry on Trusts*, vol. 1, p. 528, § 430; 16 Am. & Eng. Ency. of Law (2d Ed.) p. 75. It is true that this jurisdiction will not be exercised saving in exceptional cases, and ordinarily an accounting between guardian and ward should take place in the orphans' court; but I apprehend that the same rule with respect to the application or nonapplication of the statute would apply in the orphans' court as in this court. But the suit at bar is not one properly cognizable by the orphans' court, because it is not between a guardian and ward, or between a guardian and the representatives of a deceased ward, but is between the representatives of a deceased ward and of a deceased guardian.

The determination of the whole question depends, in my view, upon whether the relation between a guardian and ward is held to be a trust relation; that is, a direct, continuing, subsisting trust. If it is, then the authorities are clear that the statute of limitations does not apply. There can be no doubt, I think, that the relation between guardian and ward is a trust, and is a direct, subsisting, continuing trust. Some courts, however, hold that the trust terminates at the majority of the ward (15 Am. & Eng. Ency. of Law, p. 82, note 1), and others have even fixed the period of the termination of the trust with respect to a female ward at the date of her marriage (Id.). In some jurisdictions, therefore, it is held that when the ward comes of age, or marries, the trust relationship ceases, and the statute of limitations, or principles in analogy thereto, apply, and an action will not lie for an accounting after the period of limitation provided. Id. But other courts hold that the relation is one of trust, and is direct, subsisting, and continuing until there is an accounting (*Mathew v. Brise*, 14 Beav. 341; *Matter of Camp*, 126 N. Y. 377, 27 N. E. 799), although in a previous case in New York an opposite view had been distinctly taken and held in the case of *Bertine v. Varian*, 3 Edw. Ch. 343. This case was cited to the court in the *Camp* case, and was, of course, disregarded. See, also, *Pyatt v. Pyatt*, 46 N. J. Eq. 285, 18 Atl. 1048. The principle upon which these last-cited cases go is that where the guardian receives property belonging to the ward, he becomes a trustee for the ward with respect to such property, and remains such trustee, subject to all the incidents thereof, until a proper account is had between him and the ward, and that the fact that the ward acquires the right to call for an ac-

counting at a particular time, considered, of course, in connection with the concurrent right of the trustee or guardian to go into court of his own volition and account, does not fix such time as a period from which either a statute of limitations applies or equitable principles in analogy thereto are applicable.

There being no direct decision in this state upon this subject, we are free to adopt whatever view seems best. I think it best to assimilate this trust with all other like trusts, and to hold that so long as the guardian has the property of the ward—that is, so long as he has not accounted for it—he should be held as a trustee with a direct, subsisting, continuing trust, unaffected by statutes of limitations or principles in analogy thereto. I think the reasoning of the cases taking this view is more satisfactory than that of those which take an opposite view. I am also of opinion that the rule that I have laid down is the wiser one. It is certainly more equitable to each of the parties concerned. I see no reason why a guardian having property of the ward confided to his care should be treated in any different aspect than any other trustee to whom is confided the property of a *cestui que trust*. He has it in his power, when the ward comes of age, of ridding himself of the burden of the trust by taking the proper proceedings either in a probate court or in this court, or, of course, by a direct settlement with the late ward. I do not see that any good purpose is served by holding that the right which the ward has of calling the guardian to account should be construed as a strict legal right subject to the statute of limitations, and I do not think that it is within the spirit of such. Speaking generally, those actions which are within the spirit of the statute of limitations are such as lie with an actor; and, if he neglects or fails to take advantage of the legal procedure open to him for a fixed period, it is the policy of this legislation to end the right. But, where trusts are concerned, the situation is radically different. There there is no one who must be the exclusive actor. Either party may, at any proper time, apply to the court and obtain full relief. Under such circumstances I can see no reason why a trustee should have protection after a stated period because the other party has not proceeded; it having been all the time within the power of the trustee to have himself proceeded had he seen fit. Succinctly stated, the argument of the defendants is that the statute of account of this state (Gen. St. p. 5) gives the right of action for an account against a guardian, and that the statute of limitations (Gen. St. p. 1974, § 8) provides, *inter alia*, that all actions of account shall be commenced within six years next after the cause of action shall have accrued. Therefore they argue that we have a case in which there is a concurrent remedy at law and in equity, and the legal remedy is barred by the statute, whereupon a court of

equity will hold that an action in equity is likewise barred. It is unnecessary to cite any of the numerous cases which affirm this doctrine; but the doctrine is not applicable to the case in hand. The doctrine just contended for applies where the courts of law originally had jurisdiction, and courts of equity subsequently obtained or were held to have concurrent jurisdiction. There, as has been just stated, a statute of limitations which barred the right of action at law equally barred it in equity. But, where the court of law did not originally have jurisdiction, the fact that it subsequently acquired it, and the action in it was barred by the statute, does not result in finding that the suit in the court of equity is likewise barred.

In the case of *Hedges v. Norris*, 32 N. J. Eq. 192, it was held that the statute of limitations is not a bar to a suit in equity for the recovery of a legacy payable out of the personal estate only. In that case the Chancellor held that an executor was a trustee with respect to the sum of money due the legatee, and that, while that trust subsisted, the statute of limitations did not run in favor of the trustee. The trustee insisted that the Legislature, by the act of March 11, 1774, had provided for the recovery of legacies by actions at law, and that thereafter courts of equity and courts of law had concurrent jurisdiction, and what would bar the action in one would have a similar effect in the other. To this the Chancellor replied that equity had jurisdiction over legacies before the courts of law assumed it, and he pointed out that, where a court of equity has jurisdiction and a court of law subsequently acquires concurrent jurisdiction, this will not serve to deprive the court of equity of its jurisdiction, nor to bind it by limitations which affect the action at law. With respect to the matter of account at law, it will be found that the action only lay, so far as guardians are concerned, against guardians in *socage*. *Bouvier's Law Dic.*, Rawle's Ed., vol. 1, p. 64; *Ency. of Pl. & Fr.* vol. 1, p. 84. An interesting and instructive history of guardianship at common law will be found in *Foley v. Mut. L. Ins. Co.*, 138 N. Y. 333, 34 N. E. 211, 20 L. R. A. 620, 34 Am. St. Rep. 456. In the case of *Green v. Johnson*, 3 Gill & J. (Md.) 389, it is said that "this action of account for rents and profits maintained by the heir after he had attained the age of 14 against the guardian in *socage* was the only one, other than an action on the bond, that could be brought against a guardian, as guardian, in a court of law." Ordinarily proceedings to require guardians to account must be brought in a probate court (*In re Hannah Barry*, *supra*), or in a court of equity, if there was anything exceptional in the case requiring the interposition of a court of equity. It therefore appears that at a time when courts of equity, under their peculiar jurisdiction respecting trusts, undoubtedly had jurisdiction over

the accounts of guardians, the common-law courts only had a limited jurisdiction respecting guardians in socage. The effect, therefore, of the act of our Legislature passed in 1794 vesting jurisdiction in the common-law courts of actions of account against guardians generally, was not to divest the court of equity of its jurisdiction with respect thereto, and any limitations placed upon such common-law action do not, directly or by analogy, bind the court of equity. Determining, then, that the relationship between a guardian and ward is a direct, subsisting, continuing trust, the conclusion is reached that, as between this ward and her mother down to the time of the death of the ward, there was no running of the statute, and no application of principles of limitation analogous thereto.

The next question to be considered, therefore, is whether the statute began to run at the date of the death of the ward. It will be observed that the second period previously spoken of by me is now under consideration. I am of opinion that if, in this state, a cause of action arising upon the death of a person, and not until his death, is barred if the statutory period begins to run at the date of his death, then this action or suit is barred; but I do not find that this is the law. In fact, the decisions are to the contrary. The authorities hold that, where the cause of action did not exist during the life of the party and came into existence subsequent to the party's death, the statute does not begin to run until the appointment of a representative. *Dekay v. Darrah* (Sup. Ct. 1834) 14 N. J. Law, 288, 296; 19 Am. & Eng. Ency. of Law, 219, note 3, p. 220. The time between the death of the party and qualification of personal representative is not counted. *Id.*, p. 220, note 3; 2 Eng. Rul. Cas. p. 133, note; *Murray v. East India Co.*, 5 B. & Ald. 204 (1821); *Pratt v. Swaine*, 8 B. & C. 285, 6 L. J. K. B. 6 (1828); *Atkinson v. Bradford Soc.*, 25 L. J. Q. B. 360 (1890); *Rhodes v. Smethurst*, 6 M. & W. 351, 16 Eng. Rul. Cas. 146 (1840); *Pinckney v. Burrage*, 31 N. J. L. 21, 24.

My conclusions, therefore, are that as between guardian and ward there is a direct, continuing, subsisting trust until the guardian accounts; that the statute or implication of limitations does not apply thereto; that during the lifetime of this ward, after her coming of age and until her death, the statute had not begun to run; that at her death it may be proper to hold that the relation between the living guardian and the person entitled to call her to account was not a direct, subsisting, continuing trust outside the statute, but was a trust by implication, and therefore within the purview of limitations. But the limitation does not begin to run until there is a person entitled as representative of the deceased ward to call the guardian to account, and such a person in this case did not come into being until the ap-

pointment of the administrator of the deceased ward's estate in March of 1906. As this suit was brought almost immediately thereafter, it is, of course, not barred by the running of the statutory time against the administrator.

The motion to strike out the bill therefore fails.

(73 N. J. E. 429)

LIPP v. FIELDER et al.

(Court of Errors and Appeals of New Jersey. Feb. 2, 1907.)

1. WITNESSES—COMPETENCY—PERSON SUED IN REPRESENTATIVE CAPACITY.

Where a plaintiff sued in his lifetime to compel specific performance of an alleged verbal promise by his wife, that on the death of either, certain land which complainant had purchased in her name should become the land of the survivor, the wife's executor being a necessary party in his representative capacity, both because he had a power of sale under the wife's will, and because he might need the proceeds of a sale of the property to pay debts, the husband was not a competent witness, under Pub. Laws 1900, p. 362, excluding a party as a witness, where the opposite party is sued in a representative capacity.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, §§ 651, 652.]

2. TRUSTS—EVIDENCE TO ESTABLISH.

Complainant purchased certain land with his own money, but caused it to be conveyed to his wife to prevent his children by a former marriage from obtaining the same at his death. On the death of the wife he sued to establish a trust in the same, that if one died the other would get the property. *Held*, that the evidence was insufficient to rebut the presumption that the wife took the property by irrevocable gift.

3. WILLS—CONTRACT TO WILL—EVIDENCE.

Evidence *held* insufficient to establish a contract by which a wife agreed to make an irrevocable will in her husband's favor.

Vroom, J., dissenting.

Appeal from Court of Chancery.

Suit by William C. Lipp against Benjamin H. Fielder, Jr., as executor and others, for specific performance of a verbal promise to convey land. From a decree denying such relief complainant appeals. Affirmed on opinion of the chancellor.

The opinion of STEVENS, V. C., is as follows:

"This is a suit which was begun by William C. Lipp in his lifetime for the purpose of compelling the specific performance of an alleged verbal promise made to him by his deceased wife that at the death of either of them certain land, which he had purchased in her name, should become the land of the survivor. He has since died, but not before he gave his testimony in reference to the alleged agreement. The defendants to the bill are Benjamin H. Fielder, Jr., executor of the wife, and the Lakewood Library Association, her devisee. I think that without the testimony of the deceased complainant, the allegations of the bill, either in its original or amended form, are not satisfactorily proved. The first question is therefore whether

the complainant is a competent witness under that provision of the evidence act, which excludes a party from being sworn as a witness, where the opposite party is sued in a representative capacity. The complainant testified shortly before the new evidence act took effect (Laws 1900, P. L. p. 362), but that does not make any difference in this case. Under *Kempton v. Bartine*, 59 N. J. Eq. 149, 44 Atl. 461, Id., 60 N. J. Eq. 411, 45 Atl. 966, and *Wyckoff v. Norton*, 60 N. J. Eq. 478, 46 Atl. 614, the executor is a necessary party. In any view, he is a proper party. He has in fact been made a party in his representative capacity, both because he has a power of sale under the will, and because, as is said by Grey, V. C., in the case first above cited, he may, as executor, need the proceeds of sale to pay the testatrix's debts. Inasmuch as the executor and devisee are really as well as formally on the same side, are equally interested in resisting the complainant's claim, and will both be injuriously affected by the establishment of that claim, it seems to me that *Hodge v. Coriell*, 44 N. J. Law, 456, applies. The record is conclusive, and prevents the complainant from testifying against either defendant, because that record shows that on the defendant side there is a party being sued in a representative capacity. This renders it unnecessary for me to consider whether a devisee is a party sued in a representative capacity, where the suit is based upon the contract of the ancestor, which, it is alleged, binds the devisee or affects the lands devised to him—a point upon which there is a conflict of authority. Without this testimony, I think that the *Duvalé Case*, 54 N. J. Eq. 581, 35 Atl. 750, and 56 N. J. Eq. 376, 39 Atl. 687, 40 Atl. 440, is not applicable.

"The complainant, Lipp, was a farmer. On April 14, 1869, the Bricksburg Land Company, for the consideration of \$1,080, agreed to convey to him a tract of land near Lakewood, containing 36 acres. In February, 1871, the company, instead of conveying it to him, conveyed it to his wife, Joanna. They had been married in May, 1866, and, on August 23, 1868, Joanna had executed a will by which she gave all the property then possessed by her, or of which she might thereafter become possessed, to her husband. The evidence indicates that her husband had made a similar disposition in her favor at the same time. In point of fact neither of them at that time possessed property of any considerable value, except a mortgage which the wife held, and from which she appears to have realized \$500. The complainant's insistence is that at the time of the conveyance of the tract in controversy to his wife, it was verbally agreed between them that the property should be his if he survived her. Outside of his own evidence, which must be disregarded, the witness chiefly relied upon is Abraham Dally, a Brooklyn lawyer. He says that, in a conversation had between

himself and Mr. and Mrs. Lipp at the dinner table, 16 or 17 years before, he testified: 'It was stated that Mr. Lipp had purchased that property, taking the title in the name of his wife, so that if anything should happen to him, certain relatives whom he had in California would not come on and disturb her; that an agreement had been made between them that she, on her decease, was to leave a will giving the property to him, so that he would have a home if he outlived her.' He says, further, that the question came up whether under Mrs. Lipp's will, as then made, the property subsequently acquired would pass, and he said 'that there would be no necessity for drawing an additional will as long as that will was made to cover any subsequent purchased property.' He says distinctly, on cross-examination, that the agreement referred to preceded, as he understood, the making of the wills. These wills, as I have said, were made nearly three years before the deed was actually delivered. The statement was the complainant's statement to him, and not his wife's, although made in her presence. It was not made in a professional interview, but casually, at the dinner table, 16 or 17 years before the witness testified. Assuming, however, it to be a perfectly correct version of what was said, and assuming moreover that, because not contradicted by the wife, at the time, she must be deemed to have admitted its truth, it neither shows a binding promise to dispose of the land by will, nor does it show a resulting trust.

"It is said in *Duvalé v. Duvalé*, supra, that, when lands are purchased by one person who pays the purchase price, and they are conveyed to another person who is a stranger, a trust in the land is implied, and results in favor of him who has paid the consideration. But that where a husband purchases and pays for lands, and takes the title in the name of his wife, a presumption arises that the husband has caused the conveyance to be made by way of settlement upon her, and that this presumption will only be overcome by clear proof to the contrary. As I have said, Mr. Dally testifies that he understood that the agreement preceded the making of the wills. Now, as Vice Chancellor Reed said, in *Duvalé v. Duvalé*, 54 N. J. Eq. 588, 35 Atl. 750, a verbal agreement to exchange wills would not, so far as land was concerned, be binding, because of the provisions of the statute of frauds. The making of the wills themselves would not be part performance. Either party could revoke at pleasure, unless restrained by binding contract, and such contract, if it had reference to land, must have been in writing. Up to the time of the conveyance, therefore, neither party was bound. Then came the conveyance. Now this conveyance standing by itself, even assuming, as the evidence indicates, that it was paid for by the husband's money, would, under the operation

of the rule above stated, import a gift to or settlement upon the wife. This being its import, how, in the absence of any agreement then made, could it be regarded as proof that the wife thereupon became bound by contract to devise the land to her husband—that her will, up to that time revocable, now, because her husband made her a gift, became irrevocable. Such an insistent seems to me to be little short of absurd. But how does the matter stand upon the notion of a resulting trust? The presumption is in the case of a wife against a resulting trust. It must be shown clearly and satisfactorily that a resulting trust was intended. Here we have no proof of any agreement relating to the matter, or even of any admission of facts from which such agreement could be inferred. A verbal agreement relating to a will that she had made three years before, having no reference to that particular land, is certainly not proof of such agreement. The transactions have no inherent relation to each other; they are severed in point of time, and they are not connected by evidence. There is no express proof that it was agreed that Mrs. Lipp was to hold the land as trustee, and it cannot be reasonably inferred that she then irrevocably bound herself to do so, because three years before she had made a revocable will. Mrs. Lipp's title was evidenced by a regular deed, made at her husband's instance, and duly recorded. It declared in terms that she was to hold for her own use. Public policy requires that such a conveyance should have its proper effect, unless there is convincing proof to the contrary.

"The other evidence produced by complainant amounts to little more than the admission by the wife of that which was the undoubted fact, viz., that she had made a will in her husband's favor, and that under this will he would take at her death. Several of complainant's witnesses testify that the reason both Mr. and Mrs. Lipp gave for putting the title in her name was that his children by his first wife would be thereby prevented from getting the property. That he did not wish to provide for them, appears from the fact that in January, 1899, he, by his last will, left all his property to his niece, the present complainant. The result of the evidence, outside of the husband's, seems to be this: That he wanted to secure his wife in the possession of the property in his lifetime by a decisive act which his children by his first wife could not nullify, and that, having at that time entire confidence in her, he was willing to trust her sense of right to leave him the property by will if she died first. It was not until 20 years afterwards that they quarreled.

"Mrs. Dally testifies that Mrs. Lipp told her that Mr. Lipp had bought the property with his money, and put it in her name so that she would be protected; but that she had made a will and left it all to him. Mr.

Marston says he heard them say that if one died the other would get the property. Clara Lipp, the present complainant, Mr. Lipp's devisee, goes further. She says that on one occasion Mrs. Lipp said that her husband had put the deed in her name, so that if anything should happen his children would not cause trouble; 'that they had an agreement that whoever should die first, the other should take the property.' In her conversation with this witness it would appear that Mrs. Lipp admitted an agreement; but what agreement? If the reference is to the agreement to make mutual wills, it is disposed of by what has already been said. If to some other agreement, when and where and under what circumstances was it made? Was it supported by a consideration? Was it in writing, or was it merely verbal? Without information on these important points, it is impossible to say whether or not an obligation arose, or a trust resulted. This witness, whose interest in the result is apparent, does not give us any information about them. A statement so indefinite can hardly avail to overcome the evidence of the deed, and be deemed satisfactory proof of the allegations of the bill."

R. TenBroeck Stout, for appellant. Aaron E. Johnston, for respondents.

PER CURIAM. The decree in this case is affirmed for the reasons stated in the opinion filed in the Court of Chancery by Vice Chancellor STEVENS.

VROOM, J., dissents.

(71 N. J. E. 770)

SEVEN MILE BEACH CO. v. DOLLEY
et al.

(Court of Errors and Appeals of New Jersey,
March 7, 1907.)

1. SPECIFIC PERFORMANCE—CONTRACT TO CONVEY REAL ESTATE—RIGHT OF PURCHASER—PERFORMANCE BY PURCHASER.

Where a contract called for the conveyance of certain land to a corporation on its establishment of a school at a certain place, and the corporation became defunct, and was declared to have no existence in law, and it abandoned any intention of carrying on a school, it could not have specific performance on an offer by the incorporators to form another corporation, and perform the requirements of the contract.

2. SAME—RELIEF TO DEFENDANT—PAYMENT OF TAXES.

Where specific performance is decreed in favor of a purchaser of land, he is bound to pay the taxes on the property from the time that he was entitled to a conveyance.

Appeal from Court of Chancery.

Suit by the Seven Mile Beach Company against Charles S. Dolley and others. Appeal by defendants from a portion of the decree. Affirmed on the opinion of Vice Chancellor Bergen in the court below.

See 65 Atl. 991.

Following is the opinion of Bergen, V. C., of the court below;

"This contract is very badly drawn, and it requires the reading of the whole contract to enable you to apprehend what the parties intended by it. As I interpret the contract, there appears to be two branches to it. Along the lines of one a conveyance was to be made to certain individuals provided they would buy and conduct a summer school at this place called Avalon. Connected with that, however, was apparently a vague theory that it was to be stationary, and an association was to be organized, and to that association another tract of land was to be conveyed, provided they erected buildings and continued to use it for the purposes of a summer school. 'The said ground to only be used for the purposes of a summer school of said association.' I do not interpret this contract as meaning that it is an absolute requirement that the individual defendants shall erect any buildings. Now, the stipulation is they are to erect and pay for within three years, from the date of this agreement, such buildings, etc., as the association may require for its purposes, and the further stipulation in this contract is that there shall be an association incorporated; but it limits the effect of this stipulation by the words, 'but no definite amount of building is specified.' Practically that destroys the agreement to build, because, if there is no definite amount of building specified, the parties of the second part may build a building that would cost only a nominal amount, and they would say and insist then that they had complied with this clause of this contract. However, at the close of this agreement we find the words, summing it all up, that it is the intention of this agreement that the said parties of the second part shall conduct a summer school, bona fide, in accordance with the prospectus, a map of which is hereto attached, marked Exhibit B, for a period of three years, and should in return receive from the Seven Mile Beach Company the land hereinbefore mentioned in the manner herein described.'

"My conclusion, therefore, is that so far as the individual defendants here are concerned, they are entitled to have the land conveyed to them; on the other hand, the association is not entitled to specific performance, because they have practically abandoned the enterprise. If the association had maintained its incorporation up to this date, and by that act had indicated that they had any intention of carrying out the contract which was to take this land and put on it buildings, lecture halls, etc., and continue the work of a summer school, the situation would be different. But as I look at it now, there is no one to convey the property to, the corporation is absolutely defunct, it has been declared to have no existence in law, there is no one to whom the property can be conveyed, and, coupled with the fact, as it appears here, that they have substantially abandoned any intention of carrying out the stipulation to conduct this summer school, or to use this land only for the

purposes of a summer school, I do not consider that they are in a position to ask specific performance. I cannot accept the argument that because they have done all this, they can now come in and say: 'Well, we are sorry we neglected to take advantage of our opportunities. We will organize another corporation, and thereby get into position so that we can go on and have this property conveyed to us.' That cannot be done. I will advise a decree of specific performance as to the one block of lots, but as to the other, there shall be no specific performance. I will not allow costs to either party. Of course, you will understand that where there is a contract like this, decreed to be specifically performed, the parties stand in this relation—that the vendor holds the title in trust for the vendee, and he is only entitled, or only has a vendor's lien for the purchase price. Substantially the land belongs to the party to whom it should have been conveyed. I am very strongly of the opinion that you took the property just as it was in 1893, upon the theory that the court has determined that the Seven Mile Beach Company held the title in trust for you, and all that they were entitled to was the vendor's lien for the purchase price, whatever that may have been. Now, of course, they have not any lien, because the purchase price has been satisfied. If it was money, then they would have a lien for their money, and you would have had to pay the taxes if the property had been conveyed. I think the defendants are bound to pay the taxes on the property from the time they were entitled to a conveyance, on the theory that it is held in trust for them, as a trustee keeps down interest and taxes and like charges. A trustee does it for his own sake. If he collects any rents he is entitled to, he can apply the rent to the payment of such indebtedness, and he is entitled to his money, with interest on it."

Norman Grey, for appellants. Lewis Starr and Clarence L. Cole, for respondent.

PER CURIAM. So much of the decree in this cause as is brought up for review by the appeal taken by the defendants below is affirmed for the reasons stated in the opinion filed by Bergen, Vice Chancellor, in the court below.

(72 N. J. Eq. 791)

VOORHEES v. NIXON et al.

(Court of Chancery of New Jersey. March 15, 1907.)

1. CORPORATIONS—OFFICERS—DEALINGS WITH CORPORATION.

In a suit by the receiver of a corporation to set aside a mortgage given by the corporation in part payment for land sold to it by the wife of the president, it appeared that the wife purchased the land for \$450 and sold it to the corporation for \$3,000; that the president was the moving spirit in the organization of the corporation, and that but three of the five directors were present at a meeting at which the resolu-

tion for the purchase was passed, and that at such meeting the wife was elected secretary; that no notice of the first meeting of the directors was given and no waiver of notice executed. It was shown that, when an application was made for the appointment of a receiver of the corporation, the wife pledged the mortgage to raise money to contest the receivership, and that thereafter she sold it and applied part of the proceeds to the husband's uses. *Held*, that the facts warranted an abatement of the mortgage, except as to the amount which the wife had paid for the land.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, §§ 1401-1415.]

2. SAME—ACTIONS—LACHES.

In a suit by the receiver of a corporation to set aside a mortgage given by it to the wife of an officer, it appearing that practically all of the stockholders had been ignorant of the facts on which the right to relief was based, and that they had been deceived by the officer in question, no laches could be imputed.

3. MORTGAGES—ASSIGNMENT—RIGHTS OF ASSIGNEES.

The assignee of a mortgage securing a bond takes it subject to all defenses to the bond, whether with or without notice, as the mortgage is a mere incident of the debt.

4. CORPORATIONS — MORTGAGES — FORECLOSURE—DEFENSES.

Where a corporation executed a mortgage to the wife of the president in part payment for land sold to the corporation by her, and thereafter the corporation was restrained from transferring any of its property rights, which was known to one who purchased the mortgage, and without any action of the board of directors authorizing it, the president and his wife, as secretary of the corporation, executed in the name of the corporation, at the instance of the purchaser, a declaration against offsets, such instrument was no bar to the assertion by the corporation's receiver of defenses against the mortgage, on the ground that the execution thereof arose from a violation of a fiduciary relation.

Action by Harrison H. Voorhees, as receiver of the Ocean Crest Hotel Company against Horace F. Nixon and others, attacking the validity of a mortgage given by the corporation. Decree advised for complainant.

The bill is filed by the receiver of the Ocean Crest Hotel Company, an insolvent corporation, to test the validity of a mortgage which was given by that corporation in part payment for land sold to the corporation by defendant Mrs. Lille M. Malott. Horace F. Nixon is made a defendant as the present holder of the mortgage. The land in question was conveyed to the corporation by Mrs. Malott, pursuant to an agreement for that purpose made at the organization meeting of the corporation for the price of \$3,000, of which \$1,000 was paid in stock of the corporation at par, and \$2,000 by the execution of the mortgage now in question on the land conveyed. Mrs. Malott was secretary of the corporation, and H. J. Malott, her husband, was president and a director. The theory of complainant's suit is that the fiduciary relations which existed between the Malotts and the corporation rendered the contract violative of the established principles controlling trusteeships,

and that the contract should be set aside to the extent of charging against the mortgage the difference between the amount which Mrs. Malott paid for the property and the amount for which she sold the property to the corporation.

Lewis Starr, for receiver. James B. Nixon, for defendants.

LEAMING, V. C. (after stating the facts). It must be regarded as the settled policy of the law of this state that express contracts between a corporation and one of its directors are voidable at the instance of the corporation. When the transaction is one in which there arises by operation of law obligations coextensive with the contract, as would be the case in the loan of money by a director to his corporation, it is manifest that no reasonable objection can be found to the transaction; but, where the right must find its support in the convention, it will not be sustained as a right. The underlying reason for the rule is that it is the duty of a director to represent the interests of his corporation, and that duty cannot be impartially performed when he contracts with it in his own behalf. I understand this to be the rule as defined by the Court of Errors and Appeals in *Stewart v. Lehigh Valley R. R. Co.*, 38 N. J. Law, 505, 522. There are cases which hold that, where the transaction is fair and open, the contract may be supported; but such cases, when applied to contracts between a director and his corporation, are clearly in conflict with the principles of the case above cited. When the contract has been executed and the parties cannot be restored to their original position, I take it to be the duty of a court of equity to decree such relief as will place the parties as nearly as possible in the position where they stood at the time the voidable contract was made.

The contract of sale in this case, however, was made between the corporation and Mrs. Malott, who was not a director, but was the wife of a director. I entertain the view that the policy which forbids a contract between a corporation and its director necessarily includes a director's wife. A trustee, or an agent to sell lands, could not properly be permitted to make sale of the trust property to his wife. Irrespective of the husband's interest in his wife's property, present or prospective, his interests in her welfare would, in such cases, necessarily interfere with an impartial exercise of his duties to his trust. A contract made by a trustee to purchase lands owned by his wife would, in like manner, operate as a strain upon his duties to his trusteeship. See *Reed v. Aubrey*, 17 S. E. 1022, 91 Ga. 435, 44 Am. St. Rep. 49, and cases there collected. If, therefore, a contract between a corporation and its director is to be deemed voidable, a like contract between a corporation and the

wife of a director should stand upon the same plane. I entertain the view that the contract of sale from Mrs. Malott to the corporation was, on these grounds, voidable at the option of the corporation.

I reach this conclusion with perhaps greater freedom than I should otherwise exercise, by reason of the fact that other considerations in this case lead me to the same result. October 7, 1905, Mrs. Malott contracted with a land company for the purchase of the two lots which were afterwards sold by her to complainant corporation. By her contract of purchase she took the lots at a valuation of \$450 per lot, but a clause in the agreement made the entire purchase price \$450 in case she built on the property purchased, pursuant to the agreement by September 1, 1906. The \$450 payment was completed by her October 25, 1905. Complainant corporation was formed in December, 1905, for the purpose of acquiring these lots and erecting thereon a hotel. In the formation of the corporation Mr. Malott was the moving spirit. He associated with him four incorporators, and filed the certificate of incorporation with the Secretary of State December 13, 1905. Of the \$1,000 capital stock with which the company was to commence business Mr. Malott subscribed for \$500. He prepared minutes for the incorporators' organization meeting and for the first directors' meeting, in advance of the meetings, and submitted them to his co-incorporators in Philadelphia. The following day, December 21, 1905, three of the five incorporators met in New Jersey and adopted these minutes as already prepared. These minutes of the organization meeting included the adoption of a set of by-laws, the election of the five incorporators as directors, and the passage of a resolution for the purchase of the lots in question for \$3,000, payable as already stated. The minutes of the first directors' meeting, prepared in advance, were also adopted. These minutes included the election of Mr. Malott as president of the board and Mrs. Malott as secretary, and also the approval of the resolution for the purchase of the lots from Mrs. Malott. While the minutes recite that the five directors were present, only three were in fact present. No notice of this first meeting of the board of directors was given, and no waiver of notice was signed. From the testimony it is apparent that Mr. Malott was the dominating factor throughout. I am entirely satisfied that no proceedings touching the purchase of these lots can be properly said to have been a genuine exercise of a discretion upon the part of a board of directors of the corporation. The proceedings were conceived and carried into execution by Mr. Malott with a free hand, and do not, in my opinion, in any proper sense represent the deliberative exercise of an intelligent or independent judgment of a board of directors. Whether the members of the board,

other than Mr. Malott, knew that the lots for which they were paying \$3,000 had cost but \$450 does not appear; but one member of the board testified that the matter was not mentioned. All this may be unimportant if it be assumed as a fact that Mrs. Malott was dealing with the corporation as an independent principal touching her own property, and that, as the wife of a director, she was privileged to do so; but I am not prepared to find as a fact that, as between Mr. and Mrs. Malott, this property was purchased by her from the land company in her own interest. When she made the contract of purchase of these lots and agreed to pay \$450 for them and to erect a building upon them costing not less than \$2,000, her sole resources were \$508.03, which she had in a bank. When an application was made for the appointment of a receiver of complainant corporation, she pledged the mortgage now in question to raise \$300 to enable Mr. Malott to contest the receivership. Later she sold the mortgage and applied part of the proceeds of sale to Mr. Malott's uses. I incline to the view that, as between them, the contract of purchase of these lots was probably in his interest as much as in hers, and that she cannot properly be treated as having been an independent owner of the lots at the time of the sale to complainant corporation. I find it impossible to view the transaction other than as one essentially between Mr. Malott and his corporation, and as one in which no independent judgment of a board of directors had been exercised.

It is urged that the corporation has not promptly asserted its rights to avoid the contract. The testimony discloses that much, if not all, of the capital which came into the corporation by the sale of stock to new stockholders after the organization meeting was procured through misrepresentations of fact by Mr. and Mrs. Malott touching this very transaction. These new stockholders have testified that both Mr. and Mrs. Malott represented to them that Mrs. Malott had sold five, instead of two, lots to the corporation, and that they remained under that belief until the contrary was disclosed by a search of title made after the insolvency of the corporation. The bill in this case was originally filed under the claim that Mrs. Malott had in fact contracted to sell five, instead of two, lots, and had failed to convey the remaining three. Both Mr. and Mrs. Malott deny having made these representations; but the evidence is strongly against them as to that fact. Under these circumstances it is manifest that no laches can be imputed, for practically all of the stockholders who were entitled to relief were ignorant of the facts.

The contract of sale having been subsequently executed by a conveyance to the corporation and a hotel having been built on the property, the parties cannot now be placed in their original positions. It becomes necessary, therefore, to restore to Mrs. Malott

what she is rightfully entitled to. She paid for the contract of purchase which she sold to the company \$450. It is claimed that, when she sold it to the company, it had greatly enhanced in value by reason of certain developments in the land company enterprise. The claim that it increased in value from \$450 to \$3,000 in less than three months cannot be seriously entertained. It may have increased in value in some degree; but I cannot conclude that its enhancement in value during that time was of such substantial amount that Mrs. Malott can at this time, under the circumstances of this case, become equitably entitled to more than the amount which the contract cost her, with interest on that amount.

It remains to be considered whether defendant Nixon, as present owner of the mortgage, enjoys rights superior to those which would be extended to Mrs. Malott as owner of the mortgage. The mortgage was assigned to defendant Nixon as security for a fee of \$300 for defending the application for a receiver of complainant corporation. Later, and after Mr. Nixon had been informed that defenses existed to this mortgage, he purchased it absolutely at a valuation of 50 per cent. of its face value, paying for it \$700 in addition to the \$300 owing to him as a fee. Even as an innocent purchaser of a negotiable instrument, he could not, under these circumstances, claim protection beyond the \$300 originally loaned. But the assignee of a mortgage securing a bond takes it subject to all defenses to the bond, whether with or without notice. "The mortgage is a mere incident of the debt which it is intended to secure, and a defense to the debt is a defense to the mortgage." *Magie v. Reynolds*, 51 N. J. Eq. 113, 117, 26 Atl. 150. Before making the loan of \$300 on the mortgage, defendant Nixon procured a declaration against offsets executed in the name of complainant corporation, and this is urged as an estoppel against complainant. This declaration against offsets was executed by Mr. Malott as president and Mrs. Malott as secretary of the corporation without any action of the board of directors authorizing it, and at a time when the corporation was under restraint, by order of this court, from transferring any of its property rights, and Mr. Nixon at that time knew of that restraint. It is clear that this instrument cannot be treated as a bar to the assertion of any defenses which complainant corporation at that time had against the mortgage.

The receiver of the corporation urges that the entire abatement from the contract price should be charged against the mortgage. I cannot accede to that view. I think the \$450 and interest, which is to be restored, should be allowed to stand as due on the mortgage, and that the decree should adjudge that amount as due on the mortgage, and no more. I will so advise.

STEELMAN v. WHEATON.

(Court of Chancery of New Jersey. March 23, 1907.)

1. EQUITY—PLEADING—MOTION TO STRIKE OUT BILL OF COMPLAINT—SUFFICIENCY.

Where the pertinent fact alleged in a bill of complaint as ground for relief raises a doubt as to complainant's right thereto, a general specification of want of equity in a motion to strike from the files the bill of complaint is sufficient.

2. WILLS—ANNUITIES—NATURE AND CREATION.

Where an executor was to invest a sufficient sum to produce \$1,200 annually, which was to be paid to the annuitant during her natural life, "in payments quarterly of three hundred dollars each," such bequest is an annuity.

3. EXECUTORS AND ADMINISTRATORS—PAYMENT OF CLAIMS—PRIORITIES—PAYMENT BEFORE ALLOWANCE.

Where an administrator pendente lite pays a legacy to a person entitled to it, which the character of his appointment does not authorize him to do, he will nevertheless be allowed such payment in his accounting, if the estate was able and liable to pay after all prior charges were provided for.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 22, Executors and Administrators, § 2065.]

Bill by Daniel Steelman, executor of Phillip M. Wheaton, against Arabella Wheaton. Defendant's motion to strike out bill of complainant allowed.

Robert H. McCarter and Herbert A. Drake, for complainant, May Steelman. Gilbert Collins, for defendant.

BERGEN, V. C. The bill in this case seeks an injunction restraining the defendant from prosecuting her action at law for the recovery of the accrued portion of a bequest which appears in the last will and testament of her husband, in the following words: "I hereby instruct, authorize and empower my executor hereinafter named, as soon as it is convenient after my decease, to invest a sufficient sum or sums of money of my estate, with good and sufficient security, approved by the orphans' court of the county in which this will is probated, which will bear twelve hundred (\$1200.00) dollars interest annually; and this sum of twelve hundred (\$1200.00) dollars I give and bequeath to my wife Arabella Wheaton, during her natural life, and if she again does not marry; which sum of twelve hundred (\$1200.00) dollars, is to be paid annually to my said wife, by my executor, in payments quarterly of three hundred (\$300.00) dollars each, and upon her decease or upon her again marrying, or upon my decease, if I should survive my said wife, I give and bequeath the sum or sums of money which my executor is authorized to invest for the use of my wife, to my daughter, May Steelman, if she be living." After the death of the testator this defendant filed a caveat against the probate of the will, and in proceedings had thereon in the orphans' court the will was admitted to probate. From this decree she appealed to the Prerogative Court and to the Court of Errors and Appeals; the result in each

of the appellate courts being an affirmation of the decree of the orphans' court. During the pendency of the litigation an administrator pendente lite was appointed by the orphans' court, and under an order made by that court he paid to the defendant her legacy or annuity of \$1,200 from the date of her husband's death. The whole amount paid by him up to the time the will was established amounted to \$4,600. Since then three quarterly payments of \$300 each have accrued, to recover which the action at law now sought to be enjoined was brought.

The complainant alleges that no part of the \$1,200 was payable to the defendant until the executor had qualified and invested an amount sufficient to produce it, and that, as the delay in making the investment was caused by the litigation instituted by the defendant, she is not entitled to the payments made by the administrator, and that she is not now entitled to further payments until he has recouped out of the income due and to become due a sum sufficient to repay to the estate the sum of \$4,600 improperly obtained by her, and that in no event was she entitled to have her income run from the date of the testator's death. The residuary legatee has notified them that she will contest any further payments until the moneys, which she claims were improperly advanced to the defendant, have been recouped from such accruing income.

The defendant now moves to strike from the files the bill of complaint, alleging as a reason therefor a want of equity. Whether this motion should be allowed depends upon the interpretation to be given the bequeathing clause. The defendant insists that a proper construction of the will, as set up in the bill, does not warrant the granting of an injunctive order, and therefore the bill should be dismissed; this motion being, under our practice, a substitute for a demurrer. The complainant resists the motion on several grounds; the first being that on a motion of this character the notice should be as specific as is required in case of a demurrer, and that a notice to strike out, for want of equity, a bill filed by an executor for affirmative relief dependent upon the construction of the will under which he is acting, does not satisfy rule 209, which calls upon every demurrant to distinctly specify the grounds of a demurrer. The retention of complainant's bill depends upon the character of the bequest. If there is an annuity, the defendant has only received what she was entitled to, and the complainant would then have no standing in this court. On the other hand, if it is only a gift of the income for life of a principal sum to be invested, with remainder over, then the complainant has made a case entitling him to an answer, or, in default thereof, a decree upon *ex parte* proofs. It therefore follows that the only question to be met on this branch of the case is whether

the clause in the will upon which the complainant rests his case entitles him to equitable relief. It seems to me that the question is clearly presented in the bill of complaint; for an inspection of it shows that the right to relief rests upon the interpretation of the material and only real element of dispute, which is the effect, when properly construed, of the clause of the will upon which the complainant founds his prayer for injunction. The defect is not latent or obscure, but the pertinent fact alleged in the bill as a ground for relief raises a doubt as to complainant's right thereto, and I am of opinion that the general specification of want of equity is sufficient to justify me in hearing this motion. *Essex Paper Company v. Green*, 45 N. J. Eq. 504, 19 Atl. 466; *Parker v. Stevens*, 61 N. J. Eq. 163, 47 Atl. 573.

The second ground urged by the complainant in resisting this application is that the legacy is not an annuity payable from the death of the testator, but is a gift of the interest or income of a sum to be invested, making it an ordinary legacy, the income from which begins to run in favor of the legatee only after the expiration of the year following testator's death, and, as the administrator pendente lite has treated it as an annuity, and paid the defendant accordingly, she has received \$1,200 more than she should, and ought not to be allowed to press her action at law until she has accounted therefor, or the complainant has received sufficient income, and returned it to the corpus of the estate, to liquidate the overpayment. Whether this bequest is an annuity is the only question to be considered on this branch of the case. In *Booth v. Ammerman*, 4 Bradf. Sur. (N. Y.) 129, an annuity is well described as follows: "An annuity is a stated sum per annum, payable annually unless otherwise directed. It is not income or profits, nor indeterminate in amount, varying according to the income or profits, though a certain sum may be provided out of which it is to be payable." I am of the opinion that the bequest we are considering falls within this definition, for the executor is to invest a sufficient sum to produce \$1,200 annually, which is to be paid to the annuitant during her natural life, "in payments quarterly of three hundred (\$300.00) dollars each." It is the gift of a fixed sum, not indeterminate in amount, or varying according to the income or profits, and, if the amount set apart by the executor to produce this annual sum should for any reason fail to produce it, the residuary legatee would be required to provide the deficiency. In *Craig v. Craig*, 3 Barb. Ch. (N. Y.) 76, the gift to a wife was: "I also give to her an annuity of \$1600 per year to be paid to her in semi-annual payments; the principal of such annuity to be invested in such manner as she may reasonably require." In construing this language, the court held that the annuity for the widow began to accrue at the testa-

tor's death. In *Merritt v. Merritt*, 43 N. J. Eq. 11, 10 Atl. 835, the will ordered the executors to invest sufficient money to produce an annual income of \$1,000 for testator's son, to be paid in equal weekly payments. The amount invested proving insufficient, through changes in interest rates, to produce the required annual income, the deficiency was decreed to be paid by the residuary legatees; the court saying: "It was obviously the intention of the testator to provide and secure, out of his estate, an annuity of \$1,000." In *Welsh v. Brown*, 43 N. J. Law, 37-43, Chief Justice Depue said: "The distinction between an annuity pure and simple, which is to be paid at all events out of testator's estate at the expense of the residuary legatee, and the interest or income for life of a certain sum set apart by the testator for that purpose, and given over in gross to another, after the death of the life tenant, has been quite uniformly adhered to"—citing with approval from *Baker v. Baker*, 6 H. L. Cas. 623, the following portion of Lord Cranworth's opinion: "In all these cases arising upon the construction of wills the real question is whether that which is given is given as an annuity, or is given as the interest of a fund, and, where that question is to be considered, what you must look to is this: Whether the language of the testator imports that a sum, at all events, is annually to be paid out of his general estate, or only the interest or a portion of the interest, of a capital sum, which is to be set apart."

Turning to the will under consideration, there is no gift of the interest of a capital sum which is to be set apart. It is a gift of a sum which is annually to be paid out of testator's estate, and is not subject to any diminution resulting from a change in the rate of interest, the payment of taxes, or a failure from any reason of a particular fund to produce the amount. The only case to which I have been referred as holding a contrary doctrine is that of *Cogswell, Ex'r, v. Cogswell*, 2 Edw. Ch. (N. Y.) 231, but there the gift was to his executors in trust to set apart a sufficient sum to produce an annual income of \$1,000, "and from time to time, as the same shall become payable, to permit my wife to take such interest moneys in the whole amounting to the annual interest of one thousand dollars." In interpreting this language, the court held that "the gross sum to be set apart to produce the yearly income of one thousand dollars is considered in the light of a legacy, payable by law at the end of the year." It will be observed that in this case the testator fixes the time of payment of the gift to be when the interest or income arising from the investment provided for "shall become payable"; and the court was of opinion that it was the plain meaning of the will that the widow was only entitled to such dividends as were declared after the expiration of the first year, and that, as the

gift depended upon the proceeds of an investment to be made in stock, the executor might take one year for the purpose of making the investment, in analogy to the time allowed by law for paying legacies. I apprehend that in determining this cause Vice Chancellor McCoun was influenced by the fact that it was not considered an absolute gift of \$1,000 to be paid in annual or at other fixed periods, but rather of interest moneys, upon investments to be made, to be paid to the wife as the income from such investments became payable; for the authority upon which he relied in reaching his determination, viz., 1 Roper on Leg. 588, does not support the proposition that a gift of a stated sum payable annually, unless otherwise directed, without regard to the income or profits derived from the portion of testator's estate set aside by his executors to provide it, is not an annuity, for a reference to the authority cited declares, "But if the disposition be of a sum of money, and the interest of it is given as an annuity to B. for life, the first payment will not accrue before the expiration of the second year after the death of the testator"—and the learned author undoubtedly means that the disposition shall be of a fixed sum upon which the interest is given, and not of a fixed amount to be paid without regard to the amount of the fund required to produce it. If the case just referred to is an authority sustaining a rule that the gift of a fixed sum to be paid annually is an ordinary legacy, and not an annuity, because the executor is to invest a sufficient portion of the estate to provide for the annuity, without any direction as to the amount of the investment, then it is contrary to the weight of authority on this subject.

It was insisted on the argument that, as the will directed the executor to invest a sufficient sum to raise the \$1,200 annually, the executor was not required to make the investment until the expiration of one year from testator's death. The answer to this contention is that the executor is only authorized to do what the law requires and permits him to do. He is always justified in setting apart immediately a fund sufficient to indemnify him against the payment of the annuity.

A further contention of the complainant is that, granting the bequest to be an annuity, nevertheless the defendant was improperly paid all that she received, because her opposition to the probate of the will was "unwarranted, dilatory, and vexatious," and that by reason of such conduct the executor was prevented from making the investments required to provide the annuity. I am unable to discover any equitable reason for refusing to the defendant what she is entitled to under the will simply because she contested its probate to an unsuccessful issue. The estate was in the hands of an officer appointed by the court. The presumption is that he did his duty, and kept the money in-

vested, and the contrary is not alleged. Therefore it could make no difference in the status of the estate whether the administrator or the executor collected the income; and I am aware of no equitable rule which visits upon an unsuccessful litigant the penalty of depriving him of that portion of the estate which the courts have determined he is entitled to, notwithstanding his unsuccessful claim that he was unfairly dealt with.

Whether the administrator pendente lite was justified in paying legacies is a question which cannot be determined in this suit. That is a matter of administration. The funds were placed in his hands by the orphans' court to be administered by him as the law directs, and any improper misapplication of the funds committed to his charge must be adjusted in the settlement of his accounts in that court. If this defendant was entitled to the money, it would have to be paid to her by the present executor, and the fact that it may have been paid to her by the administrator pendente lite works no injury to the parties interested therein, which calls upon a court of equity to interfere; for such an administrator, even if he pays a legacy which the character of his appointment does not authorize him to do, will nevertheless be allowed such payment in his accounting, provided the party who received it was entitled to it, and the estate able and liable to make the same, after all prior charges are provided for.

The result which I have reached is that the bill of complaint presents no equity as against this defendant; and the motion should prevail.

(72 N. J. Eq. 568)

BUTTERWORTH-JUDSON CO. v. CENTRAL R. CO. OF NEW JERSEY.

(Court of Chancery of New Jersey. March 11, 1907.)

1. EMINENT DOMAIN—INJURY TO PROPERTY—COMPENSATION—EASEMENTS.

Where a railroad purchased the fee of land for occupation by its tracks in the exercise of its public franchise of operating a railroad, one who had an easement of a right of way over such land, which easement was interfered with by the operation of the railroad, was entitled to compensation under the eminent domain act (Revision 1900, P. L. p. 79), providing for compensation to all persons having any interest in the land taken.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Eminent Domain, § 403.]

2. SAME—INJUNCTION—OCCUPATION BY RAILROAD.

An injunction will lie to restrain a railroad from occupying complainant's real estate, and to compel the removal of its tracks, unless compensation be made.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Eminent Domain, §§ 744, 750.]

Suit by the Butterworth-Judson Company against the Central Railroad Company of New Jersey for an injunction to restrain the

operation of a railroad over certain land, unless compensation be made to complainant. Decree advised for complainant.

John A. Miller, for complainant. George Holmes, for defendant.

EMERY, V. C. The construction and operation by the defendant of its railroad across the strip of land in question is an interference to some extent with the right of way over the strip, to which the complainant is entitled under its deeds. This results necessarily from the fact that by reason of such operation the complainant is at all times required to observe at the place of crossing increased care and attention to avoid danger, and is at some time during every day regularly deprived for a time of the use of the right of way at this crossing.

The railroad, as appears by the answer, is constructed and operated under the authority of defendant's charter and the provisions of the general railroad law authorizing the construction of railroads and their use as public highways, with the right of taking tolls. The construction, therefore, is made under express statutory authority to construct and operate for public use that which would otherwise be a nuisance to the complainant. The strip of land in question has been purchased by the defendant railroad company, which owns the fee thereof, subject to the complainant's right of way; but the ordinary use of the land by the owner of the fee does not include the erection and operation on it of a steam railroad for the purpose of reaching lands of other parties in the exercise of a public franchise of operating a railroad and taking tolls. The company sets up in its answer that the road runs from its Newark and New York branch to the factories on the meadows, and it was proven in the case that it is operated for that purpose. This makes the use of the railroad at the strip of land in question the operation of a portion of its system which it holds under its charter and the general railroad acts, and subject to the conditions provided by those acts, as to the interference with private rights in the lands on which the road is constructed and operated. One of these conditions is that private property cannot be taken for public use without just compensation first made; and the interference in any manner whatever with complainant's easement of the right of way in question is a taking of the complainant's property under the statute. The general eminent domain act (Revision 1900, P. L. p. 79), etc., provides for compensation to the owners, occupants, and all persons appearing of record to have any interest in the land taken, and under statutes of this character it is settled that persons holding easements of right of way are included as persons interested. *State National Ry. Co., Pros., v. Easton & Amboy R. R. Co.* (Sup. Ct., 1873), 36 N. J. Law, 181, 184. The amount of

compensation depends, of course, on the extent of interference; but the complainant has a right to compensation for any permanent disturbance of its right of way by the construction or operation over the strip in question of a steam railroad as a public highway for the payment of tolls.

The claim on the part of the defendant, that this construction and operation of a railroad is an exercise of the reserved powers of the owner of the fee to use his own land in such way as not to interfere with the right of way, is not well founded, either in fact or in law, and does not, in my judgment, reach the case, which is altogether one of interference with complainant's right of way under powers given to defendant by its charter and the railroad acts. The situation and rights of the parties, both as to fact and law, are controlled by those acts, and not by the rules regulating the ordinary use by the owner as of common right of land subject to a private right of way.

I conclude, therefore, that so far as the rights of the complainant are concerned I must declare that its right has been interfered with, and without the payment or tender of compensation therefor provided for by the statute. I do not go into the extent of the interference, because, in the view I take of the case, that question is not at present material. As complainant did not consent to this erection or operation of the railroad across the strip of land in question, but did everything in its power to prevent it, it is a case where I think it is strictly entitled to the protection of its constitutional and statutory right to compensation by the exercise of the power of this court to enjoin the further operation of the railroad and compel the removal of the tracks, unless compensation is made. See cases cited in *Hart v. Leonard* (Err. & App., 1886), 42 N. J. Eq. 416, 419, 7 Atl. 865, par. 4. The complainant's right to an easement being admitted, and the facts on which the claim of right to interfere therewith is based being undisputed, there is no reason for sending complainant to a court of law merely to determine whether on these facts the interference is the lawful exercise of the common-law rights of an owner of land subject to an easement, or whether it is a taking of lands for public use under statutory authority. If it is such taking, then the right can be ultimately protected only by an injunction, and, the case being on final hearing here, the relief should now be granted. But, inasmuch as defendant would be entitled to take proceedings for condemnation, I will hear parties on the settlement of the decree as to whether the issuing of the injunction should be delayed until a time fixed, in order to give the defendant opportunity to institute condemnation proceedings, and will at the same time hear them on the terms, if any, upon which such delay should be made in the issuance of the injunction.

REISMANN v. POTTER & CO.

(Supreme Court of Rhode Island. Dec. 29, 1905.)

Action by Frederick W. Reismann against Potter & Co. Judgment for plaintiff, and defendants except to denial of petition for new trial. New trial granted.

Washington R. Prescott, for plaintiff. Comstock & Canning, for defendants.

PER CURIAM. The court is of the opinion that the evidence preponderates against the claim that the grille was constructed as required by the contract between the parties, and the defendant's petition for a new trial is granted.

The case will be remanded to the superior court for further proceedings.

RYER v. LEE.

(Supreme Court of Rhode Island. Dec. 11, 1905.)

JURY—RIGHT TO JURY TRIAL—WAIVER.

Defendant demurred to a declaration, and, on the demurrer being overruled, excepted, and went to trial on the merits. Decision was rendered for plaintiff, whereupon defendant filed a claim for jury trial and paid the costs, and thereafter claimed a bill of exceptions and the exceptions were heard and overruled on appeal and the cause remanded. *Held*, that the taking of the exceptions was not a waiver of the claim for jury trial; the provision forbidding the prosecution of exceptions and a claim for jury trial (chapter 17, § 7) being repealed May 17, 1895.

Petition by Ina E. Ryer for a writ against Christopher M. Lee, clerk, to compel him to certify the case of Charles F. Gladding against her to the superior court for jury trial. Writ issued.

George S. Engle, for petitioner. Washington R. Prescott, for respondent.

PER CURIAM. We think the petitioner is entitled to have the case of Charles F. Gladding against her certified to the superior court for jury trial. The petitioner, who was defendant in the original case, has demurred to the declaration, and, on this demurrer being overruled, duly excepted and proceeded to a trial on the merits of the case. Decision for the plaintiff was rendered May 15, 1905, and within two days thereafter she filed a claim of jury trial, and paid the costs. Objection has been made to the form of this claim, but we think that, although containing some surplusage, it was sufficient in law. Within five days after the decision, and before the next court day, the papers still remaining in the district court, she claimed her bill of exceptions, and the same was allowed, and the papers were certified to the appellate division. Subsequently the exceptions were heard and overruled in this court, and the case was remanded to the district court for further proceedings. We

do not think that the taking of exceptions to this court was a waiver of the claim for jury trial. It would have been so under the judiciary act as originally passed, but the provision forbidding the prosecution of exceptions and a claim of jury trial (chapter 17, § 7) was repealed May 17, 1895, by section 54 of the amendatory act. The evident intention of this legislation was to give a party the right to have his exceptions heard and afterwards the right to a jury trial upon the facts of the case, provided he claimed his exceptions before the papers had been transmitted to the common pleas division. The petitioner's rights were suspended while the exceptions were pending; all proceedings in the district court being stayed.

The writ will issue as prayed.

DI STEFANO v. RHODE ISLAND CO.

(Supreme Court of Rhode Island. March 28, 1906.)

NEW TRIAL—VERDICT CONTRARY TO EVIDENCE.

A new trial must be granted on the ground that the evidence very strongly preponderates against the verdict.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, New Trial, §§ 135, 140, 143.]

Exceptions from Superior Court, Providence County.

Action by Antonio Di Stefano against the Rhode Island Company. Heard on exceptions of defendant after denial of motion for new trial by superior court. Exceptions sustained, and new trial granted.

John I. Devlin, for plaintiff. Henry W. Hayes, Frank T. Easton, Lefferts S. Hoffman, and Alonzo R. Williams, for defendant.

PER CURIAM. The evidence very strongly preponderates against the claim that the accident was caused by any negligence on the part of the servants of the defendant corporation, and a new trial must be granted on that ground.

The exception to the refusal of the court below to grant a new trial on account of the presence on the jury of one George W. Bennett, who, it is alleged, was not duly drawn, must be overruled, for the reasons stated in *Oates v. Union Railroad Co.*, 27 R. I. 499, 63 Atl. 675, which presented the same question.

New trial granted, and case remitted to the superior court for further proceedings.

(28 R. I. 220)

PRICE v. RHODE ISLAND CO.

(Supreme Court of Rhode Island. March 13, 1907.)

STREET RAILROADS—INJURIES TO PERSONS ON TRACK—CONTRIBUTORY NEGLIGENCE.

A failure to look and listen before going upon a street railroad track amounts to contributory negligence as a matter of law.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Street Railroads, § 215.]

Exceptions from Superior Court, Providence County.

Action by May E. Price against the Rhode Island Company. Verdict in favor of plaintiff, and defendant brings exceptions. Exceptions sustained, and cause remanded for new trial.

Argued before DOUGLAS, C. J., and DUBOIS, BLODGETT, JOHNSON, and PARKHURST, JJ.

Robert S. Emerson and Geo. H. Huddy, Jr., for plaintiff. Henry W. Hayes, for defendant.

PER CURIAM. The accident which occasioned the injuries complained of was caused by a trolley car of the defendant striking and frightening a horse driven by the plaintiff across the track. The defendant asked the court to charge the jury as follows: "If you believe the plaintiff did not look for an approaching car before entering the track, she was guilty of contributory negligence, and cannot recover." To which the court replied: "I suppose that that request is based upon the fact that the plaintiff stated that at some distance away from the track she did pull up her horse and did look, and that after that she drove upon the track. Gentlemen, I shall decline to give you the charge in that form. I will say to you that the plaintiff was bound to exercise due care in going upon that track, and due care is dependent upon all the circumstances and all the facts of the case, as I have already explained to you. It is not necessarily negligence for the plaintiff not to look before driving upon the track; that is, it is not so as a matter of law, but it is a matter that you may take into consideration in determining whether she was guilty of negligence. If, at a point 20 or 25 or 30 feet, more or less, from the track, she held up her horse and looked in both directions, and then started on, and did not look again, and did not hold up her horse again, that is a circumstance which you may consider in determining whether or not she was guilty of contributory negligence; but I will not say to you, gentlemen, that this is negligence as a matter of law. It is a fact which you may take into consideration, and determine for yourself whether she was guilty of contributory negligence. Mr. Hoffman: If your honor please, I didn't mean by that request, as to whether or not she looked between the distance of 25 feet away from the track, whether she looked at all or not. The Court: Very well; I will say the same thing as to whether she looked at all or not. That, if the plaintiff—although you will recall the fact she said she did hold up her horse and did look, and there are two witnesses that say, as I recollect it, that she did hold up her horse and did look, but whether she did or not I will not charge you, gentlemen, that it was negligence on her part, as a matter of law, not to look. I will charge you, gen-

tiemen, that she was bound to exercise due care as a person of reasonable—as a reasonable person she was bound to use due care in driving upon that crossing, and whether she was in the exercise of due care is entirely for you to say under all the circumstances from the evidence in the case. And if you find that she did not look, but drove upon the crossing without looking at all, then you may take that fact into consideration in determining whether she was guilty of contributory negligence in driving upon the track. I will not, however, charge you, gentlemen, that it was negligence, as a matter of law in her not to look before driving upon the track. That depends upon all the circumstances upon the conditions, the surroundings, the environments, in which she found herself."

In view of the opinion of this court in *Beerman v. Union R. R. Co.*, 24 R. I. 275, 52 Atl. 1060, this ruling of the court was erroneous. The obligation to look and listen when approaching a track upon which cars are run is so well established as the duty of a prudent person that a neglect of it must be held to be negligence in law, and not a mere circumstance for the jury to consider in passing upon the question of the plaintiff's care. Although the charge of the court had very fairly instructed the jury in the law applicable to the case, the refusal to charge as requested on this point and the comments of the court in answer to the request were misleading upon a vital issue in the case. We think, therefore, that this exception must be sustained and that a new trial must be granted.

We find no merit in the other exceptions, and it is not necessary to discuss the weight of the evidence or amount of the verdict, which may vary at the next trial.

Case remanded to the superior court for a new trial.

(28 R. I. 177)

KEBABIAN v. ADAMS EXPRESS CO. et al.
(Supreme Court of Rhode Island. Feb. 20, 1907.)

1. REPLEVIN—DEFENSE—SUFFICIENCY.

A defendant in replevin who sets up title in a third person must connect his possession with the third person's title.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Replevin, §§ 102, 103.]

2. SAME.

Evidence, in replevin against an express company, that plaintiff had directed a third person to send the goods by the company, supported its special plea alleging special property and right of possession under its lien as carrier, justifying the direction of a verdict in its favor.

3. SAME—VERDICT—CORRECTION.

Where, in replevin against an express company, the evidence supported a plea of special property and right of possession under its lien as carrier, a verdict finding the company not guilty, assessing damages, and directing a return of the goods, was incorrect in form, for failing to directly decide the issue raised by the plea, and the court could correct the error in entering the judgment.

Exceptions from Superior Court, Washington County.

Action by John C. Kebabian against the Adams Express Company and another. There was a judgment granting nonsuit as to defendant Albert Fournier, and there was a judgment in favor of defendant the Adams Express Company, and plaintiff brings exceptions. Overruled.

Argued before DOUGLAS, C. J., and DU-BOIS, BLODGETT, JOHNSON, and PARK-HURST, JJ.

John W. Sweeney, for plaintiff. Harry B. Agard, for defendants.

DOUGLAS, C. J. This is an action of replevin, brought by one John C. Kebabian, of the city of New Haven in the state of Connecticut, against the Adams Express Company, described as a joint-stock company under the laws of the state of New York, and Albert Fournier, of the city of Norwich, in said state of Connecticut. The property which is the subject of this suit consists of hotel linen, bedding, towels, etc., and was replevied from the office of said Adams Express Company at the village of Watch Hill, in the town of Westerly, in this state. The writ was answered by both defendants, who jointly pleaded non cepit, and separately the following special pleas: The defendant Fournier pleaded a detention at Norwich, in Connecticut; denied a taking or detention at Westerly; and avowed and justified his detention of the goods at Norwich under a claim of a lien for work and labor performed upon them. The express company pleaded: First, property in Fournier under a lien for services; secondly, special property and right of possession in itself for its claim as carrier from Norwich to Westerly. The case came to the superior court for the county of Washington, upon the plaintiff's claim of a jury trial, from the district court of the Third judicial district, after a decision in that court in favor of the defendants. The case was heard in part before Mr. Justice Baker and a jury at a session of the superior court held at Westerly on the 5th day of November, 1905. Upon the defendants' motion a nonsuit was granted by the presiding justice, and the plaintiff took his exception to this court. The plaintiff's exceptions were sustained by this court in a decision handed down May 23, 1906 (27 R. I. 564, 65 Atl. 271), and the case was remanded to the superior court for a new trial. The case was again heard before Mr. Presiding Justice Sweetland and a jury in the superior court at South Kingstown on the 12th of November, 1906. All the testimony was upon depositions, and upon the conclusion of the plaintiff's case the defendant Albert Fournier moved for a nonsuit as to him, on the ground that at the time the writ was served he was not in possession or control of the goods or detaining them in any way, and was not therefore a proper party defendant. The

motion was granted, and the plaintiff reserved his exception. Evidence was then introduced on behalf of the express company showing that they had carried the goods from Norwich to Westerly on request of Fournier, who had been directed by the plaintiff to send them by the express company, and that their charges were unpaid. At the conclusion of the whole evidence the court directed a verdict for the defendant, to which the plaintiff excepted and brings his bill of exception to this court.

The evidence introduced on behalf of the plaintiff did not connect the defendant Fournier with the taking or detention of the goods at Westerly; and his motion for a nonsuit was properly granted. This left in the case the express company with its plea of non cepit and its two special pleas. The first special plea was defective in that it simply set up title in Fournier, but did not allege that the express company held as his agent. A defendant in replevin cannot set up title in a third person unless he connects his possession with such person's title, and shows a right thereto acquired from the owner, and thus establishes a paramount right to that of the plaintiff, justifying either the taking or detention of the property. 5 *Walt Ac. & Def.* 489, and cases cited.

Evidence was then introduced on behalf of the express company, amongst which was a letter from the plaintiff directing the defendant Fournier to send the goods by Adams Express Company. This supported the express company's second special plea and justified the direction of a verdict in its favor sustaining its lien as a carrier for its own charges. *Vaughan v. Prov. & Wor. R. R. Co.*, 13 R. I. 580.

The verdict entered was incorrect in form, finding the defendant not guilty, assessing 10 cents damages, and directing a return of the goods. It should have directly decided the issue raised by the special plea. It is, however, substantially right, and the court can correct the formal error in entering the judgment.

The exceptions are overruled, and the cause is remanded to the superior court, with direction to enter judgment for the defendant Fournier as of nonsuit; and for the defendant the Adams Express Company that it is entitled to a lien upon the goods for \$4.70, and that the same be returned and restored to said company to be held as security for its said lien, and that said company recover 10 cents damages and costs.

(28 R. I. 186)

SIMONE v. RHODE ISLAND CO.

(Supreme Court of Rhode Island. Jan. 15, 1907.)

1. CARRIERS—INJURIES TO PASSENGERS—NEG- LIGENCE—RES IPSA LOQUITUR.

Proof of a collision between two street cars operated by the same company injuring a passenger on one of them raises a presumption of

negligence of the company, placing the burden of proving freedom from negligence on it.

[Ed. Note.—For cases in point, see *Cent. Dig.* vol. 9, Carriers, §§ 1233-1294.]

2. SAME—QUESTION FOR JURY.

Where, in an action by a street car passenger for injuries in a collision with another car, the passenger proved the collision and injuries, and the company gave evidence in explanation of the collision, the question whether the presumption of negligence was overcome by the company's evidence was for the jury.

[Ed. Note.—For cases in point, see *Cent. Dig.* vol. 9, Carriers, §§ 1315-1325.]

3. DAMAGES—PERSONAL INJURIES—NATURE AND EXTENT OF INJURIES—QUESTION FOR JURY.

Where, in an action for personal injuries, the evidence of the nature and extent of the suffering of the person injured, and whether the suffering was a result of the accident, or was due to her previous physical conditions, was conflicting, the question whether the person injured was injured as a result of the accident complained of was for the jury.

[Ed. Note.—For cases in point, see *Cent. Dig.* vol. 15, Damages, § 533.]

4. EVIDENCE—EXPERT WITNESSES—OPINION EVIDENCE—ADMISSIBILITY.

In a personal injury action, a question asked a physician, based on his observation of the person injured as to the time of her ultimate recovery, is properly allowed.

[Ed. Note.—For cases in point, see *Cent. Dig.* vol. 20, Evidence, § 2365.]

5. APPEAL—HARMLESS ERROR—OVERRULING IMPROPER QUESTIONS ASKED A WITNESS.

Where a physician, in a personal injury action, in response to a question calling for his opinion as to the time of the ultimate recovery of the person injured, stated that he could not tell, the error, if any, in admitting the question was harmless.

[Ed. Note.—For cases in point, see *Cent. Dig.* vol. 3, Appeal and Error, §§ 4140-4445.]

6. DAMAGES—PHYSICAL SUFFERING CAUSED BY FRIGHT.

While recovery cannot be had for mere fright caused by negligence of another, yet where fright is followed by physical ill, or gives rise to nervous disturbances and those in turn to physical troubles, an action will lie.

[Ed. Note.—For cases in point, see *Cent. Dig.* vol. 15, Damages, §§ 100-105.]

7. TRIAL—INSTRUCTIONS—REFUSAL TO GIVE INSTRUCTIONS EMBODIED IN THOSE GIVEN.

Instructions are properly refused where they are sufficiently covered by the charge as given.

[Ed. Note.—For cases in point, see *Cent. Dig.* vol. 46, Trial, §§ 651-659.]

8. DAMAGES—INJURIES TO CHILD—EXPENSES INCURRED.

A parent suing for injuries to a minor child may recover the expenses incurred in nursing the child which are in excess of the ordinary services the parent is bound to render to a minor child.

[Ed. Note.—For cases in point, see *Cent. Dig.* vol. 15, Damages, § 243.]

Exceptions from Superior Court.

Action by Theresa Simone against the Rhode Island Company. There was a judgment for plaintiff, and defendant brings exceptions. Overruled.

Argued before DOUGLAS, C. J., and DU-BOIS, BLODGETT, JOHNSON, and PARK-HURST, JJ.

Dennis H. Sheahan, for plaintiff. Henry W. Hayes, Frank T. Easton, Lefferts S. Hoffman, and Alonzo R. Williams, for defendant.

PARKHURST, J. This is an action by a widow to recover for loss of the services of her minor daughter, caused, as she alleges, by the negligence of the defendant's servants, whereby the minor child was injured and disabled from earning the wages which she had earned prior to the accident and turned over to her mother.

It appears in evidence that on the morning of December 17, 1904, the plaintiff's minor daughter, then about 17 or 18 years old, was a passenger in a car of the defendant, proceeding easterly from Olneyville on Westminster street in Providence, and was seated about midway of the car on the left-hand side thereof talking with a friend when the car reached a point near the junction of Broadway and Westminster street, where there is a switch crossing over from the east-bound track, and so arranged as to enable a car taking the switch to turn from Westminster street into Broadway. When the car in question had approached this switch near enough to allow the motorman to turn the switch, he stopped the car and turned the switch so as to enable his car to proceed along the straight track easterly on Westminster street, and then started his car forward. The wheels of the forward truck passed the switch in the usual manner as intended, but the wheels of the rear truck, in some way and for some reason unexplained, "split the switch," as it is called; i. e., in some unknown way the switch was so far opened that the rear wheels left the straight or main track and proceeded on the switch track towards Broadway, thereby approaching the line of the west-bound track. As soon as the motorman perceived that the rear of his car was thus slewing toward the west-bound track, he put on his brake and stopped the car, but not quickly enough to avoid a collision with a west-bound car, operated by the defendant's servants, which was proceeding at this time towards Olneyville on the west-bound track. This latter car had stopped, according to custom, on approaching the said switch or cross-over track, and its motorman, seeing the other car apparently passing the switch in safety, had thereupon started his car, intending to pass onward westerly into Olneyville, when just as he was coming alongside of the other car he saw its rear end slewing towards the track on which he was proceeding, and immediately applied his brake, but not quickly enough to avoid a collision. The forward end of the west-bound car struck the side of the east-bound car, towards its rear end, just before they stopped, doing little, if any, damage to the cars, which moved only a few inches before they stopped altogether.

The testimony shows that the collision was not a violent one, and it does not appear that any particular damage was done to either of

the cars, or that any person, other than the plaintiff's daughter, was injured; although Miss Gillan, the friend with whom Miss Simone was sitting and conversing at the time, says, "I was very badly shaken up," and that there was a "crash." It further appears that Miss Simone fainted immediately after the "crash," and was taken from the car into a drug store, where she recovered from her fainting fit, and was then taken home. It does not appear that she suffered any actual external bodily injury at the time of the collision; and she herself testifies that when she heard the crash she was frightened with the idea that the car had been struck by a steam train at the crossing of the steam railroad at Plainfield street, and immediately fainted. After she got home she claims that she suffered from vomiting, insomnia, headache, pains in the left side, left leg, and back; the pains sometimes going across to her right side; that she remained in bed for nearly three months, was too weak to get up without assistance, and continued to suffer from headaches and the pains above mentioned; had frequent fainting attacks, continued to suffer from insomnia and nervous disorders and weakness down to the time of the trial, and that she has suffered complete failure to perform her menstrual functions. A doctor was called to her on the day of the accident, and attended her subsequently for some weeks. He made a complete physical examination of her, and he does not testify that he found any external injury to her body whatever; and there is no other evidence tending to show any external physical injury. We think it is fairly to be inferred, from all the testimony in the case, that whatever physical sufferings and disorders resulted to the plaintiff's daughter were due to nervous shock brought on by fright. The jury returned a verdict for the plaintiff for the sum of \$400.

The defendant asks to have this verdict set aside (1) because there is no proof of negligence on the part of the defendant; (2) because the plaintiff's daughter was not injured as a result of the accident; (3) because the damages were excessive; (4) because the superior court erred in its rulings in admission of testimony, and in its charge to the jury.

As to the proof of negligence of the defendant company, it is uncontradicted that there was a collision between two cars, both operated by the defendant company, and a presumption of negligence arises from this fact which places the burden of explanation upon the defendant. The question of the defendant's negligence was therefore properly submitted to the jury, and it was for the jury to say whether the explanation offered by the defendant was or was not a satisfactory explanation. The jury, having found for the plaintiff, must have found that the defendant was negligent, and this court cannot properly set the verdict aside on that ground.

As to the question whether the plaintiff's daughter was or was not injured as a re-

sult of the accident, there was some conflict of testimony as to certain claims of injury, as to the nature, character, and extent of the actual suffering of the plaintiff's daughter, and as to whether such suffering was a result of the accident, or was due to her previous physical conditions, and it was therefore properly left to the jury to determine whether such injuries as the plaintiff's daughter actually suffered were the result of the accident or were due to other and independent causes. We cannot properly disturb the verdict on this ground, since the jury have found for the plaintiff. Nor do we think the amount of the verdict is excessive, in view of the previous earning capacity of the plaintiff's daughter, and of the length of time the plaintiff has been and probably will be deprived of the earnings, while still bound to support and maintain her minor child. All of the foregoing questions were properly submitted to the jury, and we do not find that the evidence was insufficient to warrant the jury in finding its verdict for the plaintiff.

The defendant urges the following exceptions, relating to alleged errors of law of the superior court: (1) That the court erred in admitting a question, which plaintiff's attorney asked of one of the physicians who had previously attended Miss Simone some eight months prior to the trial, asking for his opinion as to the time of her ultimate recovery. The question, as finally framed, was based upon his observation of the case, and was properly admitted, and the doctor answered that he could not tell, so that no harm was done to the defendant in any event. (2) That the court erred in its refusal to charge the jury, as requested by the defendant, as follows: "The plaintiff cannot recover for the effects upon her daughter of fright at the time of the accident, not accompanied by physical injury. * * * If the fright of the plaintiff, at the time of the accident, was due to imagining that a steam railroad train had run into the car upon which she was riding, she cannot recover for the effects of the fright, so caused." And erred in charging the jury as follows: "If that fright was followed by a series of physical ills as its natural consequence; if that fright as a cause gave rise to nervous disturbances, and those in turn to physical troubles; and that fright itself was caused by the negligence of the defendant—then the defendant would be liable for the physical results of its own negligence." These rulings bring squarely before this court the question whether there can be a recovery for bodily injury caused by fright when the fright was caused by the negligence of the defendant, where there was no actual physical injury at the time of the accident, but where the fright was followed by a series of physical ills as its natural consequence; where the fright as a cause gave rise to nervous disturbances, and those in turn to physical troubles. This question has not heretofore been determined in this state, and the

cases relating thereto in other jurisdictions have given rise to widely differing decisions.

The defendant contends that this court should be governed by the rule laid down in *Mitchell v. Rochester Railway Co.*, 151 N. Y. 107, 45 N. E. 354, 34 L. R. A. 781, 58 Am. St. Rep. 604, where the court says (page 108 of 151 N. Y., page 354 of 45 N. E. [34 L. R. A. 781, 58 Am. St. Rep. 604]), by Martin, J.: "The facts in this case are few and may be briefly stated. On the first day of April, 1891, the plaintiff was standing upon a crosswalk on Main street in the city of Rochester, awaiting an opportunity to board one of the defendant's cars which had stopped upon the street at that place. While standing there, and just as she was about to step upon the car, a horse car of the defendant came down the street. As the team attached to the car drew near, it turned to the right and came so close to the plaintiff that she stood between the horses' heads when they were stopped. She testified that from fright and excitement caused by the approach and proximity of the team she became unconscious, and also that the result was a miscarriage and consequent illness. Medical testimony was given to the effect that the mental shock which she then received was sufficient to produce that result. Assuming that the evidence tended to show that the defendant's servant was negligent in the management of the car and horses, and that the plaintiff was free from contributory negligence, the single question presented is whether the plaintiff is entitled to recover for the defendant's negligence which occasioned her fright and alarm, and resulted in the injuries already mentioned. While the authorities are not harmonious upon this question, we think the most reliable and better-considered cases, as well as public policy, fully justify us in holding that the plaintiff cannot recover for injuries occasioned by fright, as there was no immediate personal injury—[citing cases]. * * * If it be admitted that no recovery can be had for fright occasioned by the negligence of another, it is somewhat difficult to understand how a defendant would be liable for its consequences. Assuming that fright cannot form the basis of an action, it is obvious that no recovery can be had for injuries resulting therefrom. That the result may be nervous disease, blindness, insanity, or even a miscarriage, in no way changes the principle. These results merely show the degree of fright, or the extent of the damages. The right of action must still depend upon the question whether a recovery may be had for fright. If it can, then an action may be maintained, however slight the injury. If not, then there can be no recovery, no matter how grave or serious the consequences. Therefore the logical result of the respondent's concession would seem to be, not only that no recovery can be had for mere fright, but also that none can be had for injuries which are the direct consequences of it. If the right of recovery

in this class of cases should be once established, it would naturally result in a flood of litigation in cases where the injury complained of may be easily feigned without detection, and where the damages must rest upon mere conjecture or speculation. The difficulty which often exists in cases of alleged physical injury, in determining whether they exist, and, if so, whether they were caused by the negligent act of the defendant, would not only be greatly increased, but a wide field would be opened for fictitious or speculative claims. To establish such a doctrine would be contrary to principles of public policy." And the defendant cites in support of the same doctrine the cases of *Ewing v. P. C. & St. Louis Ry. Co.*, 147 Pa. 40, 23 Atl. 340, 14 L. R. A. 686, 30 Am. St. Rep. 709; *Deming v. C.*, R. I. & P. Ry. Co., 80 Mo. App. 154; *Halle's Curator v. Tex. & Pa. Ry. Co.*, 60 Fed. 558, 9 C. C. A. 134, 23 L. R. A. 774; *Lehman v. Brooklyn City R. Co.*, 47 Hun (N. Y.) 355; *Scheffer v. Railway Co.*, 105 U. S. 249, 26 L. Ed. 1070; *Mahoney v. Dankwart*, 108 Iowa, 321, 79 N. W. 134; *Victorian Ry. Com'rs v. Coultas*, L. R. 13 App. Cas. 222.

All these were cases where there was evidence of actual physical or nervous disorders, such as miscarriage, or insanity, nervous prostration or other serious disorders, shown to have been the results of negligence of the defendant in the several cases; and in all of these cases the courts substantially adhere to the rule contended for by defendant in this case, some finding that the damages proved were too remote, and were not the proximate result of the defendant's negligence, and many of them taking the same ground as to public policy as was set forth in the above quotation from *Mitchell v. Rochester Ry. Co.*, *supra*. The balance of the cases cited on behalf of defendant, to wit, *Gulf, C. & St. F^e Ry. Co. v. Trott*, 86 Tex. 412, 25 S. W. 419, 40 Am. St. Rep. 866; *Wyman v. Leavitt*, 71 Me. 227, 36 Am. Rep. 303; *A. T. & St. F^e Ry. Co. v. McGinnis*, 46 Kan. 109, 26 Pac. 453; *The Queen (D. C.)* 40 Fed. 694; *Kalen v. Terre Haute, etc., R. Co.*, 18 Ind. App. 202, 47 N. E. 694, 63 Am. St. Rep. 343—were all cases where it appeared that the claim was for mere fright, fear, or terror, not accompanied by any immediate physical injury, and not shown to have been followed by any nervous or physical disorder of any kind as a result of the fright, etc. These cases, therefore, do not apply here.

One case not cited on defendant's brief, but seemingly quite as closely applicable in its doctrine as those above referred to, is that of *Spade v. Lynn & Boston R. R. Co.*, 168 Mass. 285, 47 N. E. 88, 38 L. R. A. 512, 60 Am. St. Rep. 393, where it is held that, in an action to recover damages for an injury sustained through the negligence of another, there can be no recovery for a bodily injury caused by mere fright and mental disturbance. The court (Allen, J.) says (page 287 of 168 Mass., page 89 of 47 N. E. [38 L.

R. A. 512, 60 Am. St. Rep. 393]): "The case calls for a consideration of the real ground upon which the liability or nonliability of a defendant guilty of negligence in a case like the present depends. The exemption from liability for mere fright, terror, alarm, or anxiety does not rest on the assumption that these do not constitute an actual injury. They do in fact deprive one of enjoyment and of comfort, cause real suffering, and to a greater or less extent disqualify one for the time being from doing the duties of life. If these results flow from a wrongful or negligent act, a recovery therefor cannot be denied on the ground that the injury is fanciful and not real. Nor can it be maintained that these results may not be the direct and immediate consequence of the negligence. Danger excites alarm. Few people are wholly insensible to the emotions caused by imminent danger, though some are less affected than others. It must also be admitted that a timid or sensitive person may suffer not only in mind, but also in body, from such a cause. Great emotion may, and sometimes does, produce physical effects. The action of the heart, the circulation of the blood, the temperature of the body, as well as the nerves and the appetite, may all be affected. A physical injury may be directly traceable to fright, and so may be caused by it. We cannot say, therefore, that such consequences may not flow proximately from unintentional negligence, and if compensation in damages may be recovered for a physical injury so caused, it is hard on principle to say why there should not also be a recovery for the mere mental suffering when not accompanied by any perceptible physical effects. It would seem, therefore, that the real reason for refusing damages sustained from mere fright must be something different, and it probably rests on the ground that in practice it is impossible satisfactorily to administer any other rule. The law must be administered in the courts according to general rules. Courts will aim to make these rules as just as possible, bearing in mind that they are to be of general application. But, as the law is a practical science, having to do with the affairs of life, any rule is unwise if, in its general application, it will not as a usual result serve the purposes of justice. A new rule cannot be made for each case, and there must therefore be a certain generality in rules of law, which, in particular cases, may fail to meet what would be desirable if the single case were alone to be considered." Page 290 of 168 Mass., page 89 of 47 N. E. (38 L. R. A. 512, 60 Am. St. Rep. 393): "The law of negligence in its special application to cases of accidents has received great development in recent years. The number of actions brought is very great. This should lead courts well to consider the grounds on which claims for compensation properly rest, and the necessary limitations of the right to recover. We remain satisfied with the rule that there can

be no recovery for fright, terror, alarm, anxiety, or distress of mind, if these are unaccompanied by some physical injury; and if this rule is to stand, we think it should also be held that there can be no recovery for such physical injuries as may be caused solely by such mental disturbance, where there is no injury to the person from without. The logical vindication of this rule is that it is unreasonable to hold persons who are merely negligent bound to anticipate and guard against fright and the consequences of fright, and that this would open a wide door for unjust claims, which could not successfully be met. These views are supported by the following decisions: *Victorian Ry. Com'rs v. Coultas*, L. R. 13 App. Cas. 222; *Mitchell v. Rochester Ry. Co.*, 151 N. Y. 107, 45 N. E. 354, 34 L. R. A. 781, 56 Am. St. Rep. 604; *Ewing v. P., C. & St. Louis Ry. Co.*, 147 Pa. St. 40, 23 Atl. 340, 14 L. R. A. 666, 30 Am. St. Rep. 709; *Halle's Curators v. Tex. & Pa. Ry. Co.*, 60 Fed. 557, 9 C. C. A. 134, 23 L. R. A. 774." We are not able to follow the rule laid down in the above-quoted cases. It is always a question, frequently of much difficulty, to be decided in the particular case, whether the injury for which damages are sought is the proximate result of the act or acts complained of. But when it is admitted, as it is in *Spade v. Lynn & Boston R. Co.*, supra, that in a large class of cases there may be injuries of the most serious character directly resulting from the negligence of the defendant, as a proximate cause, for which the law will afford no remedy because of some probable difficulty or occasional injustice in the administration of a more liberal rule, it appears to us that the conclusion is quite illogical and is a pitiful confession of incompetence on the part of courts of justice.

The Supreme Judicial Court of Massachusetts, through Holmes, J., in speaking of the rule laid down in *Spade v. R. Co.*, supra, said, in *Homans v. Boston Elevated R. Co.*, 180 Mass. 456, 457, 62 N. E. 737, 57 L. R. A. 291, 91 Am. St. Rep. 324: "As has been explained repeatedly, it is an arbitrary exception, based upon a notion of what is practicable, that prevents a recovery for visible illness resulting from nervous shock alone. * * * But when there has been a battery and the nervous shock results from the same wrongful management as the battery, it is at least equally impracticable to go further and to inquire whether the shock comes through the battery or along with it. Even were it otherwise, recognizing as we must the logic in favor of the plaintiff when a remedy is denied because the only immediate wrong was a shock to the nerves, we think that when the reality of the cause is guaranteed by proof of a substantial battery of the person there is no occasion to press further the exception to general rules." We trust we may be excused for calling such a rule illogical, when the same court which pro-

mulgated the rule has given us its own opinion in such plain terms to the same effect. We think that the rule laid down in the cases hereinafter discussed is the logical rule in such cases, and fully supports the ruling of the superior court in the case at bar.

In *Bell v. Great Northern Railway Co.*, 26 L. R. (Ir.) Ex. Div. 428, 438, et seq., the syllabus shows that: "While A. was traveling as a passenger in an excursion train over a portion of the defendants' line of railway, the train, which was too heavy to be carried by the engine up an incline, was divided by the defendants' servants; the carriage occupied by A., with certain others, remaining attached to the engine. The hinder part of the train having thereupon descended the incline with great velocity, the engine was reversed, and with the remaining carriages [including that in which A. was seated] followed down the incline, also at a high rate of speed, until stopped with a violent jerk. In an action for injuries sustained by A., it was proved that A. was put in great fright by the occurrence, and that she suffered from nervous shock in consequence of such fright. She was incapacitated from performing her ordinary avocations; and medical witnesses were of opinion that her symptoms might result in paralysis. The learned judge in charging the jury told them that if great fright was, in their opinion, a reasonable and natural consequence of the circumstances in which the defendants had placed A., and she was actually put in great fright by these circumstances, and, if injury to her health was, in their opinion, a reasonable and natural consequence of such great fright, and was actually occasioned thereby, damages for such injury would not be too remote, and might be given for them. * * *

Palles, C. B., says (page 438 et seq.): "It is, then, to be observed (1) that the negligence is a cause of the injury, as least in the sense of a *causa sine qua non*; (2) that no intervening independent cause of the injury is suggested; (3) that jurors, having regard to their experience of life, may hold fright to be a natural and reasonable consequence of such negligence as occurred in the present case. If, then, such bodily injury as we have here may be a natural consequence of fright, the chain of reasoning is complete. But the medical evidence here is such that the jury might from it reasonably arrive at the conclusion that the injury, similar to that which actually resulted to the plaintiff from the fright, might reasonably have resulted to any person who had been placed in a similar position. It has not been suggested that there was anything special in the nervous organization of the plaintiff which might render the effect of the negligence or fright upon her different in character from that which it would have produced in any other individual. I do not myself think that proof that the plaintiff was of an unusually nervous disposition would

have been material to the question; for persons, whether nervous or strong-minded, are entitled to be carried by railway companies without unreasonable risk of danger; and my only reason for referring to the circumstance is to show that, in this particular case, the jury might have arrived at the conclusion that the injury which did, in fact, ensue was a natural and reasonable consequence of the negligence which actually caused it. Again it is admitted that, as the negligence caused fright, if the fright contemporaneously caused physical injury, the damage would not be too remote. The distinction insisted upon is one of time only. The proposition is that, although, if an act of negligence produces such an effect upon particular structures of the body as at the moment to afford palpable evidence of physical injury, the relation of proximate cause and effect exists between such negligence and the injury, yet such relation cannot in law exist in the case of a similar act producing upon the same structures an effect which, at a subsequent time—say a week, a fortnight, or a month—must result, without any intervening cause, in the same physical injury. As well might it be said that a death caused by poison is not to be attributed to the person who administered it, because the mortal effect is not produced contemporaneously with its administration. This train of reasoning might be pursued much farther; but, in consequence of the decision to which I shall hereafter refer, I deem it unnecessary to do so."

The court then proceeds to criticise *Victorian Ry. Com'rs v. Coultas*, supra, and refuses to follow its rule; and concludes as follows (page 442 of 13 App. Cas.): "In conclusion, then, I am of the opinion that, as the relation between fright and injury to the nerve and brain structures of the body is a matter which depends entirely upon scientific and medical testimony, it is impossible for any court to lay down, as a matter of law, that if negligence cause fright, and such fright, in its turn, so affects such structures as to cause injury to health, such injury cannot be 'a consequence which, in the ordinary course of things, would flow from the' negligence, unless such injury 'accompany such negligence in point of time.'"

In *Purcell v. St. Paul City Ry. Co.*, 48 Minn. 134, 138; 50 N. W. 1034, 16 L. R. A. 203, it was held that if the negligence of a carrier place a passenger in a position of such apparent imminent peril as to cause fright, and the fright causes nervous convulsions and illness, the negligence is the proximate cause of the injury, and the injury is one for which an action may be brought. A passenger injured by negligence of the carrier is entitled to recover to the full extent of the injury so caused, without regard to whether, owing to his previous condition of health, he is more or less liable to injury.

It was said by Gilfillan, C. J. (page 138 of 48 Minn., page 1034 of 50 N. W. [16 L.

R. A. 203]): "There may be a succession of intermediate causes, each produced by the one preceding, and producing the one following it. It must appear that the injury was the natural consequence of the wrongful act or omission. The new, independent, intervening cause must be one not produced by the wrongful act or omission, but independent of it, and adequate to bring about the injurious result. Whether the natural connection of events was maintained, or was broken by such new, independent cause, is generally a question for the jury. In this case the only cause that can be suggested as intervening between the negligence and the injury is plaintiff's condition of mind, to wit, her fright. Could that be a natural, adequate cause of the nervous convulsions? The mind and body operate reciprocally on each other. Physical injury or illness sometimes causes mental disease. A mental shock or disturbance sometimes causes injury or illness of body, especially of the nervous system. Now, if the fright was the natural consequence of—was brought about, caused by—the circumstances of peril and alarm in which defendant's negligence placed plaintiff, and the fright caused the nervous shock and convulsions and consequent illness, the negligence was the proximate cause of those injuries. That a mental condition or operation on the part of the one injured comes between the negligence and injury does not necessarily break the required sequence of intermediate causes. If a passenger be placed, by the carrier's negligence, in apparent, imminent peril, and, obeying the natural instinct of self-preservation, endeavor to escape it by leaping from the car or coach, and in doing so is injured, he may, if there be no contributory negligence on his part, recover for the injury, although, had he remained in the car or coach, he would not have been injured. The endeavor to escape is not of itself contributory negligence. *Wilson v. Northern Pac. R. Co.*, 26 Minn. 278, 3 N. W. 333. In such case, though there comes, as an intermediate cause between the negligence and injury, a condition or operation of mind on the part of the injured passenger, the negligence is nevertheless the proximate cause of the injury. The defendant suggests that plaintiff's pregnancy rendered her more susceptible to groundless alarm, and accounts more naturally and fairly than defendant's negligence for the injurious consequences. Certainly a woman in her condition has as good a right to be carried as any one, and is entitled to at least as high a degree of care on the part of the carrier. It may be that, where a passenger, without the knowledge of the carrier, is sick, feeble, or disabled, the latter does not owe to him a higher degree of care than he owes to passengers generally, and that the carrier would not be liable to him for an injury caused by an act or omission not negligent as to an ordinary passenger. But when the act or omission is negligence

as to any and all passengers, well or ill, any one injured by the negligence must be entitled to recover to the full extent of the injury so caused, without regard to whether, owing to his previous condition of health, he is more or less liable to injury. If the recovery of a passenger in feeble health were to be limited to what he would have been entitled to had he been sound, then, in case of a destruction by fire or wrecking of a railroad car through the negligence of those in charge of it, if all the passengers but one were able to leave it in time to escape injury, and that one could not because sick or lame, he could not recover at all. The suggestion mentioned would, if carried to its logical consequences, lead to such a conclusion."

In *Sloane v. Southern Cal. Ry. Co.*, 111 Cal. 668, 680, et seq., 44 Pac. 320, 32 L. R. A. 193, after statement of the facts of the case and of the arguments of counsel, the opinion, per Harrison, J. (page 680 of 111 Cal., page 322 of 44 Pac., et seq. [32 L. R. A. 193]) says: "The real question presented by the objections and exception of the appellant is whether the subsequent nervous disturbance of the plaintiff was a suffering of the body or of the mind. The interdependence of the mind and body is in many respects so close that it is impossible to distinguish their respective influence upon each other. It must be conceded that a nervous shock or paroxysm, or a disturbance of the nervous system, is distinct from mental anguish, and falls within the physiological, rather than the psychological, branch of the human organism. It is a matter of general knowledge that an attack of sudden fright or an exposure to imminent peril has produced in individuals a complete change in their nervous system, and rendered one who was physically strong and vigorous weak and timid. Such a result must be regarded as an injury to the body rather than to the mind, even though the mind be at the same time injuriously affected. Whatever may be the influence by which the nervous system is affected, its action under that influence is entirely distinct from the mental process which is set in motion by the brain. The nerves and nerve centers of the body are a part of the physical system, and are not only susceptible of lesion from external causes, but are also liable to be weakened and destroyed from causes primarily acting upon the mind. If these nerves or the entire nervous system is thus affected, there is a physical injury thereby produced, and, if the primal cause of this injury is tortious, it is immaterial whether it is direct, as by a blow, or indirect through some action upon the mind. This subject received a very careful and elaborate consideration in the case of *Bell v. Great Northern Ry. Co.*, L. R. 26 Ir. 428. [The opinion then quotes with approval from the *Bell* Case, much the same portions as above quoted, and proceeds as follows:] This case is quoted at great length, and with approval, in the eighth edition of

Mr. Sedgwick's treatise on Damages, § 860. Mr. Beven, in the recent edition of his work on Negligence (volume 1, pp. 77-81), also comments upon it with great approval. In *Purcell v. St. Paul City Ry. Co.*, 48 Minn. 134, 50 N. W. 1034, 16 L. R. A. 203, the defendant so negligently managed one of its cars that a collision with an approaching cable car seemed imminent, and was so nearly caused that the attendant confusion of ringing alarm bells, and of passengers rushing out, produced in the plaintiff, who was a passenger on the car, a sudden fright which threw her into convulsions, and, she being then pregnant, caused in her a miscarriage and subsequent illness. The court held that the defendant's negligence was the proximate cause of the plaintiff's injury, and that it was liable therefore, even though the immediate result of the negligence was only fright, saying: 'A mental shock or disturbance sometimes causes injury or illness of body, especially of the nervous system.' * * * The mental condition which superinduced the bodily harm in the foregoing cases was fright, but the character of the mental excitation, by which the injury of the body is produced, is immaterial. If it can be established that the bodily harm is the direct result of the condition, without any intervening cause, it must be held that the act which caused the condition set in motion the agencies by which the injury was produced, and is the proximate cause of such injury. Whether the indignity and humiliation suffered by Mrs. Sloane caused the nervous paroxysm, and the injury to her health from which she subsequently suffered, was a question of fact to be determined by the jury. There was evidence before them tending to establish such fact, and, if they were satisfied from that evidence that these results were directly traceable to that cause, and that her expulsion from the car had produced in her such a disturbance of her nervous system as resulted in these paroxysms, they were authorized to include in their verdict whatever damage she had thus sustained."

In *Dulleu v. White & Sons*, 70 L. J. (King's Bench Div. 837, 842, the court says (per Kennedy, J., page 837): "The statement of claim alleges that on July 20, 1900, the plaintiff, then being in a state of pregnancy, was behind the bar of her husband's public house, and that the defendants by their servant negligently drove a pair-horse van into the public house. It goes on to allege, in paragraph 4, that the plaintiff in consequence sustained a severe shock, and was seriously ill, and on September 29th following gave premature birth to a child; and in paragraph 5, that, in consequence of the shock sustained by the plaintiff, the child was born an idiot. Then follows the claim for damages. The only matter we have to decide is whether, if it be proved at the trial that the defendants' servant did negligently drive a pair-horse van, and, by reason of his negligence, drove it into the part of the public house where the

plaintiff was, and did thereby cause her such a nervous shock as to make her ill in body and suffer bodily pain in the way alleged, the plaintiff has a good cause of action for damages under paragraph 4. * * * The defendants' counsel summed up his contention against the legal validity of the plaintiff's claim in the statement that no action for negligence will lie where there is no immediate physical injury resulting to the plaintiff. He has argued that the bodily harm, which, in the present case, resulted to the plaintiff through the shock received by her through the inroad of the van and horses into the room in which she was, and which so acted upon her in her then state of health as to cause the bodily harm, was in point of law too remote a consequence of the negligence of the defendants' servant. My Brother Phillimore and I agree that this contention ought not to be upheld; but as we arrive at this result by somewhat different courses of reasoning, and the case is upon the authorities not free from difficulty, and raises points of general interest, I think that I ought to state the considerations which have led me to my conclusion." The court then proceeds to discuss several cases, including *Victorian Ry. Com'rs v. Coultas*, supra, *Mitchell v. Rochester Ry. Co.*, supra, and various text-writers and other cases, and pays special attention to the case of *Spade v. Lynn & Boston R. R.*, supra. After carefully analyzing this case, the opinion concludes as follows: "But certainly, if as is admitted, and I think justly admitted, by the Massachusetts judgment, a claim for damages for physical injuries naturally and directly resulting from nervous shock which is due to the negligence of another in causing fear of immediate bodily hurt is in principle not too remote to be recoverable in law, I should be sorry to adopt a rule which would bar all such claims on grounds of policy, and, in order to repress the possible prosecution of unrighteous or groundless actions of the like kind. Such a course involves the risk of denial of justice to meritorious claims, and it necessarily implies a certain degree of distrust, which I do not share, in the capacity of legal tribunals to get at the truth in this class of case. So far as I am entitled to speak from experience, I see no reason to suppose that a jury would really have more difficulty in weighing the medical evidence as to the effects of nervous shock through fright, than in weighing the like evidence as to the effects of a nervous shock through a railway collision or a road car accident, where, as often happens, no palpable injury, or very slight palpable injury, has been occasioned at the time." See also, as tending to support the same rule, *East Tenn.*, etc., *R. R. Co. v. Lockhart*, 79 Ala. 315; *Fitzpatrick v. Great Western Ry. Co.*, 12 U. C. Q. B. 645; *Yoakum v. Kroeger* (Tex. Civ. App.) 27 S. W. 953; *McKeon v. Chicago*, etc., *Ry. Co.*, 94 Wis. 477, 69 N. W. 175, 35

L. R. A. 252, 59 Am. St. Rep. 910; *Mack v. South-Bound R. Co.*, 29 S. E. 905, 908, 52 S. C. 323, 40 L. R. A. 679, 68 Am. St. Rep. 913; *I Beven*, Neg. in Law, 77 et seq.; 4 *Sutherland on Damages*, 3600, 3614; *Pollock on Torts*, 50; *Watson on Pers. Inj.* 510, § 405. We are of the opinion that the true rule is well stated in the above cases, and that the charge to the jury, as given by the court below, stating the rule as to recovery for injuries caused by fright, was a full and correct statement of the law, relating to the grounds of recovery in this class of cases. The two requests, to the refusal of which exception was taken, were sufficiently covered by the charge of the court as previously given, instructing the jury that there could be no recovery for mere fright, not accompanied by physical injury, and not followed by any injury as its natural consequence.

The remaining exceptions relate to the refusal of the court to charge the jury properly, and its error in charging the jury as to the plaintiff's right of recovery for such services, in nursing her daughter in her illness, as were in excess of the ordinary services she would be bound to render to a minor child. We find no error in these instructions, and it does not in any way appear that the jury placed exaggerated value upon such services, or that the verdict was thereby unduly increased.

On the whole, we find no error upon any point taken by the exceptions, and the same are overruled; and the case is remanded to the superior court, with instructions to enter judgment on the verdict.

CONNECTICUT MUT. LIFE INS. CO. v. TUCKER et al.

(Supreme Court of Rhode Island. Dec. 29, 1905.)

On reargument. Affirmed.

For former report, see 27 R. I. 170, 61 Atl. 142.

PER CURIAM. We have carefully examined the cases cited by the counsel for Darius Pinkham and considered his argument, and are of the opinion that the decision reported in 27 R. I. 170, 61 Atl. 142, is correct, and the same is therefore affirmed.

The case will be remanded to the superior court with directions to enter the decree framed by this court.

(23 R. I. 180)

GORMAN v. HAND BREWING CO.

(Supreme Court of Rhode Island. Feb. 25, 1907.)

1. MASTER AND SERVANT—INJURIES TO SERVANT—SUFFICIENCY OF EVIDENCE—NEGLIGENCE OF MASTER.

Where plaintiff's intestate was thrown from the wagon which he was driving for defendant,

and killed while the horses attached to the wagon were running away with the wagon pole, which had become broken and detached from the wagon, evidence tending to prove that the breaking of the pole was caused by imperfect welding of the iron by which the pole was attached to the wagon, that the work was done by servants of defendant in its blacksmith shop, and that the pole was made and fitted for the wagon by defendant's servants established a *prima facie* case of negligence on defendant's part.

2. SAME.

In an action against a master for injuries to a servant causing his death, and resulting from his being thrown from the wagon he was driving for defendant through the breaking of the pole thereof, evidence examined, and *held* insufficient to overcome the *prima facie* showing of negligence on defendant's part.

3. EVIDENCE — UNCONTROVERTED EVIDENCE — SUFFICIENCY.

Where the testimony of a witness contains inherent improbabilities or contradictions which satisfy the court or jury of its falsity, they need not accept it as true merely because it is not contradicted by direct testimony.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 2437.]

4. DEATH—EXCESSIVE DAMAGES.

In an action for death of a strong healthy man 32 years of age, employed as a teamster, a verdict *held* excessive above the sum of \$10,000.

Exceptions from Superior Court.

Trespass on the case for negligence by Julia Gorman against the Hand Brewing Company. Verdict for plaintiff, and defendant brings exceptions. Exceptions overruled, except on question of damages.

Argued before DOUGLAS, C. J., and DUBOIS, BLODGETT, JOHNSON, and PARK-HURST, JJ.

John W. Hogan and Philip S. Knauer, for plaintiff. Lewis A. Waterman and John J. Fitzgerald, for defendant.

DUBOIS, J. This is an action of trespass on the case for negligence, brought, under the statute, by the widow of Jeremiah Gorman, to recover damages for the death of her husband, which, she alleges, was caused by the wrongful act, default, or neglect of the defendant.

It appears that the plaintiff's husband, a strong, healthy man of the age of 32 years, a driver in the employ of the defendant, while properly driving a pair of horses harnessed to a loaded wagon, in the course of his employment, on the 29th day of March, 1904, received the injuries which caused his death by being thrown from the driver's seat of the wagon to the ground, while the horses were running away with the wagon pole, which had become broken and detached from the wagon, and which had probably struck and frightened the horses and caused them to run away. After verdict for the plaintiff in the superior court the defendant duly made a motion for a new trial for the reasons hereinafter stated which motion was denied by said superior court, and the cause was brought to this court and heard upon

the defendant's bill of exceptions based upon the following grounds: That the verdict is against the law; that the verdict is against the evidence; that the damages awarded by the jury in said cause are grossly excessive and unjust; that the defendant has discovered new and material evidence in said cause, which it had not discovered at the time of the trial thereof, and which it could not have discovered at said time by the exercise of reasonable care; that the judge who presided at the trial of said case erred in certain of his rulings, to which exceptions were duly allowed, and that the counsel for the plaintiff made a statement in the nature of testimony, to which exception was duly allowed. The verdict is not against the law. Under the instructions given to the jury, which constituted the law governing them in the case, the jury was at liberty to find either for the defendant or for the plaintiff, according to the preponderance of the evidence as weighed by them. There is nothing in the verdict to indicate that the jury disregarded the instructions of the court.

1. The verdict is not against the evidence. The testimony for the plaintiff tended to prove that the breaking of the pole, which resulted in the injury and subsequent death of her husband, was caused by imperfect welding of the iron by which the pole was attached to the wagon, and that the work was done by the servants of the defendant in its blacksmith shop, and that the pole was made and fitted for said wagon by servants of the defendant. As poles do not usually become detached from wagons while in ordinary use through breaks of that character and cause, and as the pole and wagon was an apparatus wholly under the control of the defendant, the mere fact that it did so break apart from the wagon is inferentially evidence of negligence on the part of the defendant. The plaintiff having thus presented a *prima facie* case, the burden was cast upon the defendant to rebut the presumption to the satisfaction of the jury. The defendant offered evidence, by two witnesses, another driver and a helper in the employ of the defendant, who, in another wagon preceded the wagon driven by the plaintiff's husband, that prior to the time of, and about a mile and a half away from the place of, the fatal accident, the off side of the half-circle (so-called) that connected the pole with the axle of the wagon gave way, and that at the request of Gorman they went back to his wagon and assisted him to make temporary repairs by strapping the half-circle of the pole to the axle of the wagon with three lazy straps taken from the harness of the horses driven by Gorman, two straps being used on the off side and one on the nigh side, and that they then proceeded on their journey without further incident until the final break occurred. No evidence was introduced tending to strengthen or rebut this testimony relative to such repairs, or to

prove that the wagons were or were not stopped at such time and place, except that the manager of the defendant testified that after the accident Gorman told him about the previous break and the repairs that had been made, and another witness testified that after the accident he saw one strap hanging down on the off side of the axle. The testimony of the manager as to the conversation with Gorman is not supported by any other witness, but is contradicted by a number of persons present at the time, including the doctor and nurse in attendance upon Gorman. And the testimony of the witness in regard to seeing the strap on the axle is not corroborated, but is contradicted by several other witnesses who were present at the time he claims to have noticed it, and who had equal opportunities to see what was in sight. The jury not only found for the plaintiff, but answered in the negative the following special finding, prepared by counsel for the defendant: "Had the half-circle on the right side broken and been repaired temporarily either by Gorman or to the knowledge of Gorman prior to the accident that resulted in Gorman's death?"

2. The defendant objects to the verdict and special finding because in reaching such a result the jury completely ignored, disregarded, or discarded the positive testimony of the driver and helper as to the prior break and repairs, and calls our attention to our quotation in *Murray v. Pawtuxet Valley St. Ry. Co.*, 25 R. I. 209, 212, 55 Atl. 491: "It is the general rule that, where unimpeached witnesses testify distinctly and positively to facts which are uncontradicted, their testimony suffices to overcome a mere presumption." We have found no better statement of the principle under consideration than is made by Mitchell, Justice, in *Anderson v. Liljengren*, 50 Minn. 3, 52 N. W. 219. He says: "The rule undoubtedly is that where the positive testimony of a witness is uncontradicted and unimpeached, either by other positive testimony or by circumstantial evidence, either intrinsic or extrinsic, it cannot be disregarded, but must control the decision of the court or jury. But a witness may be contradicted by the facts he states as completely as by direct adverse testimony. A court or jury is not bound to accept it as true merely because there is no direct testimony contradicting it, where it contains inherent improbabilities or contradictions, which alone, or in connection with other circumstances in evidence, satisfy them of its falsity." Among the advantages that the jury always has over the court which is asked to review its finding is the opportunity given to weigh witnesses, as well as their testimony. From the moment that a witness is called to the stand until he leaves it and is lost to view his physical and mental characteristics are subject to the analysis of 12 students of human nature, having different degrees of capacity, and more or less

experience, who pass judgment upon him as well as his story. In this case the jury took a view of the places where the accidents are said to have occurred; and, although this view was taken in October, 1905, and therefore at a different season of the year from that in which the accident happened, and the condition of the roads was doubtless better, still the material composition, width, and grade of the streets were observable by them, and were doubtless of value in the consideration of the evidence as to what transpired thereon. The jury also had the benefit of an examination of the pole, wagon, harness, and lazy straps, and the testimony in explanation of the change in the circle of the pole by lengthening it since the accident, and, after the arguments of counsel and the clear and correct charge of the court, found the verdict and special finding hereinbefore mentioned. That the jury was warranted in so finding is clear if there are any improbabilities or contradictions in the testimony relating to the first accident which alone, or in connection with other circumstances, reasonably satisfied the jurymen of its falsity.

There is an inherent improbability in the story that one side of the half-circle broke without being immediately followed by a corresponding break on the other side. No claim is made that the break occurred while the wagon was at rest, as, for instance, from a kick by one of the horses, or by a weight falling upon it, or from any force suddenly applied to that side. On the contrary, the inference is that, while this loaded wagon was being drawn over the rough road on that day in early spring, the horses pulled away one part of the end of the half-circle on the off side from its other part, which was shackled to the axle. If so, what would naturally be likely to happen? All the weight of the wagon and load and all the force and strength of the horses would instantly be transferred to the high side of the half-circle, which thus would be called upon to bear the strain to endure which the entire half-circle had just proved insufficient, with the probable result of an immediate break on that side. The story of a partial break in such circumstances assumes that a part is stronger than the whole. The narrative of the temporary repairs by means of the lazy straps is no more probable. If the half-circle of the pole was strapped to the axle as tightly as it could be on the off side, and was strengthened by strapping the same as well as possible on the high side, the effect must have been to draw the pole several degrees out of true towards the off side, so that, when the horses attempted to overcome the inertia of the loaded wagon, they were drawing towards their right side, and were more likely to turn the wagon than to draw it forward, and all attempts made by the driver to counteract this tendency must have added greatly to the strain ordinarily imposed upon the half-circle and at that time en-

(102 Me. 123)

**AMERICAN MERCANTILE EXCHANGE
v. BLUNT.**(Supreme Judicial Court of Maine. Nov. 19,
1906.)**1. CONTRACTS — CONSTRUCTION — GENERAL
RULES — CONSTRUING INSTRUMENTS TO-
GETHER.**

When a contract is partly written and partly oral, the written and the oral parts must be construed together in determining what the whole contract expresses.

**2. SAME—LEGALITY—EFFECT OF PARTIAL IL-
LEGALITY.**

When any material part of an entire contract which was legal when made becomes illegal by reason of a statute subsequently enacted, such contract is thereby wholly terminated as soon as the statute takes effect, although the time specified in the contract for its performance had not then fully expired.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 11, Contracts, § 702.]

**3. SAME — ACTIONS FOR BREACH — RIGHT OF
ACTION.**

When a contract legal at its inception becomes illegal by subsequent statutory enactment, no action can be maintained on such contract for a failure to continue to perform the conditions of such contract after the illegality has attached.

4. SAME.

But while it is true that a contract which was legal at its inception may become illegal by subsequent statutory enactment, yet it does not follow that the acts done under the contract before the enactment of the statute are illegal. In such case the statute puts an end to the contract, and no recovery can be had thereon for nonperformance after the time when the contract is thus terminated.

**5. SAME — ENTIRE CONTRACT — TERMINATION
—PERFORMANCE.**

The plaintiff and the defendant made a contract which was partly written and partly oral, wherein it was stipulated, among other things, that the plaintiff should employ its "system" in the collection of claims placed in its hands by the defendant. This contract was a continuing agreement, and was intended to be operative until the same was canceled by the parties, or abrogated by law. The parties did not cancel the same. It was a part of the plaintiff's "system" that when judgments had been obtained against debtors, it would advertise such judgments for sale by public posters. By a statute subsequently enacted such advertising was made illegal. *Held*, (1) that the contract was an entire contract; (2) that the contract being an entire contract was wholly terminated as soon as the statute took effect; (3) that the plaintiff cannot recover from the defendant for nonperformance of the conditions of the contract after the time when the statute went into effect.

(Official.)

Report from Supreme Judicial Court, Penobscot County.

Action by the American Mercantile Exchange against A. G. Blunt. Heard on report. Judgment for defendant.

Assumpsit on a contract made November 24, 1897, by the plaintiff corporation, a collection agency, and the defendant in relation to the collection of claims placed in the hands of the plaintiff by the defendant. The plaintiff alleged that the defendant had failed to perform his part of the contract, and that in consequence of this failure the defendant ow-

dured by the two straps on the off side and the unbroken end of the half-circle and one strap on the nigh side. The jury was asked to believe that this make-shift was sufficient to accomplish its purpose, and, in fact, did last while the wagon was being drawn, a distance of about a mile and a half, to the place where the final break occurred; and by the special finding the jury made its response. It was a matter clearly within the province of the jury to determine, and there is nothing to indicate that the verdict, including the special finding, was the result of passion, prejudice, or any improper motive on the part of the jury.

We are of the opinion that the jury erred in computing the amount of damages, and that the same is excessive, and should not exceed the sum of \$10,000. A new trial will be granted for this reason unless the plaintiff shall remit the amount in excess of that sum.

The affidavits filed to support the claim of newly discovered evidence contain mostly cumulative or explanatory testimony, which, by the exercise of reasonable diligence, could have been presented at the trial, and, moreover, is not, in our opinion, of a nature likely to affect the result.

The exceptions to the rulings of the presiding justice present no new questions of law, and we find no error in his rulings in these respects, therefore the exceptions are overruled.

The statement of counsel, to which the defendant took exception, was perfectly proper in the circumstances. In cross-examination a witness for the plaintiff had just denied that two men whom he saw on Saturday came from Mr. Hogan. Mr. Hogan immediately admitted that they did, and said that he was surprised at the denial of the witness.

The defendant also excepted to the refusal of the presiding justice to grant his motion for a new trial upon each of the following grounds: that the verdict is against the law; that the verdict is against the evidence; because the damages awarded are excessive, and for newly discovered evidence. The exception that the damages awarded are excessive must be sustained, as hereinbefore decided, and the other exceptions, which we have considered and disposed of, must be overruled. The presiding justice had the same opportunity that the jury had to satisfy himself of the credibility of the story told by the witnesses, and the fact that he was unwilling to disturb the verdict strengthens the presumption that it was correct.

Case remanded to the superior court for a new trial, unless within 30 days hereafter, the plaintiff shall file, in said court, her remittitur of all damages awarded in said case in excess of \$10,000, in which case judgment shall be entered on the verdict so reduced.

ed the plaintiff \$75 for subscriptions. The action was brought to recover this sum of \$75.

The writ was dated May 5, 1905. Plea, the general issue, with the following brief statement:

"And for brief statement defendant further says that the alleged several promises claimed in the declaration to have been made by the defendant were not made within six years before the commencement of said suit."

Tried at the April term, 1906, of the Supreme Judicial Court, Penobscot county. At the conclusion of the testimony the case was "reported to the law court for determination upon so much of the evidence as is legally admissible."

The case appears in the opinion.

Argued before WISWELL, C. J., and EME-
RY, WHITEHOUSE, SAVAGE, PEABODY,
and SPEAR, JJ.

T. P. Wormwood, for plaintiff. Martin & Cook, for defendant.

SPEAR, J. This action is based upon a contract wherein the plaintiff avers that the defendant has failed of performance on his part, and in consequence of such failure is indebted to the plaintiff in the sum of \$75. The essential part of the contract under which the plaintiff claims is as follows:

"American Mercantile Exchange,
Incorporated.

"Nov. 24, 1897.

"In consideration of an annual contract in above agency, I hereby agree to pay said agency, or order, all sums of money as collected out of accounts placed in said agency's hands by me, whether such collections or settlements are made through said agency's office, or by me through my office, or by any other person in my behalf, until the same shall amount to twenty dollars, and I further agree to send to the said agency on or before ten days from date, ten accounts, otherwise the payment of twenty dollars shall become due and payable to said agency, or order, on demand."

This agreement was properly executed by the plaintiff and defendant.

"To American Mercantile Exchange:

"We hereby agree to subscribe to your exchange under the following special terms and conditions:

"(1) You will employ your system to collect all claims we may place in your hands, suing where you deem advisable, and using legal means to enforce payment from debtors in any part of the United States and Canada, and all such claims shall be subject to our control or withdrawal, unless legal action has been taken, and all debts that may be advertised for sale shall be held at the figures quoted by us."

It will be observed by the use of the language in the first clause of this stipulation,

"you will employ your system to collect all claims," etc., that the written contract herein set forth did not state or contain all the elements of the contract. What the plaintiff's system above alluded to was is not stated. The testimony, however, fully describes the "system" employed by the agency in the collection of accounts. In answer to the question: "You have stated that when you went to Mr. Blunt you explained to him the method of the agency. Now, will you explain to us what that method was?"—the agent of the plaintiff who executed the contract answered in detail as follows: "At that time the method was to take the list of claims on a blank form, collecting 10 cents for each claim to cover postage. A series of four letters were employed by the agency, the first notifying that the account was due and unpaid, and asking them to call on their creditor and make some settlement, and informing them at the same time that the agency in no case handled the money. After a certain length of time which shows on the list, I can't remember now, a second letter was sent informing them of the fact that they who did not pay would be reported to the trade if it was still left unpaid. After a certain length of time a third one was sent informing them that they would be sued if it was not paid, and a fourth one that when judgment was obtained the account would be advertised for sale by public posters, and inclosing them a copy of one of the posters that had already been published."

This "system," the terms of which were not incorporated in the written contract, nevertheless, in view of the purposes and object of the defendant, became, by the specific written allusion to it, a material and important feature in the performance of the contract on the part of the plaintiff. The defendant in the written stipulation, prescribing its duties, required that the plaintiff should use its "system." Its "system" at the time the contract was executed was explained by the plaintiff's agent as above set forth. When so explained, the terms of his interpretation became as much a part of the contract as though they had been contained in a separate written document. Therefore, the whole contract of the parties, or so much of it as is necessary to the decision of this case, is contained in the written clauses before quoted in this opinion, and the explanation of the "system" as made by its agent to the defendant, that is, the written and the oral parts of the contract, are to be construed together in determining what the whole contract expressed.

This contract was entire, and constituted a continuing agreement, and was binding upon the defendant to pay his subscription yearly, unless abrogated by consent of the parties or operation of law. There is no pretense that the contract was mutually canceled, but the defendant avers that its further performance was made illegal by the enactment of chapter 112, p. 117, Pub. Laws 1899, which

went into effect April 16, 1899, seven months before the maturity of the second year's subscription. By the contract the subscription was not due until the end of the year. This act is now incorporated in chapter 130, § 7, of the Revised Statutes, as follows: "No person, firm or corporation, shall publicly advertise for sale in any manner whatever, or for any other purpose whatever, any list or lists of debts, dues, accounts, demands, notes or judgments, containing the names of any or all of the persons who owe the same. Any such public advertisement containing the name of but one person who owes as aforesaid, shall be construed as a list within the meaning of this section. Any person, firm or corporation, violating the provisions of this section, shall be liable in an action of debt, to a penalty not exceeding one hundred dollars, and not less than twenty-five dollars, to each and every person, severally and not jointly, whose name appears in any such list."

It is clear that this statute when it took effect April 16, 1899, absolutely prohibited the plaintiff from using that part of its "system" wherein it had stipulated that accounts would be advertised for sale by public poster. It is presumed that the plaintiff did not violate this statute and did not, subsequently to the date when it took effect, post any list of delinquent debtors. Therefore, the case stands as if the plaintiff on the 16th day of April, 1899, had ceased to perform its contract in respect to posting lists of debtors' names and advertising the judgment for sale. While the plaintiff's contract as to the method of advertising does not specifically state that the posters shall contain the name of the debtor, yet the only inference to be derived from the language used clearly sustains that conclusion.

But the full performance of its contract was a condition precedent to the right of the plaintiff to recover the annual payment agreed upon, whether the nonperformance was caused either by the fault of the plaintiff, by impossibility, as by an act of God, or by a statute prohibiting performance. Upon this point the Circuit Court of the United States for the District of Pennsylvania in *Odlin v. Insurance Company of Pennsylvania*, Fed. Cas. No. 10,433, says: "It is a general principle of law that where a contract is lawful when made, and a law afterwards renders performance of it unlawful, neither party to the contract shall be prejudiced, and the contract is to be considered at an end." This does not mean that a contract legal at its inception becomes illegal by subsequent statutory prohibition as to acts done before the enactment of the statute, but that the statute puts an end to the contract, and there can be no legal recovery by the plaintiffs, even if it should perform the unlawful acts, as it is contrary to the policy of the

law to permit a party to recover for the performance of his own illegal acts, or benefit by his own wrong. The law, however, excuses the plaintiff from performing its contract, and releases it from liability to damages for nonperformance, but it does not leave it in a position to maintain an action for recovery upon an entire contract, the performance of any part of which is prohibited, even if performed.

In *Greenough v. Balch*, 7 Me. 461, the court fully approved of this rule of law, and say: "Nor are we disposed to find fault with the doctrine that where the consideration, or a part of it is *malum prohibitum*, it violates and invalidates the promise, as much as if it had been *malum in se*; both being unlawful, and neither entitled to favor or indulgence."

Shaw, C. J., in *White v. Buss*, 3 Cush. 448, in discussing the status of illegal contracts says: "The law will not lend its aid to carry into effect an illegal contract, if it be executory, nor to restore the party who has paid money on it, if executed."

In *Goodwin v. Clark*, 65 Me. 280, it was held: "A person cannot recover for his personal services, portions of which are rendered in an unlawful employment, the contract being an entirety."

In *Bishop v. Palmer*, 146 Mass. 469, 16 N. E. 299, 4 Am. St. Rep. 339, the court say: "As a general rule where a promise is made for one entire consideration, a part of which is fraudulent, immoral, or unlawful, and there has been no apportionment made, or means of apportionment furnished by the parties themselves, it is well settled that no action will lie upon the promise." But these propositions are elementary. While these two cases do not involve the same state of facts presented in the case at bar, yet, by analogy, they are clearly applicable. In the cases cited it is held that when any stipulation of an entire contract is illegal, the contract cannot be enforced. In the case at bar the contract is entire, and a part of it became illegal, *malum prohibitum*, at once upon the effect of the statute. The advertisement of a single account for sale, however, soon after the statute became a law, would have subjected the plaintiff to the penalty prescribed. Therefore, if the plaintiff during the second year of the contract, and before it was performed, was prohibited by law from the performance of any material stipulation, the entire contract for the year failed, and it cannot recover even for the part performed.

For the third and subsequent years for which it has brought suit the prohibited part of the contract was illegal from the beginning of the year, and no recovery can be had for any of these years.

Under the contract the balance of the first year's subscription, \$11.14, is barred by the statute of limitations.

Judgment for the defendant.

(182 Ma. 72)

IN re AMERICAN BOARD OF COM'RS
FOR FOREIGN MISSIONS.

IN re CHANDLER'S WILL.

(Supreme Judicial Court of Maine. Nov. 12,
1906.)

1. WILLS—SANITY OF TESTATOR—BURDEN OF
PROOF.

Rev. St. c. 76, § 1, provides as follows: "A person of sound mind, and of the age of twenty-one years, may dispose of his real and personal estate by will, in writing, signed by him, or by some person for him at his request, and in his presence, and subscribed in his presence by three credible attesting witnesses, not beneficially interested under said will." There is no exception or qualification to the requirement that a person must be of sound mind in order to make a valid will, and the burden rests upon the proponent of the will to prove affirmatively that the testator was of sound mind when he made the will. Hence, in probating a will, the sanity of the testator must be proved. It is not to be presumed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, § 104.]

2. SAME—INSANITY—DEFINITION.

But the word "sanity" is used in its legal, and not its medical, sense. Etymologically, insanity signifies unsoundness. Lexically it signifies unsoundness of mind, or derangement of the intellect. In law, every mind is sound that can reason and will intelligently, in the particular transaction being considered; and every mind is unsound or insane that cannot so reason and will. The law investigates no further. This definition clearly differentiates the sound from the unsound mind, in the legal sense.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, § 66.]

3. SAME—DISPOSING MIND—DISPOSING MEM-
ORY.

A disposing mind involves the exercise of so much mind and memory as would enable a person to transact common and simple kinds of business with that intelligence which belongs to the weakest class of sound minds; and a disposing memory exists when one can recall the general nature, condition, and extent of his property and his relation to those to whom he gives, and also to those from whom he excludes, his bounty. But mere intellectual feebleness must be distinguished from unsoundness of mind. The requirements of a "sound and disposing mind" do not imply that the powers of the mind may not have been weakened or impaired by old age or bodily disease.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, §§ 92, 94, 96-100.]

4. SAME—EVIDENCE OF MENTAL INCAPACITY.

It is a well-established rule in this state that, while confinement in an insane asylum or the disability of guardianship is made prima facie evidence of some mental incapacity, yet it is a rebuttable presumption of fact and may be overthrown by a preponderance of the evidence. The incapacity of guardianship is simply a fact, which may be proven like any other fact tending to establish mental incapacity; but it does not work an estoppel upon the proponent of a will. Rev. St. c. 69, § 26, recognizes this principle and provides, among other things, that, "when a person over twenty-one years of age is under guardianship, he is incapable of disposing of his property otherwise than by his last will."

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, § 75.]

5. EVIDENCE—MEDICAL EXPERTS.

In the consideration of the testimony of medical experts, the test of consistency and reasonableness, always having reference to the

other testimony in the case, which their opinions may tend to corroborate or contradict, should be applied.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 2395-2398.]

6. SAME.

The opinion of a medical expert, whose testimony does not differentiate between a medically sound mind and a legally sound mind, is entitled to weight only when the other evidence shows that it applies to legal unsoundness, as a mind legally sound may be medically unsound. On the other hand, a medically sound mind necessarily includes a legally sound mind.

7. SAME—WEIGHT OF EVIDENCE—INTEREST OF
WITNESS.

When it appears that the opinion of a medical expert is made up from a prejudiced view and for a predetermined purpose, then the ordinary rule of law with reference to the effect of interest upon credibility should be applied with special force, as such opinion evidence presents an unsafe criterion upon which to found a judgment affecting important interests. Such testimony is not only worthless, but insidious and dangerous; for it is impossible for the layman, in the analysis of such testimony, to distinguish the true from the untrue; and, if the untrue is acted upon, injustice must follow. (Official.)

Report from Supreme Judicial Court, Cumberland County.

Appeal by the American Board of Commissioners for Foreign Missions from the decree of the Judge of probate, Cumberland county, approving and allowing certain instruments as the last will and testament, and codicils thereto, of Solomon H. Chandler, late of New Gloucester, Cumberland county, deceased. This appeal was taken in accordance with the provisions of Rev. St. c. 65, § 28. The appeal and reasons of appeal are as follows:

"State of Maine.

"To the Honorable the Judge of the Probate Court in and for the County of Cumberland:

"Respectfully represents American Board of Commissioners for Foreign Missions, a corporation legally existing and located in Boston, in the county of Suffolk and commonwealth of Massachusetts, that it is interested in the estate of Solomon H. Chandler, late of New Gloucester, in said county of Cumberland, deceased, of which said court has now jurisdiction, as residuary legatee under a certain instrument purporting to be the last will and testament of said deceased, dated September 17, 1897, and certain instruments purporting to be the last will and testament and codicils thereto of the said deceased, dated, respectively, March 10, 1896, August 11, 1896, and August 9, 1902, that it is aggrieved by your honor's decree on the petition of Andrew C. Chandler et al., that certain instruments purporting to be the last will and testament and codicils thereto of said deceased, dated, respectively, March 10, 1896, August 11, 1896, and August 9, 1902, may be proved and allowed, made at a probate court held at Portland, in and for said county of Cumberland, on the 3d day of June,

A. D. 1904, whereby certain instruments presented with said petition, dated, respectively, March 10, 1896, August 11, 1896, and August 9, 1902, purporting to be the last will and testament and codicils thereto of Solomon H. Chandler, late of New Gloucester, in said county, deceased, were approved and allowed as the last will and testament and codicils thereto of said deceased, and letters testamentary issued to Lyman M. Cousins, Andrew C. Chandler, and John W. True, and whereby it was further decreed that the costs of the petitioners and contestants, including fees of witnesses and stenographers, together with reasonable counsel fees for both said petitioners and contestants, be paid out of the estate of said Solomon H. Chandler, and hereby appeals therefrom to the Supreme Judicial Court, being the supreme court of probate, to be held at Portland, within and for the county of Cumberland, on the second Tuesday of October, A. D. 1904, and alleges the following reasons of appeal, viz.:

"First. The written instruments offered by the proponents, purporting to be the last will and testament and codicils thereto of Solomon H. Chandler, dated, respectively, March 10, 1896, August 11, 1896, and August 9, 1902, are not, nor is either of them, the last will and testament of the said Solomon H. Chandler.

"Second. The said written instrument dated March 10, 1896, offered by the proponents, purporting to be the last will of said Solomon H. Chandler, was revoked by a subsequent and valid will duly made and executed by the said Solomon H. Chandler on the 17th day of September, 1897, he being then of sound mind and of the age of 21 years, which said valid will was not thereafter legally changed or revoked by said Solomon H. Chandler.

"Third. The said written instrument dated August 11, 1896, and offered by the proponents, purporting to be a codicil to the alleged last will and testament of said Solomon H. Chandler dated March 10, 1896, was revoked by the said Solomon H. Chandler by his said valid will duly made and executed on the 17th day of September, 1897, which said valid will was never changed or revoked by said Solomon H. Chandler.

"Fourth. The said written instrument dated August 9, 1902, purporting to be a codicil to the alleged last will of Solomon H. Chandler, was not legally executed in the presence of three credible attesting witnesses not beneficially interested thereunder.

"Fifth. The said Solomon H. Chandler, at the time of the making and executing of the written instrument offered by the proponents, dated August 9, 1902, purporting to be a codicil to his alleged last will and testament dated March 10, 1896, was not of sound and disposing mind.

"Sixth. Upon petition of the municipal officers of the town of New Gloucester, in the county of Cumberland, and state of Maine,

dated April 12, A. D. 1902, said town then being the place of residence of said Solomon H. Chandler, representing said Solomon H. Chandler to be a 'person of unsound mind, who by reason of infirmity and mental incapacity is incompetent to manage his own estate and to protect his rights,' and further praying that John W. True, of New Gloucester, be appointed guardian of said Solomon H. Chandler, and after due notice given to said Solomon H. Chandler on said petition as ordered by the court, and after a hearing upon the same at which said Solomon H. Chandler was present and was interrogated by the court, said Solomon H. Chandler was adjudged and decreed by the probate court for said county of Cumberland on May 20, A. D. 1902, to be 'a person of unsound mind,' and said John W. True was appointed by said court to be the guardian of said Solomon H. Chandler, and gave bond in that behalf as ordered by said court, and under the warrant of said court caused the estate of said Solomon H. Chandler to be inventoried and appraised, and took and maintained, until said Chandler's decease, custody and control of his person and estate; and said judgment and decree was not subsequently modified, annulled, or reversed or vacated by said court, or any court having jurisdiction in the premises; and the mind of said Solomon H. Chandler did not, after the time of said judgment and decree, become restored to a condition of sanity of mind, and was not so restored on August 9, A. D. 1902, the date when said alleged codicil purports to have been made.

"Seventh. The making and execution of the written instrument dated August 9, 1902, purporting to be a codicil to the alleged last will and testament of the said Solomon H. Chandler dated March 10, A. D. 1896, was obtained by the undue influence of William K. Neal, John W. True, and Andrew C. Chandler, exerted over Solomon H. Chandler.

"Eighth. The said Solomon H. Chandler, at the time of the making and execution of the written instrument dated August 9, 1902, purporting to be a codicil to his alleged last will and testament dated March 10, 1896, was unduly influenced and fraudulently deceived in the making and execution thereof by other persons, or by influence other than his own mind, to wit, by persons having confidential and fiduciary relations to him and his estate, viz., John W. True, his legal guardian, William K. Neal, attorney for the guardian, and Andrew C. Chandler, the guardian's agent, to whom was committed the custody of his person, all of whom were then participating in the guardianship service in their several capacities for hire, and all of whom were to be benefited by the provisions of said alleged codicil, and the execution of said alleged codicil was thus procured by them.

"Ninth. The said written instrument dated August 9, 1902, purporting to be a codicil to

the alleged will of Solomon H. Chandler dated March 10, 1896, is not the offspring of the mind and will of said Solomon H. Chandler, but is the offspring of the mind and will of another or other persons, viz., William K. Neal, John W. True, and Andrew C. Chandler.

"Tenth. The said written instrument dated August 9, 1902, purporting to be a codicil to the alleged will of Solomon H. Chandler dated March 10, 1896, is not the act of the free will of said Solomon H. Chandler, but was procured by the fraud, deceit, and undue influence of other persons to be benefited by reason thereof, viz., Andrew C. Chandler, named as legatee under said alleged codicil, John W. True, named as executor under said alleged codicil, and William K. Neal, acting as agent and attorney for said John W. True in this behalf.

"Eleventh. The making and execution of said alleged codicil dated August 9, 1902, was not the spontaneous act of Solomon H. Chandler, understanding the nature and consequences thereof, but was the act of William K. Neal and other persons advised by him.

"Twelfth. John W. True, then the legal guardian of Solomon H. Chandler, and William K. Neal, then acting as attorney and agent of said guardian, and Andrew C. Chandler, agent of said guardian, to whom was then committed the custody of the person of said Solomon H. Chandler, and in whose actual custody upon said date was his person, fraudulently deceived said Solomon H. Chandler, and thereby procured from him the making and execution of the alleged codicil of August 9, 1902, as a codicil to a will dated March 10, 1896, which will they each and all then knew had been revoked by a subsequent valid and existing will, by reason whereof the contestant was defrauded of its legal rights under the provisions of said valid will dated September 17, 1897.

"Thirteenth. John W. True, then the legal guardian of Solomon H. Chandler, and William K. Neal, then acting as attorney at law, legal adviser and agent of said guardian, and Andrew C. Chandler, agent of said guardian, to whom was then committed the custody of the person of said Solomon H. Chandler, and in whose actual custody upon said date was his person, practiced a fraud upon said Solomon H. Chandler in obtaining the making and execution by said Solomon H. Chandler of the alleged codicil dated August 9, 1902, under the provisions of which they were persons to be benefited, in that they all were present at the making and execution thereof, and they each and all then knew said Solomon H. Chandler to be a person then under guardianship, by reason of the fact that he had been decreed by the probate court of the county of Cumberland, in which he then resided, to be 'a person of unsound mind,' and they each and all then knew that his condition of mind was such that he did not then recall the fact of the existence of or the provi-

sions of the valid will dated September 17, 1897; and they each and all then had knowledge of the existence of such subsequent valid last will of said Solomon H. Chandler which revoked the alleged will of March 10, 1896; and they each and all then failed and neglected to recall to the mind of said Solomon H. Chandler that he had theretofore made and executed such valid will, which was subsequent to said alleged will of March 10, 1896; and in place thereof said William K. Neal, in the presence of, and with the knowledge and consent of, said John W. True, the guardian, and Andrew C. Chandler, the custodian of the person, of Solomon H. Chandler, presented and read to Solomon H. Chandler the revoked will, dated March 10, 1896, as a then valid will subject to be changed by a codicil, by reason of all of which fraudulent practice the making and execution of the alleged codicil of August 9, 1902, was obtained with the purpose and intent thus to defraud the contestant, and to so divert the testamentary disposition of the estate of said Solomon H. Chandler that they might be benefited thereby.

"Fourteenth. William K. Neal, in the presence of and with the assistance of John W. True and Andrew C. Chandler, on the 9th day of August, 1902, fraudulently deceived the said Solomon H. Chandler, he being then under guardianship as a person of unsound mind, by falsely representing and pretending to him that the then revoked and void instrument dated March 10, 1896, purporting to be the will of Solomon H. Chandler, of which said Neal had obtained possession by virtue of said guardianship, was his legal and valid last will and testament, and thereby unduly influenced and induced him to make pretended alterations and changes therein by the making and execution of the instrument dated August 9, 1902, purporting to be a codicil to said alleged will dated March 10, 1896, whereby the legal and valid will of said Solomon H. Chandler dated September 17, 1897, of the existence of which the said William K. Neal, John W. True, and Andrew C. Chandler each and all then had knowledge, would be by said Solomon H. Chandler unwittingly revoked.

"Fifteenth. Andrew C. Chandler and John W. True are the petitioners who signed the petition as proponents for the probate and allowance by the probate court of the alleged will dated March 10, 1896, and the alleged codicil dated August 11, 1896, and the alleged codicil dated August 9, 1902, as the last will and testament of said Solomon H. Chandler, now in hearing. They are also two of the executors named in said alleged codicil of August 9, 1902, and they are persons to be benefited thereby; and they are also two of the persons by reason of the fraud, deceit, acts, promptings, and undue influence of whom, acting upon the weakened mind of said Solomon H. Chandler, the making and execution of said alleged codicil dated Au-

gust 9, 1902, was procured; and by reason thereof the decree of the court directing 'that the costs of the petitioners and of the contestants in this case, including fees of witnesses and stenographers, together with reasonable counsel fees for both said petitioners and contestants be paid out of the estate of said Solomon H. Chandler by the executors and charged in their account with said estate' is unjust, without equity, encouraging and assisting the practice of frauds and deceit, and is contrary to the policy of the law.

"Dated this 14th day of June, A. D. 1904.
"American Board of Commissioners for Foreign Missions,

"By Frank H. Wiggin, Treasurer."

This appeal and the reasons therefor were duly entered at the said October term of said Supreme Judicial Court sitting as the supreme court of probate.

At said October term of said Supreme Judicial Court the petitioners and legatees filed a motion to have the appeal dismissed. The motion was overruled, and thereupon the petitioners and legatees took exceptions. These exceptions were not considered by the law court.

Afterwards, at said October term of said Supreme Judicial Court, the appellant was allowed to amend its "Reasons of Appeal" by adding, directly after the fifteenth specification therein, the following averment:

"Sixteenth. And the said American Board of Commissioners for Foreign Missions avers that Frank H. Wiggin upon all the dates of taking this appeal, and of making, signing, filing in the probate court, and entering in the Supreme Judicial Court these reasons for appeal, was the duly elected and qualified and acting treasurer of said corporation, the American Board of Commissioners for Foreign Missions, and for more than a year next preceding any and all of said dates was continuously such treasurer; and said Frank H. Wiggin, in his said capacity as treasurer, was duly authorized by said corporation in its name and behalf to take this appeal, and to sign these reasons for appeal for and in its name and behalf; and said treasurer, Frank H. Wiggin, in the name and behalf of said American Board of Commissioners for Foreign Missions, was duly authorized to execute and procure to be executed the necessary bond for costs of appeal from said decree of the probate court.

"American Board of Commissioners for Foreign Missions,

"By Seth L. Larrabee,
"Samuel C. Darling,
"Fred Matthews,
"Its Attorneys."

To the ruling allowing this amendment to the "Reasons of Appeal" the appellees and legatees took exceptions; but the same were not considered by the law court.

Also at said October term of said court a

motion was filed by the appellees to strike out and expunge certain allegations in the appellant's "Reasons of Appeal."

The grounds of the motion were that the allegations objected to "were immaterial, argumentative, scandalous, not pertinent to the issue, in legal effect a repetition of allegations in other reasons of appeal, a recital of evidence only, and that they did not present any issue or allegation material to the appeal, but was an attempt to raise false issues, which would obscure the real issues to be tried, and produce confusion and unduly prejudice the rights of the appellees in the trial of the appeal."

This motion was denied, and thereupon the appellees took exception; but the same were not considered by the law court.

The cause was fully heard at said October term of said Supreme Judicial Court, sitting as the supreme court of probate. (The testimony, including that taken out in the probate court, together with depositions, fills four printed volumes, containing in all nearly 3,000 pages.)

At the conclusion of the testimony in the Supreme Judicial Court, and in accordance with the previous agreement of the parties, the presiding justice made the following order:

"Upon the hearing of said cause, the justice presiding being of opinion that questions of law are involved of sufficient importance and doubt to justify the same, and the parties agreeing thereto, and in accordance with their written stipulations, the cause is, by direction of the justice, reported to the law court for final determination and decision of all questions of law and fact, upon the foregoing testimony, being the evidence adduced at the hearing before the judge of probate, and certain additional evidence introduced before this court, by deposition and oral testimony, or so much thereof as may be deemed legally admissible."

The wills and codicils under consideration in the case, and other facts material to the issue, sufficiently appear in the opinion.

Solomon H. Chandler, the deceased testator, appears to have been commonly known as "Hewitt Chandler," and is frequently spoken of by that name in the testimony, a part of which is quoted in the opinion.

Catherine C. Chandler, one of the legatees, is called "Madam Chandler," both in the testimony and in the opinion.

The case does not disclose the exact amount of the deceased testator's estate, but the appellant's brief refers to the codicil of August 9, 1902, as disposing of "nearly half a million of dollars."

Case reported, appeal dismissed, and decree of probate court affirmed.

Argued before WISWELL, C. J., and WHITEHOUSE, STROUT, SAVAGE, POWERS, and SPEAR, JJ.

Seth L. Larrabee, Samuel C. Darling, Fred V. Matthews, and S. Boyd Darling, for ap-

pellant. Nathan & Henry B. Cleaves, Stephen C. Perry, and Guy H. Sturgis, for appellees, as also for Andrew C. Chandler, Charles P. Chandler, Fred H. Chandler, Roland C. Chandler, and Catherine C. Chandler, legatees. Josiah H. Drummond, for executors.

SPEAR, J. This is an appeal from the decree of the judge of probate of Cumberland county approving and allowing the last will and testament, and codicils thereto, of Solomon H. Chandler.

The cause is "reported to the law court for final determination and decision of all questions of law and fact, upon the foregoing testimony, being the evidence adduced at the hearing before the judge of probate, and certain additional evidence introduced before this court, by deposition and oral testimony, or so much thereof as may be deemed legally admissible."

On the 10th day of March, 1896, Mr. Chandler executed a will by which, after providing for the payment of the usual expenditures and appropriating a sum not exceeding \$500 for the erection of a monument, he directed the disposition of the property as follows:

"Third. I give, bequeath and devise all the rest, residue and remainder of my estate, real, personal and mixed, wherever found and however situated, intending to include in this provision all property I now have and all which may hereafter be acquired by me, and any rights and interest in and to any property which I may have at the time of my death though not reduced to my possession at that time to the American Board of Commissioners for Foreign Missions, a corporation duly established by the laws of the commonwealth of Massachusetts and having an office and place of business in Boston, in the county of Suffolk and commonwealth of Massachusetts, for the following uses and purposes, and for none other; that is to say: To invest and reinvest the property which said board may acquire under this provision, and all sums of money which may be received by said Board of Commissioners as premiums from the sale of any of the securities which may come to said Board of Commissioners under this provision as well as all sums which may be received as premiums by said Board of Commissioners by reason of the investment and reinvestment of any of the funds received by them from my estate or the accumulation thereof in such manner as will yield a fair annual income, having regard more for the safety of the funds than for the amount of the income that may be realized therefrom, and said Board of Commissioners are to apply and use from year to year, the income of said rest, residue and remainder and the income of such portions of said principal sum as may remain from year to year, together with such portion of the principal

as added to such yearly income will make the sum of thirty thousand dollars per annum for four years and after the expiration of said four years such income and such portion of the remainder of said principal as added to such income will make a sum of twenty-five thousand dollars per annum until the full amount of the said principal sum and the income therefrom shall have both been expended for the general purposes and objects of said board, but upon the following conditions that none of the property which said American Board of Commissioners for Foreign Missions shall receive from my estate under these provisions and none of the income which said board, or its successors or assigns, may derive from such property shall ever be expended towards the reduction of the indebtedness of said American Board, or their successors or assigns, and that none of the aforementioned principal or interest shall ever be used to defray any of the running expenses of said society, but shall be wholly expended for purely missionary purposes. It is my wish and preference that the funds which the said American Board of Commissioners for Foreign Missions may receive under the provisions of my will shall be conscientiously expended for the advancement of the cause of Christ, in those foreign lands and mission fields where, in the judgment of said American Board, the most good can be accomplished."

He appointed Andrew C. Chandler and John H. Card as executors of this will.

On the 11th day of August, 1896, he made a codicil by which he appointed Lyman M. Cousins as an additional executor, making no other change in the will.

On the 17th day of September, 1897, Mr. Chandler made a further will, providing, as in the will of 1896, for the payment of the ordinary expenses of administration and directing the erection of a monument, and made a change in the executors, appointing Lyman M. Cousins and Henry P. Cox. The third clause in this will was identical with the third clause in the will of 1896 above quoted, except the omission of the two words "of any"; clause 3 in the will of 1896 reading "investment and reinvestment of any of the funds," and clause 3 of the will of 1897 reading "investment and reinvestment of the funds." It is apparent that the omission of these two words in the connection in which they were used made no difference whatever in the identity of meaning of these two clauses in the two wills. The fifth clause of the will of 1897 simply provided for an early settlement of the estate.

On the 9th day of August, 1902, Mr. Chandler made a codicil to the will of March 10, 1896, which, omitting formal parts, provided as follows:

"I hereby ratify and confirm as and for my last will and testament the instrument made and executed by me March 10th, A. D. 1896, and the codicil thereto dated Au-

gust 11th, A. D. 1896, with the exception of the following provisions and changes in the disposal of my estate:

"Believing that it is right and proper for me to give to my next of kin some portion of the estate belonging to me at time of my decease, a large share of which was received by me from the estate of my deceased father, Solomon Hewitt Chandler, I make the following devises and bequests.

"First. To each of the sons of my deceased brother Andrew C. Chandler, my nephews Andrew C. Chandler, Charles P. Chandler, Fred H. Chandler and Roland C. Chandler, all of New Gloucester, I give, devise and bequeath one-tenth part of all the estate belonging to me at time of my decease, after the payment of all sums required under the provisions of the first and second items of my said will. To have and to hold to them and each of them and their heirs and assigns forever.

"Second. I give and bequeath to Catherine C. Chandler, widow of my deceased brother Andrew C. Chandler, if she is living at time of my decease, one-tenth part of all my said estate in remembrance of her continual acts of kindness towards me during the many years I have made my home in her family.

"Third. I give and bequeath unto Sara Archer Chandler, child of my nephew Andrew C. the sum of five hundred dollars, as a token of my regard for her, she having received her name at my suggestion and request.

"Fourth. If either of the persons named in this codicil as devisees and legatees is not living at the time of my decease I give, devise and bequeath the share and portion of my estate which would be received by such one if then alive to the children of the deceased legatee, in equal shares and portions, to have and to hold to them and their heirs and assigns forever.

"Fifth. I hereby confirm the appointment of Lyman M. Cousins and Andrew C. Chandler as executors of my will, and this codicil thereto, and I revoke the appointment of John H. Card as such executor, and in his place and stead I nominate and appoint John W. True of New Gloucester, as one of the executors thereof, and I request and direct that no bond be required of him in that capacity by the judge of probate having jurisdiction of my estate.

"Sixth. I hereby revoke and annul all wills by me at any time made and executed, excepting the will first mentioned herein."

Solomon H. Chandler died on the 31st day of December, 1903. On the 22d day of January, 1904, Andrew C. Chandler and John W. True, two of the executors named in the codicil of August 9, 1902, filed a petition in the probate court for the county of Cumberland, dated January 18, 1904, praying for the proof and allowance of the will of 1896 and the codicil thereto, including the codicil

of August 9, 1902, and that letters testamentary issue to Lyman M. Cousins, Andrew C. Chandler, and John W. True, the executors therein named. This petition was resisted by the American Board of Commissioners of Foreign Missions, and upon full hearing the probate court entered a decree that the will of 1896 and the codicils thereto be approved and allowed as the last will and testament and codicils thereto of said deceased, and that letters testamentary issue to the several persons therein named as executors. From this decree the American Board appealed, filing 15 reasons therefor.

At this point it is proper to add that, in the space which could properly be given to the longest opinion, it would be both useless and impossible to undertake any connected analysis of the testimony and evidence presented in this case, containing, as it does, 3,000 printed pages, besides numerous exhibits not printed, and argued by the appellants in a brief of 985 printed pages, besides indexes, and by the appellees in a brief covering over 600 printed pages. The great volume of these arguments, which are not only very able, but also logical and concise as a complete analysis of the great mass of testimony would permit, establishes the futility of any attempt on the part of the court to follow out the various branches of the controversy, unprecedented in the mass of material involved.

We desire, however, to acknowledge our appreciation of the great assistance the arguments have afforded us in considering the case, not only by reason of their masterly discussion and analysis, but by presenting complete indexes of the witnesses and cases cited, and a thorough digest, chronologically and topically arranged, of every material piece of testimony. While these helps have not relieved us of the laborious task of reading the testimony, they have been of inestimable value in enabling us to collate and compare it.

Notwithstanding the voluminous testimony and the large sum involved, yet, in the propositions of law and fact governing its consideration, this proceeding may be resolved into the ordinary will case, presenting only the usual questions raised in such contests, and must be decided upon its own peculiar circumstances and facts. The appellants filed 15 reasons of appeal, but in their brief they say "the issues raised by these separate reasons of appeal will all be considered in argument under the general subdivisions of testamentary capacity, undue influence, and fraud." We adopt this classification.

Therefore the first, and perhaps the most important, question for our determination is, did Solomon H. Chandler, on the 9th day of August, 1902, possess such soundness of mind as, in contemplation of the law, enabled him to make a valid disposition of his estate by will? At this time our statute provided that

"a person of sound mind and of the age of 21 years may dispose of his real and personal estate by will." There is no exception or qualification to this requirement that a person must be of sound mind to make a valid will. The burden rests upon the proponents to affirmatively prove it. In probating a will the sanity of the testator must be proved, and it is not to be presumed. These principles are too well established in this state to require citation. But the word "sanity" is used in its legal, and not its medical, sense.

In *Johnson v. Me. & N. B. Ins. Co.*, 83 Me. 186, 22 Atl. 108, Mr. Justice Emery, speaking for the court, says: "Etymologically, insanity signifies unsoundness. Lexically it signifies unsoundness of mind, or derangement of the intellect. Medical science, with its usual zeal, has deeply investigated the various forms, symptoms, causes, results, and manifestations of mental unsoundness, or disease, and has discovered numerous kinds of such diseases to which it has given appropriate technical names. Dr. Hammond (late Surgeon General of the United States Army), for instance, classifies these kinds into 7 classes, and 33 subclasses (not claiming this to be a natural classification). Dementia and mania are both specified in this classification. But, however necessary such an analysis and classification of mental diseases may be to the science of medicine, they are impracticable and unnecessary in legal science. In law, every mind is sound that can reason and will intelligently in the particular transaction being considered, and every mind is unsound or insane that cannot so reason and will. The law investigates no further." This definition clearly differentiates the sound from the unsound mind, in the legal sense.

In *Hall v. Perry*, 87 Me. 572, 33 Atl. 161, 47 Am. St. Rep. 352, Mr. Justice Whitehouse, in delivering the opinion of the court, goes a step further, and defines those faculties of the mind whose presence are essential to verify the existence of testamentary capacity in the testator: "A 'disposing mind' involves the exercise of so much mind and memory as would enable a person to transact common and simple kinds of business with that intelligence which belongs to the weakest class of sound minds; and a disposing memory exists when one can recall the general nature, condition, and extent of his property, and his relations to those to whom he gives, and also to those from whom he excludes, his bounty. He must have active memory enough to bring to his mind the nature and particulars of the business to be transacted, and mental power enough to appreciate them and act with sense and judgment in regard to them. He must have sufficient capacity to comprehend the condition of his property, his relation to the persons who were or should have been the objects of his bounty, and the scope and bearing of the provisions of his will. He must have sufficient active memory to collect in his mind, without prompting,

the particulars or elements of the business to be transacted, and to hold them in his mind a sufficient length of time to perceive at least their obvious relations to each other, and be able to form some rational judgment in relation to them. * * * But mere intellectual feebleness must be distinguished from unsoundness of mind. The requirement of a 'sound and disposing mind' does not imply that the powers of the mind may not have been weakened or impaired by old age or bodily disease. A person may be incapacitated by age and failing memory from engaging in complex and intricate business, and incapable of understanding all parts of a contract, and yet be able to give simple directions for the disposition of property by will." For an exhaustive review of the authorities upon this point, see *Delafield v. Parish*, 25 N. Y. 9.

In speaking of the testatrix in this particular case, Mr. Justice Whitehouse further says: "She may have been childish, changeable, impatient, and sometimes inconsiderate; her judgment in relation to the value of property may not have been the most reliable, and her mind may not have been vigorous enough to grasp all the features of a complicated transaction; but all this may be said of multitudes of elderly people, whose competency to manage simple and ordinary kinds of business is never questioned by their acquaintances and friends. 'Weakness of memory, vacillation of purpose, credulity and vagueness of thought, may all consist with adequate testamentary capacity under favorable circumstances.'" *Schouler on Wills*, § 70.

Our court have also said in *Randall & Randall, Appellants*, 99 Me. 898, 59 Atl. 553: "If the testator possesses so much mind and memory as enables him to transact common and simple kinds of business with that intelligence which belongs to the weakest class of sound minds, and can recall the general nature, condition, and extent of his property, and his relations to those to whom he gives, and also to those from whom he excludes, his bounty, it is sufficient."

Under these legal principles arises a pure question of fact upon the first proposition, which it is incumbent upon the proponents or appellees in the first instance to prove, namely, that the testator on the 9th day of August—not the 8th, nor the 10th, nor any other day—was possessed of testamentary capacity. Under our statute, the question of age being eliminated, the only standard as to such capacity is whether the testator was of "sound mind," as this phrase is used in its fixed legal meaning; that is, had he on that day, at the time the codicil was executed, the capacity to make "a" codicil, not "the" codicil, produced. If he had, the codicil in question should be sustained. If he had not, the codicil should fail. As said in *Delafield v. Parish*, 25 N. Y., at page 97, under a statute similar in principle to ours: "The question in

every case is, had the testator, as *compos mentis*, capacity to make a will; not, had he capacity to make the will produced? If *compos mentis*, he can make any will, however complicated; if non *compos mentis*, he can make no will, not the simplest." Likewise Mr. Chandler, if of sound mind in the legal sense, could have made any codicil, and consequently the one under consideration.

In assuming the burden of proof upon this proposition, which requires only a preponderance of the evidence, as in civil actions, the proponents of the will and codicil of 1902 present, first, as evidence of the testamentary capacity of the testator, the internal proof furnished by the terms of the codicil itself. Under the will of 1896 republished, as under that of 1897 revoked, Mr. Chandler had bequeathed practically all of his extensive estate to the American Board. In fact, he had not disposed of any of it by either of these wills in favor of any of his relatives. It appears that the nucleus of his great fortune was derived from his father, a direct ancestor of the nephews, who were recognized in the codicil of August 9th. By this codicil he diverted about one-half of his large fortune, substantially all of which would have been transmitted by his will to the American Board, from them to his relatives above named.

If the other evidence in the case affords satisfactory proof that, at the time the above codicil was made, the testator was not possessed of testamentary capacity, then, of course, the internal evidence, from the terms of the codicil itself, is of no value, as it was not the testator's will. On the other hand, if such evidence does not amount to such proof, then the internal evidence is material, and may become important. While the question of testamentary capacity under the evidence, aside the internal proof, is a very close one, yet we are inclined to the opinion that it does not preclude the proponents from the right to have considered the internal evidence of the terms of the codicil. This evidence is plainly in harmony with what we should expect to be the rational and natural instinct of the testator. The character of the codicil, therefore, in this case becomes significant. It manifests a rational act. Its provisions are just, reasonable, and natural, in harmony with natural justice, and have a tendency to prove a normal state of mind.

Gardner on Wills (Hornbook Series, 1903) p. 136, speaking of this class of evidence, says: "In determining the question of competency, the character of the will itself is extremely significant. A rational act, rationally done, is convincing proof that a rational being did it. 'The strongest and best proof that can arise as to a lucid interval is that which arises from the act itself.' Indeed, sometimes the intrinsically reasonable character of a will gives rise to a presumption that it was executed during a lucid interval,

though the testator be chronically insane. So, if the provisions of the will are just, reasonable, and natural, they point towards a normal testator." In *Barker et al. v. Comins et al.*, 110 Mass. 477, the court says: "Where the will is unreasonable in its provisions and inconsistent with the duties of the testator with reference to his property and family, it furnishes some ground which the jury may consider upon the question of loss of memory, undue influence, and other incapacity." Our court has recognized these principles in *Wells, Appellant*, 96 Me. 164, 51 Atl. 868.

The next evidence presented by the proponents to prove the testator's testamentary capacity was that of the persons who witnessed the execution of the codicil. At this point we shall consider only such part of the testimony of the subscribing witnesses as bears upon the testator's soundness of mind. Their testimony as to undue influence and fraud will be considered under those heads, respectively. The witnesses to this codicil were William K. Neal, Margaret McGlinch, and Minnie M. Morse. Mr. Neal, a well-known lawyer of Portland, drew the codicil upon the date of its execution, having had some weeks previously a conversation with Mr. Chandler with respect to it in his office in Portland. Before drawing the codicil Mr. Neal called upon Mr. Chandler in New Gloucester, and, as he testifies, asked him if he had thought over the matter that they talked of in Portland a short time ago. Mr. Chandler said he had, although Mr. Neal did not speak of the business as pertaining to the will. Mr. Neal then went into Mr. Chandler's room in company with other parties, and there had some conversation with him upon general topics, and later asked him again if he had thought over the matter which had been talked of in Portland before, and if he had concluded what to do, and he said he had. After more conversation, Mr. Neal produced the will of 1896 and the codicil attached to it, and read it to Mr. Chandler. Mr. Neal says: "And after I got through reading I remember one remark which he made as I finished the reading. 'Well,' he said, 'I don't think that John H. Card is much of a fellow, do you?' And I think the answer I made was, 'Perhaps you might have selected somebody else for executor who would be better,' and he said, 'Will you read that again?' and I read it the second time."

This remark with reference to Mr. Card and the request to have the will read again are in accord with the existence of memory and understanding. The remark shows that he recalled what he, at least, considered defects in the capacity or qualification of Mr. Card for the important trust of executor. The request for the re-reading of the will is evidence of a desire to comprehend and understand it.

Mr. Neal then asked him what he had con-

cluded to do, and he answered: "'Well, it is rather natural that I should give them something, is it not? and I think it would be right.' I think that was very nearly his exact words." Then, after some more conversation, Mr. Neal inquired how much he desired to give. As the character of this testimony is very important, we give Mr. Neal's answer in full to the following question: "Q. You stated that you went to his desk and made a memorandum? A. No; I went to the desk, and got a piece of paper, and made a memorandum; and I said then, 'How much?' and he said he hadn't quite made up his mind how much; and that matter was— Then I think I said this, as I recall it: 'Will you make it a specific sum, or make it some per cent. of the amount which you leave?' And he sat and thought the matter over apparently, and he said he thought about 10 per cent. for each one; and I made the memorandum giving the name of the four nephews, and I think Mr. True gave me their full names, and I carried out against the name one-tenth; and then, as I recall it, Mr. True asked something in regard to whether he wanted Mrs. Chandler to have any part of the estate; and then the matter of his having lived in the family for so many years was spoken of; and he said, 'Yes, I will give her the same as the rest;' and then I think the next thing, as I recall it now, was, I said, 'In case any of these parties should die before you do, Mr. Chandler, what disposition do you want made of these legacies?' Q. That was your suggestion to him? A. That was my question: 'And do you want it to go back into the estate, or what should be done with it?' and he said, 'Give it to the children.'"

During this interview the will and codicil of 1896 were twice read to Mr. Chandler by Mr. Neal, and from the testimony of Mr. Neal it would seem that he understood them; at least nothing appears in the interview, with respect to Mr. Chandler's disposition to make a change in his will, to indicate the contrary. Mr. Neal drew up the codicil of August 9th at Mr. True's house at noon. He had no conversation with Mr. True as to the provisions of the codicil, nor with Andrew Chandler nor Charles P. Chandler. He returned to Mr. Chandler's room in the afternoon with the codicil prepared. What was then done will be shown by the following question to Mr. Neal and his answer:

"Q. Now, if you will, state the conversation which took place between you and Mr. Chandler when you returned with this paper. A. After we sat down, I produced this paper and read it aloud, and Mr. Chandler was sitting facing me near his desk; and when I had finished it he said, 'Well, that is just right; that is just as we talked this morning,' and I said, 'I tried to make it that way,' and I folded it up and handed it to Mr. Chandler, and I said, 'You want to keep

that and think it over, and, the first time you come down to Portland, drop in, and if it is all right we will fix it up,' and his answer to that was, 'It is all right, and why not fix it to-day?' And I said, 'If you prefer to do that, of course, I can do it now just as well as then.'"

Mr. Neal also said, in response to a question, that Solomon H. Chandler on the 9th day of August, 1902, was in his opinion in the possession of mental capacity sufficient to transact business and with an intelligent understanding of what he was doing, and also that he had had an acquaintance with the testator more than 25 years.

We have quoted thus fully from the testimony of Mr. Neal, as his evidence constitutes the citadel of assault against which the appellants hurl the force of their attack. From all the admissible testimony of Mr. Neal, fairly considered, his evidence adequately proves a legally sound and disposing mind in the testator on the 9th day of August, 1902. That he might have had days, immediately preceding or soon following this date, when his mind was not sufficiently clear to enable him to comprehend all the relations which the law requires he should understand in order to make a valid will, may be true. But the testimony of Mr. Neal, if true, proves that the mind of Mr. Chandler on this day, although slow and unquestionably impaired from age, and possibly by the incipient stages of disease, was nevertheless working with an intelligent and comprehensive understanding as to the subject-matter under consideration. The evidence clearly shows that Mr. Chandler was a silent, deliberate, reticent man with respect to all his business affairs. He did not discuss them in the family, nor with the neighbors. He had said nothing about his intended change in his will; but the evidence shows, when Mr. Neal called upon him, weeks after this matter had been discussed in his office in Portland, Mr. Chandler had been thinking about it. Without restraint or influence of any kind, when approached a few weeks later upon the subject, he at once comprehended what had been said before in the office, and had come to his own conclusion, absolutely free from any suggestion in the meantime, to distribute a portion of his estate among his next of kin. Now this silent deliberation of two or three weeks, and the determination to which he at once had come, when asked with respect to it, to divert a part of his estate to his relatives, was in complete harmony with the characteristics of Mr. Chandler and the manner in which we should expect him to act, if in a normal condition of mind.

The conclusion to which Mr. Chandler came, after deliberating upon the matter from the time of the interview in Portland until the 9th day of August, in response to the question as to what he had made up his mind to do, was so aptly, tersely, and naturally expressed as to show a clear comprehension

of the relation of those whom he was about to make the objects of his bounty: "Well, it is rather natural that I should give them something, is it not? and I think it would be right." It was natural and it was right. What more could be said? What more would you expect Solomon H. Chandler, in view of his characteristics as disclosed by the testimony, to say? What expression could better describe the apparent duty of the testator? Fairly analyzed, this declaration of his seems to have comprehended the whole situation embraced in the transaction of August 9th. The testator and his brother, the father of the nephews, had accumulated and owned their property jointly, until the death of the brother, Andrew, in April, 1894. A portion of the joint property came to Andrew and Solomon Chandler by inheritance from their father, the grandfather of the nephews, who were made legatees under Solomon's codicil. Madam Chandler, his sister-in-law, another legatee, was the widow of his deceased brother, Andrew. For him she had made a pleasant home the greater part of his life, until ill health had compelled her to surrender the further discharge of the duty which she for so many years had cheerfully performed. When this necessity required a change of domicile for Mr. Chandler, he did not seek the company of strangers, but made his new abode in the home of his nephew Andrew, a member of the Chandler family with which he had been closely identified from boyhood. He entertained pleasant relations with all of his nephews, and had said in his interview in Portland that they were reliable, likely men. He himself had become old, decrepit, and broken. His body was weak and his mind was failing. He was undoubtedly aware of his condition. From the activities of a shrewd business life, with his thoughts and energies engrossed in the details of managing a large and growing property, he had, in obedience to the mandate of old age, become relieved of these exacting duties; and his mind, though impaired, had an opportunity to meditate upon other matters than the accumulation and management of wealth. It is an instinct of old age, when ambition has laid aside the cares of life, to revert to the days of one's youth, to call up the memories of the past, to reflect upon family relations, and to ponder upon the duties which these new thoughts awaken. When Solomon Chandler's attention was called to the fact that he had entirely overlooked all of his next of kin in the distribution of his large estate, we feel convinced that, true to this instinct, he also reflected upon the manner in which the basis of his fortune had come to him—the relation of his brother, his nephews, and his sister-in-law—and gave expression to that reflection in the phraseology already quoted, "Well, it is rather natural that I should give them something, is it not? and I think it would be right."

From all the facts and circumstances sur-

rounding the life of Solomon H. Chandler and this codicil of August 9th, we think the reason which he gives for his action is ample proof of his understanding and comprehension of his act, and, in the legal sense, of his soundness of mind.

The next witness to the codicil in question was Miss Minnie M. Morse. She was, on August 9th, acting in the capacity of a nurse for Madam Chandler, who was at the time ill, and was called from Madam Chandler's room into that of Solomon's with the express purpose of becoming a witness to the codicil. The effect of her testimony is that, in her judgment, Mr. Chandler knew what he was doing when he signed the codicil. She said that Mr. Neal asked him if he understood fully the codicil, and if it was done in accordance with his dictation and as he wanted it, and Mr. Chandler said he did. The last witness was Miss Margaret McGlinch, who had long been a servant in Madam Chandler's family. The effect of her testimony is that from 1900 down to August 9, 1902, she observed that Solomon was growing older and weaker physically; but she did not observe any peculiarities of mind nor incoherence of thought, but that he was forgetful. She did not recall any others. These witnesses substantially corroborated the testimony of Mr. Neal as to the mental condition of Mr. Chandler on the 9th day of August, 1902. We do not deem it necessary to further refer to their testimony at the present time, as we are now discussing only the evidence offered in proof of the execution of the codicil and the testamentary capacity of the testator.

The only other witnesses present at the interview and at the execution of the codicil were John W. True and Andrew Chandler. Mr. True corroborates the testimony of Mr. Neal as to what was said and done upon these occasions, and, while Mr. Chandler does not remember all the conversation as testified to by Mr. Neal and Mr. True, he does not deny that it occurred substantially as they have related it. His testimony clearly demonstrates that he must necessarily either have not heard or forgotten parts of the conversation which took place at the execution of the will. He does, however, recollect some of the conversation, and particularly that, in case any of the legatees or nephews died, their share would go to their children. He also says that the testator talked intelligently, and that he appeared to understand what he was talking about. Andrew Chandler was his attendant, and, from his relation to him, necessarily had a very intimate knowledge of the workings of his mind from day to day and from time to time. He was, perhaps, better able to determine than almost any other person whether, at the execution of this codicil, he talked intelligently and comprehended what he was doing. While his testimony comprises nearly 2,000 questions, yet the vital part of it, with respect to the testamentary capacity of Solomon Chandler on

August 9th, is included within the few sentences in which he says on that day he talked intelligently and appeared to understand. Andrew Chandler says that Solomon's mind was mixed at times upon some matters, and clear upon others; that he was more confused on some days than others, but that these confused spells passed away.

Whatever his condition of mind before or after the 9th day of August, its only bearing upon the issue here involved is its tendency to prove or disprove the mental capacity of Mr. Chandler on that date. Whether he was upon any particular day before August 9th, or upon any particular day thereafter, mentally incapable of making a will, is not the question. Was he capable on that day? Andrew Chandler's testimony indicates that he was.

Mr. True's testimony upon two propositions of fact which occurred on August 9th, connected with the preparation and execution of the codicil in question, is positive and very important. It distinctly shows the clearness of Mr. Chandler's mind upon the matter of the codicil. The testimony is so decisive that we deem a few questions and answers worthy of quotation. With respect to the amount he desired to give to each of his nephews, Mr. True, a witness for the contestants, in answer to his own counsel, testified as follows: "Q. I will ask you just once more. This is an important point. I want you to try and recollect. Was Mr. Neal's remark that it would be proper for him to divide 10 per cent. among them, or something less? A. 'You could either give a lump sum or make it a percentage, 5 or 10 per cent., or more or less.' Q. That is all he said? A. That is all he said. Q. Now, Mr. Hewitt Chandler replied to that what? A. 'I guess 10 per cent. will be about right.' Q. What further was said? A. Mr. Neal said, 'Ten per cent. to each?' and he said, 'Yes; to each one.' Q. Now, Mr. True, are you positive that the next question asked by Mr. Neal was whether Mr. Hewitt meant 10 per cent. to each nephew, or 10 per cent. to all of them? A. Yes, sir. Q. He said 10 per cent. to each? A. Yes, sir. Q. And what did Hewitt answer to that? A. He said, 'Yes; 10 per cent. to each,' repeated. Q. Did he use the word 'yes,' or look at Mr. Neal as you are looking at me? Did he merely nod his head? Now, I want your best recollection, sir. A. My best recollection is that he said 'yes,' repeated the 10 per cent. to each. Q. Said, 'Yes, 10 per cent. to each?' A. Yes, sir; that is my best recollection. Q. You don't think there was any nodding of the head at all? A. No, sir; not in that case. Q. But spoken words? A. Yes, sir. Q. 'Yes, 10 per cent. to each?' A. Yes, sir."

The next important point is the testimony of this same witness with reference to the time of signing the codicil. After Mr. Neal had read the codicil to Mr. Chandler, he laid it upon the roll-top desk, and said he could

look it over, and if it was satisfactory, or if it was all right, he could sign it at some later time. To this suggestion Mr. Chandler answered, "That is all right, and why not fix it to-day?" or, "Why not fix it now?" These two propositions of fact are as well established as human testimony can do. The declaration of the testator as to the amount he desired to give was made in the forenoon, and that stating that the codicil was all right, and why not sign it now? in the afternoon; the two covering the whole period from the taking of the minutes for the preparation of the codicil to the time of its execution. If there is anything in the conduct or conversation of Mr. Chandler during this period that indicates an unsound mind in the legal sense, we fail to discover it. On the other hand, both of these transactions indicate a lucid mind as to the business being transacted, and a comprehensive understanding of what he himself was doing. He seems to have said all that was necessary upon both points, and to have said it clearly.

His statement, we again repeat, that the codicil was as they had talked in the morning, and that it was all right, and why not sign it now? not only evidenced the exercise of the functions of memory as to what had occurred, but a comprehension of the import of the morning conversation; that it was for the purpose of making a change in his will, and that, to be effective, it must be signed. In other words, when this codicil was read to him, by the operation of the law of association, that mysterious power of the intellect that produces a "consecution of mental states," his mind ran back over the ground of the previous interview, remembered the talk in the morning, comprehended the object of it, and understood that the codicil embraced it.

There is another fact brought out in the testimony of Andrew Chandler which we deem conclusive as showing, not only the exercise of memory, but of original thought. Either upon the afternoon of the execution of the codicil, or the next day, he said, of his own volition, "We" or "I have left Margaret out." Margaret had long been a faithful servant in the family of the brother and sister-in-law, with whom he had spent the most of his life. But especially in his later days, when the feebleness of old age and mental decline were creeping upon him, and greater care was necessary to his comfort, undoubtedly the fidelity of Margaret, who had administered to him at this time so well, had impressed itself upon his appreciation, and what more natural or rational than he should think of her in the distribution of his favors? And more important than all is the necessary inference from an analysis of the mental operation which produced the thought of Margaret. To discover this, we have but to recall the expression, "I have left Margaret out." Out of what? Out of the codicil. His mind must necessarily have

conceived something from which she was left out. What was he thinking of when he gave utterance to this expression? There can be but one rational answer. He recalled that he had modified or changed his will; that he had made his nephews and his sister-in-law beneficiaries under the change; that he had given his grandniece \$500. He recalled some or all of these things first, and then came the reflection that he had omitted this faithful servant—had “left Margaret out.”

It can be said of this incident, as was said in *Wells*, Appellant, 96 Me. 164, 51 Atl. 869: “It frequently happens that the most satisfactory evidence of a person's real state of mind is to be gathered from the mind's own action, as shown by his conversation, claims, declarations, and acts. Proven facts of this class carry greater weight than the opinion of witnesses.” His evident anxiety and repeated inquiries after Madam Chandler's health, upon this day, are also significant, and show both the existence of memory and the emotion of solicitude.

We have now substantially reviewed the evidence of all the witnesses who had the opportunity of any personal knowledge, worth noting, with respect to the mental condition of Mr. Chandler on the 9th day of August, 1902. Under the legal principles established by our court and embodied in the first part of this opinion, we are unable to say, upon the testimony reviewed, that Mr. Chandler was not of sound mind on the 9th day of August, 1902. On the other hand, we think this evidence quite conclusively shows that he was of disposing mind on that day. We think an examination of the report will show the fact that no witness called, either by the proponents or contestants, has testified to a single act or word on the part of the testator on the 9th day of August which is not entirely consistent with the existence of testamentary capacity.

But it should be remarked that we have thus far confined ourselves to the testimony relating to this single day. Now arises the question whether the other testimony, volumes of which have been taken, with respect to his mental condition before and after this date, fairly warrants the inference that, in view of his condition before and after, he must at this time necessarily have been of unsound mind. The appellants take the affirmative of this proposition and confidently assert that the evidence sustains it. The proponents of the will and codicils must sustain the burden of proof of the testator's mental capacity, not only upon the evidence of August 9th, but upon all the evidence in the case, and if, upon all the evidence, they have failed, then the appeal must be sustained.

The report of the evidence requires the court to determine this case upon so much of the testimony reported as is legally admissible. We feel at this time constrained to say that

this restriction eliminates at least quite a part of the testimony upon which the contestants rely to overthrow the contention of the testator's responsibility when he executed the codicil. The admissible and the inadmissible are so interlaced that it would be almost an endless task to separate the wheat from the chaff. We have endeavored, however, in our investigation, to give a liberal interpretation to the rule of admissibility.

We shall be able to discuss the volume of testimony bearing upon the different phases of this case only by grouping it under certain heads and referring to it in that form. The first proposition which the appellants assert in derogation of Mr. Chandler's mental capacity is the contention that he was, at the time of executing the codicil, under legal guardianship, and consequently incapable of making a will, unless the restoration of his sanity be proved beyond a reasonable doubt. But such is not the law. It is a well-established rule in this state, and we think in most others, that while confinement in an insane asylum, or the disability of guardianship, is made *prima facie* evidence of some mental incapacity, it is a rebuttable presumption of fact, and may be overthrown by a preponderance of the evidence. Of course, it is evident that a greater or less amount of evidence may be required to overcome this presumption, depending upon the nature and extent of the incapacity of the person under guardianship, and varying with the circumstances of the case. As was said in *May v. Bradlee*, 127 Mass. 414, a case where the testator at the time of making his will had been under guardianship as non compos for 26 years: “The testator was under guardianship, and that implies some degree or form of mental unsoundness. The issue at the trial was whether that unsoundness amounted to testamentary incapacity.”

As we interpret the law, the incapacity of guardianship is simply a fact, which may be proven like any other fact tending to establish mental incapacity; but it does not work an estoppel upon the proponents. The law recognizes that a person may require a guardian by reason of incapacity in one particular, while in other respects he may be entirely competent. It is well settled that a man may be of unsound mind in one respect and not in all respects; that there may be partial insanity of the testator, some unsoundness of mind, that does not in any way relate to his property or disposition of the same by will. Chapter 69, § 26, Rev. St., recognizes this principle, and provides in part: “When a person over 21 years of age is under guardianship, he is incapable of disposing of his property otherwise than by his last will.” Therefore any presumption of testamentary incapacity arising from a decree of unsound mind may be overcome by testimony as to the facts and circumstances connected with the execution of the instrument, as was held in *Halley v. Webster*, 21

Me. 461, in the instructions to the jury "that, if they were satisfied that previous to the execution of the will the deceased was of unsound mind and memory, the burden of proof would be upon the proponent to prove that at the time of executing it he was of sound mind and memory, and also that the lowest share of mind and memory which would enable a person to transact the ordinary business of life with common intelligence would be sufficient to answer the requirements of the law that he should be of sound and disposing mind and memory."

Under our statute and the decisions of our own court, the only burden upon the proponents of a will to overcome the disability imposed by guardianship is to prove by a preponderance of the evidence that the testator at the time of executing the will was of sound mind in the legal sense. As before intimated, if the guardianship was imposed on account of the impairment of some particular function of the brain which did not materially interfere with the judgment, comprehension, and memory, it might require scarcely any evidence at all to remove the effect of it. On the other hand, if it was imposed on account of long-standing and chronic insanity, involving the destruction of all these faculties, no amount of evidence could overcome it.

Of the impairment of the mind between these two extremes, the amount of evidence required to overcome the disability would depend upon the facts and circumstances of each particular case; so that, when we reach the final determination as to mental capacity or incapacity, whether the person is in an insane asylum, under guardianship, or under no legal disability, we revert to the simple proposition of law whether under all the circumstances in the particular case under consideration, the testator was of sound and disposing mind. The proof must be sufficient to overcome all disabilities, however originating and however imposed. When the proponents have sustained the burden of proof upon this proposition, it matters not how the obstacles to be overcome were created.

Upon this contention the contestants must fail, as the evidence relating to the mental condition of Mr. Chandler on the 9th day of August, 1902, and which has led us to conclude upon this particular evidence that he was on that day of disposing mind, has in no way been impaired by the mere fact that several months earlier the testator was placed under legal guardianship. We come to this conclusion, regardless of the claim of those immediately interested in procuring guardianship that it was on account of Mr. Chandler's physical condition, upon the assumption that the decree of guardianship is a legal judgment and conclusive upon the facts therein recited.

The two next groups of evidence, that of the neighbors and friends of Mr. Chandler and of the medical experts, will be consider-

ed upon the same propositions, namely: Do they show that the mind of Mr. Chandler, before and after August 9th, had approached such a state of decay that, notwithstanding the evidence of those who observed him personally and witnessed with their own eyes his appearance, manner, and conduct at the execution of the codicil, the inference must be drawn that he was upon that day of unsound mind, in the legal sense, notwithstanding his apparent mental capacity?

First we will consider the testimony of the neighbors and friends. Of these there are upwards of 120. We shall allude principally to the character of their testimony, without attempting to discuss it in detail. It is evident from the record that the death of Mr. Chandler, the disposal of a portion of his property by the execution of a codicil, at a time when it was generally known that he had become enfeebled by age and disease, and a contest over the validity of this codicil involving nearly half a million of money, had excited a keen interest and a divided sentiment among the people of the quiet village of New Gloucester and vicinity. As is true in the development of all such controversies, all these people arrayed themselves in support of one side or the other of the contention. Everything that Mr. Chandler said or did in the presence of any of these witnesses was recalled, and undoubtedly discussed and so applied to his mental and physical condition as to support the particular bias of the witness presenting it. While witnesses are thus arrayed against each other, their convictions strengthening with the growth and heat of the discussion, although they may be honest in their purpose, they cannot, while human nature remains unchanged, overcome the tendency to distort, magnify, or minimize the incidents which they relate as their interest persuades.

That Mr. Chandler's mind was in a precarious condition on August 9th nobody disputes. That he was forgetful, and at times dazed, and at all times for several months prior thereto partially incapacitated, nobody denies. But there was a line somewhere between the beginning and the end of the maladies. But there was a line somewhere between the possession of a sound to that of an unsound mind, as this term is defined in law. The question is whether, in the progress of that disease, he had passed that line on the 9th day of August. None of these neighbors and friends pretend to have any personal knowledge of his mental condition on that particular day. Does their testimony, when massed upon the single point of testamentary capacity, as to what was his mental condition before and after, establish the conclusion that upon that day he was incapable of making a will? The effect of this testimony as a whole is that, physically, Mr. Chandler for nearly a year after this date was able to be about; to attend his meals with the family at the table;

to go into Portland from time to time with Andrew, who attended him; to walk about the village alone and to go to the post office; to attend church and Sunday school; that he lived and was about, gradually declining, for more than a year; and that he died December 31, 1903, more than 16 months later. This class of testimony as to his mental condition, covering the years 1902 and 1903, has a tendency to show that prior and up to August 9th his mind was somewhat impaired; that he was growing forgetful; that there were times when his ideas were confused and his mind hazy; that when he was tired these spells came upon him, and when he became rested they passed away; that these confused spells were manifested by various acts and statements; that at other times his conversation was coherent and intelligible, his acts rational, and his appearance normal; that the normal was his general condition up to August 9th, and the confused and dazed the exception. That during all this period, up to and beyond August 9th, he did not have lucid intervals for a longer or shorter period, does not appear from a single witness. That he did have such an interval on August 9th, without a single incident occurring upon that date to contradict it, affirmatively appears from the testimony which we have already reviewed. We are therefore still unable to say that the proof of his condition, as discovered by the testimony of his neighbors and friends prior and subsequent to August 9th, necessarily shows such a mental condition on that date as to outweigh the evidence already considered in proof of his legal sanity.

The next class of evidence to which our attention is called is that of the medical experts. The testimony of the seven witnesses who testified under this head contains more than 600 pages of the report. Four eminent alienists testify upon the one side, upon long hypothetical questions purporting to contain facts and incidents in the life of Mr. Chandler pertinent to the issue, that on the 9th day of August he was of unsound mind. Three, equally eminent, are called upon the other side, who, upon hypothetical questions purporting to contain similar facts and incidents, as unhesitatingly testify that on the same day he was of sound and disposing mind. The facts and incidents contained in the hypothetical questions put by the proponents are objected to on the part of the contestants, on the ground of the omission of facts which should be considered and of containing statements which should be omitted. To the hypothetical questions put by the contestants the proponents interpose a similar objection. To distinguish the admissible from the inadmissible, for the purpose of determining whether the objections upon either side are well founded, would be practically impossible. We shall therefore not attempt to correct the hypothetical questions, nor to modify the opinion expressed by any of the

eminent alienists as being based upon any alleged overstatement or understatement of facts therein contained. We do not entertain the slightest suspicion, if the hypothetical questions put by the contestants had been so changed as to be absolutely satisfactory to the proponents, and the same had been done with respect to the questions put by the proponents, that any one of the eminent specialists would have changed his testimony, or the reasons therefor, in the slightest degree. Their testimony upon the one side and the other clearly demonstrates that they were inclined to testify in favor of the side which called them. In considering their testimony we have endeavored to apply the test of consistency and reasonableness, always having reference to the other testimony in the case, which their opinions may tend to corroborate or contradict.

Judged by this criterion, we find an inherent weakness in the very foundation upon which their conclusions rest. First we discover that the experts called by the contestants have made no proper distinction in giving their opinion, nor could they do so under the law, between medical and legal sanity. We may say here that this criticism does not apply to the three experts who testified that the testator, in their opinion, was of sound mind does not differentiate between a medically sound mind must necessarily include a legally sound mind. On the other hand, the opinion of the four witnesses, whose testimony does not differentiate between a medically sound mind and a legally sound mind, is entitled to weight only when the other evidence shows that it applies to legal unsoundness; because a mind legally sound may be medically unsound. It may require additional and different evidence to prove legal unsoundness; that is to say, medical unsoundness may intervene in the diagnosis of a case before legal unsoundness appears at all. Therefore these medical experts may be correct in their opinions as to medical unsoundness, without having expressed any opinion at all as to legal unsoundness. Unless, then, it is shown from some source that these opinions apply to legal unsoundness, they are of but little value; and three of them expressly declare that their opinions relate only to medical unsoundness.

Again, the error underlying the basis of Dr. Bancroft's opinion, the only expert called by the contestants who says he founded his opinion upon the evidence, instead of the assumptions, is illustrated by quoting a few questions and answers of his cross-examination: "Q. You have undertaken to give your opinion based upon all the evidence in the case, have you? A. Yes, sir. Q. Where there is a conflict of evidence, how have you reconciled it? To whom have you given the benefit of a doubt? A. I have carefully weighed the evidence, and have placed it where I thought it belonged. Q. You have undertaken to pass on all the evidence, have

you not, and given an opinion? A. I have. Q. You have assumed the province, have you, of the court and jury in giving your opinion upon all the evidence in the case? A. No, sir. Q. You have undertaken to give your opinion, haven't you, upon all the evidence in this case? A. I have not undertaken to assume the province of any court or any jury. Q. Have you undertaken to give your opinion and to find the fact that he was of unsound mind on this evidence? A. I have undertaken to weigh all the evidence from a medical point of view and pronounce an opinion. Q. And you have undertaken a sort of judicial medical position in doing it, have you, or undertaken to? A. I have undertaken to answer in a medical opinion."

For two reasons the opinion of this witness is entitled to very little weight. One is that he gave his own interpretation to more than 2,000 pages of testimony, and then based his opinion upon his own interpretation. Now, we have already said it clearly appears from the record that a large part of the testimony was inadmissible. This medical expert says that he "carefully weighed the evidence." What evidence? Is it to be presumed for a moment that he eliminated the inadmissible from the admissible? There is no pretense that he did or could. Suppose he based his opinion upon the testimony of Charles P. Haskell; what part of it did he adopt, the hearsay, the opinion, or the facts? We are unable to say, and therefore it would appear that no further comment is necessary to show the unsatisfactory character of an opinion thus given. The second is, he gave only a medical opinion. He does not pretend to have differentiated between medical and legal unsoundness. Whether this opinion covers legal unsoundness can be ascertained only by reference to the other testimony.

All the experts concede that Mr. Chandler died December 31, 1903, from senile dementia. That he had become a senile dement some time prior to this date all agree, and whether this disease had fixed itself upon him on the 9th day of August to such a degree as to incapacitate him mentally is where the doctors disagree.

Again, upon this point the experts for the contestants have gone so far in their effort to make the testator a senile dement on that day as to render their testimony of substantially no value. Let us subject a vital part of it to the test, and see if, in the light of their own statements, it meets the standard of consistency and reason. Dr. Channing, on page 858, admits that he testified as an expert in the case of McCoy v. Jordan at Dedham in 1902, and described normal old age as distinguished from senile dementia, as follows: "Q. I will read the question to you: 'Assuming that the arteries as you felt them at the wrist, or at the temples, or in the neck, or wherever you can feel them,

especially in the arteries at the wrist, show a degree of hardness that comes from what we call an "atheromatous deposit," a sclerosis, a hardening of the arteries caused by a deposit, an atheromatous deposit, and that in a measure cuts off the supply of the blood to the brain, the brain shrinks and loses its power in proportion as that condition of the arteries in the body and generally in the brain exist, and that the brain does not get the nutriment necessary for its growth and development to keep it in good order, and it becomes shrunken and weakened, and that weakening is shown by loss of memory, by enfeebleness of the memory, by hesitation in speech, by a disposition to dwell upon things in the past and forget things in the future; I will ask you whether or not those things are characteristic of senile dementia, as distinguished from normal old age.' I will read the answer: 'I should say not. That is the rule in old age. You do get those things sooner or later in the arteries.' Whether or not you recognize that question and that answer? A. I do vaguely; yes."

This was a case in which the question of senile dementia was involved, and this same expert says, in answer to the question: "Q. I ask you whether or not you stated yesterday that on August 9th the disease of senile dementia was well advanced in the hypothetical man? A. Yes; I think it was. Q. Did you hear the testimony of Dr. Cowles? A. I did. Q. Did you hear him state that there was a grave condition of dementia in 1902, and on August 9th a strong and pronounced type? A. As I remember it, I did." The hypothetical man was the testator. On page 361 of the report is found a definition by this same expert upon the same trial of a senile dement, the important part of which is as follows: "Senile dementia is a diseased condition, as contradistinguished from a condition that is to be regarded as a normal one. It is a form of insanity—form of mental disease. The individual who has this form of disease has little or no memory. If there is any memory at all remaining, it is for nothing of importance; simply an automatic mental operation. He has no memory for persons or places or names, or, as a rule, even for his own name. He practically remembers nothing of a recent period, and, as a rule, nothing of a remote period. In case of normal old age he generally has a relative one, but in senile dementia there is an absolute change. In normal old age a man, to a greater or less degree, can put his mind upon matters that seem important to him. He is able to give his attention more or less continuously to matters of interest; but a man with senile dementia is not capable of doing that. It is a man practically without a mind, without the use of his mental faculties, reduced to more or less of an automaton, and living the simplest kind of a life on a more or less animal scale; and he not only shows these marked mental

changes, but also a good deal of physical disturbance."

It will be here noted that these experts declare that on the 9th day of August the testator presented a strong and pronounced type of senile dementia; that is, on that day Mr. Chandler was a man, according to the definition just given, practically without a mind, without the use of his mental faculties, reduced to more or less of an automaton, and living on a more or less animal scale. Now, the evidence from all the witnesses upon both sides, who knew and saw Mr. Chandler up to August 9th, flatly and effectually contradict the above conclusion of the medical experts as to his actual condition on that day. We need only refer to the testimony already alluded to, to establish this assertion. The hypothetical man who, these experts say, was an automaton and reduced to a condition little better than an animal, was not the Mr. Chandler who was present on the 9th day of August at the making of his codicil, who designated the amount which should be given to his legatees, who inquired after the health of Madam Chandler, and who exhibited no incident of mental unsoundness to any of the witnesses who observed him upon that occasion. It seems to us that a fair interpretation of the evidence, as a whole, rather places Mr. Chandler, on the 9th day of August, in the classification of men who have reached a normal old age, as defined by the witness, or was crossing over that unknown border that marks the fatal passage from normal old age to senile dementia. This single contradiction of the expert opinions illustrates, not only how dangerous, but how unfortunate, that men of great knowledge, experience, and skill should array themselves upon different sides of the same proposition, which can have but one solution in truth, and come to absolutely contrary conclusions. It is evident that such testimony is not only worthless, but insidious and dangerous; for it is impossible for a layman, in the analysis of such testimony, to distinguish the true from the untrue. If the untrue is acted upon, injustice must follow.

Another fundamental weakness in the testimony of the experts for the contestants is that their testimony does not apply to the condition of the actual Mr. Chandler, but to a hypothetical man who, we conceive, is supposed to represent Mr. Chandler in the hypothetical questions. Dr. Channing is asked if, assuming that the hypothetical question or questions did not include all the substantial facts proved at the trial, his answer would be more or less modified on that account. He says, in answer: "I should say that a sufficiently strong case was made out in the hypothetical questions which would not be materially changed." Then further along he is asked: "Suppose the evidence shows a different state of facts, whether or not your opinion would be partial? A. That would be

a different condition of affairs, and, of course, I would have to weigh whatever there was. That would be an entirely new proposition, and I should have to take it up anew. I have given a definite opinion on the hypothetical question—the facts in that question." Then further along he is again asked: "So you are not speaking of the mental condition of the man whose mind is being investigated, are you, in this hypothetical question? A. I am speaking of a man in a hypothetical question when I am speaking of that subject." Then, again, when asked whether or not, in the hypothetical question, he was speaking of the man whose mind was being investigated in this proceeding, he answered, "No."

Dr. Jelly says that although he read the evidence and depositions and heard the testimony for several days, yet, as his opinion depended upon the truth of the hypothetical questions, he could have given his opinion "just exactly as well by reading the hypothetical question as by hearing the evidence"; that is to say, if the hypothetical questions assumed statements of facts not existing, or omitted those that did exist, in the language of the eminent specialists, that would present "an entirely new proposition, and I should have to take it up anew." In fact, he admits that, if the hypothetical question were wrong, his opinion was wrong. That the questions were wrong can be demonstrated from the following testimony. Dr. Cowles was asked this question: "Assuming that Howard Gould, who had known Mr. Chandler for many years, met him in the latter part of the summer of 1902, probably in August, at the Falmouth Hotel in Portland, and had a conversation with him, Mr. Chandler inquiring about Mr. Gould's wife, whom he knew and had known for years, calling her by name, and inquired for her sister, calling her by name, inquiring for Mr. Gould's son, and that there was nothing peculiar about him at that time, no incoherence in his talk, nor change in his intelligence from former years; did you consider that assumption of fact in your hypothetical question? A. There was no assumption of that nature that I remember in the question. Q. That was eliminated entirely from the hypothetical question, was it not? A. I didn't hear it in the question." Yet Howard Gould did testify as to the conversation with Mr. Chandler in the Falmouth Hotel as follows: "I met him, I think, in the corridor of the hotel, and he inquired for my wife, and called her by her name, Sarah, and wanted to know how Sarah was, and if she was well, and if she was enjoying good health. He said he hadn't seen her for a long time, and he inquired for her sister, Martha Stowell, and wanted to know how she was, and where she was living at the present time—if she was with me; and then he inquired for my son Arthur." He further said that he did not observe anything peculiar about him at that time, nor any incoherence in his talk, nor

notice any change in his intelligence different from former years. Dr. Cowles admits that, if this testimony was true, it showed both memory and intelligence. Still he did not consider it.

These questions and answers present but one of the numerous instances of a similar nature to be found in the evidence calculated to show the one-sided character of the medical testimony. In other words, these experts are testifying to the mental condition of an assumed man, whom they themselves have helped to create, by aiding in formulating the hypothetical questions, with the avowed purpose of declaring him a dement. That the hypothetical questions upon both sides are erroneous in the rehearsal of facts is manifest from a casual reading. The statements upon the different sides differ materially, and it follows as a corollary that one, the other, or both, must be wrong. The truth is, all are wrong. They are made up from a prejudiced view and for a predetermined purpose. The ordinary rule of law with reference to the effect of interest upon credibility should be here applied with special force. Such opinion evidence presents an unsafe criterion upon which to found a judgment affecting important interests. It might make an appalling difference, in deciding this important question, whether all the material found in this hypothetical man corresponded with real material of which the actual man was constructed; and whenever the expert, who has never examined the actual man, as many of the witnesses have, fails to satisfy us that the assumed and the real correspond, we must decline to accept his opinion upon the point in issue as of sufficient value to overthrow the testimony of witnesses having personal knowledge of the real man. We shall not discuss the testimony of the proponents' experts further than to say that to our minds they have given fully as satisfactory reasons for the opinions they have expressed in the case as have the experts on the other side. Upon the whole, we consider it more consistent with the facts shown by the other testimony, and therefore entitled to some probative force. In fine, we at least think the opinion evidence of the proponents fully as convincing of the truth of their position as that of the contestants is of theirs.

We have not undertaken to discuss this class of testimony in detail. We have, however, endeavored to explore the grounds upon which the experts based their conclusions, and to discover, if possible, the foundation upon which their opinions stand. This accomplished, our conclusion still is that the testator's legal sanity, on August 9th, as before declared, has not in the least been shaken by the testimony of the medical experts.

The next class of evidence bearing upon the issue of mental capacity is found in the production of the memoranda and diaries. These furnish us but little aid, as Mr. Chand-

ler practically ceased writing before 1902. The last of his handwriting showed an unsteady hand and an imperfect sight. Letters were repeated and the lines were crooked. We should hesitate, however, to say that this defect in the chirography of the testator was evidence of any greater decay than that which may be attributed, in many instances, to the weakness incident to approaching old age. It needs no expert to inform us that the hand may tremble and the sight may fail long before the mind is deprived of its mental grasp. These evidences of mental incapacity, therefore, must be considered in each particular case in connection with the other testimony. The other testimony may show that these defects are due solely to mental decline. It may show that they are due to other causes. Without attempting to assign any particular cause, it is sufficient to say here that the production of the memoranda and diaries, considered in connection with the testimony tending to prove the testator's legal sanity, on August 9th, which we have already reviewed, does not overcome the effect of that testimony.

Our conclusion upon this phase of the case is, after a careful examination of the evidence, to only a small portion of which we have been able to allude, that Solomon H. Chandler on the 9th day of August, 1902, was in the possession and exercise of sufficient mental power to render him of sound mind in the sense that the law requires it.

But the contestants go further, and assert that, even if the court arrives at the conclusion that Mr. Chandler was in the possession of testamentary capacity on the 9th day of August, the codicil should still be overthrown, because of the exercise of undue influence in inducing the testator to make it. They also claim that they have proven the existence of such fiduciary relations existing between Mr. Neal, Mr. True, and Mr. Chandler as to impose upon the proponents the burden of showing the absence of undue influence. But such is not the rule in this state. O'Brien, Appellant, 100 Me. 156, 60 Atl. 880.

It is charged in the argument of counsel that "the preparation and execution of the codicil was the combined act of the tripartite guardianship of John W. True, William K. Neal, and Andrew C. Chandler. This tripartite guardianship contributed a large beneficiary, an executor, a self-assumed attorney for the estate, and custodian of the codicil, and provided the witnesses in part from its composite self and the remainder from servants within the sphere of its influence, without any action or request from Mr. Chandler."

We are unable to find anything in the evidence that establishes the truth of the above charge, or warrants the severe expression of counsel. It will require more than the acrimonious epithets of those subject to unexpected disappointment to induce us to be-

lieve that men who have passed middle age without a suspicion of wrong, for no greater consideration than appears in this case, have suddenly overthrown the reputation of a lifetime, and at once become unprincipled and sordid malefactors. It is our duty to decide the case upon the evidence, and not upon innuendo or rhetoric. What, then, is the basis of the serious charge made by the contestants against these three men? What took place at Mr. Neal's office, when and where the first suggestion, as to any change in his will, was made to Mr. Chandler? We will quote substantially all the testimony upon this point.

With respect to the interview at the office, and how Mr. Chandler happened to be there, Mr. Neal said, in answer to whether he sent for him: "I never sent for him to come and see me at any time, for any purpose." It is therefore plain that Mr. Neal cannot be charged with securing the presence of Mr. Chandler in his office. He further says he spoke to him about the matter of the will, and in reply to the question, "What did you say to him?" answered, "I said that I had been informed that he had made one or more wills, and that in them he had given all of his property to foreign missions and nothing to his relatives, and asked him the question if that was not a little strange, to which he replied, as I now recall, that that was a notion which he had; and I asked him, then, in regard to his nephews, as to what sort of men they were, and he gave them a very high recommendation."

Now, as to what was said by Mr. Neal, or by anybody else in the office, to Mr. Chandler, with respect to making a change in his will, appears in the following statement, in answer to a question: "I will say that as he got up to leave the office I said to him, 'If you think this matter over, Mr. Chandler, and decide to make any change, drop in and see me when you are down here,' or words to that effect. I cannot give the exact words. And he said, 'I will see,' and went out." That is all that Mr. Neal ever said or did, as shown by the evidence, by way of attempting to influence Mr. Chandler, at the interview in the office. There is not a syllable of testimony in the case which pretends to show that anything else was ever said or done. That the inquiry of Mr. Neal can be distorted into an exercise of undue influence is too trivial to discuss. Nor does the testimony show that any other influence of any kind was at this time exerted upon Mr. Chandler. We find no legal or moral impropriety, under the circumstances of Mr. Chandler's visit to Mr. Neal's office, in Mr. Neal's inquiry.

He had a right, under the law, to suggest to the testator to provide for his relatives, who were the natural objects of his affection and bounty; but he did not even go to this extent. He only asked if it was not "a little strange" that he had omitted them

in the distribution of his property. Mr. Neal was not a relative of the family. He took nothing under the codicil, nor was he in any way directly interested in this instrument, nor did he have any personal interest in the distribution of the property. The case also shows that he had no knowledge and took no part in placing Mr. Chandler under guardianship, and that, on August 9th, he went to New Gloucester for the direct and express purpose of assisting in the draft of two wills for neighbors of Mr. True. His interview with Mr. Chandler and the making of his codicil upon this day were, consequently, incidental to the main purpose.

From the time Mr. Chandler left Mr. Neal's office, until the 9th day of August, there is neither claim nor pretense that any of the three men charged, or any other person, even made mention of the word "will" or "codicil" to Mr. Chandler. If a conspiracy had been working in the hearts of these men to improperly influence Mr. Chandler in the distribution of his property, something would have occurred in the furtherance of that purpose in the interval between the visit at the office and August 9th. Up to this date we fail to find a single word or act, on the part of either one of the three men charged with conspiracy, calculated to influence Mr. Chandler in the least degree.

What, then, do we find upon August 9th? We have substantially quoted all the testimony of Mr. Neal, brought out upon cross-examination, relating to what was said and done upon that occasion. We need not repeat it. It is sufficient to say that not one word can be attributed to the lips of either one of these three men in any way urging, or in the least degree persuading, Mr. Chandler to make and execute the codicil in question. A most careful scrutiny of the evidence will show that Mr. Chandler, instead of being requested to do anything, was asked if he had thought over the matter of making a change in his will, and then as to what he had concluded to do, and that Mr. Chandler made the reply that it was rather natural that he should give his relatives something, and thought it would be right. Then Mr. Neal inquired how much he desired to give, and suggested that he could give a specific sum or make it a percentage, and Mr. Chandler suggested 10 per cent. Mr. Neal retired, made the codicil, brought it back, read it to Mr. Chandler, then placed it upon the roll-top desk, told him that he could look it over, and at some future time, when he came to Portland, sign it, upon which Mr. Chandler at once replied: "It is all right. Why not sign it now?"

The evidence of this day's transactions, instead of tending to prove a conspiracy, conclusively proves the contrary. If these three men had entered into a plot to influence and induce Mr. Chandler to execute a codicil, diverting the succession of one-half of his property, the instrument by which this unlawful act was to

have been accomplished would not have been laid upon the roll-top desk, to be looked over and at some future time signed by the victim of the conspirators. In fine, the evidence surrounding the execution and making of this codicil presents no features of an unusual character. There is no evidence in the case that Andrew Chandler said one word with respect to the disposal of the property, and that Mr. True simply inquired of him if he desired to remember Madam Chandler. While Mr. True was guardian of Mr. Chandler, he was the recipient of no favors under this codicil. And he reiterates his statement of denial, in every possible form, that any one of the nephews, the Chandler boys, or the widow of the deceased brother, Mr. Neal, or any other person ever requested him in any way, directly or indirectly, to talk or confer with Mr. Chandler as to the disposition of his property.

The burden of proof rests upon the contestants to sustain the allegation of undue influence by a preponderance of the evidence. They have failed to do so.

The next proposition which the contestants assert as a reason why this codicil should not be sustained is that the three men above charged with the exercise of undue influence were also guilty of a fraud upon Mr. Chandler in inducing him to execute the codicil. We feel called upon to notice but one allegation, under this head, and that is that Mr. Neal read to Mr. Chandler the will and codicil of 1896, instead of the later will of 1897, as the will which the new codicil of 1902 was intended to republish.

We have already quoted in full item 3 of the will of 1896, and shown that the corresponding item of the will of 1897 was identical, with the exception of the clerical omission of two unimportant words; that is, the two wills were in their substantial features precisely alike. Mr. Neal read the will of 1896 and the codicil, and at the request of Mr. Chandler read it again; and, as we have already held, under the question of testamentary capacity, he comprehended and understood it. With the exception of the provision in the will of 1897 directing a speedy settlement of the estate and a change or addition in the board of executors, there was no difference in the provisions of the two wills. It is apparent, therefore, that the codicil affecting the will of 1896, instead of that of 1897, perpetrated no fraud, either upon Mr. Chandler or the residuary legatees under the will of 1897. The situation of the residuary legatees was not changed in any degree because the codicil was applied to the will of 1896, instead of that of 1897. If the testator was possessed of such mental capacity on August 9th as enabled him to comprehend the effect of the codicil which he executed, and we have decided that he was, we find in the evidence presented upon the question of fraud no adequate reason for setting it aside.

Our final determination upon all the contentions of fact is that the codicil republished the will of 1896 and the codicils thereto, which became a part thereof, and that said will and codicils are valid instruments representing the last will and testament of the testator, Solomon H. Chandler.

Appeal dismissed. Decree of probate court that the instrument purporting to be the last will and testament, dated March 10, A. D. 1896, of Solomon H. Chandler, late of New Gloucester, in the county of Cumberland, deceased, and codicils thereto, dated August 11, 1896, and August 9, 1902, be approved and allowed, and that letters testamentary issue to the executors, affirmed. Ordered, that the costs, stenographers' and counsel fees, and other expenses of the proponents and executors, in the probate court and supreme court of probate, be paid out of said estate by the executors, and charged in their account with said estate. Case remanded to the court below for further proceedings in accordance with this opinion. It is further ordered that the estate is not to be charged with the payment of any costs, stenographers' or counsel fees, or other expenses of the contestant.

(217 Pa. 77)

COMMONWEALTH v. JOHNSON.

(Supreme Court of Pennsylvania. Feb. 25, 1907.)

1. CRIMINAL LAW — CONFESSIONS — ADMISSIBILITY.

While a prisoner accused of murder was in jail he sent for an acquaintance to become his bail, and the latter testified that, when the prisoner started to tell him about the killing, he was told that he was not obliged to say anything unless he wished to, and that what he said might be used against him. *Held*, that a confession then made was properly admitted in evidence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1157-1160.]

2. HOMICIDE—EVIDENCE.

Where accused entered into a plot with another, by which the latter was to do the killing, while he was to wait at some little distance from the house to allow the murderer to escape, and then to set fire to the house, and the plot was carried out, accused could be convicted of murder in the first degree.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Homicide, § 49.]

Appeal from Orphans' Court, Bradford County.

Charles Johnson was convicted of murder in the first degree, and appeals. *Affirmed*.

See 63 Atl. 184.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

I. McPherson and Lilley & Wilson, for appellant. Charles E. Mills, Dist. Atty., David E. Kaufman, and Wm. Maxwell, for the Commonwealth.

BROWN, J. There was sufficient evidence in this case to establish the corpus delicti. What it was need not be set out in detail.

The prisoner was indicted for the murder of Maggie B. Johnson, the wife of his brother, Bigler Johnson. The latter, having been indicted for her murder, was adjudged by the court below on his plea of guilty to have been guilty of murder of the first degree and sentenced to death. This judgment was affirmed in *Commonwealth v. Johnson*, 211 Pa. 640, 61 Atl. 246, and he was subsequently executed.

The murder was a most atrocious one. Bigler Johnson was not living with his wife, but was paying her \$6 per month for her support. That he might be freed from this burden, she was murdered in her home on the night of September 18, 1904, and with her a child, about 10 years of age, who was her companion. To conceal the crime, the house was burned. The charred remains were found in the ashes. The appellant was indicted for murder as one of the participants in the killing of his sister-in-law, and the only questions to be determined by us on this appeal are the sufficiency of the evidence to justify his conviction of murder of the first degree and the proper submission of the case to the jury by the trial judge.

Without the appellant's confession, made October 25, 1904, the circumstantial evidence of his guilt was weak, but not so weak that the court was bound to say to the jury that without it there could be no conviction. In no part of the charge were they distinctly told that the circumstantial evidence was sufficient to convict, though they might have inferred from the instructions that it was, if they believed it. The evidence upon which they manifestly did convict, and upon which they must have understood the court to say that the case of the commonwealth chiefly rested, was the confession. On October 25, 1904, the prisoner, then in jail, sent for G. C. Hollon, and asked him to become his bail. Hollon refused, telling him that the case looked dark for him. The prisoner then stated that he had not done the killing, but had "done the burning, or burned the building." He was then told by Hollon that, if he was only guilty of that, he would be punished accordingly, and he shortly afterwards made the confession offered at the trial. Hollon testified that the prisoner was told he was not obliged to say anything unless he desired to do so: that no inducement or hope had been held out to him; that he was told that whatever he said might be used against him, and, after this caution, the confession was made. In substance the prisoner admitted that on the night preceding the murder he heard his mother speaking to other members of the family in regard to killing her daughter-in-law, Maggie B. Johnson; that the next morning he called her attention to it and she gave him no particular reply; and that on Sunday, September 18th, he and Bigler Johnson were in Towanda, when Bigler talked to him about killing his wife. The following is from the confession of the prisoner taken

down as he made it: "He [Bigler], asked the hack driver if the train was gone, he told him 'Yes.' He said he would go down home and leave his satchel at Steve Sullivan's. He said he and ma was going to put Mag out of the way. Nancy was going to stand outside the house watching. He said, 'I will give you and Lanson \$3 apiece if you will burn the house.' I told him I did not want to have anything to do with it. He said he would give me the \$3 'just as soon as I earned it.' I said, 'Get found out anyway.' He said, 'It won't.' He said, 'If you don't do it, I will get you in it anyway.' I said, 'I don't want anything to do with it.' He said, 'What do you say?' He said, 'Lanson said he would go up with you to burn the house.' So he asked me what time I would be down. I told him about 8 o'clock or half past 8. He said they would be down there by the bridge, Powers' bridge, and I went down there from Will's. They were there by the bridge, Bigler and ma, Lanson and Nancy. He said, 'You got any matches?' I said, 'No.' He reached in his pocket and gave me a handful of matches. Q. Who was this? A. Bigler; and I put them in my pocket and we went up. He said, 'Don't go too fast, so I can go down and change my clothes and go up town.' And then I walked along up the road, me and Lanson. We waited there to the four corners, and he came along and whistled. Q. Which four corners was that? A. Where you turn up towards Perry Pool's up that river road. He told us to wait about three-quarters of an hour and that would give him a chance to get to town. Q. Bigler told you? A. Yes; and we waited along the road there about three-quarters of an hour, and then went up and poured oil on the carpet and floors on the bedroom and on the outside of the house and set the fire, and went down the road, went back home. When we got down by Herb Lamb's, looked back and the house was all in flames. Lanson, he, went on down home and I went up to Will's."

"To exclude a voluntary confession of guilt, some inducement must be held out to prompt to falsehood, and on this the trial court must be the judge in the first instance, and their ruling will be set aside only for manifest error. *Fife v. Commonwealth*, 29 Pa. 429." *Commonwealth v. Johnson*, 162 Pa. 63, 29 Atl. 280. After having heard a recital of the circumstances under which this confession was made, there was no semblance of error in admitting it. But even after it was admitted the trial judge, with all due regard for the rights of the prisoner, instructed the jury: "While the question of the admission of this alleged confession was primarily for the court, and it was received in evidence, yet we say to you, carefully weigh the evidence in the light of the defendant's surroundings and environment, his apparent mental caliber, his age, the fact that he was in jail, that he was trying to secure bail, and what was said, and from all the evidence determine

whether or not the confession or statement read was freely and voluntarily made, as we have explained to you. If it was not, exclude it from your consideration. Direct your inquiries in the same manner to the other statements, and, if they were not voluntarily made, exclude them also from your consideration, treating them all the same as though they never had been offered in evidence, and base your verdict solely upon the remaining testimony in the case. If, however, you find the confession was freely, voluntarily made by the defendant after being properly warned, it is important evidence in the case for your consideration."

But it is contended that, even if the confession of the prisoner was voluntary and true, it did not connect him with the actual commission of the crime, and under it he was at most guilty only as accessory after the fact. The answer to this is that he was in the plot before the murder was committed and remained in it until it was consummated by the burning of the house. After Bigler had planned it he told him what he was about to do and assigned to him work to be done in carrying out the murderous scheme. The prisoner agreed to do what was asked of him. If he had not so agreed in advance of the commission of the crime to aid in its concealment and in the escape of the murderer, the murder might not have been committed. What he agreed to do was in the eye of the law an agreement to aid and abet, and he carried out his agreement. If, in pursuance of an agreement with Bigler, he had gone with him to the house and stood outside of it while the murderer went in to kill the woman, and, when he emerged, had fired it to conceal the crime and facilitate the escape of the guilty party or parties, that the degree of his guilt would have been no less than that of the actual murderer cannot be questioned. Instead of doing that, he did what must be regarded as the same thing in determining the degree of his guilt. He took his iniquitous post at some distance from the house, waiting for the murder that he knew was about to be committed, and, after the lapse of about three-quarters of an hour, the time agreed upon by Bigler and himself as sufficient to give the former a chance to get away, he went to the house and fired it in pursuance of his previous agreement to do so. At the time the murder was being committed he was assenting to it by agreement with the actual perpetrator of it, and, with the perpetrator's previous knowledge, had taken a place near the scene of the crime for the purpose of aiding and encouraging its commission, and this, in the judgment of the law, made him constructively present aiding in the commission of the murder. "When the law requireth the presence of the accomplice at the perpetration of the fact, in order to render him a principal, it doth not require a strict, actual, immediate presence, such a presence as would

make him an eye or ear witness of what passeth. Several persons set out together, or in small parties, upon one common design, be it murder or other felony, or for any other purpose unlawful in itself, and each taketh the part assigned him, some to commit the fact, others to watch at proper distances and stations to prevent a surprise, or to favor, if need be, the escape of those who are more immediately engaged. They are all, provided the fact be committed, in the eye of the law present at it; for it was made a common cause with them, each man operated in his station at one and the same instant towards the same common end, and the part each man took tended to give countenance, encouragement and protection to the whole gang, and to insure the success of their common enterprise." Foster's Crown Law, 349, 350, discourse 3, § 4.

No one of the assignments can be sustained. All are overruled, and the judgment is affirmed, with direction that the record be remitted for the due execution of the sentence.

(217 Pa. 106)

UNGER v. PHILADELPHIA, B. & W. R. CO.
(Supreme Court of Pennsylvania. Feb. 25, 1907.)

1. RAILROADS—ACCIDENT AT CROSSING—NEG-
LIGENCE.

In an action to recover for death of plaintiff's husband killed at a grade crossing, question of defendant's negligence held one for the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, §§ 1152-1165.]

2. SAME—PRESUMPTION OF DUE CARE.

Whether the presumption of due care on the part of a person killed at a railroad crossing has been rebutted is for the jury, unless the evidence to the contrary is so clear as to justify the court in holding that a verdict against defendant must be set aside as a matter of law.

Appeal from Court of Common Pleas, Philadelphia County.

Action by Freda Unger against the Philadelphia, Baltimore & Washington Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

Sharswood Brinton and John Hampton Barnes, for appellant. Louis Bregy and H. Homer Dalbey, for appellee.

FELL, J. The plaintiff's husband was killed at a grade crossing of the defendant's road in the city of Chester. He was riding in a butcher's wagon which was struck by the rear end of a work train of six or seven cars which was moving backwards. None of the plaintiff's witnesses saw the accident. Her case rested on the presumption that the deceased exercised proper care before driving on the track, and upon proof that at the time it was dark, foggy, and raining, that no notice of the approach of the train was given

by bell or whistle, that the safety gate was up, that there was no light at the crossing, and that the only light on the rear of the train was a lantern on the platform of the last car. Her case was met by proof offered by the defendant that there were three points near the tracks but separated by intervening sheds or buildings from which a view of the track for a half a mile could be had; that although the night was dark and rainy, the train could be easily seen and distinguished as a moving train; and that the deceased had been warned by the watchman of the approach of the train and disregarded the warning.

The question raised by the assignments of error is whether the court should have taken the case from the jury. This could not properly have been done. A mere presumption of due care on the part of the person killed at a railroad crossing is met by a presumption of equal force of like care on the part of those in charge of the train (*Haverstick v. Penna. R. R. Co.*, 171 Pa. 101, 32 Atl. 1128; *Hanna v. P. & R. Ry. Co.*, 213 Pa. 157, 62 Atl. 643, 4 L. R. A. [N. S.] 344), or it may be entirely overcome if the facts and circumstances clearly established admit of no other conclusion than that if he had stopped, looked, and listened, he would have seen the train (*Connerton v. D. & H. Canal Co.*, 169 Pa. 339, 32 Atl. 416; *Seamans v. D., L. & W. R. R. Co.*, 174 Pa. 421, 34 Atl. 568). Whether the presumption has been rebutted is for the jury, "unless the evidence to the contrary was clear, positive, and credible, and either uncontradicted or so indisputable in weight and amount as to justify the court in holding that a verdict against it must be set aside as a matter of law." *Patterson v. Pittsburg, etc., Ry. Co.*, 210 Pa. 47, 59 Atl. 318. Where there is any uncertainty as to facts or the inferences to be drawn from them, the case is necessarily for the jury. *Cromley v. Penna. R. R. Co.*, 208 Pa. 445, 57 Atl. 832.

There was nothing in the circumstances connected with the accident that rebutted the presumption of due care on the part of the deceased. It cannot be said with certainty that if he looked he saw the train, nor that, if he saw it, he observed in the darkness and storm that it was backing to the crossing, since the natural inference from the position of the engine would be that it would move in the opposite direction. The testimony offered by the defendant to rebut the presumption was far from being clear and indisputable. It was wholly discredited by the jury for reasons satisfactory to the learned trial judge, as we learn from his opinion. The testimony on behalf of the plaintiff to show that no signal of the movement of the train was given was more than merely negative. One of her witnesses who was walking between the tracks in the direction the train was moving and observed it as it passed him and kept it under observa-

tion until the accident testified positively that neither bell nor whistle was sounded. The plaintiff's case rested upon the presumption of care, un rebutted by proof that would have warranted the court in holding that it was overcome, and upon testimony tending to show negligence on the part of the defendant. It was clearly for the jury.

The judgment is affirmed.

(217 Pa. 97)

CUNNINGHAM v. PENNSYLVANIA R. CO.
(Supreme Court of Pennsylvania. Feb. 25, 1907.)

MASTER AND SERVANT—INJURIES TO SERVANT—EVIDENCE.

In an action for injuries to a workman employed about a construction train, evidence held insufficient to show negligence on the part of defendant railroad.

Appeal from Court of Common Pleas, Philadelphia County.

Action by James J. Cunningham against the Pennsylvania Railroad Company. Judgment for plaintiff, and defendant appeals. Reversed.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

Sellers & Rhoads, for appellant. Horace L. Henderson, for appellee.

STEWART, J. This appeal is from the order of the court refusing a motion for judgment for defendant non obstante verdicto. The facts as established by the finding of the jury are these: The plaintiff was one of some 25 workmen employed about a construction train in the work of loading and unloading gravel along the line of the defendant's road-bed. The train consisted of some six or eight open cars, and was in charge of a conductor. On the morning of the accident, the cars having been loaded and the train being about to proceed to the point for the distribution of the gravel, the workmen were directed by their foreman to get aboard the cars and begin the work of unloading when the train stopped. The plaintiff took his position on the car farthest from the engine. After proceeding about 500 yards on the main track, the train came to a stop on the signal of the foreman, and the plaintiff at once proceeded with his work. While in the act of sticking his shovel into the gravel, the train suddenly, without notice or warning and within a moment after it had come to a rest, again started with a severe jolt, which threw plaintiff overboard. In the fall and what resulted directly therefrom he sustained serious injury.

As the case was submitted to the jury on the theory that the facts would be found to be as testified by the plaintiff's witnesses, negligence in the matter of starting the train was assumed, and the only question was, whose was the negligence? One of the plaintiff's witnesses testified that the train started upon the signal of Hounslow, who was a foreman.

All the others testified that the signal was given by a Mr. Potter, who the evidence shows was supervisor of the work of repair, and Hounslow's superior. The learned trial judge made it very clear in his charge to the jury that no liability would result to the defendant from any negligence of Hounslow in this connection, inasmuch as, being a fellow employé with the plaintiff, the latter must be held to have assumed all such risks in the course of his employment. He held, however, and so instructed the jury, that if the train started on a signal given by Potter, the defendant company would be liable in this action, for the reason that Potter stood in the relation of vice principal, and that what he did must be regarded as the act of the company. The finding of the jury was that Potter gave the signal, not Hounslow. In our view of the case, it is immaterial whether Potter be regarded a fellow employé with plaintiff or a vice principal. The result must be the same in either case. If the former, of course no liability attached to the defendant for his act for the reason stated by the court. If the latter, the same result must follow, but for a different reason. How inconclusive, with respect to the main question in the case, the negligence of the defendant company, the finding of the jury that Potter gave the signal for the train to start was, is made apparent by an examination of the evidence. Potter is shown to have been at the time of the accident supervisor of this particular construction work, but there is not a particle of testimony that connects him, even indirectly, with the operation and movement of the train. He is not shown to have been on or about the train the morning of the accident, nor does it appear that his duty required him to accompany the train at any time. It was his business to indicate the places along the line of the road where the gravel was to be unloaded, where the train should stop for this purpose, and to what point it should proceed; but the actual movement of the train, the starting and stopping the machinery that produced the movement, these were matters of detail with which he is not shown to have had anything to do. In the absence of all evidence to the contrary, it is to be supposed that authority with respect to these was committed to the conductor in charge of the train. On this particular occasion the train, after running about 500 or 600 yards from where the gravel was loaded, had stopped short of the place where Potter wanted it discharged. He was at that time 175 yards away, and was seen by plaintiff's witnesses to signal for the train to advance further.

It was the sudden starting of the train, following the signal from Potter, that occasioned the accident; but where was there any negligence in what was done by Potter in this connection? If the train was not where it should be for purposes of unload-

ing, he was strictly in line of duty in requiring it to proceed further. In communicating his order to this effect to those in charge of the train, it is not pretended that he adopted any unusual or unreasonable method. Whether the signal was given to the conductor of the train or to the engineer does not appear, nor does it appear whether or not any intermediate order was given. All that the evidence discloses is that the movement of the train followed immediately upon Potter's signal. The sudden and violent starting of the train without warning, under such circumstances as we have here, might well be regarded as a negligent act; but how is it possible to derive from the facts of the case any duty resting upon Potter to give such warning? How could he have done it except by proceeding to where the train was? If a vice principal, he had a perfect right to assume that those in charge of the train, whose duty it was to obey the signal given by him, would act with ordinary prudence in carrying it out. *Hoover v. Railway Company*, 191 Pa. 146, 43 Atl. 74. The customary way of giving warning in such cases, as we all know, is by bell or whistle, both of which were under the immediate control, in this case, of the engineer. If additional warning is required at any time, it is only natural to expect it to come from the conductor in charge of the train. It is so obviously the duty of these particular employés to see that accustomed signals are given when occasion calls for them that there is no escape from the conclusion that for the failure to give such warning here upon one or both must rest the responsibility for what resulted from the omission. Potter, as we have said, had a right to expect that such warning would be given. His duty did not require him to go to the train to see that it was given. The result of the verdict was to charge the responsibility upon Potter without a particle of evidence from which an inference could be drawn that what he did in the matter was negligently or improperly done, or that he omitted anything that was his duty to do. Had he been a mile away when he gave the signal, it could not have been pretended that it was incumbent upon him to see that warning was given before starting the train. The fact that he was only 175 yards from the train when he gave the signal affects only the practicability of his giving the warning, and not his duty in this regard. We are not to be understood as conceding that he was a vice principal. We have assumed it only to show that were this a fact in the case, the evidence would not warrant a recovery. It discloses no negligence for which the defendant was responsible.

The order discharging the rule for judgment non obstante veredicto is reversed, and record is ordered to be remitted for the court below to enter judgment in accordance herewith.

(217 Pa. 121)

McGEEHAN v. HUGHES et al.

(Supreme Court of Pennsylvania. Feb. 25, 1907.)

1. MASTER AND SERVANT—DUTIES OF MASTER.

An employer is bound to furnish and maintain suitable appliances for the work required of his employes, and, if he fails so to do, he is liable for any resulting injuries.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 173, 199.]

2. SAME—INJURIES TO SERVANT—DEFECTIVE APPLIANCES.

In an action against an employer to recover for personal injuries sustained while unloading ore from a vessel, *held*, that a verdict for plaintiff was sustained by the evidence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 950-952.]

3. SAME—EVIDENCE.

In an action by a servant to recover for injuries received while unloading iron ore from a ship, evidence as to the appliances in general use was properly excluded where there was no offer to show that the method used by defendant was unusual and more dangerous than the ordinary method.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 920-923.]

Appeal from Court of Common Pleas, Philadelphia County.

Action by Bernard McGeehan against William J. Hughes and Morris Boney, Jr., trading as Morris Boney & Son. Judgment for plaintiff, and defendants appeal. Reversed.

When plaintiff was on the stand he was asked this question: "Q. Is there any other kind of bucket you saw used for loading iron ore? (Objected to. Objection sustained. Exception for plaintiff.)"

George B. Drake, plaintiff's witness, was asked this question: "A. I have been quite familiar with the unloading and loading appliances around vessels in Buffalo and Cleveland and Ashtabula, and also in Chicago, and I have had more or less of it down here. Q. Will you state what is the method in ordinary and general use for the unloading of iron ore from vessels? (Objected to. Objection sustained. Exception for plaintiff.)"

Francis McGlashen was asked this question: "Q. Were these buckets used for anything else than Marbella iron ore? (Objected to. Objection sustained.) Mr. Warner: I wish to show that these buckets, the construction of which I will explain later on, were used to carry all sorts of loads, irrespective of the weight. (Objected to. Objection sustained. Exception for plaintiff.)"

Verdict for plaintiff for \$10,000. The court subsequently entered judgment for defendants non obstante veredicto.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

Frederick H. Warner and Arthur B. Houseman, for appellants. A. L. Cameron and W. W. Smithers, for appellee.

POTTER, J. This was an action of trespass by an employé against his employers

to recover damages for personal injuries sustained, in the course of his employment, through the alleged negligence of the employers. The facts, substantially as stated by the trial judge, were as follows: The defendants, Morris Boney & Son, were stevedores. The plaintiff, Bernard McGeehan, a laborer in their employ, was injured by iron ore falling upon him from a tub or bucket hoisted from the hold of a vessel where he was employed with other men who were working for defendants. The bail or handle by which it was attached to the hoisting tackle was torn from the side of the bucket during an ascent, and the contents, about 4,000 pounds of ore, dropped back into the ship, some of it striking plaintiff and inflicting the injuries which were the basis of his suit. The negligence with which defendants were charged was failure to supply a reasonably safe bucket of sufficient strength to hoist iron ore from the hold of the vessel. Plaintiff's statement averred "that the said bucket fell by reason of a defect in the said handle or frame, and that the said defendants were negligent in furnishing him for use an appliance so defective, which said defect could have been discovered by his said employers with proper care, and which said defect was unknown at the time to this plaintiff." The jury found a verdict for the plaintiff in the sum of \$10,000, but the court below entered judgment in favor of the defendant non obstante veredicto, under the provisions of the act of April 22, 1905 (P. L. 286). Plaintiff has appealed, and assigns for error the exclusion of certain testimony and the entry of judgment.

The first assignment of error complains of the exclusion of evidence as to the general use of other kinds of buckets for unloading ore than that by which plaintiff was hurt. This error was rendered harmless by reason of the fact that defendant's foreman afterwards answered practically the same question, and the fact was undisputed that defendants had at that place two kinds of buckets in use, one with clamped balls and rivet holes, and the other with solid forged eye-plates in the balls or handles.

The second assignment of error complains of the rejection of evidence as to the methods which were in ordinary and general use in unloading iron ore. If an offer had been made to follow this question by evidence tending to show that the method used by defendants was unusual, and was more dangerous in itself than the ordinary method, the question would have been admissible. In the form in which it was presented, and with no indication that it was to be followed with anything further, it was properly rejected.

The offer contained in the third assignment of error, to show that the buckets were used to carry all sorts of material, does not seem to have been relevant, but, if it was, we do not see that its exclusion did any harm, for there was ample evidence to show

that the defendants were using the buckets to carry loads of iron ore to the extent of 4,000 pounds in weight. The testimony is uncontradicted that the buckets were of sufficient size, when filled, to contain 4,500 pounds of iron ore. According to the evidence, the weak point in the construction of the bucket was in the handle or bail. It was the breaking or tearing out of the bail that caused the accident in this case.

The testimony of Francis McGlashen, a fellow workman, who examined the bucket after the accident, was that the break in the bail was directly through one of the rivet holes. There was no testimony as to any cause of the breaking except overloading. All the witnesses agreed that the loads on the buckets were about 4,000 pounds each. George B. Drake, a naval architect and expert called by plaintiff, testified that the safety point in weight for such a bucket would be 1,500 pounds. If the bucket had had a bail, with a forged eye, the safety point would have been increased to 2,000 pounds. The case for the plaintiff was abundantly sustained by the uncontradicted evidence of Mr. Drake, the naval architect, who showed thorough familiarity with appliances for loading and unloading vessels, and whose experience in the building of ships and vessels had fitted him to judge of the tensile strength of iron and steel. In his testimony he discussed the different kinds of buckets, their relative merits, the question of ordinary usage, and their tensile strength. In commenting on his evidence, the learned trial judge says that he "was not able to say whether the bucket in question was made of iron or steel"; but the architect's estimate as to strength was founded upon steel, and therefore was in that respect favorable to the defendants. The architect said that the safety point for loading was 1,500 pounds, while the ultimate breaking point was 6,000 pounds, thus providing for the usual factor of safety of four to one. As the evidence showed that the load placed in the bucket was 4,000 pounds, it is apparent that no attention was paid to the factor of safety, as this was considerably more than twice the weight which the buckets could safely carry. There is no force in the suggestion of the trial judge that loads of the same amount had frequently been placed in the buckets before without breaking. Continuous overloading could only result in producing a strain which would finally cause the bail to give away, just as it did. The evidence was certainly sufficient to submit to the jury as to the cause of the break. This was not the case of a mere guess as to how the accident happened. The value of the testimony of the naval architect was forfeited by his long experience, which gave him unusual means of knowledge of the appliances in use in work of this character. It is difficult to see how a better witness for the purpose could have been produced than one with expert knowledge of the strength of

materials, and of the methods usually employed in loading and unloading vessels by means of buckets and hoisting apparatus.

The general rule governing the liability of the employer in such cases was stated by this court in *Patterson v. Pittsburg, etc., R. R. Co.*, 76 Pa. 389, 18 Am. Rep. 412, as follows: "It is true the master is not responsible for accidents occurring to his servant from the ordinary risks and dangers which are incident to the business in which he is engaged; for in such case the contract is presumed to be made with reference to such risks. But, on the other hand, where the master voluntarily subjects his servant to dangers, such as, in good faith, he ought to provide against, he is liable for any accident arising therefrom. * * * The servant does not stand on the same footing with the master. His primary duty is obedience, and if, when in the discharge of that duty, he is damaged through the neglect of the master, it is but meet that he should be recompensed. * * * The employer is bound to furnish and maintain suitable instrumentalities for the work or duty which he requires of his employes, and, failing in this, he is liable for any damages flowing from such neglect of duty." We are of opinion that under the evidence in this case the questions were properly for the jury, and the court below erred in entering judgment for the defendants non obstante veredicto.

The fourth assignment of error is sustained, and in accordance with the precedent established in *Hughes v. Miller*, 192 Pa. 365, 43 Atl. 976, we remit the record to the court below, that such judgment may be entered, in accordance with this opinion, as law and justice require.

(217 Pa. 110)

HODDER v. PHILADELPHIA RAPID TRANSIT CO.

(Supreme Court of Pennsylvania. Feb. 25, 1907.)

TRIAL—INSTRUCTIONS—WEIGHT OF EVIDENCE.

In an action for injuries alleged to have been received by the sudden starting of a street car on which plaintiff was a passenger when she was attempting to alight, where her evidence is directly contradicted by the employes and four passengers, it is proper for the court to comment on the numerical inequality of the evidence, and it was error to minimize the effect of such inequality.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 539-548.]

Appeal from Court of Common Pleas, Philadelphia County.

Action by Augusta O. Hodder against the Philadelphia Rapid Transit Company. Judgment for plaintiff, and defendant appeals. Reversed.

The material portion of the charge of the court was as follows:

"Now, then, gentlemen, you are to decide from the evidence, applying to it the rules which govern you in the ordinary affairs of life, whether or not this lady stepped from a

moving car, or, as one of the witnesses said, jumped from a moving car; or whether, having notified the conductor to stop the car, he gave the bell to stop the car, and the car having stopped, she then attempted to alight, and the car was started forward before she got off, and she was thrown from the car. Counsel with great clearness and great fairness to each other and to us have put that question before you, and that is a fact for you to decide.

"I shall say very little about the testimony of the witnesses. That is for you. You should reconcile it if you can; if not, you must decide between the witnesses. On the one hand, it has been argued from the circumstances of the case that the lady's story is hardly credible, but you have a right to believe it, and, if you believe it, to determine that the company was, through its employees, guilty of carelessness in that, having stopped the car to give her an opportunity to alight, they did not give her time enough to alight. But if you believe the testimony of the defendant's witnesses and believe she stepped or jumped from a moving car, she is guilty of contributory negligence. Of course, the credibility of witnesses is for you. You should look a witness straight in the face, and you 12 men are to decide whether you believe or do not believe the witnesses. You heard the plaintiff, you heard her examined and cross-examined, and you have doubtless by this time come to a conclusion as to whether her recollection is accurate, or whether her story is to be believed. And so as to the witnesses for the defendant. They are more numerous in number, and agree pretty well that the lady stepped or jumped off the car while it was in motion; but when they come to describe the accident, it is for you to say whether you think their story holds together. I am not going into a disquisition on evidence; but where witnesses come in and tell exactly the same story to the letter, it is rather thought to be against their credibility than for it. That is, if people make up a story, they are apt to make it up exact in all the details. But I do not want to take up time on that. I want to get right at this case. You have got to decide, as these witnesses said this woman either jumped off the car or stepped off the car while it was in motion, whether their story is accurate or not, and first of all applying to her and her witnesses your careful consideration, critical consideration, do the same thing to the witnesses for the defendant. Because they seem to agree in this, that the lady jumped or stepped off the car while it was in motion; but you can test their accuracy by the testimony. The witness Southcott, who testified quite fully about it, when asked where he sat, was not quite sure of the seat, but was back in the smoking seats. He thought it was the second from the back and on the same side, as I understood his testimony, though that is for you, as the lady was on,

and he said there were two empty seats between him and the lady. We will pass over Smith and Meredith, the conductor and motorman. They testified simply and directly. The motorman was not cross-examined. But you may test their testimony. Then we come to the testimony of the witness Siglang. Siglang first said that he was on the left side of the car, and then said he was on the right-hand side. That may have been a slip of the tongue or the memory. And the other witness, Carlin, also said: 'I was on the east side; that is, on the same side as the lady that I saw.' Now, you have got to test the accuracy of the recollection of those witnesses by their accuracy and by the way they stood cross-examination, because, while they did say—and one of the witnesses not having stated how the lady got off, in answer to a question, said she jumped off with both feet. The other witnesses described her getting off in a rather different way. I am not arguing this case. I am simply putting to you the testimony of these witnesses. It is not always numbers, but it is whom the jury believe. However, I have called your attention first of all to the testimony of the plaintiff. Counsel for the defendant was accurate in his statement that though the testimony of a witness who is interested is no longer excluded by the law, the jury must take into consideration the great interest she has in the case. At the same time, you heard her examined and cross-examined, and you must determine whether her story was true and accurate, because her right to recover from this defendant company depends on the accuracy of her statement that the car had stopped, and while she was in the act of alighting started forward suddenly and threw her down. And so you should apply the same critical analysis and care to the testimony of the defendant. They are both entitled to it. It has been well and fairly presented by counsel on both sides. There has been no attempt to either move your sympathy or to stir your indignation or to excuse anything. Your business in that jury box is not to decide for this lady because you sympathize with her, or against the company because you have any prejudice against it, but to determine the facts, and if you determine that her story is accurate and true, and that the others are mistaken, you have a right to do it and to decide in favor of the plaintiff. That is the foundation of our government."

Verdict and judgment for plaintiff for \$2,000.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

Thomas Leaming and Chester N. Farr, Jr., for appellant. Haines D. Albright and Henry B. Tawresey, for appellee.

STEWART, J. It is complained in the assignment of error that the charge of the court was not a fair and adequate presenta-

tion of the case upon the facts. That it was a very full and entirely correct exposition of the law applicable to the case itself is conceded. It does not concern us to inquire whether the verdict was in accordance with the facts or otherwise, but the assignment of error puts upon us the duty of inquiring whether the jury, in reaching its conclusion, was properly and sufficiently aided by the court in the presentation and discussion of the evidence. The plaintiff was injured in the attempt to alight from the car of the defendant company, and the action was for the recovery of damages. The negligence charged was the sudden starting of the car from a state of rest while plaintiff was in the act of getting off, with the result that she was thrown upon the ground and injured. The case presented this marked feature, that while but one witness, and that the plaintiff herself, testified to the particular fact relied upon to establish negligence, viz., that the car was at rest when plaintiff attempted to alight, the conductor, motorman, and four passengers, all of whom witnessed the occurrence, testified, in direct and positive contradiction to the plaintiff, that when she attempted to alight the car was moving, that it had not then reached the crossing, and that it had not stopped at all. Did the case present no other feature than this marked numerical inequality in the support given one side and the other by the witnesses, this of itself would be a circumstance properly calling for remark in the general charge, and the least the court could do would be to instruct the jury to allow it due weight. By so much the greater reason should it be the subject of observation and instruction when, as in this case, the solitary witness on the one side is the plaintiff herself testifying in her own behalf, unsupported by a single fact or circumstance not equally supporting those testifying adversely to her; and, on the other side, a half dozen witnesses, each with equal opportunity with the plaintiff to know what the actual fact was, testifying without impeachment of credibility by witness or circumstance, in positive contradiction to the plaintiff's statement. Here was a state of evidence which not only invited comment by the court, but required it, in order that what was so unusual might have neither too much nor too little influence in determining the conclusion of the jury, but strictly its proper weight. In deciding the question of defendant's liability, the jury had but one fact to ascertain—was the car at rest or in movement when plaintiff attempted to alight? The answer to this question depended on where they rested their belief—in the plaintiff's testimony, or that of the opposing witnesses.

The complaint is, not that the feature of the case referred to was overlooked in the charge, but that in remarking upon it the learned trial judge not only failed to allow it the prominence and force it was entitled to,

but so minimized its effect as to make what was said on the subject, if not a positive misdirection, a prejudicial misleading. The charge contains but two references to this pronounced inequality, both so brief that their insertion here will add but little to the length of this opinion. The first is: "And so as to the witnesses for the defendant, they are more in number, and agreed pretty well," etc. The next is: "It is not always numbers, but whom the jury believe." Since the only question was, as the court correctly put it, whom they should believe on the disputed point, the impression left on the minds of the jurors by these brief references to the disparity of the number of witnesses testifying on the one side and the other to the vital fact of the case would most likely be that it was a circumstance too unimportant for fuller reference, and therefore too important for their serious consideration. Had the learned judge said so in so many words, it would have been manifest error, because it would have denied the defendant the benefit of an advantage it had a right to claim on the state of the evidence as exhibited. That it was differently expressed is immaterial, if, as expressed, it was calculated to produce the same effect. The case, for the reasons referred to, called for full and explicit instructions as to the weight of the evidence, as to what is meant by this expression, and what instructions should influence in determining where the weight of evidence lay. The charge would have been open to exception had it by implication even allowed the jury to suppose that it was necessarily determined by numbers. The error was none the less decided, if by implication it left the jury free to disregard, or treat as unimportant, the fact that the issue of credibility was between one interested party and half a dozen others, four of whom, so far as the evidence disclosed, stood clear of all bias, and all of whom had equal opportunity with the one to know the truth. What was impressed on the minds of the jury with an earnestness out of proportion to the requirements of the case was their right to accept the testimony of plaintiff, rather than that of the opposing witnesses. We say out of proportion to the requirements, because this right was unchallenged, and nothing called for such a vindication of it by the court as it received.

This is the language of the charge: "Your business is not to decide for this lady because you sympathize with her, or against the company because you have any prejudice against it, but to determine the facts, and if you determine that her story is accurate and true, and that the others are mistaken, you have a right to do it and to decide in favor of the plaintiff. That is the foundation of our government." It may be that the collective intelligence of the jury prevailed to avoid misunderstanding what was here said, but we cannot be made certain of it. It would not be at all strange if the less intelligent and

discriminating of the jurors derived from it the notion that their acceptance of plaintiff's testimony as true would relieve them of a responsibility, which otherwise would be theirs, of exposing to serious danger our civil institutions. It was in marked contrast to the earlier references made to the testimony of defendant's witnesses. Not only was the effect of the marked numerical preponderance there unduly minimized, but the testimony was not reviewed with that accuracy of statement required for careful investigation by the jury. As to whether the car was in motion or at rest when the plaintiff attempted to alight, the only question in the case, these witnesses were in entire and absolute accord. There was some uncertainty as to the seats occupied in the car by each, and some slight discrepancy with respect to some other wholly unimportant details; but on the one fact to be inquired about their agreement was positive and exact. The reference to this testimony was as follows: "They [the defendant's witnesses] are more numerous and agree pretty well that the lady stepped or jumped off the car while it was in motion, but when they come to describe the accident, it is for you to say whether you think their story holds together." This was an unwarranted depreciation of the testimony of these witnesses, to say the least. It was not a case where explanation and reconciliation were required to show agreement, but where concurrence was so pronounced and exact that no refinement could make of it anything less than unanimity. Such characterization of the testimony was inaccurate and unfair, because calculated to rob it of its true significance.

Nor was the effect at all corrected by what was said as to the individual witnesses testifying for the defendant, but rather intensified. Reference to the testimony of each was made, only, however, to point out those things which the learned judge thought proper to consider as testing their accuracy. Matters thus indicated for the jury's consideration were unrelated to the one important fact. However found to be, they could not qualify in the slightest the witnesses' opportunities to see how the fact was, nor could they furnish any reasonable basis for discrediting the testimony. One witness spoke of the plaintiff jumping off the car, while all the others described it as a stepping off. Another could not be certain whether he was two seats in the rear of the plaintiff or three, and another immediately corrected his statement that he was on the left-hand side of the car. These are the features of the testimony specifically pointed out by the court to enable the jury to test the accuracy of their testimony. To say that a jury may reject the testimony of a half dozen witnesses for no other reason than here appears is simply to invite them to do so. The testimony of the conductor and motorman was in accord with that of the other witnesses. The only refer-

ence to it was as follows: "We will pass over Smith and Meredith, the conductor and motorman. They testified simply and directly." An omission of all reference to the testimony of these two witnesses would have been marked, but its effect would not have been so prejudicial to the defendant as the reference that was made. Why pass over them? The inference that the jury would be likely to derive from such a remark would be that because the witnesses were employees of the defendant company their testimony need not be seriously considered, and yet it bore as directly upon the one fact in issue as that of the other witnesses, and was in entire accord with it. Of course, the court intended no such inference to the drawn, but the jury would be most likely to accept it as the obvious one.

It is unnecessary to illustrate further. We have sufficiently indicated wherein the charge comes short of being a fair and impartial résumé of the evidence. Any review of the evidence by the court that is inaccurate in statement, or that gives such undue prominence to minor considerations as to divert the attention of the jury from the material questions in the case, and deprives either side of an advantage it is entitled to under the rules of evidence, is in effect misleading. That is what is complained of in respect to the charge in this case; and what we have indicated shows, we think, that the complaint is not without reason. It was not a fair and adequate presentation of the case, and the assignment of error must be sustained.

Judgment reversed, and venire facias de novo awarded.

(217 Pa. 82)

WILSON v. WERNWAG et al.

(Supreme Court of Pennsylvania. Feb. 25, 1907.)

1. CONTRACT—CONSTRUCTION.

In construing a doubtful contract, the situation of the parties, circumstances, and relations of the property in regard to which they have negotiated are to be considered.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 11, Contracts, §§ 723-770.]

2. DAMAGES—BREACH OF CONTRACT.

Plaintiff was a manufacturer, and defendant was his sole agent. In 1890 plaintiff proposed that, if defendants would remain in business for one year from January 1, 1891, plaintiff would guaranty the business against losses for 1 per cent., and defendant continued in business during that year, and late in the year plaintiff proposed a similar guaranty for the year 1892, which defendants accepted; but in April, 1892, they went out of business, and another firm conducted the business under its name, employing the same salesmen and clerks. Held that, for the breach of the contract of the defendants to continue the sale of plaintiff's goods during the whole year of 1892, plaintiff was entitled to recover the 1 per cent. guaranty on the total sales, less the losses.

3. SAME—EVIDENCE.

Where defendants agreed to act as selling agent for plaintiff manufacturer for a certain year, and thereafter discontinued the business, and plaintiffs had agreed in the contract to guaranty defendants against losses from fail-

ures for the sum of 1 per cent. on the net amount of their sales for such year, the sales made and the losses incurred during the remainder of such year, while the business was conducted by the firm which succeeded the defendants, could be taken as the data on which to estimate the commissions or profits due the plaintiff on such guaranty.

4. SAME—PROFITS.

Damages are not excluded simply because they are profits, if it reasonably appear that they would have been made had the terms of the contract been observed, and that their loss necessarily followed the breach.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Damages, §§ 72-88.]

Potter and Elkin, JJ., dissenting.

Appeal from Court of Common Pleas, Philadelphia County.

Action by Thomas H. Wilson against Theodore Wernwag and T. Russell Dawson. From an order dismissing exceptions to report of referee, defendants appeal. Affirmed.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

Peter Boyd, for appellants. Henry Budd and William C. Stoeber, for appellee.

MESTREZAT, J. This is an action of assumpsit to recover damages for an alleged breach of contract. The plaintiff was a manufacturer of woollen goods, in the city of Philadelphia. The defendants were commission merchants, and carried on the business in Philadelphia and New York. For a few years prior to 1890, they were the sole consignees and agents of the plaintiff in selling his goods, for which they received a fixed percentage of the amount of sales made as compensation for their services. On December 12, 1890, the plaintiff submitted certain propositions to the defendants in writing, which they accepted, among which were the following: "In consequence of the great loss which would be incurred by the sudden changing of his commission house, Thomas H. Wilson makes to Wernwag & Dawson the following propositions: '(a) That on and after January 1, 1891, to July 1, 1891, that he will allow Wernwag & Dawson 7½ per cent. commissions on all goods sold and entered for his account; (b) that for and in consideration of 1½ per cent. on the total sales of Wernwag & Dawson, he will guarantee all accounts sold by them between January 1 and July 1, 1891, this to include goods sold before July 1, 1891, and not entered until after that date; (c) if Wernwag & Dawson will agree to remain in business for one year from January 1, 1891, he will guarantee the entire business against losses by bad debts for 1 per cent.; (d) on or before July 1, 1891, Wernwag & Dawson will decide whether they will remain in business for the balance of the year, say from July 1, 1891, to December 31, 1891. Should they decide to continue in business till December 31, 1891, then they are to pay Thomas H. Wilson 1 per cent. only for guaranteeing the entire year's busi-

ness.'" The defendants continued in business during the year 1891. In October, 1891, the plaintiff requested the defendants to advise him by November 1st whether they intended remaining in business during the year 1892, and said that he was willing to guaranty them against losses for the year of 1892 at 1 per cent. of the net amount of their sales, and would pay them 7½ per cent. commission, but would not pay \$1,500 expenses, as he had done during the year 1891. In November, 1891, the plaintiff signed and delivered to defendants the following writing, written and witnessed by Samuel White, the creditman and head bookkeeper of defendants: "Philadelphia, November 10, 1891. Mr. Thomas H. Wilson hereby agrees to guarantee Wernwag & Dawson against all losses from failures, for and in consideration of the sum of one per cent. upon the net amount of their sales for the year 1892." The defendants accepted this offer orally. They continued in business, and continued to sell the plaintiff's goods, until April 1, 1892, when their firm was dissolved, and they refused thereafter to sell his goods or longer to carry on the commission business. This action was brought by the plaintiff to recover damages, which he alleges he sustained by reason of the defendants having discontinued their commission business and having declined to continue it during the entire year of 1892, which he claims was a breach of the contract of November 10, 1891. He (plaintiff) claims that, under the contract between the parties, the defendants were to continue the business during the whole of 1892, and that by failing to do so he is injured to the extent of 1 per cent. of the sales which the defendants would have made from April 1, 1892, the date of the dissolution of their partnership, to December 31, 1892, less the losses which they would have sustained during that period. The defendants, on the other hand, deny that the contract between the parties contemplated that they should continue the business during the whole of the year 1892, or obligated them to do so, and contend that, if such is the correct interpretation of the contract, the proper measure of damages for its breach is not 1 per cent. of the sales which they would have made had they continued in business for the whole year, less the losses; that such profits are too remote and too uncertain as a measure of damages for the alleged default. These are the important and controlling questions in the case, and the only questions which we deem it necessary to consider on this appeal.

The case was referred to a referee under the act of May 14, 1874. He found against the contention of the defendants on both propositions, and his report was confirmed by the court. He has found and stated at length the facts in the case, and we think his findings are supported by the evidence. The referee found that "It was understood by both

parties to said agreement of November 10, 1891, that an important inducement to the plaintiff to enter into it was the continuance of the defendants in their said business during the whole of the year 1892, and it was the intent and understanding of both parties that defendants should remain in said business during that period." He therefore held that the contract of November 10, 1891, required the defendants to continue their commission business, and to accept and sell the plaintiff's goods during the entire year of 1892. We are clear that this is a proper interpretation of the contract. In *Lacy v. Green*, 84 Pa. 514, Woodward, J., delivering the opinion, says (page 518): "Where the meaning of an agreement is doubtful, its terms are to be considered in the light thrown on them by approved or admitted illustrative facts. The situation in which the parties stand, the necessities for which they would naturally provide, the conveniences they would probably seek to secure, and the circumstances and relations of the property in regard to which they have negotiated, are all elements in the interpretation of an ambiguous contract." We think the language of the proposition of November 10, 1891, made by Wilson to the defendants, discloses clearly an intention that the business should be continued for the whole of the ensuing year. His guaranty, as therein expressed, is against all losses from failures, and the consideration which he is to receive is a percentage "upon the net amount of their [defendants'] sales for the year 1892." The percentage, therefore, was not to be computed upon such sales as they might make in 1892, or until the dissolution of their partnership, or until they discontinued their business, but was stated clearly and distinctly to be upon the "net amount of their sales for the year 1892." When we consider all the circumstances under which the contract was made, it is still made more apparent that such is the proper interpretation of the agreement of the parties. The agreement of the previous year between the same parties assists in construing the contract under consideration. By that agreement it appears that the plaintiff apprehended a great loss from any sudden changing of his commission house, and that it was entered into for the purpose of preventing such a change. It is apparent that the same reasons existed for his desire to prevent a sudden change in his commission house when the contract of 1891 was made, and hence it is fair to infer that, by the contract of 1891, he intended to guard against a sudden or unexpected changing of his commission house, and desired to fix a definite time on which he might rely for his goods being sold by the defendants. By the contract of 1890 it also appears that the parties considered and agreed that a fair consideration for guarantying the business against losses was 1 per cent. on the total sales for an entire year; and, further, that the consideration for guarantying the busi-

ness for a half year should be $1\frac{1}{2}$ per cent. on the sales for that period. In that contract the stipulation for the consideration in the first instance was for a percentage for six months, but with a provision that, if the defendants remained in business for the whole year, the plaintiff was "to guarantee the entire business against losses by bad debts for 1 per cent." It is apparent, therefore, that, in determining the rate of commission for guarantying the business, the length of time was an important and controlling consideration, and that for one year the consideration should be 1 per cent., and for any time less than a year the rate should be greater.

Another reason, as suggested by the referee, for the conclusion that the contract contemplated a continuance of the business for the whole of the succeeding year, was the fact that the amount of the sales was greater during certain months of the year than during other months, and that it appeared that during 1891 the heaviest sales were made in June, July, and August. With these facts before him, it cannot be assumed that the plaintiff would agree to guaranty against losses for an indefinite time which might exclude the heaviest selling months of the year; and especially should we not presume that the plaintiff would consent to 1 per cent. commission, in view of the further fact, suggested above, that he demanded and received $1\frac{1}{2}$ per cent. for guarantying against losses for the first six months of the preceding year. We think it clear that the parties meant what the plaintiff proposed and the defendants accepted on November 10, 1891, that the plaintiff's consideration for guarantying against losses was "upon the net amount of their sales for the year 1892," and that therefore the contract manifestly contemplated, as understood by both parties, that the defendants should continue in the commission business and sell the plaintiff's goods for the entire year of 1892.

The next and an important question, and one not entirely free from difficulty, is the measure of the plaintiff's damages for the violation of the contract. As we have seen, the defendants dissolved their partnership and discontinued their business on April 1, 1892. The referee found that, "after said dissolution, the firm of Minot, Hooper & Co. of New York took the place of the defendants, accepting transfer from defendants of their accounts, and conducted under their own name the business formerly carried on by the defendants, employing the same manager, using the same store and the same salesmen and clerks, and conforming substantially to the same rules as to giving credit." It appears that those who had been the defendants' consignors prior to the dissolution of the partnership, including the plaintiff, thereafter consigned their goods for the balance of 1892 to Minot, Hooper & Co. The goods of the plaintiff in the possession

of the defendants at the dissolution of their firm were also transferred to the same firm, and the plaintiff and the defendants agreed as to the quantity and quality of the goods transferred. The referee also found, and his finding was sustained by the court, that: "If the defendants had remained in business, the plaintiff would have received 1 per cent. on the amount of net proceeds of sales for the balance of the year, less the losses. The amount of this difference can be ascertained by subtracting the actual losses on sales made by Minot, Hooper & Co. during that period from 1 per cent. upon the amount of net proceeds of sales by that firm. * * *

It is reasonably certain that the defendants, had they remained in business and performed their part of the contract in good faith, would have made the same sales and losses as were made by their successors." The referee therefore held that the measure of damages was 1 per cent. upon the net proceeds of sales made by Minot, Hooper & Co., from April 1 to December 31, 1892, less the losses.

Hoy v. Gronoble, 34 Pa. 9, 75 Am. Dec. 628, was an action to recover damages for the breach of a parol contract by which the defendant agreed to employ the plaintiff to cultivate a farm upon shares. It was held that the proper measure of damages was the profit which the plaintiff would have made on the farm if the contract had not been violated. In delivering the opinion, Strong, J., said (page 10 of 34 Pa., 75 Am. Dec. 628): "While it is well settled that a jury are not at liberty to allow mere speculative damages, yet there are cases in which a plaintiff has been held entitled to what he would have made had the contract been fulfilled—I mean, to what he would have made immediately out of the contract. The loss of such profits is not consequential, in the sense in which consequential damages are sometimes said to be too remote. They are in the immediate contemplation of the parties when the contract is made." The same learned judge, delivering the opinion in *Adams Express Co. v. Egbert*, 86 Pa. 360, 364, 78 Am. Dec. 382, says: "The loss of profits or advantages, which must have resulted from a fulfillment of the contract, may be compensated in damages, when they are the direct and immediate fruits of the contract, and must therefore have been stipulated for, and have been in the contemplation of the parties when it was made." *Hoy v. Gronoble*, 34 Pa. 9, 75 Am. Dec. 628, was followed and approved in *Wolf v. Studebaker*, 65 Pa. 459. The first two of the above cases are cited in the opinion of Mr. Justice Green in *Pennypacker v. Jones*, 106 Pa. 237, as holding that "profits may be recovered where they are 'part and parcel of the contract itself, entering into and constituting a portion of its very elements; something stipulated for, the right to the enjoyment of which is just as clear and plain as to the enjoyment of any other stipulation.'" *Imperial Coal Co. v. Port Royal Coal Co.*, 138

Pa. 45, 20 Atl. 937, was an action to recover damages for violation of a contract by which the defendant agreed to supply the plaintiff company with coal sufficient to keep its coke plant in operation for a definite period. The coal was to be converted into coke for the defendant at a fixed price per ton. The measure of damages for the breach was held to be the net profits which the plaintiff would have made had the contract been fulfilled. In the opinion it is said (page 47 of 138 Pa., page 937 of 20 Atl.): "While it is undoubtedly true that mere speculative profits cannot be recovered in an action for breach of contract, a careful examination of the assignment shows that the profits in question were not within this rule. The jury have found * * * that the defendant was to furnish plaintiff with enough coal to keep its 60 ovens in operation for six months, and that the price was to be \$1 per ton. The profits in such case were not speculative. They did not depend upon the fluctuations of the market, or the demand for coke, and they could be ascertained with mathematical accuracy." This part of the opinion is quoted and approved in the very recent case of *Puritan Coke Co. v. Clark*, 204 Pa. 556, 54 Atl. 350. *Pittsburg Gauge Co. v. Ashton Valve Co.*, 184 Pa. 86, 39 Atl. 223, was an action for the breach of a contract by which the defendant constituted the plaintiff its sole agent for the sale of certain goods within certain designated territory for a term of three years. The plaintiff's compensation was a commission of 10 per cent. on the amount of sales. Before the expiration of the term, the defendant declared a forfeiture of the contract without sufficient cause. It was held that the plaintiff could show, as bearing upon the damages, the extent and volume of the business under his own agency, and the extent and volume of it under the agent appointed in his place. The very recent case of *Singer Manufacturing Co. v. Christian*, 211 Pa. 534, 60 Atl. 1087, was an action to recover for the price of a number of machines. The defendant claimed that he had purchased them by an oral contract with the plaintiff's agent by which it was agreed that the plaintiff would furnish work to keep the machines going, and that they were to be paid for out of the profits of such work, and that sufficient work was not furnished. The defendant alleged a breach of contract on the part of the plaintiff, and claimed as a set-off the damages he had sustained. It was held that the measure of his damages for the breach was the profit which the defendant might have made, together with the expense of maintaining the plant in idleness caused by the neglect or refusal of the plaintiff to furnish work continuously according to the terms of the contract.

In other jurisdictions, the same rule as to the measure of damages has prevailed. In *Brigham v. Carlisle*, 78 Ala. 243, 56 Am. Rep. 28, *Clopton, J.*, delivering the opinion, says: "When they [profits] form an elemental con-

stituent of the contract, their loss, the natural result of its breach, and the amount can be estimated with reasonable certainty, such certainty as satisfies the mind of a prudent and impartial person, they are allowed.

* * * Profits are not excluded from recovery, because they are profits; but, when excluded, it is on the ground that there are no criteria by which to estimate the amount with the certainty on which the adjudications of courts and the findings of juries should be based. The amount is not susceptible of proof." *Wakeman v. Wheeler & Wilson Manufacturing Co.*, 4 N. E. 264, 101 N. Y. 205, 54 Am. Rep. 676, was an action to recover damages for the breach of a contract by which the defendant company agreed to give the plaintiff the sole agency for every place in Mexico in which he should within a given time sell 50 machines. The plaintiff sold 50 machines or more in several places, and therefore qualified himself for the agency. It was held that the plaintiff was entitled to recover the profits which he probably could have made, and, as showing such profits, he could prove that, subsequent to the repudiation of the agreement, the defendant established agencies in Mexico, and the number of machines sold by them for the defendant company. *Wells v. National Life Association of Hartford*, 99 Fed. 222, 39 O. C. A. 476, 53 L. R. A. 33, was an action brought to recover damages for the alleged breach of a contract employing plaintiff as general agent of defendant company for the state of Texas. It was there held by the United States Circuit Court of Appeals that: "Loss of anticipated profits may be included in a recovery for breach of a contract to employ plaintiff on commission as exclusive general agent of an insurance company for particular territory during a specified time, which may be estimated by considering the value of renewals on policies already written not shown by the company to have lapsed, and the probable future business as indicated by that actually done by the company through their agents after the breach, the respective facilities of the two for doing the work, the probable expense, and the amount to be done." There is an extended note to the report of this case, collecting all the authorities on the subject of loss of profits as an element of damages for breach of contract. In *Griffin v. Colver*, 16 N. Y. 489, 69 Am. Dec. 718, *Selden, J.*, delivering the opinion, says: "Profits which would certainly have been realized but for the defendant's default are recoverable, those which are speculative or contingent are not. * * * Indeed, it is clear that, whenever profits are rejected as an item of damages, it is because they are subject to too many contingencies, and are too dependent upon the fluctuations of markets and the chances of business to constitute a safe criterion for an estimate of damages." In *Ætna Life Insurance Co. v. Nexsen*, 84 Ind. 347, 43 Am.

Rep. 91, and in *Lewis v. Atlas Mutual Life Insurance Co.*, 61 Mo. 534, it was held that an insurance agent who had been discharged without cause could recover the probable value of renewals on policies previously obtained by him upon which future premiums would, in the usual course of business, be received by the company. In *Masterton v. Mayor, etc., of Brooklyn*, 7 Hill (N. Y.) 61, 42 Am. Dec. 38, *Nelson, C. J.*, after holding that collateral profits are too remote to be considered in the measure of damages, says: "But profits or advantages which are the direct and immediate fruits of the contract entered into between the parties stand upon a different footing. These are part and parcel of the contract itself, entering into the constituting a portion of its very elements; something stipulated for, the right to the enjoyment of which is just as clear and plain as to the fulfillment of any other stipulation."

From these authorities, it is clear that damages may be recovered for loss of profits caused by a breach of contract, and that they are never excluded simply because they are profits. If it reasonably appear that profits would have been made had the terms of the contract been observed, and that their loss necessarily followed its breach, they may be recovered as damages if the evidence is sufficiently certain and definite to warrant the jury in estimating their extent. An examination of the well-considered cases will show that prospective profits may be recovered for the breach of a contract whenever they are susceptible of proof. They have been rejected by the courts as damages only because of the failure to prove them with sufficient certainty and definiteness. There can be no good reason why they should not be recovered when they are capable of definite estimation. The injured party has the right to demand and receive from the defaulting party full compensation for the loss he has sustained by a breach of the contract. Each party knows the terms of the contract, and therefore is presumed to know the loss each will sustain by its breach. Hence, when either party refuses to observe his agreement, he knows the necessary consequence of his act, which is to deprive the other party of the value of his bargain, the equivalent of which is the profits he would realize if its terms had been complied with. In such cases, as said in *Hitchcock v. Supreme Tent*, 58 N. W. 640, 100 Mich. 40, 43 Am. St. Rep. 423, "the profits lost constitute the legitimate measure of damages. The law is not so blind to justice as not to require the defendant to respond in damages, if there is any reasonable basis for their ascertainment." When, therefore, the evidence shows with reasonable certainty the profits which have been lost by the breach of a contract, they should be considered damages recoverable by the injured party from the one in default.

Applying these principles to the case in hand, we think the referee and the learned

court below were right in holding that the plaintiff was entitled to recover as damages his commission on the net sales of goods which would have been made by the defendants from April 1 to December 31, 1892, less the losses sustained during the same period. Assuming the contract to have covered that period, the commissions as guarantor to which the plaintiff would have been entitled, had the defendants continued their business, are susceptible of proof and sufficiently certain and definite to warrant a recovery. As found by the referee, Minot, Hooper & Co. "took the place of the defendants, accepting transfer from defendants of their accounts, and conducted under their own name the business formerly carried on by the defendants, employing the same manager, using the same store and the same salesmen and clerks, and conforming substantially to the same rules as to giving credit." On the dissolution of the defendants' partnership, the plaintiff transferred to Minot, Hooper & Co. all his goods which a statement prepared by defendants showed to be in their possession. The sales made by that firm under these circumstances are criteria from which can be definitely estimated the sales which the defendants would have made had they continued their business, as required by the contract. These are actual sales made under precisely the same conditions as if the defendants had been the firm conducting the business. As found by the referee, the business was carried on for the remainder of the year 1892 in the same store, with the same consignors, with the same manager, and with the same clerks and salesmen as it had been prior thereto by the defendants. There is no evidence in the case that would warrant the conclusion that the sales made in the name of Minot, Hooper & Co. during the period in question and the losses sustained were greater or less in number or amount than would have been the sales and losses if defendants had continued the business. On the contrary, the evidence is convincing that the sales and losses would have been practically the same. There is therefore no sufficient reason why the sales made and the losses incurred during the remainder of the year 1892, while the business was conducted in the name of Minot, Hooper & Co., should not be taken as the data on which to estimate the commissions or profits due the plaintiff in this action. Such profits are not speculative, imaginary, or uncertain, but are determined by a standard that renders them almost as certain as if the business had been continued by the defendants. The law does not require absolute certainty as to the data upon which profits are to be estimated, but certainty to a reasonable degree or extent, so that the damages may rest upon a definite basis, and not wholly in speculation and conjecture. If prospective or probable profits are ever to be held as having been sufficiently and certainly proved as a measure of dam-

ages for a breach of contract, then the plaintiff here must be permitted to recover. Any further or greater degree of proof would be, in effect, to exclude all profits as a measure of damages for a violated contract.

The judgment is affirmed.

POTTER, J., dissenting. I think the conclusion reached in this case by the majority of the court is based upon a misapprehension of what the contract between the parties really was. It was a contract of insurance, by which the plaintiff was to guaranty the defendants against loss by reason of bad debts, upon all sales made by the defendants during the year. The compensation of the plaintiff for insuring against this risk of loss was to be 1 per cent. of the amount of the sales. If the sales were large in volume, the commission would be large in proportion; if the sales were small, the commission would be reduced accordingly. There was no agreement as to any definite amount of sales or commission, beyond the fact that it was to be limited to 1 per cent. of the amount of those sales, whatever they were. If the defendants had remained in business during the entire year, while their sales might have been greater, yet the risk of loss to be borne by the plaintiff would also have been larger. When the defendants ceased doing business in April, 1892, then, at that instant, the risk of insurance against bad debts which the plaintiff was called upon to bear also came to an end. He was not thereafter called upon to insure the defendants any further against the risk of loss by reason of bad debts, and he therefore necessarily was not in a position from that time on to earn any more commissions; and this for the obvious reason that his commission was limited to 1 per cent. of the actual amount of the sales. When the sales ceased the insurance ceased, and the compensation to be paid for it, as a matter of course, also ceased. The opinion of the majority of the court has apparently taken no account of this fact, and it permits the plaintiff to recover commissions against the defendants upon a large amount of sales which were never in fact made by them, and as to which plaintiff took no risk of insurance whatever, and upon which he therefore had no right to ask for compensation. The affirmance of this case gives to the plaintiff something for nothing. I cannot agree to such a judgment.

ELKIN, J., concurs in this dissent.

(217 Pa. 140)

McCABE et al. v. CITY OF PHILADELPHIA.

(Supreme Court of Pennsylvania. Feb. 25, 1907.)

MUNICIPAL CORPORATIONS—INJURY TO PEDESTRIAN—NEGLIGENCE.

In an action to recover for injuries received by stepping in a hole through the ice

on a sidewalk, evidence *held* to sustain a verdict for defendant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, §§ 1739-1743.]

Appeal from Court of Common Pleas, Philadelphia County.

Action by Mary E. McCabe, by her father as next friend, and by John T. McCabe in his own right, against the city of Philadelphia. From an order refusing to take off a nonsuit, plaintiffs appeal. Affirmed.

Argued before MITCHELL, C. J., and BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

Frederick H. Warner and Arthur B. Houseman, for appellants. Harry T. Kingston, Asst. City Sol., and John L. Kinsey, City Sol., for appellee.

STEWART, J. The accident to the plaintiff, complained of as the result of defendant's negligence, happened in this wise: At an early hour in the morning, while it was yet dark, and darker than usual because of the fact that the street lighting had been temporarily interrupted, plaintiff in passing along the sidewalk encountered a sheet of ice that covered the entire pavement, from house line to the curb, for a considerable distance. Plaintiff was walking upon the ice, about the middle of the way, when she stepped into a hole covered with a thin coating of ice—and for this reason unobserved by her—which extended through the body of the ice to the pavement beneath and was filled with water. The hole was just large enough to admit the foot, and into it she plunged with one limb up to her knee. The rest of her person was thrown back on the ice, and her injury resulted from this fall. The ice at this point was between two and three feet deep, and the hole as described by the plaintiff "was just a round little hole, like as if some one had cut it through." To the question what was its diameter in inches, she replied: "I could not tell you that, I know it came up to my knee. My stocking was all wet nearly up to my knee." When asked whether she had slipped, she said: "My foot went right into the hole, and it threw me, of course, on my back. I did not slip at all; just went right into the hole." In another part of her testimony she described the hole as just large enough to admit her foot. The ice that covered the pavement was the accumulation of weeks, if not months; the weather having been unusually and continuously severe. It had not prevented the public use of the pavement, and, so far as we know, no one was injured in consequence of it. Plaintiff herself had passed over it daily without accident, and had never observed the hole into which she stepped the morning of the accident. If negligence on the part of the defendant in suffering so great an accumulation of ice to remain for so long a period on the pavement be conceded, the question remains, was such

negligence the proximate cause of the accident?

But for the accumulation of the ice the accident would not have happened. This, however, does not bring the answer. Quite as much could be affirmed with respect to any condition antecedent, however remote, which was in the causative line. Responsibility for negligence does not extend to every consequence. It must have its limitations. The law in such cases looks at the near, not the remote. Was there any intervening cause, distinct in itself, though related to and conditioned on what went before, to which the accident may be referred? If so, defendant's relation to such intervening cause is the matter to be adjudged. By its responsibility for that, is its negligence to be determined. The immediate and direct cause of plaintiff's accident was the hole in the ice. She did not slip on the ice, nor did she fall in consequence of any obstruction it presented. She fell because her foot and limb plunged into a narrow hole in the ice in the middle of the pavement. That this hole, covered as it was by a thick coating of ice, was a dangerous pitfall, cannot be gainsaid. Any one stepping into it incautiously would most likely be injured just as the plaintiff was. Not so with respect to walking upon the ice itself. The continued use of the way by the public, with the ice upon it, for months, and by the plaintiff herself, without injury, shows the marked difference between the two circumstances, and enables us to see how the hole may, and should, be regarded as an independent, and at the same time the proximate, cause of plaintiff's injury. If the hole was there by the defendant's direct agency, negligence in leaving it uncovered would follow necessarily, and responsibility in connection therewith. But this is not pretended. If the effort be to derive responsibility by connecting it with the ice accumulation, such result can only be reached in case it is made to appear that pitfalls of this character are the probable and natural consequence of ice accumulation, and therefore to be anticipated. No one attempted to account for the existence of the hole into which plaintiff fell. That it was the work of the elements does not seem probable. Its size, location, and character, and the fact that it was filled with water, whereas all about it was solid, compact ice, would seem to indicate some other origin. If resulting from other than natural causes, negligence could not be imputed to the defendant from the mere fact that it was there. If from natural causes, experience and observation forbid that it should be regarded as anything less than extraordinary, so unusual that the defendant could not be charged with negligence in not foreseeing it. As was said in *South Side Pass. Railway Company v. Trich*, 117 Pa. 390, 11 Atl. 627, 2 Am. St. Rep. 672: "The utmost that can be said would be that such a consequence might possibly happen. But things or results which are on-

ly possible cannot be spoken of as either probable or natural. For the latter are those things or events which are likely to happen and which for that reason should be foreseen. Things which are possible may never happen, but those which are natural or probable are those which do happen, and happen with such frequency or regularity as to become a matter of definite inference. To impose such a standard of care as requires, in the ordinary affairs of life, precaution on the part of individuals against all the possibilities which may occur, is establishing a degree of responsibility quite beyond any legal limitations which have yet been declared."

The accumulation of ice being the proximate cause, and the defendant not being chargeable with negligence simply because of the existence of the hole, can its negligence be derived from other circumstances? This question remains to be considered. Plaintiff, though she had passed over this way daily, had never observed the opening in the ice. Two of her witnesses testify that they had seen such an opening in the immediate locality where the accident happened. Their testimony does not certainly and clearly identify the opening they saw with that which occasioned plaintiff's fall. That however, would be a question for the jury. One saw a hole a week before the accident, and again three days before. The other saw it once, about a week before. It is not pretended that the authorities had actual notice of the existence of the hole. According to plaintiff's testimony it was a pitfall, concealed from her by a covering of ice. The testimony of all the witnesses was that the weather was unusually severe, and so continuous that the ice on the pavement was constantly accumulating. Under such conditions, the opening would be likely to escape observation at most times, except as searched for. Certainly it was not so obvious that an officer exercising reasonable supervision of the highway should have observed it; and this is the measure of defendant's duty—reasonable supervision, not actual search for defects: *Duncan v. Pennsylvania*, 173 Pa. 550, 84 Atl. 235, 51 Am. St. Rep. 790. Had it been an open and exposed danger, obvious to those charged with supervision, had they exercised reasonable vigilance, notice to the defendant would have been imputed from the length of time it had been allowed to remain there; but this element, too, is lacking in the case. The motion for nonsuit was properly allowed.

Judgment affirmed.

(217 Pa. 161)

WIDGER v. CITY OF PHILADELPHIA.

(Supreme Court of Pennsylvania. Feb. 25, 1907.)

BRIDGES—MUNICIPAL CORPORATION—PERSONAL INJURIES—PROXIMATE CAUSE—EVIDENCE.

In an action against a city by a boy for injuries received on a bridge, evidence held to

show that the cause of the injury was the intervening and wrongful act of a stranger, for which the city was not responsible.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Bridges, § 119.]

Appeal from Court of Common Pleas, Philadelphia County.

Action by Andrew Widger, by his father, against the city of Philadelphia. From an order refusing to take off a nonsuit, plaintiff appeals. Affirmed.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, and STEWART, JJ.

David Lavis, Charles Knittel, and J. Fletcher Budd, for appellant. Thomas Raeburn White, Asst. City Sol., and John L. Kinsey, City Sol., for appellee.

FELL, J. The city of Philadelphia maintains a drawbridge on the line of a street, which crosses a stream navigable by small vessels. Near the entrance to the bridge there are gates over the cartway and over the footways, which are kept closed while the draw is open. These gates are so connected by cogwheels that they open and close at the same time; the force applied to move either being transmitted to the other. The cogwheels are four or five feet from the ground, and about twenty inches in diameter. The plaintiff, a boy under seven years of age, climbed on a girder of the bridge while the draw was open to see boats go through, and placed his hand on the cogwheels, which were directly over the girder on which he was standing. The bridge tender had closed the gates and fastened them by means of a heavy iron latch or bar, before opening the draw. After he had closed the draw, and was engaged in driving wedges which fastened it in place, a stranger unbarred the gate over the cartway and pulled it partly open, thus moving the cogs and injuring the plaintiff's hand. On this state of facts a nonsuit was entered.

The city owed to the plaintiff the duty not wantonly to expose him to danger, but it was under no duty to protect him from a danger not to be anticipated, which could not have resulted from the ordinary and lawful use of the bridge, nor to maintain its structures in such a way as to prevent the possibility of an accident to a child. The exposed cogwheels were not in themselves dangerous, and no one in the proper use of the bridge could be injured by them. The case cannot be distinguished in principle from that of *Oil City*, etc., *Bridge Co. v. Jackson*, 114 Pa. 321, 6 Atl. 128, in which a child of seven years of age in crossing a bridge walked on a large gas pipe located at the side of the footway, and slipped and fell through an opening in the bridge. Moreover, the proximate cause of the accident was the intervening and wrongful act of a stranger, for which the city was in no way responsible.

The judgment is affirmed.

(217 Pa. 190)

CONSOLIDATED NAT. BANK v. McMANUS.
(Supreme Court of Pennsylvania. March 4, 1907.)

1. **DISMISSAL AND NONSUIT—LEAVE OF COURT.**
Though a discontinuance must be by leave of court, it is the universal practice in the state to assume such leave.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Dismissal and Nonsuit, § 80.]

2. **SAME—MOTION TO SET ASIDE.**

A motion to set aside a discontinuance is addressed to the sound discretion of the trial court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Dismissal and Nonsuit, §§ 86, 183.]

3. **SAME.**

Where a rule is taken by defendant to strike off a discontinuance, and is discharged by the court, such action is equivalent to leave to discontinue, and the court is under no obligation to reconsider the matter because defendant failed to present his whole case at the hearing of the rule.

Appeal from Court of Common Pleas, Philadelphia County.

Action by the Consolidated National Bank against Michael McManus. From an order dismissing the application to strike off discontinuance, defendant appeals. Affirmed.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

James W. M. Newlin, for appellant. George R. Van Dusen and John G. Johnson, for appellee.

PER CURIAM. A discontinuance in strict law must be by leave of the court, but it is the universal practice in Pennsylvania to assume such leave in the first instance. This was stated to be the established practice as long ago as 1843, in *Schuylkill Bank v. Macalester*, 6 Watts & S. 147, where it is said per curiam: "All the cases show that a discontinuance must be founded on the express or implied leave of the court. In England this leave is obtained on motion in the first instance, and here it is taken without the formality of an application, but subject to be withdrawn on cause shown for it; that is the whole difference." The causes which will move the court to withdraw its assumed leave and set aside the discontinuance are addressed to its discretion, and usually involve some unjust disadvantage to the defendant, or to some other interested party, such as a surety. The fact that a case is at issue on a plea of set-off is not sufficient to prevent the plaintiff from taking a nonsuit. *McCredy v. Fey*, 7 Watts, 496; *Gilmore v. Reed*, 76 Pa. 462. And without some other hardship the same rule applies to a discontinuance, in actions at law. The practice in equity is somewhat stricter.

The plaintiff, following the usual practice, entered a discontinuance on the assumed leave of the court. A rule was then taken by defendant to strike off the discontinuance, which the court heard and discharged. This was equivalent to a grant of leave. Defend-

ant then filed a petition for a rule to show cause why the order discharging the previous rule should not be rescinded and the discontinuance be set aside. This petition the court dismissed, and from this action the present appeal was taken. Having considered and discharged the rule, the court was not bound to reconsider the matter on the new and amplified application by petition. If appellant failed to present his whole case at the hearing of the rule, as fully as his present counsel now thinks desirable, the fault or misfortune was his own. He was bound to present his whole case, and his failure to do so did not entitle him to a second hearing. The court might *ex gratia* have given him a second rule, but was under no obligation to do so.

Judgment affirmed.

(217 Pa. 148)

LINDSAY v. DUTTON.

(Supreme Court of Pennsylvania. Feb. 25, 1907.)

1. **BILLS AND NOTES—PLEADING—AFFIDAVIT OF DEFENSE.**

In an action on a note, the affidavit of defense alleged that the payee had brought a former suit on the note which was discontinued without defendant's knowledge. *Held*, to state no defense.

2. **SAME—DEFENSES.**

An allegation in an affidavit of defense, in an action on a note, that the indorsement was after maturity, with full notice of the maker's defense, will avail defendant only so far as he has a defense against the payee.

3. **SAME—AFFIDAVIT OF DEFENSE.**

An affidavit of defense, in an action on a note, that defendant believes the collateral was more than sufficient to pay the note, is insufficient.

Appeal from Court of Common Pleas, Philadelphia County.

Action by Daniel S. Lindsay against Lewis G. Dutton. From an order making absolute rule for judgment for want of a sufficient affidavit of defense, defendant appeals. Reversed.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

William S. Divine, for appellant. John Eckstein Beatty, for appellee.

MESTREZAT, J. This is an action by an indorsee against the maker of a negotiable collateral promissory note for \$1,525, dated September 9, 1903, made by the defendant, and payable September 17, 1903, to the order of Charles S. Warner, who indorsed and delivered it after maturity to the plaintiff. By the note it appears that the maker delivered to the payee certain bonds and stocks as collateral security for its payment at maturity, and authorized the holder of the note to sell the collateral at public or private sale at any time or times thereafter without any further notice to the maker. The defendant filed an affidavit of defense which was declared insufficient by the court below, and

judgment was entered in favor of the plaintiff and against the defendant for the full amount of the note and interest. The defendant alleges the court erred in entering judgment against him, and has taken this appeal.

The statement avers that the payee, "for valuable consideration, indorsed and delivered said note with collateral, to plaintiff." The plaintiff concedes that the note was transferred to him after maturity, and admits that the defendant is entitled in this suit to any defense he might have against the original payee. There is little clearness or precision about the affidavit of defense. In drawing it, the defendant seems to have ignored the well-established rules requiring precision and definite averments in affidavits of defense. It sets up no sufficient defense except the payment of \$250 which, it is averred, was paid on the note in suit. To that extent we think the affidavit is sufficient. The averment in the affidavit that the payee had brought a former suit on the note, and that it was discontinued without the defendant's knowledge or consent, is no defense in this action. If the discontinuance was improperly or illegally entered the defendant should have applied to the court to strike it off. So long as the record of that case shows that the suit has been discontinued, we must, in this action, treat it as having been regularly and legally done. The action of the court in permitting that case to be discontinued by the plaintiff cannot be reviewed by this court on this appeal. The allegation in the affidavit of defense, that the indorsement was after maturity with full notice of the maker's defense, will only avail the defendant, so far as he may have a defense against the payee. As we have already seen, the plaintiff admits that the indorsement and transfer to him was after the maturity of the note. The defendant, therefore, can set up in this action any defense he may have against the payee. It is immaterial, however, in this case, as between the plaintiff and the defendant, whether the note was transferred before maturity and for value, unless the defendant has, and sufficiently avers in his affidavit, a sufficient defense against the payee. There is no merit in the averment as a defense in this action that the defendant believes that the collateral was of sufficient value to more than pay the note in suit. The defendant admits that it was not readily marketable. In addition to that admission, the terms of the note show that the holder was authorized to sell the collateral at public or private sale. The statement avers that the plaintiff gave defendant written notice that the collateral would be sold at public sale at a certain time and place, that the defendant was present in person at the sale, and that the collateral was then and there sold for a nominal consideration. These facts are not denied in the affidavit of defense. It, therefore, ap-

pears that the collateral was disposed of by the holder of the note strictly in accordance with the terms of the instrument itself. There is a distinct averment in the affidavit of defense that there was paid on account of the note in suit at the time it was given, or shortly thereafter, the sum of \$250. To this extent we think the affidavit is sufficient. As to the other matters set up in the affidavit, they disclose no reason why the plaintiff should not have judgment for the amount of the claim. The court below, therefore, should have entered judgment for the plaintiff for the amount of the note, less \$250 as of the date it is alleged to have been paid, with leave to the plaintiff to proceed for the recovery of the balance which he claims to be due and unpaid.

The judgment of the court below is reversed, with instructions to enter judgment in conformity with this opinion.

(117 Pa. 159)

MEYERS v. CITY OF PHILADELPHIA.

(Supreme Court of Pennsylvania. Feb. 25, 1907.)

1. MUNICIPAL CORPORATIONS — STREET IMPROVEMENTS—INDEPENDENT CONTRACTORS.

Property owners, working on a city street in front of their properties under an ordinance, are not contractors exercising an independent employment, over whom the municipal authorities have no control.

2. SAME—OBSTRUCTIONS IN STREET.

Where a city requires a property owner to reset a curb, and the owner contracts with a curbsetter to do the work at a fixed price, and the curbsetter leaves a pile of old curbstones on the cartway on finishing the work, and they remain in the street for four or five days, when a cab is overturned by collision therewith, the driver may recover against the city for the injuries received.

Appeal from Court of Common Pleas, Philadelphia County.

Action by Charles G. Meyers against the city of Philadelphia. Judgment for plaintiff, and defendant appeals. Affirmed.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

Robert Brannan, Asst. City Sol., Francis M. McAdams, and John L. Kinsey, City Sol., for appellant. Fred Taylor Pusey, for appellee.

FELL, J. The city of Philadelphia gave notice to the Monument Cemetery Company to reset the curb on the part of Fifteenth street, about two squares in length, which passes through its grounds. The cemetery company entered into a contract with a curbsetter, who agreed to do the work at a fixed price per foot. He left a pile of old curbstones that were unfit for use on the asphalt pavement between the new curb and the car track. This pile was one foot high and extended into the street two feet from the curb, and on the night of the accident there was no light near it to give notice to persons driv-

ing on the street. The plaintiff was the driver of a hansom, and ran into the pile of stones at midnight. His cab was overturned and he was injured. The stones had been in the street four or five days before the accident, and there was evidence tending to show that the work at this place had been completed for that length of time. The city seeks to relieve itself of liability, on the ground that a municipal corporation is not responsible for an injury caused by the negligence of an independent contractor. But this principle has no application to the case. Property owners, engaged in work on a city or borough street in front of their properties, in obedience to the requirements of an ordinance, are not contractors exercising an independent employment, over whom the municipal authorities have no control. *Trego v. Honeybrook Borough*, 160 Pa. 76, 28 Atl. 639. A municipality may not be responsible for the negligence of an owner of property engaged in work on a street, done on notice from it, where the negligence is in the manner of doing the work on the part of the street necessarily occupied for that purpose, but its duty to exercise reasonable supervision of streets thrown open for travel always continues. The placing of the rejected curbstones in the street was not a part of the work of resetting the curb, but the unauthorized use of the street as a place of storage for material that should have been placed elsewhere or at once removed. It was allowed to remain there, a menace to travel, during the progress of the work and after its completion, and the question of constructive notice to the city was for the jury.

The judgment is affirmed.

(217 Pa. 126)

**ALLENTOWN NAT. BANK v. CLAY
PRODUCT SUPPLY CO.**

(Supreme Court of Pennsylvania. Feb. 25, 1907.)

1. BILLS AND NOTES—BONA FIDE HOLDER.

Where a debtor gives a bank a note on which he is a second indorser, and the bank on receipt of the note extends time to the debtor, and applies the proceeds of the note as a credit to the debtor, and relinquishes bills of lading pledged as collateral, the bank is a holder for value, if without notice of any infirmity in the instrument, or any right of set-off in connection therewith.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 7, Bills and Notes, § 908.]

2. SAME—RENEWAL—EVIDENCE OF ACCEPTANCE.

Where a bank refuses to accept a renewal note, acceptance is not shown by the fact that, when it wanted to make a demand on the original note, it attached to it the renewal note, so that both could be restored to the maker on payment.

Appeal from Court of Common Pleas, Philadelphia County.

Action by the Allentown National Bank against the Clay Product Supply Company. Judgment for plaintiff, and defendant appeals. Affirmed.

The note in suit was in the following form: "\$1,500.00. Newark, N. J., Feb. 18, 1904. Four months after date we promise to pay to the order of Clay Product Supply Co. Fifteen hundred and 0-100 dollars, at Essex Co., National Bank. Value received, with interest. [Signed] Van Keuren & Son, Wm. Van Keuren, President." Indorsed: "Pay to the order of Hickory Run Brick Co. Clay Product Supply Co., J. Mortimer West, Jr., Treasurer." "Hickory Run Brick Co., S. N. Weaver, Treasurer." "Duly protested for nonpayment. Costs of protest, \$1.85." Other facts appear by the opinion of the Supreme Court. The trial judge gave binding instructions for plaintiff.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

Clifton Maloney, for appellant. Thomas F. Gross, for appellee.

STEWART, J. This was an action on a promissory note by holder against indorser. The defense attempted was twofold: First, failure of consideration; and, second, that the plaintiff had discharged all liability on the note in suit by retaining another which was given and intended as a renewal. An essential preliminary to the first defense was denial that plaintiff was a holder in due course. The facts were these: Van Keuren & Sons had contracted to do certain municipal paving work in the city of Newark. The contract provided that the brick to be used should be subject to the acceptance of the city authorities. Van Keuren & Sons contracted with the Clay Product Supply Company, the defendant, to furnish the brick for the work, and the Clay Product Supply Company, not being a manufacturer, engaged them of the Hickory Run Brick Company. Each contract contained the stipulation that the brick were to be subject to the acceptance of the city authorities. The Hickory Run Brick Company, in order to fill its contract, was compelled to borrow money to carry on its operations. The Allentown National Bank, the plaintiff, discounted certain notes of this company, receiving, as collateral security at the same time for their payment, the bills of shipment of brick to the Product Supply Company duly assigned and transferred to the bank. Such of these assigned bills as were paid were paid by the Product Supply Company directly to the bank, and the amounts were credited to the account of the Hickory Run Brick Company. Some of the brick for which bills of shipment had been assigned to the bank, were condemned by the city authorities. Van Keuren & Sons withheld payment to the Product Supply Company for these, and that company, in turn, withheld payment to the bank on the assigned bills. Thereupon the bank demanded payment of the note of the brick company, which was then due, and also made demand

upon the supply company for payment of the bills assigned. The brick company being unable to meet its note, its treasurer, Mr. Weaver, to satisfy the demands of the bank, prevailed with Van Keuren & Sons to give their note to the supply company for \$1,500, approximately the amount of the unpaid bills of shipment, and had the supply company indorse this note over to the brick company; the brick company indorsing it over to the bank. This is the note in suit. It was given by Van Keuren & Sons and indorsed by the Product Supply Company in expectation that the brick would eventually be accepted by the city authorities. Whatever inducements were held out by Weaver to Van Keuren & Sons or the supply company to obtain this note from them, or whatever representations were made as to its subsequent renewal by the bank, the evidence fails to show that the bank was in any way involved therein. If Weaver assumed to speak for the bank, such fact could prejudice the bank only as it were shown that he was authorized so to do, or that the bank had accepted the note with knowledge of the representations made by him. There is no evidence to connect the bank with what transpired between the original parties to the note. By receiving the note, the bank extended the time of payment to the advantage of the brick company, the proceeds were applied as a credit to the latter's account, and the bills of shipment pledged as collateral were receipted and relinquished.

From the facts as they appear in the case, but one conclusion can be derived. The bank was not only a holder for value, but a holder without any notice of infirmity in the instrument or any right of set-off in connection therewith. It was therefore a holder in due course. The facts in regard to the later note, which it was claimed was a renewal of the note in suit, do not support defendant's contention. Had this note been accepted by the bank as a renewal, it would have been an extinguishment of the right of action on the note in suit; but it was not so accepted. It was drawn by the same party, for the same amount, payable to the order of the supply company, and by the latter indorsed over to the brick company; but meanwhile the latter company had passed into the hands of a receiver. When tendered by the treasurer of the brick company to the bank, it was unavailable to the bank, being unindorsed, and was rejected. The reason assigned was that the bank was unwilling to do anything in the matter that would release the brick company from its liability on the other note. Being rejected by the bank, it remained in the hands of the treasurer of the brick company. Subsequently, when the bank desired to make demand for payment of the note in suit upon the maker, it procured from the treasurer of the brick company the note that had been rejected, attached it to the other, and forwarded both to its correspondent in Newark to be presented for payment. There

is nothing in all this that would warrant an inference that the bank had at any time accepted the note in renewal of the first. In *Hart v. Boller*, 15 Serg. & R. 162, 16 Am. Dec. 536, and in each of the other cases relied upon by appellant there were circumstances from which an intention to accept might be deduced, and it was held error for the court to exclude the jury from the decision of the question; but here was a positive and unquestioned refusal of the bank to accept the note when tendered, with not a single circumstance to qualify it, or show a change of purpose in this regard, except the mere fact that, when the bank wanted to make demand upon the drawer, it procured the note to attach it to the original, so that both could be restored to the maker on payment. A finding by the jury, from such facts, that the bank had accepted the note, could not be sustained; and therefore no submission of the question was required. It was a case that called for binding instructions, and there was no error in directing the verdict for the plaintiff.

Judgment affirmed.

(217 Pa. 189)

MELOY v. PHILADELPHIA RAPID TRANSIT CO.

(Supreme Court of Pennsylvania. March 4, 1907.)

STREET RAILROADS—INJURY TO PERSON ON TRACK—CONTRIBUTORY NEGLIGENCE.

In an action by a boy seven years old against a street railway company for injuries received, instruction for defendant held proper, because of plaintiff's contributory negligence.

Appeal from Court of Common Pleas, Philadelphia County.

Action by John Meloy, Jr., by his father, and by John Meloy, Sr., against the Philadelphia Rapid Transit Company. From a judgment for defendant, plaintiff appeals. Affirmed.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

Henry J. Scott, for appellant. Russell Duane and Thomas Leaming, for appellee.

PER CURIAM. There was no evidence of negligence on the part of defendant. The car, going south on Second street, reached the corner of Lombard, at which point the middle of the street is occupied by a market shed, narrowing the street so that the track on the east side is close to the shed. As the car turned the curve into the track along the shed, the plaintiff, a boy of seven years, who was playing tag in the market shed, darted out and ran into the fender in the front of the car. The testimony to these facts is practically undisputed, and brings the case clearly under the authority of *Sontgen v. Kittanning, etc., St. Ry. Co.*, 213 Pa. 114, 62 Atl. 523.

Judgment affirmed.

(217 Pa. 182)

JONES v. BEALE.

(Supreme Court of Pennsylvania. March 4, 1907.)

1. MUNICIPAL CORPORATIONS — MUNICIPAL CLAIMS—ENFORCEMENT.

Act June 10, 1881 (P. L. 91), providing for service by posting and advertisement in proceedings on a municipal claim, applies to registered taxes; they being, in a general sense, municipal claims.

2. SAME.

Act June 10, 1881 (P. L. 91), providing for service for posting and advertisement in proceedings on a municipal claim, applies to a registered owner who is dead.

3. SAME—SERVICE—DECEASED OWNER.

Where the record of a scire facias sur municipal lien for taxes shows on its face that the registered owner is dead, an acceptance of service for her or for "her estate" is fatally defective; there being no such legal entry as an "estate," and, as a designation of a party to be served with a writ, it is unknown to the law.

Appeal from Court of Common Pleas, Philadelphia County.

Action by Mary J. Jones, executrix of Silas Jones, against George M. D. Beale. From a judgment making absolute the rule for judgment for want of a sufficient affidavit of defense, defendant appeals. Reversed.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

Walter Biddle Saul and Robert W. Finletter, for appellant. Ira Jewell Williams, Francis Shunk Brown, and Alex. Simpson, Jr., for appellee.

MITCHELL, C. J. Act March 14, 1865, § 9 (P. L. 324), after directing that it shall be the duty of owners of houses and lots in the city of Philadelphia to furnish descriptions of their lots to the chief engineer and surveyor (now the registry bureau of the department of public works), provides that "no property so returned shall be subject to sale for taxes thereafter to accrue as a lien of record thereon, except in the name of the owner as returned, and after recovery by suit and service of the writ on him made as in the case of a summons." By the supplementary act of March 29, 1867 (P. L. 600), the provision quoted was extended to "taxes or other municipal claims." The object of both of these acts, as stated by Sterrett, J., speaking of the act of March 23, 1866 (P. L. 303), in *Simons v. Kern*, 92 Pa. 455, was "to remedy the then existing grievances, fully recited in its preamble, among which were the oppressive costs and expenses to which property owners were subjected, and especially the sale of their property without notice to them." These remedial statutes, however, were found in one respect to be more drastic than the evil required, for in the case of a registered owner who was nonresident or could not be found no service as in case of summons could be made upon him, and the city was powerless to collect its just dues. In *Simons v. Kern*, 92 Pa. 455, it was held that service by posting and

advertisement (the practice under prior laws), and a return of nihil habet as to the registered owner, was a nullity, that judgment founded on it was void, and that the defect was one of jurisdiction of which the purchaser at the sheriff's sale was bound to take notice. To relieve the situation in which the city was thus placed the act of June 10, 1881 (P. L. 91), provided "that whenever it shall be made to appear, by affidavit filed of record, that after diligent search and inquiry registered owners of any real estate, against which a municipal claim has been or may hereafter be filed as a lien, by or in the name of any city of the first class, are nonresidents of such city, or cannot be found therein, it shall and may be lawful for the sheriff to whom any writ of scire facias for the collection of any such claim is directed, to proceed to make known the same by posting" and advertisement, etc.

The first question that arises relative to this act is whether it applies to registered taxes. They are not expressly named; the words of the act being "any municipal claim." But registered taxes are in a general sense municipal claims—i. e., claims by the city in its municipal capacity—and they are assimilated in their enforcement by lien of record and method of collection by scire facias. The hardship to the property owner by sale without notice, etc., was the same in both cases, and the remedial acts of 1865 and 1867 provided the same remedy for both, by the registration of the name of the owner, and prohibition to sell without service of the writ on him as in the case of a summons. If the act of 1881 does not apply to registered taxes, then as to them the city is still in the same position as it was when *Simons v. Kern* was decided, helpless when no service can be made on the registered owners. When the Legislature had before it for consideration two kinds of claims which it had classed together in the act of 1867, and which in practice had developed the same inconvenience to the city, it is not reasonable to suppose that it meant the remedy, equally needed and equally adapted to both, should be restricted to one. We are of the opinion that the act of 1881 applies to registered taxes as well as to other municipal claims. The appellee refers to the act of March 23, 1866 (P. L. 303), as in pari materia, and cites *Philadelphia v. Scott*, 72 Pa. 92, in which it was held that that act did not apply to registered taxes. But that decision was founded on the difference in prior laws in relation to taxes, historically reviewed by Read, J., and the reasoning of the opinion, never entirely satisfactory, is based on the difference in the kind and expense of advertisement (one by description of the property, the other merely by the name of the delinquent taxpayer), and the collection by different departments of the city government; i. e., the receiver of taxes in one case and the city solicitor in the other. The bearing of that case is not so direct as to require us to

make what we could not but consider an erroneous application of the law in this.

The remaining question under the act of 1881 concerns the method of service where as in the present case there is an owner registered, but he is dead. The act makes no express provision for such case. The appellee contends that, being *casus omissus*, we are relegated to the prior law, and service must be made as in mechanic's claims, in which service on an executor or administrator is held good, citing as parallel cases the proceedings under mortgages, pre-existing judgments, and ground rents. But there is a serious distinction between the classes of cases. In the class suggested of mortgages, judgments, ground rents, etc., the obligation grows out of personal contract or conduct which implies notice in its inception and the duty of keeping informed as to the status of the obligation itself from time to time. The tax or municipal claim, on the other hand, is an imposition in rem of which the owner has not necessarily any personal knowledge or notice at all. To secure him such notice was the object of the statutes involved, and we should not go back to the old evil unless under constraint by want of alternative. In *Simons v. Kern*, already cited, it is said: "Prior legislation as to the mode of service on registered owners so far as it is inconsistent with the supplement of 1867 was in effect repealed thereby, and, where it appears of record that the writ was not served 'as in the case of a summons,' there is clearly a want of authority either to issue or execute the writ." And in *Philadelphia v. Cooper*, 212 Pa. 306, 61 Atl. 926, it was held that a *scire facias* on municipal claim not served on the registered owner, and no affidavit filed that he was a nonresident or could not be found, was so fatally defective that it would not support an alias legally served, but issued after the lien of the claim had expired. Our Brother ELKIN said: "The lien of the mechanic or municipal claim being by statute, its validity, duration, and extent are wholly dependent upon compliance with the statutory provisions. * * * If there is personal service on the registered owner, it must be in the same manner as a summons, as provided in the act of March 29, 1867 (P. L. 600). If personal service on the registered owner is not made, then an affidavit must be filed suggesting that the registered owner is a nonresident or cannot be found, to be followed by posting and publication, as provided by the act of June 10, 1881 (P. L. 91)." These extracts are but recent expressions of the uniform current of decision that in matters depending on statutory authority for their entire validity we must follow the statute strictly, and the further principle that remedial statutes should be applied so as to make the remedy coextensive with the evil, if it can be done by reasonable construction in furtherance of its object. The act of 1881, though making no express provision for the

case of the death of the registered owner, has a provision for the facilitation of the city's course in a closely analogous case. Where it is made to appear by affidavit filed of record after diligent search and inquiry that the owner is nonresident or cannot be found, the sheriff is authorized to serve by posting and publication. Whether the registered owner is nonresident, or dead, produces the same obstruction to the statutory command to serve him as upon a summons. He is within the literal terms of the act that he cannot be found for purposes of service. The inconvenience to the city is the same, and the remedy for the one case is equally appropriate to the other. We are of opinion that it should be followed, and thus the statute be made efficacious to the full extent of the mischief it was intended to remedy.

Turning to the record in the present case, we find it bristling with irregularities. The claim is filed against an owner and Louisa C. Robeson, registered owner. A suggestion was filed by the city that "Louisa C. Robeson, the registered owner, is deceased, and the present owner of the lot of ground against which this claim is filed is the estate of Louisa C. Robeson, deceased, Samuel L. Robeson, administrator, and its name is therefore suggested on the record as defendant." On the same day the city filed an affidavit of service of the notice required by statute preliminary to the issue of a *scire facias*, in which the affiant deposes that Louisa C. Robeson is the owner or reputed owner and has a known residence in the city of Philadelphia, and that affiant had served the notice upon the said owner by handing it to Silas Jones. There is thus a direct contradiction between these two papers filed on the same day by the city as plaintiff. In the affidavit no information is given as to who Silas Jones was, nor why he should be served with notice for the registered owner whom the affidavit avers to be living. On the other hand, service of the notice itself, of which a copy was filed, was accepted by Silas Jones as "attorney for Samuel L. Robeson, administrator of the estate of Louisa C. Robeson, deceased." When we come to the *scire facias* the matter is not improved. It was issued on the claim filed as already noted against Louisa C. Robeson, owner or reputed owner, and Louisa E. Robeson, registered owner; recited the suggestion of the administrator as the present owner; and commanded the sheriff to "make known to the said Louisa C. Robeson, owner, and Louisa E. Robeson, Reg. Own., and the estate of Louisa E. Robeson, dec'd, Samuel L. Robeson, Adm., and to all such persons as may hold or occupy the said building and premises, that they be and appear before the judges of our court," etc. Service of this writ was accepted by Silas Jones "attorney for defendants." Notwithstanding the affidavit of service of the preliminary notice on Louisa C. Robeson, the registered owner, it is plain upon the whole record that

she was dead, and there could be no acceptance of service for her. There could be none for her "estate," as there is no such legal entity. It is a convenient phrase sometimes to identify the subject of litigation in the orphans' court, and in proceedings in rem it may be treated as harmless superfluity (as in *Reece v. Haymaker*, 164 Pa. 575, 30 Atl. 404), but as a designation of a party to be served with a writ it is unknown to the law. The third defendant was the administrator who prima facie had no concern with the real estate, and whose exceptional right to represent it, if any he had, was not set out. The acceptance of service of the writ was not by any one or for any one who answered to the statutory requirements, or could bind the rem. There was therefore an entire failure of such service as would sustain the judgment, and the sale, as in *Simons v. Kern*, was void for want of jurisdiction patent on the record of which the purchaser was bound to take notice.

The other point raised by the appellant, as to the presumption of a trust in Jones from his having purchased while apparently acting as attorney for the owners, need not be considered. The plaintiff's title not being marketable, the appellant was not bound to accept it.

Judgment reversed, and procedendo awarded.

(217 Pa. 156)

HENSON v. ARTHUR.

(Supreme Court of Pennsylvania. Feb. 25, 1907.)

1. MUNICIPAL CORPORATIONS — STREETS AS HIGHWAYS—NEGLIGENCE.

The driver of a wagon is not negligent in approaching the crossing of a side street at an ordinary trot, where the horse is under such control that he can be stopped in about six feet.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 86, Municipal Corporations, § 1515.]

2. SAME—NONSUIT.

In an action against the driver of a wagon for injuries at a crossing, judgment of nonsuit is properly entered where the evidence shows conclusively that plaintiff walked against the side of defendant's wagon while the driver was looking at the travel in front of him on a cross-street.

Appeal from Court of Common Pleas, Philadelphia County.

Action by Wilmer Y. Henson and Le Roi Henson, by his next friend, against Joseph W. Arthur, trading as the Arthur Milk Company. From an order refusing to take off a nonsuit, plaintiff appeals. Affirmed.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, and STEWART, JJ.

Meredith Hanna, for appellant. George L. Crawford, for appellee.

FELL, J. The plaintiff, a boy 13 years and 6 months old, was injured under these circumstances. With a companion of his own age, he was walking west on the south side of Columbia avenue. When he reached the east side of Seventeenth street, a car was standing at the crossing. He waited on the sidewalk until it started south, and then walked across Seventeenth street to the west side of the car track, where he was struck by the side step of the defendant's wagon. The wagon was a milk wagon with side doors and steps between the front and hind wheels, which projected slightly beyond the line of the wheels. It was moving north on the west side of the street, between the car track and the west curb. The speed of the horse was described by one of the plaintiff's witnesses in his examination in chief as a "fast trot," and on his cross-examination as an "ordinary trot," and by another of his witnesses as "just a trot." The wagon was stopped within six or eight feet of the point of collision. The car was 25 feet from the crossing when the boy passed behind it, and there was nothing on the street to obstruct his view or that of the driver.

It is contended that there was negligence on the part of the driver in approaching a crossing at undue speed and in driving on the left side of the street. There would be force in these contentions if the plaintiff had been on the crossing in front of the horse, but, as he was in a position of safety when the horse and front wheels of the wagon passed in front of him, there is none. With a clear street and an unobstructed view, it cannot be said to be negligent to approach a crossing at an ordinary trot with a horse under such control that he can be stopped within six or eight feet. The driver was on the left side of the street because that was the only side open to him. He had stopped on that side near the middle of the block to deliver milk, a wagon was standing farther north on the opposite side between the curb and the car track, and, until the car was met and passed, he had no opportunity to cross over. He was lawfully where he was, and the "rule of the road" had no application except as between him and other drivers whose rights to that side of the street were superior to his. With them he took the chance of collision. *Foot v. American Product Co.*, 195 Pa. 190, 45 Atl. 934, 49 L. R. A. 764, 78 Am. St. Rep. 806.

The only conclusion possible from the testimony is that the plaintiff walked against the side of the defendant's wagon when the driver's attention was directed to the travel in front of him on the cross-street.

The judgment of nonsuit is affirmed.

(105 Md. 338)

PRESTON et al. v. WILLETT et al.

(Court of Appeals of Maryland. April 2, 1907.)

WILLS—CONSTRUCTION—LIFE ESTATE WITH POWER OF DISPOSITION.

Testator, after making certain devises and bequests, directed that the residue of his estate, after the death of his wife, should be held in trust for his six children, one equal sixth part of the annual income to be paid to each of his children during life, and from and after the death of his children he devised the share of his estate of the one so dying to such of that child's issue as he might by last will appoint, which appointment he empowered his children to make whether married or single; that in case of the death of any of his children intestate, but leaving issue living at his death, the share of his estate of the one so dying should be equally divided among such issue; that in case of the death of any of his children intestate and without leaving issue at his death the share of the one so dying should be held in trust to be equally divided among his surviving children and the issue of any deceased child or children. *Held*, that a child of testator, though not leaving issue, could by will dispose of her share of testator's estate.

Appeal from Circuit Court of Baltimore City; Alfred S. Niles, Judge.

Action between Achsah R. Preston and others and Mary W. L. O. Willett and others. From the decree, Achsah R. Preston and others appeal. Affirmed.

Argued before BRISCOE, BOYD, PEARCE, SCHMUCKER, and BURKE, JJ.

Alexander Preston and Frank Gosnell, for Preston and family. John E. Semmes, Whiteley & Whiteley, and Charles W. Field, for Willett. Charles McH. Howard, for the Safe Deposit & Trust Co., trustee.

BOYD, J. The Safe Deposit & Trust Company of Baltimore, which was appointed substituted trustee to administer the trusts created by the will of the late James Carroll, instituted this proceeding to obtain a construction to certain provisions of that will. Mr. Carroll had a wife, five daughters, and one son when his will was made, in 1876, all of whom survived him, but his widow died the year after he did. Mrs. Preston, who is still living, was the only child of Mr. Carroll who was married when the will was made, and she then had several children. Prior to the death of Mr. Carroll, which occurred in 1887, his daughter Mary L. married James Holmes Whitely, and after his death Sophia G. married John O. Turnbull and Catharine L. married John O. Willett. His son Harry died intestate and unmarried in 1888, and his daughter Sallie W. is still living and unmarried. None of his children have had issue except Mrs. Preston, who has several children and grandchildren, and Mrs. Willett, who has one daughter, Mary W. L. O. Willett. Mrs. Turnbull died in 1906, without issue, but leaving a last will and testament by which, after providing for her debts and funeral charges and bequeathing a miniature of her deceased husband, she left to her niece, Mary

W. L. O. Willett all her estate and property "and all over which I have any power of appointment." That provision in her will presents the question to be determined by us, namely, whether she could by will dispose of her share in the residue of her father's estate; she not having any issue. As that depends upon the will of her father, we will quote such of its provisions as reflect upon the question. The testator left all of his property to his wife for life, then gave his son certain personal property and a house and lot in Baltimore and gave certain properties to his five daughters, as tenants in common. He left all the rest and residue of his estate, after the death of his wife, to trustees: "In trust, nevertheless, share and share alike for my six children aforesaid, upon the following trusts and conditions, to wit: (1) In trust to pay one equal sixth part of the clear annual income thereof to each of my children during life, and from and after the death of my said children, I give, devise, and bequeath the share of my estate of the one so dying absolutely and discharged from the trust hereby created to such of his or her issue as he or she may by last will appoint and for such estates and with such limitation as may be in said will set forth, which appointment I hereby empower my children to make whether married or single. (2) And in case of the death of any of my said children intestate, but leaving issue living at his or her death; I give, devise and bequeath the share of my estate of the one so dying to be equally divided, among such issue per stirpes and not per capita, absolutely and discharged from the trust hereby created. (3) And in case of the death of any of my said children intestate and without leaving issue at his or her death, then the share of the one so dying shall be held in trust as aforesaid to be equally divided among my surviving children and the issue of any deceased child or children per stirpes, my children's portions thereof to be held upon the same trusts as are herein provided for their original shares." We have, for convenience of reference, inserted numbers before those clauses, although they are not in the original. It is clear that those clauses made provision for at least three classes: (1) That a child of the testator who had issue could will his or her one-sixth share to any one or more of such issue; (2) that the share of a child dying intestate, but leaving issue, should go to such issue; and (3) that if a child died intestate, without leaving issue, the share of such child should be equally divided among the testator's surviving children and the issue of deceased children per stirpes. It is equally clear that the testator did not in terms make any disposition of the share of a child who died testate and without leaving issue, unless some such construction be given the will as is contended for by the appellees. It was suggested by the appellants that the expression used

in clause 3, "intestate and without leaving issue," meant "intestate" as to the share of a child received from his or her father, but according to their construction of the will a child who died "without leaving issue" could not make a valid will to affect that share, and hence, if that be so, the word "intestate" in that connection would be meaningless and useless; for, if a child who died without leaving issue had no power to will his or her share, why was it necessary to provide for a case in which one died "intestate and without leaving issue"? Does it not strongly imply that the testator intended that some of his children might die testate, as to his or her share, although not leaving issue? Of course, the testator could not control his children's disposition of their own property not received from or through him. They might die testate or intestate as to that, and, whether they left issue or not, he could not direct how it should go. Nor did he attempt in any way to limit their disposition of property left them absolutely by his will, but the provisions we are quoting and are considering only refer to the shares of the residue of his estate which he left in trust for his children during their lives, and provide for contingencies that might happen with reference to those shares. If the testator intended that in case any of his children died without leaving issue the share of the one so dying must go as provided for in clause 3, whether such child died testate or intestate, he could and doubtless would have said so, but he expressly limited the disposition of a share by that clause to the "one so dying"; that is to say, dying "intestate and without leaving issue," and not merely to dying "without leaving issue." It would seem, therefore, to be quite certain that the testator did not intend a share to pass under that clause 3, unless both of the conditions provided for by him existed—that is to say, that such child die "intestate and without leaving issue"—and the implication is very strong that he intended that a child could die testate as to such share, although not leaving issue.

When we look to clause 1, what do we find? He first provided that one equal sixth part of the clear annual income be paid "to each of my children during life"—making no distinction between the married and the single—and "from and after the death of my said children, I give, devise and bequeath the share of my estate of the one so dying * * * to such of his or her issue as he or she may by last will appoint, * * * which appointment I hereby empower my children to make whether married or single." There was no necessity to give special power to a married child to make the appointment, as even at common law a married woman could execute a power, and for many years she could make a will in this state. Nor was there any reason for specially authorizing a single child to do so. It is dif-

ficult to believe that he intended thereby to limit the appointment to children who left issue, as he knew those who remained single would not have issue. If he did so intend, the last part of that clause was wholly unnecessary, for he had already provided for those leaving issue. It is more reasonable to suppose that, instead of leaving the share of a child who had issue to all of his or her issue, he intended simply to provide that it could go to such of the issue as his child named by will, but, upon failure of the child to make a will, he provided by clause 2, where the share should go. Then, when he said "which appointment I hereby empower my children to make whether married or single," he apparently intended to authorize all of his children, regardless of the question whether they were married or single, to make an appointment, which was to be by last will "and for such estates and with such limitation as may be in such will set forth," but did not name the class of persons for whom the appointment should be made. Then, in clause 3, he provided for those who died "intestate and without leaving issue." It may be conceded that the expression, "which appointment," would properly be construed to refer to the designation of the class from which the appointees must be selected, as well as the method of making it, character of estate, etc., if there was nothing to qualify it, or indicate a contrary intention, but, when we find it used in connection with language which must enlarge the appointment beyond the restrictive language previously used, if given its plain and ordinary meaning, it ought not to be so limited. We must either strike out the words "whether married or single," which judging from their position in the will must have been deliberately inserted, or attribute to the testator a degree of ignorance that the record does not justify. Of course, he did not for a moment suppose that a child who remained single would have issue, and, as only one of his children was married when he made his will, he must have known that the power to appoint for "such of his or her issue" then only applied to one daughter. Indeed, after a lapse of over 30 years from the date of the will, she alone can exercise the power of appointment, as construed by the appellants, as she is the only child who has more than one child or descendant. It is not reasonable to suppose he would have intended such a restrictive power; and, having used expressions in clauses 1 and 3 which clearly indicate that he did not, we must give effect to them. If he had intended that the share of each child who died without leaving issue should at all events go back into his estate for the benefit of his surviving children and the issue of deceased children, he could so easily have said so that the absence of such an expressed intention is a strong presumption that it did not exist. Especially is that so when the omission of

the two words "intestate and" from clause 3 would have accomplished it. But he inserted them and now the appellants ask us to strike them out; at least that is the effect of their contention.

The construction of the appellants would cause an intestacy as to each share held by children who die without leaving issue. It not only makes the testator say what shall be done if any of them die intestate, as to their respective shares, and without leaving issue, but that all such shall die intestate in respect thereof, although he said he empowered his children whether married or single to make an appointment, and provided for what should be done when any died "intestate and without leaving issue" with such particularity as to necessarily imply that he intended that those who did not leave issue might make wills affecting their respective shares. We are therefore of the opinion that by a proper construction of the whole will of Mrs. Turnbull, or any child similarly situated (not leaving issue), could make a valid will leaving her share to such person or persons as she therein named. Whether or not a child having issue could leave her share to any one other than of her issue is not involved in this case, but we have no doubt that she could leave it to one or more of such issue, where there are more than one.

We do not deem the authorities cited by appellants to be at all in conflict with this conclusion. The case of *Smith v. Hardesty*, 88 Md. 387, 41 Atl. 788, so much relied on, does not seem to us to in any way control the construction of this will. There the power given the wife of the testator was "to devise the same at her death, to my children or either of them, in such manner as she may deem best." The testator had given all of his property to his wife, during her life, with power to sell and dispose of it as she might desire, and to exercise all rights of ownership over it without impeachment of waste, as fully as if it belonged to her in fee simple. Then followed the power to devise it above quoted, and the testator then continued, "At the death of my wife, I give, bequeath and devise to my two children, all of my property that may remain undisposed of by my wife at the time of her death, or which she may not dispose of by last will and testament or otherwise"; and mentioned his two children by name. The widow of the testator made a will leaving \$200 to her sister, to be paid out of the proceeds of crops raised on a farm which had belonged to the testator, and then left the farm subject to a charge of the \$200 to a granddaughter. We held that the widow only had a life estate in the property with a power of disposition of the reversion, and that the power to devise was expressly limited to one or both of the testator's two children, and, although both of them were then dead, the widow had no power to make other disposition

of the property by her will. In that case we had no question as to whom the will of the testator authorized his wife to appoint. When that is determined, there is generally not much difficulty in deciding whether the power has been properly exercised, but in this case we are called upon to determine whether one of the testator's children who had no issue could under the provisions of the will make an appointment—in other words, the question here is whether Mrs. Turnbull, having no issue, had the power to appoint any one, while in *Smith v. Hardesty* it was whether the widow had the power to appoint those she did appoint. If we had concluded that the testator only intended to give each child power to appoint one or more of his or her issue, of course, the will of Mrs. Turnbull would not have been a good execution of the power, but having concluded that such was not his intention, but that he meant that his children who had no issue could make an appointment by will, it must be conceded that, if we are right in that conclusion, there was a general power of appointment given to such of his children, and it was not attempted to be limited, as was done in *Smith v. Hardesty*, to a particular class.

Without discussing other authorities, as we have found none which were of assistance in enabling us to reach a conclusion as to what was the intention of the testator beyond those announcing general principles applicable to wills, we will affirm the decree; but will direct the costs to be paid by the trustee out of the corpus of the estate passing under the will of Mrs. Turnbull, inasmuch as it was proper to have the question determined by the court.

Decree affirmed, the costs to be paid by the trustee out of the corpus of the estate, passing under the will of Sophia G. C. Turnbull.

(105 Md. 371)

BOGGS v. INTER-AMERICAN MINING & SMELTING CO.

INTER-AMERICAN MINING & SMELTING CO. v. BOGGS.

(Court of Appeals of Maryland. April 2, 1907.)

1. PROCESS—SERVICE—SUFFICIENCY.

Where a director of a corporation knew of the institution of a suit against it and of the sheriff's desire to summon it by serving process on him as a director, and that a deputy was about to make that service, he could not defeat service by running out of the room and slamming a door in the officer's face.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Process, §§ 76-82.]

2. CORPORATIONS — FOREIGN — PROCESS — REMOVAL OF OFFICE FROM STATE.

Under the express provisions of Code Pub. Gen. Laws, art. 23, §§ 409-412, where a foreign corporation went into a state, transacted business, and incurred a liability therein, the courts of that state acquired jurisdiction of a suit on that liability by service of process on a resident director, though the corporation had

removed its office from, and ceased to do business in, the state before the suit was brought.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, §§ 2603-2626.]

3. JUDGMENT—VACATION—GROUNDS.

Where a court acquires jurisdiction of the subject-matter and the parties of a suit, when the provisions of the rule day acts have been conformed to, and judgment regularly entered thereunder, it will not be stricken out on motion of the defendant, unless some reason be shown why the defendant was prevented from appearing and defending in accordance with the statute or upon some ground of fraud, surprise, or mistake; and, when the motion to set aside is made after the term at which it was rendered, proof of fraud, surprise, or mistake must be clear and convincing.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 80, Judgment, §§ 264, 269-284.]

4. APPEAL—ORDERS APPEALABLE—REFUSAL TO REQUIRE SECURITY FOR COSTS.

Appeal will not lie from an order refusing to require a nonresident plaintiff to furnish security for costs; it being not final in its nature, nor settling any substantial right of the defendant, nor denying the means of further defending the suit.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, §§ 641, 823.]

5. COSTS—SECURITY FOR COSTS—APPLICATION.

The record on appeal from an order refusing to require plaintiff, alleged to be a nonresident, to give security for costs insufficiently showed his nonresidence, though the application for the rule for security so stated; the application having been made ex parte, and having not been sworn to nor accompanied by admission, affidavit, or proof of such nonresidence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Costs, §§ 462, 471.]

Appeals from Superior Court of Baltimore City; Henry Stockbridge, Judge.

Action by William R. Boggs against Inter-American Mining & Smelting Company. From an order striking out upon terms of final judgment in his favor, plaintiff appeals; and from an order refusing to lay a rule security for costs upon plaintiff, defendant appeals. Order striking out judgment reversed. Defendant's appeal dismissed.

Argued before BRISCOE, SCHMUCKER, BOYD, PEARCE, BURKE, and ROGERS, JJ.

Stewart Janney, for plaintiff. Joseph N. Ulman, for defendant.

SCHMUCKER, J. The first of the cross-appeals in this case is by William R. Boggs, the plaintiff below, from an order of the superior court of Baltimore City striking out upon terms of final judgment theretofore rendered in his favor against the Inter-American Mining & Smelting Company. The second is by the said company, the defendant below, from an order of the same court, refusing upon its application to lay a rule security for costs upon the plaintiff, who was alleged to be a nonresident of this state. The two appeals were heard together and they can be disposed of by one opinion.

The mining company was incorporated in the District of Columbia; but for some time prior to March 7, 1906, its office, where its records were kept and from which its gen-

eral business was transacted, was in the Calvert Building, in Baltimore, and during that time H. O. Turnbull, Jr., who did business in Baltimore City and resided in Baltimore county, was president of the corporation. During the time that the company was thus located in Baltimore City, its president, purporting to act in its behalf, employed the plaintiff, Boggs, as a mining engineer at a salary of \$200 per month and personal and traveling expenses. On May 28, 1906, Boggs sued the company in the superior court to recover his salary and expenses for October, November, and December, 1905, and January, 1906, amounting in the aggregate to \$1,188. The suit was brought under and in conformity to the rule day acts in force in Baltimore City, and the defendant having been returned summoned, and having failed to appear to the action or plead, judgment by default was entered against it on June 27, 1906. On the same day the judgment by default was duly extended for \$1,188 and costs. On October 17, 1906, the company appeared by counsel, and moved to strike out the judgment on two grounds: (1) That it, being a foreign corporation, was never served with summons within the meaning of the Maryland statutes, and was therefore not properly in court when the judgment was rendered, and (2) that it was not amenable to this suit in the state of Maryland, and the judgment and all of the proceedings are void for want of jurisdiction. At the hearing of the motion to strike out the judgment, testimony was taken tending to prove that on March 7, 1906 the company moved its office and papers and seal from Baltimore to East Orange, N. J., and thereafter did not conduct any business in Maryland, and that Wm. R. Sweeney was selected president of the company to succeed Mr. Turnbull, although the latter remained, and at the time of the institution of the suit was, one of its directors. P. M. Gover, a deputy sheriff of Baltimore City, then testified that, having been directed to serve the writ in the case upon Mr. Turnbull, he went over to the Calvert Building, and asked Turnbull if he was one of the officers of the company, and he replied that he was not, but had formerly been its president. To the best of witness' recollection, Turnbull said that he knew the plaintiff, Boggs, and would like to see him get what was due him. The deputy reported this interview to the sheriff, who told him to serve the writ on Turnbull, as he was one of the directors, and the deputy went back to do it; but Turnbull shut the door in his face, and would not let him serve it. The deputy further swore that he explained his object to Mr. Turnbull, and the latter saw the writ, and said he was doing what he could to get Mr. Boggs righted in the matter, or something to that effect. He, the deputy, did not read the writ to Mr. Turnbull, but he explained it to him, and Turnbull looked at the writ. Thatcher Bell, another deputy sheriff,

testified that he was told by the sheriff to go over to the Calvert Building and serve the writ on Mr. Turnbull; that Gover had not been able to get a service. Witness went over to Turnbull's office with the copies ready to serve, and said to Turnbull, "I have a paper to serve on you." Turnbull said, "I know what you have," and started to go out. Witness reached for Turnbull with the copies, and, when the latter kept running, he commenced to read them, but Turnbull got into the next room and slammed the door. Witness then laid the copies on the table and returned to the sheriff's office. He left the copies of the narr., notice to plead, and writ in this case on the table in Turnbull's office. Mr. Turnbull was put on the stand, and his account then given of the visits of the two deputy sheriffs to him substantially corroborated their testimony, except he denied that he said to the deputy Bell that he knew what he had, or that he (Turnbull) saw or looked at the writ. There was also evidence tending to show that Mr. Turnbull never reported the service of the writ on him to the company, or took any steps himself looking to a defense of the action, and that the motion had been promptly made by the company when it learned of the suit and judgment.

Assuming that Turnbull was a proper person upon whom to serve the writ and other papers, we are indisposed to consume much time in discussing the sufficiency of the service. It is apparent from the evidence that Turnbull was fully informed as to the institution of the suit by Boggs against the company and the desire of the sheriff to summon the company by serving the papers on him as one of its directors, and knew that the deputy was about to make that service when he attempted to elude him and evade the service by running out of the room and slamming the door in the officer's face. Neither he nor the company he represented, if he did represent it for the purpose of the service, can be permitted to set up such a state of facts in support of the motion to strike out the judgment. He might as well have remained in his office and put his fingers in his ears while the deputy read the writ to him, and then claimed to be without information as to its contents or purpose. Defendants have frequently sought to evade or defeat service of process upon them by flight or refusal to accept the process handed them by the serving officer, but the courts have held such efforts futile. *Davison v. Baker*, 24 How. Prac. (N. Y.) 42; *Slaght v. Robbins*, 13 N. J. Law, 340; *Borden v. Borden*, 63 Wis. 377, 23 N. W. 573; *Baker v. Carleton*, 32 Me. 334.

The laws of this state do not prescribe precisely how a summons shall be served upon an individual defendant. The service must be a personal one (2 Poe, Pleading & Practice, par. 62); but the sheriff is not required to read the writ to the defendant,

although it is usual for him to read it or explain its nature and leave a copy of it with the person served. Sections 409 to 412 of article 23 of the Code of Public General Laws provide for service of process upon corporations. Section 409 provides that any foreign corporation which shall transact business in this state "shall be deemed to exercise franchises" here, and "shall be liable to suit in any of the courts of this state on any dealings or transactions therein." Section 410 authorized process against a domestic corporation to be served on any president, director, etc. Section 411 provides that suit may be brought in any court in this state against any foreign corporation "deemed to hold and exercise franchises in this state," by a resident of this state on any cause of action, and by a nonresident plaintiff when the cause of action has arisen in this state, and that process in such suits may be served as provided in section 410, or it may be served, in the manner prescribed, upon any agent of such corporation. Section 412 provides that if any corporation, embraced in the preceding section, after any liability shall occur within this state, or after any contract shall have been made by it with any resident of this state, shall cease to have any agent within the state, and no president, director, or manager of the corporation can be found within the state, then, in such case, service of any writ or process from the courts of this state may be had on the person who was last the agent of such corporation; and the statute in such case further provides for the service of copies on the officers of the company, wherever they may be found, in cases where the writ has been served on the last agent. These sections, when properly construed together, provide, among other things, that where any corporation, domestic or foreign, shall, while transacting business in this state, incur a liability here or make a contract with any resident of this state and shall thereafter cease to have an agent here, service of any writ or process issuing from the courts of this state, in respect to such liability on contract, may be made upon the president or any director or manager of the corporation, if he can be found in this state. In other words, that, if a foreign corporation comes here and transacts business and incurs liabilities here, it shall be quoad those liabilities remain subject to the jurisdictions of our courts, even though after incurring the liabilities it may have removed its office and business to another state. With these laws upon our statute book staring it in the face, the defendant came here and transacted business, and in the course of that business incurred the liability for the enforcement of which the present suit was instituted. It cannot now be heard to say to the courts of this state that no jurisdiction for the purposes of this suit was acquired

over it, by service of process according to our laws upon one of its directors residing within this state, because since incurring the liability it has removed its office to another state: "If a state permits a foreign corporation to do business within her limits, and at the same time provides that in suits against it for business there done process shall be served upon its agents, the provision is to be deemed a condition of the permission, and corporations that subsequently do business in the state are to be deemed to assent to such condition as fully as though they had specially authorized their agents to receive service of the process." *St. Clair v. Cox*, 106 U. S. 350, 1 Sup. Ct. 354, 27 L. Ed. 222. The court below in our opinion acquired jurisdiction over the defendant in this suit by the service of the process upon its resident director Mr. Turnbull.

In cases where the court has jurisdiction of the subject-matter and the parties, "when the provisions of the rule day acts have been conformed to, and a judgment regularly entered thereunder, it will not be stricken out upon motion of the defendant, unless some reason be shown why the defendant was prevented from appearing and making defense in accordance with the requirements of the statute or upon some ground of fraud, surprise, or mistake." *Mueller v. Michaels*, 101 Md. 191, 60 Atl. 485; *Griffith v. Adams*, 95 Md. 170, 52 Atl. 66; *Coulbourn v. Boulton*, 100 Md. 350, 59 Atl. 711; *Gemmell v. Davis*, 71 Md. 458, 18 Atl. 955. When, as in the present case, a motion to set aside a judgment is made after the term at which it was rendered, the proof of fraud, surprise, or mistake must be clear and convincing. *Abell v. Simon*, 49 Md. 318; *Smith v. Black*, 51 Md. 247; *Siewerd v. Farnen*, 71 Md. 627, 18 Atl. 968. There being an absence from the record before us of proof of any of the grounds whose existence is essential to warrant the vacating of the judgment, the learned judge below erred in passing the order striking it out, and that order must be reversed.

The appeal from the order refusing to require the plaintiff to furnish security for costs must be dismissed. That order was not final in its nature, nor did it settle any substantial right of the appellant or deny to it the means of further defending the suit. *Gittings v. State*, 33 Md. 461; *Chappell v. Funk*, 57 Md. 479. Furthermore, it does not appear from the record that the plaintiff is in fact a nonresident of the state. It is so stated in the application for the rule for security for costs, but the application was made ex parte, and was not sworn to nor accompanied by admission, affidavit, or proof of the fact of his alleged nonresidence.

Order striking out the judgment reversed, with costs. Appeal from the order refusing to lay rule security for costs dismissed, with costs.

(195 Md. 336)

REILLY et al. v. BRISTOW et al.

(Court of Appeals of Maryland. April 2, 1907.)

1. WILLS—NATURE OF ESTATES CREATED.

Testator made a gift to a son and two daughters, and provided that on the death of the survivor of them the property should then be divided between "the children the lawful heirs of my aforesaid children." *Held*, that the rule in *Shelley's Case* was inapplicable, and testator's children did not take a life estate in possession and an inheritance in remainder.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, §§ 1372-1374, 1377.]

2. SAME—CONTINGENT ESTATES.

A testator made a gift to his son and two daughters, and declared that, on the death of the last survivor of them, the property should be divided between "the children the lawful heirs of my aforesaid children." *Held*, that the gift to the grandchildren was a contingent remainder, which could not become vested unless there were living at the time of the death of the last surviving child of the testator children of the testator's three children.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, §§ 1488, 1495, 1498-1499, 1502, 1503.]

Appeal from Circuit Court No. 2 of Baltimore City; Pere L. Wickes, Judge.

Bill of interpleader against Helen J. G. Reilly and another and William H. Bristow, executor of Frederick H. Griffin, deceased, and others, for the construction of the will of John A. Griffin, deceased. From a decree construing the will, Helen J. G. Reilly and another appeal. Affirmed.

Argued before BRISCOE, BOYD, PEARCE, SCHMUCKER, BURKE, and ROGERS, JJ.

Michael A. Mullin, for appellants. Albert C. Ritchie, for appellees.

PEARCE, J. This case involves the construction of the will of John A. Griffin, of Philadelphia, Pa., who died in September, 1902.

The clause here in question is as follows, the punctuation being exactly as it appears in the record, and that being, as we are informed by counsel, just as it appears on the original will: "I give, devise, bequeath and desire that all the dividends, interest, rents and net income derived from my aforesaid estate or property shall go to and be divided equally between my son Frederic Hintze Griffin and my daughter Annie Hintze Griffin until my daughter Helen Julia Griffin Reilly wife of Colonel James William Reilly, United States Army, becomes a widow, whenever my said daughter Helen Julia Griffin Reilly becomes a widow then in that case all the said dividends, interest, rents and net income derived from my aforesaid estate or property to be divided equally between my son Frederic Hintze Griffin my daughter Annie Hintze Griffin and my daughter Helen Julia Griffin Reilly if either my son Frederic Hintze Griffin or my daughter Annie Hintze Griffin die then in that case all the said dividends, interest, rents and net income derived from my

aforesaid estate or property to be divided equally between my aforesaid son or daughter that remains alive and my daughter Helen Julia Griffin Reilly, then whenever either of my last two children die then in that case all the said dividends, interest, rents, and net income derived from my aforesaid estate or property to go to the last of my aforesaid children that remains alive as long as my said child lives then after all my aforesaid children die then in that case all my aforesaid estate or property and dividends, interest, rents and net income derived therefrom to go to and be divided between the children the lawful heirs of my aforesaid children the lawful heirs of my aforesaid to receive and be allowed and paid what would have been their parents share of my aforesaid estate or property, dividends, interest, rents and net income derived therefrom." Frederic Hintze Griffin died January 1, 1905, unmarried and without issue, leaving a last will and testament by which he made certain bequests and devises, and made Wm. H. Bristow, one of the appellees, his executor. Annie Hintze Griffin died March 1, 1905, unmarried and without issue, but leaving a last will and testament by which she devised and bequeathed all of her property to said Helen Julia Griffin Reilly. Mrs. Reilly and her husband are both still living. Mrs. Reilly has had three children. The eldest, Henry Hintze Reilly, died intestate and without issue on June, 23, 1892, in the lifetime of the testator, John A. Griffin. Wm. Griffin Reilly and Frederick Hamilton Reilly, the two other children of Mrs. Reilly, both survived the testator, John A. Griffin, but have both since died intestate and without issue, the former on January 21, 1904, and the latter on January 11, 1904. The property in dispute in this case consists exclusively of the proceeds of a policy of fire insurance upon a house in Baltimore destroyed by fire on February 7, 1904, which house had been the property of the wife of John A. Griffin and was devised by her to him. The policy of insurance was originally issued to Mrs. Griffin, was renewed from time to time in her life, and after her death, in 1900, was renewed "for acct. of estate of Henrietta H. Griffin for three years to May 6th, 1906," and so stood at the time of the fire. The insurance company recognized its liability for the loss, and filed a bill of interpleader against the claimants for its protection. Under this bill a decree was passed directing payment into court of the proceeds of the policy, less the costs paid by the insurance company and a fee allowed its solicitor, and the claimants were required to interplead. Upon this decree the usual proceedings were had; it being conceded by all concerned that the renewal of the policy in the terms stated simply indicated that the loss was payable to those who were entitled to the property assured. Upon hearing, the circuit court No. 2 passed a decree appointing the Baltimore Trust &

Guarantee Company trustees to receive the fund in question, and to hold the same in trust for Mrs. Reilly during her life, and upon her death, leaving no child or children surviving her, to distribute one-third thereof under the will of Frederic H. Griffin, one-third under the will of Annie H. Griffin, and one-third under the will of Mrs. Reilly, or, if she leaves no will, then this one-third to the heirs at law of Mrs. Reilly, and, if Mrs. Reilly dies leaving a child or children surviving her, then to distribute one-third to such child or children, and to distribute the remaining two-thirds as follows, viz.: One-third under the will of Frederic H. Griffin, one-third under the will of Annie H. Griffin, and one-third under the will of Mrs. Reilly, or, if she leaves no will, then this one-third to her heirs at law—and from that decree Mrs. Reilly and her husband have both appealed.

This decree proceeds upon the theory that Mrs. Reilly is entitled as sole surviving life tenant to a life interest in the fund, which represents real estate, and that the remainder therein is a contingent remainder, which can never become vested unless there are living at Mrs. Reilly's death children of the testator's three children heretofore named; that, if Mrs. Reilly dies without leaving a child or children surviving her (the other two children of the testator being now dead without issue), there will be an intestacy as to said remainder, which will then vest in the heirs at law of John A. Griffin who were living at his death, and in that event will pass one-third under the will of Frederic H. Griffin, one-third under the will of Annie H. Griffin, and one-third under the will of Mrs. Reilly, or, if she leaves no will, then to her heirs at law; and, further, that if Mrs. Reilly dies leaving a child or children surviving her, then a one-third interest in said remainder will vest in such child or children, but there will be an intestacy as to the remaining two-thirds of said remainder, which will then vest in the heirs of the testator who were living at his death, and will in that event pass one-third under the will of Frederic H. Griffin, one-third under the will of Annie H. Griffin, and one-third under the will of Mrs. Reilly, or, if she leaves no will, then to her heirs at law. The contention of the appellants is that the testator's two grandchildren living at his death took vested estates in the remainder of the testator's estate subject to the life estates given to his own children, and subject to the letting in of any after-born children of the testator, and that upon their death intestate the remainder under the statute of descents then vested in their father, Gen. Reilly, as their heir at law.

The appellees, on the other hand, contend that under the rule in Shelley's Case each of the testator's three children took a life estate in possession, and an inheritance in re-

mainder, which latter, upon the termination of the last life estate, passes, under the wills of Frederic, Annie, and Mrs. Reilly, one-third under each. The argument of appellees' counsel upon this contention was able, and we have given it careful consideration. It rests for its authority mainly upon three cases from the Supreme Court of Pennsylvania, viz., *Mason v. Ammon*, 117 Pa. St. 127, 11 Atl. 449; *Sheeley v. Neldhammer*, 182 Pa. St. 163, 37 Atl. 939; *Shapley v. Diehl*, 203 Pa. St. 566, 53 Atl. 374, and it must be conceded they afford proper ground for argument by counsel. In *Mason v. Ammon* the devise was to "said sister, and at her death to her child, children, or other lineal descendants"; and the court said: "It is admitted that whilst 'child' or 'children' will not, per se, be construed to be a word of limitation, yet when coupled with some other expression of testator showing that they were used as a nomen collectivum, signifying 'heirs of the body,' the rule in *Shelley's Case* has been applied." And the court in that case laid hold of the words, "or other lineal descendants," as indicating the nature of the estate intended to be given to the successors of said sister as one he meant they should take by descent from her. An illustration of the same process of reasoning is found in our own decisions in *B. & O. R. R. v. Patterson*, 68 Md. 606, 13 Atl. 369, in which this court, speaking through Judge Miller, said: "Counsel have argued as if the words, 'heirs of the body of the father' mean the same thing as 'heirs of the blood of the father' [the language of the devise in that case], but to this we cannot agree. The former include only heirs in the descending line, while the latter include heirs both in the ascending and descending line, and in our opinion mean the same thing as 'heirs on the part of the father.' In *Sheeley v. Neldhammer*, the devise was to one for life, and then "to his children or legal heirs." This was held to vest in the first taker an estate in fee simple. The court said: "The words 'legal heirs' are in this connection equivalent to 'descendants.' It does not matter that this may defeat the testator's intention. Such is the common result of the application of the rule in *Shelley's Case*." In *Shapley v. Diehl* there was a grant to a son for life, then "to his children or heirs," and it was held to vest a fee in the son. The court said: "Suppose he had omitted 'children' and said 'heirs' only. The precise case for the rule would have been presented. Yet the meaning would have been exactly the same, and the children would have come in as first in the line of inheritance." In all three of these cases it may be observed that the word "or" was employed, "children, or other lineal descendants," "children, or legal heirs," "children, or heirs," indicating alternate devises, to children if any, and, if none, then "to other lineal descendants," "to all

legal heirs, to all heirs." But in the case before us the alternative word, "or," is absent. There is no more doubt under the Maryland than under the Pennsylvania cases that, where there is no expression to rescue the case from the application of the rule, it does not matter that the testator's intention may be defeated, as is clearly shown in *Clark v. Smith*, 49 Md. 106, 120, but the courts of this state have always struggled against the application of the rule, and have searched the will or deed for some inconsistent provision or word which would exclude the application. The case of *Fulton v. Harman*, 44 Md. 251, presents perhaps the strongest example of this effort. There the devise was of all the residue of testator's estate "to his son George, during his natural life, and after his death, the proceeds thereof to be equally divided between all his George's lawful heirs"; there being a subsequent provision in the will directing the executors to sell all his remaining real and personal property. The court, Chief Judge Alvey delivering the opinion, held the rule in *Shelley's Case* did not apply, and said: "As the words 'lawful heirs' are followed by words of partition and distribution, inconsistent with the devolution of the estate by inheritance, the estate cannot be enlarged to a fee simple by force of the term 'lawful heirs'; but, the gift being of the proceeds to be divided in a manner specially prescribed, the terms of the gift must be construed as clearly indicative of an intent to give a life estate only to the son George, with a gift over to those who may be embraced within the term 'lawful heirs' as purchasers."

In the case now before us the words are "to go and be divided between the children the lawful heirs of my aforesaid children." The argument of appellees' counsel is that the addition of the words "lawful heirs" explains and enlarges the preceding word "children." This argument is legitimate and persuasive on first presentation, but does not reach the plane of conviction. It may be argued as plausibly, and with as much reason, that the word "children" restricts the meaning of the words "lawful heirs." "Children" are embraced within the term "lawful heirs." In the language of *Shapley v. Diehl*, supra, they come in "as first in the line of inheritance," but the word is not per se descriptive of the whole line of lawful heirs. There is no magic in the mere collocation of words, and the construction of this clause cannot be controlled by the order in which these words are coupled. If the language had been "the lawful heirs, the children of my said children," the same argument now made by the counsel for the appellees would support the contention that the rule does not apply, upon the ground that the latter would restrict the former, and that it is always in latter words which qualify the former whether enlarging or restricting them.

this is not a rule of universal or imperative application, and depends upon whether it will support or defeat the intention of the testator as deduced from the whole will. Where, as here, there are two possible constructions, one of which would enlarge and the other would restrict the meaning of the word "children," we think the spirit of our decision requires us to adopt the restrictive construction which will give effect to the natural and primary meaning of the word, rather than to the arbitrary meaning placed upon it by an artificial rule of law.

The remaining question is whether the remainders to the children of the testator's children are vested or contingent. It is unnecessary to refer to the numerous authorities in Maryland that remainders will be held to vest at the death of the testator whenever it can be fairly done without doing violence to the language of the will, and that to make them contingent there must be plain expressions to that effect, or such intent must be plainly inferable from the terms used. All of these cases, however, distinctly recognize that whether the remainder is vested or contingent depends entirely upon the testator's intention, and that where he has indicated with reasonable certainty his intention that it shall not vest until a particular time, it will not vest until that time arrives, and then only in those who are in esse, and capable of taking at that time. *Bailey v. Love*, 87 Md. 608, 11 Atl. 280, in which the remainder was held vested, and *Straus v. Rost*, 87 Md. 465, 10 Atl. 74, in which it was held contingent, will suffice as examples of its recognition. In the will before us there is no immediate gift to the children of the testator's children, after providing minutely for the disposition of his property during the lives of all his children, down to the last survivor of them, his children's children are for the first time mentioned, as follows: "Then, after all my aforesaid children die, then, in that case, all my aforesaid estate to go to and be divided between the children the lawful heirs of my aforesaid children the lawful heirs of my aforesaid children to receive, and be allowed and paid what would have been their parents share of my aforesaid estate." The use and repetition of the word "then," in reference to the children's children, is conspicuous and significant. In *Larmour v. Rich*, 71 Md. 369, 18 Atl. 702, the deed of trust under consideration reserved the life estate to the grantor, and provided that upon the termination of that estate the rents and profits should go to his daughter Mrs. Miller for her life, "and from and immediately after her decease" that the property itself should "*then descend to and become the property of her children*, the issue of any deceased child to take and have the part to which the parent if living, would be entitled." The court emphasised the words italicized, and said: "Mrs. Miller's death was fixed by him as the point of time

at which the corpus of the estate should descend to and become the property of her children." In *Cherbonnier v. Goodwin*, 79 Md. 57, 28 Atl. 894, the devise was in trust "for Edward Goodwin during his life, and from and after his death to be equally divided among all his children"; and the question was whether a son of Edward who died in his life had any interest in the fund to be divided on Edward's death. It was held he had not, and the words "from and after the death of Edward," in connection with a limitation over upon Edward's death without child or children, clearly indicated it was the intention of the testatrix to postpone the vesting until after Edward's death.

While it is unnecessary to go beyond our own cases, appropriate reference may be made to the following, because of the close similarity of the facts: In *Hale v. Hobson*, 167 Mass 397, 45 N. E. 913, the residue of the estate was devised in trust to pay certain annuities until the decease of the last survivor of the annuitants, the residue then to be equally divided among the testator's grandchildren per stirpes. The testator had grandchildren living at his death, some of whom died during the life of the annuitants, and others survived all the annuitants. The grandchildren were held to take only contingent interests. The court said: "The scheme of the will indicates a contingent interest. It is more reasonable to suppose the grandchildren living at the time of distribution were intended than those living at testator's death. Again, there are no words of present gift." In *Clark v. Cammann*, 160 N. Y. 315, 54 N. E. 709, there was a devise of income in trust for the wife for life, and after her death to a niece, Mary Ann, for her life, and upon her death the principal sum to be equally divided among all her children and to their lawful representatives forever as tenants in common per capita, the issue of any child who may then be dead to take his or her deceased parent's share. The widow died in 1872. Mary Ann had two sons living at the testator's death. One died in 1870, and one in 1873, both without issue and intestate, the latter leaving his father as next of kin. The remainders were held contingent; the court saying: "If futurity is annexed to the substance of a gift, the vesting is suspended. The remainders were contingent and not vested for the reason that the persons to whom, or the event upon which the estate was limited to take effect, remained uncertain until the termination of the life estate, and it follows that, as there are no persons to take in remainder under the will, the testator died intestate." This last point directly sustains the ultimate effect of the ruling of the court below in this case. In the *Matter of Crane*, 164 N. Y. 71, 58 N. E. 47, the court said: "Where the only gift is in the direction to pay, the bequest or devise is not to be ranked with those in which the payment or distribution only is deferred, but is one in which

time is of the essence of the gift." We discover no error in the decree of the learned court, and it will therefore be affirmed.

Decree affirmed, with costs to the appellees above and below.

(105 Md. 442)

**WESTERN UNION TELEGRAPH CO. v.
N. LEHMAN & BRO.**

(Court of Appeals of Maryland, April 2, 1907.)

**1. TELEGRAPHS—NEGLIGENCE—FAILURE TO
DELIVER MESSAGE—DAMAGES.**

Plaintiffs had been buying and shipping cattle from a small station for many years, and had received as many as 2,500 or 3,000 telegrams from their agent at the station in the course of a year, which fact was known to defendant telegraph company's office at the station. Instructions had been given defendant to deliver all messages received at night at the residence of plaintiffs; those received in business hours to be delivered at their office. Plaintiffs had purchased a large number of cattle for export on a steamer, instructing their agent to wire them when the cattle were shipped. A telegram sent by the agent and addressed to plaintiffs at their residence, reading, "Shipped cattle to-day," was received by defendant at 9:30 p. m. at its office, two blocks distant from plaintiffs' residence, but was not delivered until 3 p. m. of the next day, when it was sent to plaintiffs' office. *Held*, that plaintiffs' damages were such as arose naturally from the breach of a contract, and were presumed to have been in the contemplation of the parties, and they were not limited to nominal damages.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Telegraphs and Telephones, §§ 64-68, 72.]

2. SAME—INSTRUCTIONS.

In an action against a telegraph company for damages alleged to have been caused by negligent delay in the delivery of a telegram sent to plaintiffs, an instruction that there was no evidence in the case legally sufficient to show a breach of its contract by defendant was properly refused; it being immaterial whether the form of the action was *ex delicto* or *ex contractu*.

3. SAME—QUESTIONS FOR JURY.

In an action against a telegraph company to recover damages for negligent delay in the delivery of a telegram sent to plaintiffs, a copy of which as delivered was addressed to plaintiffs' residence, the questions whether a paper shown a witness and alleged to be the original message, purporting to be addressed to plaintiffs' business address, was the original message, and how the same was addressed, were for the jury.

4. APPEAL—INSTRUCTIONS—HARMLESS ERROR.

In an action against a telegraph company for damages resulting from negligent delay in the delivery of a telegram sent to plaintiffs, notifying them of a shipment of cattle, an instruction that plaintiffs were entitled to recover to such an extent as the jury should believe from the evidence they sustained loss, while erroneous as leaving the question of damages at large, was harmless; the jury finding the precise sum testified to as the actual loss sustained.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4225-4230.]

Appeal from Superior Court of Baltimore City; Ch. E. Phelps, Judge.

Action by N. Lehman & Bro. against the Western Union Telegraph Company. Judgment for plaintiffs, and defendant appeals. *Affirmed*.

Argued before BRISCOE, BOYD, PEARCE, SCHMUCKER, BURKE, and ROGERS, JJ.

Frederick C. Colston and W. Irvine Cross, for appellant. Wm. Pinkney Whyte and Louis B. Bernel, for appellees.

PEARCE, J. This action was brought by the appellees against the appellant for the recovery of damages alleged to have been caused by negligent delay in the delivery of a telegram sent to them. The appellees are exporters of cattle, and have been engaged in the business many years in the city of Baltimore, shipping large numbers to Liverpool, London, Glasgow, and other ports in Europe, chiefly by the Johnston Line steamers sailing from Baltimore. These cattle are purchased through agents in various states, largely in Virginia, Kentucky, and Ohio, and are shipped as required from the place of purchase, so as to arrive one day before the day fixed for loading the steamer. Under the arrangement with the steamer line, the appellees contract for space according to the capacity of the steamer, and this space must be paid for whether it is all used or not, and the steamer line gives notice usually a week ahead of the sailing day, and again notifies the shippers a day or two before sailing when to have the stock alongside of the vessel. Under this arrangement, the appellees in November, 1903, had contracted for space for 505 cattle on the steamer Ulstermore, and on November 7th were notified by the steamer's agents to have the stock ready for Saturday November 14th, and on November 13th were notified to have the stock alongside the ship at 7 o'clock next morning. In order to make up this shipment, the appellees had purchased, through their agents in Tazewell, Va., Messrs. Brown & Crockett, 331 head of cattle, which the appellees directed to be shipped on November 11, 1903, for the Ulstermore, and also directed Brown & Crockett to telegraph them when the shipment was made. The cattle were shipped accordingly on November 11th, and immediately thereafter, on the afternoon of the same day, Brown & Crockett sent the appellees the following telegram: "Tazewell, Va. Nov. 11th, 1903 To N. Lehman & Bro. 1819 Eutaw Place Shipped cattle to-day Brown & Crockett." Instruction had been given the defendant company to deliver all messages received at night at 1819 Eutaw Place, the residence of the appellees, and to deliver those received in business hours at the office, 16 South Paca street. This telegram was received by the defendant company at 9:30 p. m. on the 11th instant, at its office, No. 321 Wilson street, two blocks distant from 1819 Eutaw Place, but was not delivered until 3 o'clock in the afternoon of the 12th instant, when it was sent to the office at 16 South Paca street. Not receiving any notice of the shipment of these cattle during the night of the 11th, or the morning of the 12th, the appellees, in order to insure as far

as possible the loading of the Ulstermore, were obliged to telegraph during the morning of the 12th to points in Farquier and Rappahannock counties, Va., where they had other cattle intended for shipment by a later steamer, and did order from these points 171 cattle, which arrived in time for the purpose. On Friday, the 13th, the 331 head shipped by Brown & Crockett arrived in Baltimore; the result being that the appellees had on their hands in Baltimore 164 head of cattle for which there was no space on the Ulstermore. This was on Friday. The next market day in Baltimore was on Monday, and there was no opportunity to dispose of these cattle in Baltimore before Monday. In Philadelphia there was a market on Saturday, and the appellees immediately shipped them over to Philadelphia, and there sold them on Saturday; one of the appellees going with them and personally attending to the sale. The result was a loss of \$4.43 a head on the 164 cattle, aggregating \$726.52, payment of which was demanded of the company, and was refused, and, upon the trial in the lower court, the jury rendered a verdict for the amount claimed; the evidence being that this was the difference between what these cattle cost the appellees, and what they sold for in Philadelphia.

The only exception was to the ruling of the court upon the prayers. The plaintiffs offered the following prayer, which was granted. "Plaintiff's Prayer. The jury are instructed that, if they find that the defendant, in the usual course of its business, for compensation, received and accepted from the plaintiffs' agents the telegram mentioned in evidence, for transmission and delivery to the plaintiff in Baltimore City, and if they shall further find that said telegram was received by said defendant's agents at the office of the defendant No. 321 Wilson street in said city of Baltimore at 9:30 p. m. on November 11, 1903, and if they shall further find that said telegram was addressed to said plaintiffs at their residence No. 1819 Eutaw Place in said Baltimore City, and that such residence was within two blocks from said defendant's office, and if they shall further find that said telegram was not delivered to said plaintiffs until 3 p. m. of November 12, 1903, and then delivered at 16 South Paca street, and if they shall further find that the defendant did not use such ordinary care and diligence in delivering said telegram as is usually used and adopted by prudent business men in like business, and if they shall further find that, by reason of such neglect, the loss in question arose, then the plaintiffs are entitled to recover to such an extent as the jury shall believe from the evidence they sustained loss. (Granted.)" And the defendant offered the following three prayers, which were refused: "(1) The court instructs the jury that, should they find for the plaintiff in this case, their verdict must be limited to nominal damages. (2) The court instructs

the jury that there can be no damages given in this case for loss incurred by the plaintiff by the sale of cattle in Philadelphia at a less price than that paid for the same, or for the expense incurred in sending the said cattle to Philadelphia; but their verdict, if they should find for the plaintiff, must be limited to the amount paid by the plaintiff to the defendant for the sending of the telegram testified to by the witness. (3) The court instructs the jury that there has been no evidence offered in this case legally sufficient to show a breach of its contract by said defendant, and their verdict must therefore be for the defendant." The defendant specially excepted to the granting of plaintiffs' prayer, because there was no evidence offered legally sufficient to prove that the original telegram mentioned therein was addressed to the plaintiffs at their residence, 1819 Eutaw street, in Baltimore, and this motion was overruled.

The defendant's first and second prayers, which seek to limit its liability either to nominal damages, or to the amount paid for the transmission of the telegram, are based upon the rule as to the measure of damages which was applied in *Hadley v. Baxendale*, 9 Exchequer, 341, and which was adopted and applied by this court in *United States Tel. Co. v. Gildersleve*, 29 Md. 251, 96 Am. Dec. 519. The case of *Hadley v. Baxendale* was reviewed in *Wilson v. Newport Dock Co.*, 1 L. R. Exch. 184, and Baron Martin, though he had concurred in that judgment, in a dissenting opinion in *Wilson v. Newport Dock Co.*, while sustaining the correctness of the rule as applied to the facts in *Hadley v. Baxendale*, declared that it was "not of universal application." That case, however, remains the law of England, and has been generally approved in this country, and has been too often recognized in this state to be departed from, even if we were so disposed. We agree with the language of Judge Alvey, in 29 Md., 96 Am. Dec., supra, where he said: "We believe it to be obviously just and reasonable, and we take it to be the true rule upon the subject." In that case, the dispatch was, "Sell fifty gold," and damages were claimed for loss caused by delay in delivering the dispatch. It was proved that this would be understood among brokers to mean \$50,000 of gold, but it was not shown, nor was it put to the jury to find, that the defendant's agents so understood it, or that they understood it at all. The court said this was as likely to be taken to mean \$50, as \$50,000, by the uninitiated, and it was held that the meaning and importance of the dispatch should have been communicated to the agent when it was offered for transmission, and, as that was not done, the damages claimed were not recoverable. In *Webster v. Woolford*, 81 Md. 331, 32 Atl. 319, where *Hadley v. Baxendale* was again cited and approved, Judge Robinson directs attention to the division of the rule into two parts, and uses the following language, indicating quite clear-

ly the two classes of cases governed by the rule: "The first part of the rule as thus laid down applies to cases in which the damages are the direct and natural result of the breach of the contract, and which the law presumes to have been in the contemplation of both parties. The latter part of the rule applies in cases where special damages are claimed under special circumstances made known by the plaintiff to the defendant at the time the contract was made; and in such cases the plaintiff is entitled to recover such damages as may reasonably be supposed to have been in the contemplation of both parties, in view of the circumstances thus disclosed." The case before us, we think, clearly comes within the first class thus described in *Webster v. Woolford*. In *Jones on Telegraph & Telephone Companies*, § 519, it is said: "It is presumed they know, where no information is given them to the contrary, that all messages are of importance, and that great loss or injury may be the result of a failure on their part to properly discharge their duty; and that they are therefore supposed to have contemplated all the damages flowing naturally and directly from such failure, though they may not have had actual knowledge of what damages might result at the time of accepting the message." And, again, in section 535: "If it [the message] is sufficiently plain to indicate that it relates to business transactions of much importance, and that loss will probably result unless it is promptly transmitted and delivered, recovery will not be limited to nominal damages."

In this case the record shows that the plaintiffs had been buying cattle in that part of Virginia for 20 years, and that it was known there that they bought for export, as well as for sale in this country, and Mr. Lehman said that they received in the course of a year as many as 2,500 or 3,000 similar telegrams from Brown & Crockett from Tazewell, Va. At a small station such as Tazewell, the shipment of so large a number of cattle at one time must have been known to the telegraph operator, as well as the custom of the plaintiffs, and such a message bore upon its face the necessity of prompt transmission and delivery. It also appears that this importance was known to the receiving office in Baltimore, because they were instructed to deliver all such messages received after business hours at the plaintiffs residence, and had been accustomed to do so up to so late an hour as midnight. We therefore think the damages claimed in this case are such as arise "naturally, i. e., according to the usual course of things, from the breach of contract," and must be presumed to have been in the contemplation of the parties. There are ample illustrations of this view, among which may be cited the following: "If enough appears in the message to show that it relates to a commercial transaction between the correspondents, it will be sufficient to charge the company with damages result-

ing from its negligent transmission. It certainly cannot be contended that the agent must be informed of all the facts and circumstances pertaining to a transaction referred to in a telegram, which are known to the parties themselves, to make his company liable for more than nominal damages. If it should be so held, the telegraph would cease to be of practical utility in the commercial world." *Postal Tel. Co. v. Lathrop*, 131 Ill. 575, 23 N. E. 583, 7 L. R. A. 474, 19 Am. St. Rep. 55. Where the message sent and negligently delayed was, "Ship hogs at once," the measure of damages was held to be the difference between the market value of the hogs on the day the plaintiff was able to put them in market after receiving the delayed telegram, and their value on the day they would have been in market if the dispatch had been promptly delivered. *Manville v. W. U. Tel. Co.*, 87 Iowa, 217, 18 Am. Rep. 8. Where a message ordered the purchase of stock which advanced in price between the time when the message should have been delivered and the time when it was purchased under a second message, the advance was held the measure of damages. The court said: "The dispatch was such as to disclose the nature of the business to which it related, and that loss might be likely to occur, if there was want of promptitude in transmitting the dispatch." *U. S. Tel. Co. v. Wenger*, 55 Pa. 267, 93 Am. Dec. 751. Where one sold cattle for future delivery, at the option of the purchaser, and the latter sent a dispatch, "Want your cattle in the morning," in pursuance of a custom among stock dealers to take and weigh cattle at early daylight, which dispatch was not promptly delivered, whereby the weighing of the cattle was delayed, and their weight decreased, the seller may recover for the loss of weight so resulting from the company's negligence. *Hadley v. W. U. Tel. Co.*, 115 Ind. 191, 15 N. E. 845. It may be observed that in that case the court cited and approved both *Hadley v. Baxendale* and *U. S. Tel. Co. v. Gildersleeve*. We discover no error in the rejection of the defendant's first and second prayers.

The reasons which led to the rejection of the defendant's first and second prayers would also require the rejection of the defendant's third prayer; but there is a further reason for its rejection. It is well settled that it makes no difference whether the form of the action is *ex delicto* or *ex contractu*, the real and substantial gravamen of the complaint is the alleged breach of the contract, and in such a case the same law is applicable to both classes of action, * * * and the measure of damages is equally a question of law, and as much under the control of the court as if the right rested in agreement merely. *B. & O. R. R. v. Pumphrey*, 59 Md. 399. In *B. & O. R. R. v. Carr*, 71 Md. 135, 17 Atl. 1052, the defendant's first prayer, the court said, seemed to be based upon the theory that the action was, in substance at

least, an action upon the contract of carriage; but the court said, "This is in form an action in tort," and, "in cases of the class to which this action belongs, the refusal or neglect to perform a duty, as well as the negligent performance of it, furnishes a ground of action in tort. In such case, both the nonfeasance and the misfeasance constitute a wrongful act, for which the remedy may be either by action on the contract or in tort, at the option of the party injured. The prayer, as an abstract proposition, may be correct enough; but it would likely have a tendency to mislead in a case like the present, and therefore there was no error in its rejection." This is directly applicable to defendant's third prayer in the present case.

There was no error in overruling the special exception to the plaintiffs' prayer, since the copy of the telegram delivered on the 12th of November was addressed to plaintiffs' residence, and though the paper shown the witness Binswanger, and alleged to be the original message, purported to be addressed to 10 South Paca street, it was for the jury to determine whether it was the original message, and how that message was addressed.

This brings us to the plaintiffs' prayer. The plaintiffs rely in support of this prayer upon the case of *B. & O. R. R. v. Schumacher*, 29 Md. 170, 98 Am. Dec. 510, in which a prayer was granted which concludes with the precise language of the plaintiffs' prayer in this case, and the ruling was not reversed on appeal. However that prayer may have been regarded in that case, we think it should not have been granted in this case. In *B. & O. R. R. v. Carr*, 71 Md. 143, 17 Atl. 1052, an instruction was granted that "the plaintiff is entitled to such damages as the jury may find, under all the circumstances, would compensate him for the refusal of entrance to the train." Judge Alvey said: "This left the whole question of damages at large, without definition by the court, to the discretion of the jury, and without any criterion to guide them. What compensation would embrace, whether for actual and necessary expenses incurred by reason of the refusal, or the mere delay, or disappointment in pleasure, or the possible loss in business transactions, however remote or indirect, were matters thrown open to the jury, and they were allowed to speculate upon them without restraint. This is not justified by any well-established rules of law. * * * The court must decide and instruct the jury, in respect to what elements, and within what limits, damages may be estimated in the particular action." For these reasons we cannot approve that prayer. But it is apparent, we think, that the granting of this prayer worked no injury to the defendant, and, if this be so, there is no reversible error. The declaration claimed \$1,500 damages, and, if the jury had given that amount, or any sum greater than that shown by all the evidence to be the

actual loss sustained in the transaction, there would have been a concurrence of error and injury. But the jury found a verdict for the precise sum testified to as the actual loss sustained, the difference between the cost of the cattle in Virginia and the amount realized on them in Philadelphia, and under these circumstances we do not feel justified in disturbing the verdict.

Judgment affirmed, with costs above and below.

(105 Md. 529)

ESTERLINE v. STATE.

(Court of Appeals of Maryland. April 2, 1907.)

1. HOMICIDE—ASSAULT WITH INTENT TO MURDER—EVIDENCE—ADMISSIBILITY.

Since, in a trial for assault with intent to murder defendant's brother-in-law, it was essential to a conviction to show malice, evidence that before the assault defendant told witness he was going to shoot the brother-in-law, that he told the latter's wife that he was going to kill the whole family, and that he had possessed a pistol before the assault, was admissible.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Homicide, §§ 293-298, 301.]

2. CRIMINAL LAW—APPEAL—REVIEW—HARMLESS ERROR.

If in a trial for assault with intent to murder the form of the question asked defendant on cross-examination as to how long he had been accustomed to carry a pistol was objectionable, it was rendered harmless by his answer denying that he was accustomed to carry one.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 3130.]

3. SAME—CONCLUSIVENESS OF FINDING.

Where in a criminal trial the evidence is conflicting, the jury's finding thereon is not reviewable on appeal.

4. SAME—TRIAL—DUTY TO INSTRUCT.

Though the court in a criminal trial may advise the jury as to the law in a criminal case, it cannot be required at the request of counsel or jury to do so; such instructions as it may give being merely advisory and subject to the disregarded by the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1803-1811.]

5. SAME—APPEAL—REVIEW OF INSTRUCTIONS.

Though the court in a criminal trial is not required to instruct, if it does, the instructions, if erroneous, are reviewable in the Court of Appeals.

6. SAME—ARGUMENT OF COUNSEL.

Counsel in a criminal trial should not be permitted, over proper objection, to state and comment upon facts not in evidence, or state what he could have proven, and persistence in such conduct may afford good grounds for new trial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 1669.]

7. SAME—DISCRETION OF COURT.

The conduct of a criminal trial rests largely in the discretion of the presiding judge, and the appellate court will not interfere with the judgment, unless there be an abuse of discretion by the trial judge of a character likely to have injured the complaining party.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, §§ 3038, 3053-3060.]

8. SAME—ARGUMENT OF COUNSEL.

Though in a trial for assault with intent to murder it was improper for the state's attorney to tell the jury that he could have proved by a

hundred witnesses the falsity of defendant's witness' testimony that defendant had finger marks on his throat after the shooting, it was not ground for reversal of a conviction, where the court told the attorney in the presence of the jury the statement was improper, and the attorney then apologized for making, and withdrew it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14. Criminal Law, §§ 1669, 1693.]

Appeal from Circuit Court, Carroll County; Wm. H. Thomas, Judge.

John W. Esterline was convicted of assault, and he appeals. Affirmed.

Argued before BRISCOE, BOYD, PEARCE, SCHMUCKER, BURKE, and ROGERS, JJ.

E. O. Weant and Charles E. Fink, for appellant. Attorney General Bryan and J. Guy W. Steele, for the State.

BURKE, J. The appellant was indicted, tried, and convicted in the circuit court for Carroll county, and was sentenced to be confined in the Maryland penitentiary for the period of 15 months. The indictment contained three counts. The first count charged him with an assault with intent to murder Adam E. Diehl; the second with an assault with intent to disable Adam E. Diehl; and the third with common assault committed upon the said Diehl. A motion for a new trial was made, and, among other grounds assigned, it was stated that there was no legally sufficient evidence to warrant the jury in finding a verdict of guilty upon the second count of the indictment. This motion was heard by the Honorable William H. Thomas, the associate judge before whom the case was tried, and was overruled. This appeal was then taken, and it brings up seven exceptions to the rulings of the court below taken by the appellant during the progress of the trial. Four of these exceptions relate to the admission of evidence, and three to certain remarks made by Mr. Guy W. Steele, the state's attorney for Carroll county, in the course of his argument to the jury. These remarks, it is contended, constitute such misconduct on the part of the state's officer as to justify this court in reversing the judgment and granting a new trial.

We will now state the evidence which constitutes the first, second, third, and fourth exceptions, which were taken to the admission of certain portions of the testimony of D. Jonas Lipsey, Mrs. Adam E. Diehl, and John W. Esterline, the accused. This testimony, which was admitted against the objection of the traverser, is this: Lipsey testified that in February or March preceding the assault, which occurred on the 3d of August, 1906, he heard the prisoner say he was going to shoot the son of a bitch, and that he asked Esterline to whom he referred, and that the accused replied, "That big son of a bitch up town"; that he said to the accused, "Tell me who it is," and the prisoner said, "My brother-in-law up town." The evidence shows that the prosecuting witness was the

only brother-in-law of the defendant living in that locality. Mrs. Adam E. Diehl testified that on the 13th day of April, 1906, the prisoner said to her that he was going to kill the whole family. "He looked over to me, and said, 'I am going to kill the whole family, and then I know I will have a rest.'" In his cross-examination of the accused the state's attorney asked him how long he had been accustomed to carry a pistol. Objection was made to this question, but the court permitted it to be answered, and this ruling is the basis of the third bill of exception. The answer of the witness was that he had owned one off and on for a good many years, but, so far as he could remember, he had never carried one. This constitutes the fourth exception. In order to convict upon the first count of the indictment, it was necessary to show a state of facts upon which the accused could have been convicted of murder had the prosecuting witness died as a result of the assault. Malice was therefore an essential element in the crime charged in the first count, because malice is the chief and distinguishing characteristic of murder; and hence it was indispensably necessary for the state to allege and prove malice before a conviction could be had upon the first count in the indictment. Malice is either express or implied. Both express and implied malice may be proved by a deliberately formed design to kill, by the preparation of the weapon or other means for doing great bodily harm, by circumstances of brutality attending the act, or by previous hostility, or threats and declarations of intention to kill, or to do serious injury. The rule upon this subject is thus stated in 1 Bishop, Crim. Proc. (3d Ed.) 673: "It is competent to show against the defendant that he bore toward the party injured enmity of a sort tending to the criminal result. For the same, and even for a stronger reason, threats made by the accused, prior to the commission of the alleged offense, may be shown against him. Nearness, or remoteness of time, intervening conduct, and the like, will considerably affect their weight." It is stated in Wharton's Crim. Evidence, § 756, that "declarations of intention and threats are admissible in evidence, not because they give rise to a presumption of law as to guilt, which they do not, but because from them, in connection with other circumstances, and on proof of the corpus delicti, guilt may be logically inferred. Threats against a class may be put in evidence as explaining the character of the attack on an individual belonging to this class, though, to make threats admissible, there must be some kind of individuation showing that the person injured was in some sense within the scope of the threats." The facts of the case bring the admissibility of the testimony embraced in the first, second, third, and fourth exceptions within the operation of these rules, although it must be noted that the defendant could not possibly

have been injured by the answer of the question embraced in the fourth exception, because, assuming the form of the question to be objectionable, the answer of the witness denied that he was accustomed to carry the pistol. The accused and the prosecuting witness were brothers-in-law, and lived in adjoining properties. For a number of years they had been on bad terms, and on three prior occasions they had had personal encounters. This feeling of personal hostility seems to have become more intensified about the last part of February preceding the assault charged in the indictment, when they ceased speaking to each other, and shortly thereafter the threats of personal violence introduced in evidence were made by the accused. The theory upon which the case was tried by the state was that the accused, intending to carry out these threats, prepared his pistol, provoked a quarrel with Diehl, who invited him out to fight, and that Esterline, under the pretense of self-defense, maliciously and without justification, shot his brother-in-law. The theory of the defense was that Diehl provoked the quarrel and was the aggressor in the assault which ensued, and that, the pistol being in the possession of the prisoner for a lawful and innocent purpose, as explained by him in his evidence, he was obliged in self-defense to protect himself from serious bodily harm from the assault made upon him by Diehl, who was a much larger man and of much greater strength than himself. Both the state and the defense offered testimony tending to support these conflicting theories. The jury was the proper tribunal to pass upon the weight of testimony and the credibility of the witnesses, and their finding upon the facts is not reviewable by this court. We have examined the record carefully, and we fail to find any error in the rulings which constitute the first four bills of exceptions.

2. The fifth, sixth, and seventh exceptions relate to what is claimed to be the misconduct of the state's attorney. Mary J. Diehl, a witness produced on behalf of the accused, has testified that immediately after the shooting the prisoner had finger prints on his throat, and, in commenting upon this testimony in his argument to the jury, Mr. Steele declared that, had he known the defense would produce such evidence, the state could have produced a hundred witnesses to prove that there were no finger prints on his throat at that time, whereupon, the record states: "The counsel for the prisoner addressed himself to the court, and objected to the above statement by the state's attorney, and the court said, 'Yes, Mr. Steele; that is not proper,' and thereupon the state's attorney apologized to the court, and withdrew his remark and stated to the jury: 'Well, I can say this: That, if there had been finger prints on his throat, he, the prisoner, could have proved it by himself and other witnesses.'" This constitutes the fifth exception. Mr. Steele then

read to the jury the law in reference to the use of deadly weapons, and the presumption of malice arising therefrom, and the law in reference to the right of self-defense, and the use of deadly weapons therein, and the counsel for the prisoner in reply read the law in reference to the same subject and commented upon it. The state's attorney in his closing argument to the jury said that the jury had a right to call upon the court for instruction if they doubted the correctness of the construction placed by him on the law, and during his argument as to the law applicable to the first count of the indictment he stated that malice could be presumed from the use of a deadly weapon, and that the law would not permit a deadly weapon to be used by one to repel a simple assault when there was no danger of death or grievous bodily harm, and that if the prisoner was the aggressor, or left a place of safety for one of danger, he could not rely upon a plea of self-defense. He then stated that, if a deadly weapon was used, the plea of self-defense was barred; and, if a deadly weapon was used, then it was not excusable homicide, and the prisoner could not rely upon self-defense or justification, whereupon the counsel for the prisoner objected to the statement of the law of the case by the state's attorney, but the court omitted to correct or stop the state's attorney in his line of argument, and suffered him to continue to so argue, and to this omission of the court the prisoner by his counsel excepted. This constitutes the sixth bill of exception. The seventh exception was taken under the following circumstances: The state's attorney again told the jury they could call upon the court to express its views of the law applicable to the case to verify his statement of what the law was, or if they doubted the correctness of the law as he stated it. He also told the jury that if they did not believe the prisoner to be guilty of an assault with intent to kill and murder, as charged in the first count of the indictment, they could if they believed he intended to disable the prosecuting witness find him guilty on the second count; and, in arguing what assault to disable meant under the Code, his line of reasoning was such as to induce the inference that if the prisoner would have been guilty of manslaughter, if Diehl had died from the effects of the wound, then they could find him guilty under the second count; and, in substance, said that, if the jury did not believe the prisoner guilty of assault with intent to kill, they could find him guilty on the second count of the indictment, if they believed that the prisoner would have been guilty of manslaughter had Diehl died from the effects of the shot. Counsel for the prisoner objected to the above statement, and appealed to the court to state its views of the law applicable to the case, and to correct what he stated to be the misstatement of the law by the state's attorney. In reply the court said: "Gentlemen, I think

you have both fully read and given to the jury all the law bearing on the case, and they are the judges of the law and the facts." The prisoner's counsel then addressed the state's attorney as follows: "Mr. Steele, I put the question to you, and I ask you to say whether if Diehl had died from the effects of the wound, and the prisoner would have been guilty of manslaughter, the jury can now find him guilty on the second count of the indictment?" To this question, after some hesitation, the state's attorney replied: "Well, Mr. Fink, I do not know. I wouldn't be willing to answer that question without consideration." The state's attorney then went on with his argument, and touched upon the question of manslaughter no further.

The thing complained of by the appellant in the sixth and seventh exceptions is the refusal of the court to instruct the jury as to the law of the case upon the suggestion of the state's attorney, and upon the request of counsel for the accused. Section 3, art. 15, of the Constitution, declares that, "In the trial of all criminal cases, the jury shall be the judges of the law as well as fact." This provision appears for the first time in the Constitution of 1851, and was first considered by this court in the case of *Franklin v. State*, 12 Md. 236, where it was held that the jury could not decide upon the constitutionality of an act of the General Assembly, but that they had a right to affix their meaning on the particular law, and to determine for themselves whether the facts proven brought the traverser within that meaning. While the court has the right to advise the jury in a criminal case, it is not bound, and cannot be required at the request of counsel or jury, to do so. Such instructions as it may give are merely advisory, and may be disregarded by the jury. If, however, it does instruct, such instructions, if erroneous, are open to review in this court, if properly presented by the record. These propositions have been settled by a number of decisions in this state, among which are *Broll v. State*, 45 Md. 356; *Baltimore & Yorktown Turnpike Co. v. State*, 63 Md. 573, 1 Atl. 285; *Beard v. State*, 71 Md. 275, 17 Atl. 1044, 4 L. R. A. 675, 17 Am. St. Rep. 536; *Wheeler v. State*, 42 Md. 563; *Swann v. State*, 64 Md. 423, 1 Atl. 872; *Guy v. State*, 96 Md. 699, 54 Atl. 879. In *Broll v. State*, supra, the appeal was by the accused from the refusal of the court to instruct the jury. The court, after quoting the constitutional provision, said that the jury, being the judges of the law as well as of fact in criminal cases, "would not be bound by any instruction given by the court, but would be at perfect liberty to utterly disregard them, and find a verdict in direct opposition to them. No court in this state can be required by counsel or jury to give instructions either upon the law or the legal effect of the evidence given at the trial. The court may, in its discretion, advise the jury as to the law and legal effect

of the evidence, but is not bound to do so, and, being a matter entirely within its discretion, its refusal to do so cannot be reviewed by this court." It is the duty of counsel to confine himself in argument to the facts in evidence, and he should not be permitted by the court, over proper objection, to state and comment upon facts not in evidence, or to state what he could have proven. Persistence in this course of conduct may furnish good grounds for a new trial. The conduct of the trial must of necessity rest largely in the control and discretion of the presiding judge, and the appellate court should in no case interfere with the judgment, unless there be an abuse of discretion by the trial judge of a character likely to have injured the complaining party.

We find nothing in the fifth exception sufficient to disturb the judgment. It was undoubtedly improper for the state's attorney to have told the jury that he could have proved by a hundred witnesses the falsity of Mary J. Diehl's testimony that the prisoner had finger marks on his throat immediately after the shooting. This remark was objected to as improper, and the court, in the presence of the jury, told the state's attorney that it was not proper for him to make that statement. The state's officer then apologized for making it, and promptly withdrew the objectionable statement. It is not to be presumed that a body of competent and honest men, sworn to try the issue of the traverse upon the evidence produced before them, would permit the statement to influence their finding, after the court had pronounced it to be improper, and after it had been withdrawn from their consideration. The observations of Mr. Justice Brown upon this subject in *Dunlop v. United States*, 165 U. S. 486, 17 Sup. Ct. 375, 41 L. Ed. 799, may well be applied to the facts embraced in this exception: "There is no doubt that in the heat of argument counsel do occasionally make remarks that are not justified by the testimony, and which are, or may be, prejudicial to the accused. In such cases, however, if the court interfere, and counsel promptly withdraw the remark, the error will generally be deemed to be cured. If every remark made by counsel outside of the testimony were ground for a reversal, comparatively few verdicts would stand, since in the ardor of advocacy, and in the excitement of trial, even the most experienced counsel are occasionally carried away by this temptation." The accused elected to try his case before the jury, and they have convicted him upon the second count of the indictment. The careful and conscientious judge before whom the case was tried, and who observed the demeanor of witnesses, and who was able to judge of the probable effect upon the jury of the remarks of counsel, as well as of all the events and circumstances of trial, refused to grant the motion of the appellant for a new trial, and, as we find no error of law committed by the court

in its rulings, and no abuse of discretion by the court, and no other error of which the defendant can be heard to complain in this court, the judgment must be affirmed.

Judgment affirmed.

(105 Md. 336)

SHUGARS et al. v. SHUGARS.

(Court of Appeals of Maryland. April 2, 1907.)

1. LOST INSTRUMENTS—RESTORATION—JURISDICTION.

A court of equity has jurisdiction to decree the restoration of a lost deed or new conveyance of the property according to its terms, on the filing of a proper bill for that purpose.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Lost Instruments, § 8.]

2. SAME—LACHES.

Laches does not constitute a defense to an action to compel the execution by the grantor of a deed to take the place of one theretofore executed and lost by the grantee.

3. PLEADING — ALLEGATIONS — CONCLUSIVE-NESS.

Where, in an action to compel the re-execution of a lost deed, the declaration averred that the consideration of the deed was a certain sum, but defendants averred in their answer and testified that the deed was not made for a money consideration, plaintiff was not estopped from showing that the deed was in fact made upon some other consideration than that named in the declaration.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, § 81.]

4. APPEAL—EXCEPTIONS—OBJECTIONS TO EVIDENCE.

Under Code Pub. Gen. Laws, art. 5, § 36, prohibiting any objections to be made in the Court of Appeals to the admissibility of evidence or the sufficiency of the averments of a bill, unless it appears by the record that such objection was made by exceptions filed in the court below, where, on appeal from courts of equity, no exceptions were taken below to the testimony, the case will be determined according to the evidence, whether it corresponds to the allegations of the bill or not.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, § 1503.]

5. LOST INSTRUMENTS—ACTION TO RESTORE—DEFENSES.

In an action to compel the re-execution of a lost deed, plaintiff testified that the land for which he furnished the money was originally deeded to his wife by reason of the fact that there was pending a suit on a bond on which he was liable, that the suit was subsequently decided in his favor, and that the land was thereafter on the death of his wife deeded by defendants to plaintiff. *Held*, that there being no creditor before the court, and neither allegation nor proof of any existing creditor of plaintiff, who could be prejudiced by the execution of the proposed deed, the decree in his favor would not be reversed.

6. VENDOR AND PURCHASER—VENDOR'S LIEN.

Where, in an action to compel the re-execution of a lost deed, the evidence showed that the lost deed was not in fact executed for a pecuniary consideration, defendants were not entitled to a vendor's lien on the land for the consideration named in the deed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Vendor and Purchaser, § 643.]

Appeal from Circuit Court, Carroll County, in Equity; Wm. H. Thomas, Judge.

Bill by James L. Shugars against Charles

Abram Shugars and others. Decree for plaintiff, and defendants appeal. Affirmed.

Argued before BRISCOE, BOYD, PEARCE, SCHMUCKER, BURKE, and ROGERS, JJ.

Edward J. Colgan, Jr., and Thomas G. Hayes, for appellants. Charles E. Fink, for appellee.

SCHMUCKER, J. The appeal in this case is from a decree of the circuit court for Carroll county, directing that a deed of all of the interest and estate of the defendants in certain land and premises be executed and delivered to the plaintiff, and appointing Charles E. Fink trustee to make the deed. The deed so to be made by the trustee is intended to take the place of a former one for the same property, which was executed directly from the defendants to the plaintiff, but has been lost or destroyed. The substantial facts alleged by the bill of complaint are as follows: On April 11, 1868, one Andrew Schaeffer and his wife conveyed to the plaintiff's wife, Margaret, the land in question, for a consideration of \$2,000, which was paid by the plaintiff out of his own money. The plaintiff's wife, Margaret, died intestate seised of the land about 25 years ago, leaving him as her surviving husband; and also a son Charles A. Shugars, who is married to Addie Shugars; a son George H. Shugars, who is now dead, intestate, without issue—he was married in his lifetime to Mollie Shugars, who since his death has married William Hoffman—a son Samuel W. Shugars, who is married to Rosie B. Shugars; and a daughter Ada E., who is married to William H. Ebaugh. All of the said persons are defendants to the bill, except Samuel Shugars and wife, whose absence from the case is hereinafter explained. About 18 years ago, subsequent to the death of the plaintiff's wife, Margaret, all of her children, with their respective husbands and wives, united in a conveyance of their several interests in the said real estate to the plaintiff for a good and valuable consideration. The consideration mentioned in the deed was \$2,000, and was fully paid, and the deed was duly executed, acknowledged, and delivered to the plaintiff, and remained in his possession, but was never recorded. Some time after the delivery of the deed, it was sent by the plaintiff to the office of his counsel in a then pending suit to be used as evidence, and it was taken from the office and lost, destroyed, or concealed by one of the sons of the plaintiff without his knowledge or consent. The plaintiff has always resided upon and been in the exclusive possession of the land in question since the death of his wife, and is still in possession of it. Since the loss or destruction of said deed, the plaintiff has requested and demanded of the defendants to re-execute and deliver to him a new deed for the land which they had conveyed to him by the former one; but, with the exception of his son Samuel W. Shugars and wife, who conveyed their in-

terest to him, they have all refused to comply with his request. The plaintiff then, after alleging that he is without adequate remedy at law, prays for a decree requiring his son Charles A. Shugars to discover whether he still has the former deed in his possession, and, if so, to require him to deliver it to the plaintiff, and, in case that deed has been lost or destroyed, that the defendants be required by a suitable decree to convey by a good deed to the plaintiff their respective shares in the land and premises, and for an injunction and for general relief. The defendants jointly answer the bill. They admit the making of the deed of April 11, 1868, from Schaeffer and wife to the plaintiff's wife, Margaret, but deny that he paid the \$2,000 consideration therefor out of his own money, but aver upon information and belief that it was paid by his wife. They admit the subsequent death of the plaintiff's wife, Margaret, and the making thereafter by her children of the deed to the plaintiff of their several interests in the property, but deny that the consideration for that deed was \$2,000, or that any consideration therefor was ever received by them, or any of them, and they aver in that connection that the said deed was executed by them upon the understanding and agreement with the plaintiff, their father, that, upon the receipt of their deed to him, he would at once divide the land into separate portions, and, retaining one portion for himself, would convey one other portion in severalty to each of his sons and his daughter; but he never performed his part of the agreement, although often requested to do so. The answer denies that the defendant Charles A. Shugars had lost, destroyed, or concealed the deed to the plaintiff from his children, but avers upon information and belief that the plaintiff's deceased son, George H. Shugars, destroyed it. The possession and occupancy of the property in question by the plaintiff is admitted, except as to about $1\frac{1}{2}$ acres thereof, which had been conveyed by the plaintiff and defendants to Samuel W. Shugars in 1898. The alleged demand by the plaintiff upon the defendants for the execution of a new conveyance of the lands by them to him is also denied, except as to a demand made immediately prior to the filing of the bill.

The plaintiff, his surviving sons, Samuel and Charles A., his daughter, Mrs. Ada Ebaugh, and Lewis C. Myerly, the scrivener who drew the lost deed, were all put upon the stand as witnesses. We have therefore before us the testimony of all of the living participants in the transactions out of which the present controversy arose. None of the witnesses, except the plaintiff, professed to have any knowledge of who paid the \$2,000 purchase money mentioned in the deed of April 11, 1868, from Schaeffer and wife to Mrs. Margaret Shugars. The plaintiff testified positively that he paid that purchase money out of his own funds, and further

stated that he had the conveyance made to his wife under the advice of his counsel because he was surety on a replevin bond on which a suit was then pending which was ultimately decided in his favor. The witnesses all agree that the lost deed mentioned in the bill was executed and delivered to the plaintiff about 18 years before the filing of the bill by all of his children and their respective husbands and wives, including those who are defendants to this suit. They also all agree that no pecuniary consideration passed or was intended to pass between the parties to that deed; but different accounts are given in their testimony of what formed the true inducement and consideration for its execution. The plaintiff said that, prior to the making of the lost deed, the property had run down and was badly in need of repairs, and he proposed to the children that he and they should unite in repairing it. They said that they had no money, and he then proposed that they convey their interest in it to him, and he would repair it, to which they consented. They then made the deed to him, and he put the property in repair at a cost of over \$500, and that the deed was afterwards lost. Charles A. Shugars, one of the sons, testified that the children gave the deed to their father, who was a blacksmith, because he had been compelled by a cancer to submit to the amputation of his right arm. Samuel, the other son, testified that the children voluntarily executed the deed to their father at his request. Mrs. Ebaugh alone testified that the deed had been made to the father upon an understanding that he would divide the property between the members of the family. Her account of the alleged arrangement was as follows: "Well, pap asked us to sign the deed, that he wanted to get the property so that he could reserve part of it for his own, so that, if anything happened to him, that stepmother would have something. He always told us that he would equally divide it and give her a portion, but, as to receiving anything for it, I never did." Myerly, the scrivener, testified that he drew the lost deed at the request of the plaintiff, who, in response to an inquiry, said that all of the children were satisfied. The witness talked to two of the sons, and he thought also to the third, about it, and they said that it was all right, and they signed it in his presence after it had been written. He testified, further, that he had stated \$2,000 as the consideration in the deed when he drew it; but that he saw no money pass between the parties to it, nor did he hear any mention of any understanding among them in reference to the making of a reconveyance from the father to the children. Each of the sons denied, when on the stand, that he had destroyed or concealed the deed or knew anything of its present whereabouts.

We are satisfied from the evidence that the deed to the plaintiff from his children was executed and delivered by them to him at

his request, without pecuniary consideration, from motives of filial affection and owing to his then almost helpless condition by reason of the loss of his right arm, and that the deed was subsequently lost. Under such circumstances, the jurisdiction of a court of equity upon the filing of a proper bill for that purpose to decree a restoration of the lost deed or a new conveyance of the property according to its terms is undoubted. We do not understand the appellants to controvert the existence of jurisdiction in equity for that purpose, although they deny, for reasons which we will notice, that this is a proper case for its exercise. They insist that the appellee's claim to relief is barred by his own laches in delaying so long after the loss of the deed to bring his suit. This not being a proceeding to impeach, set aside, or reform a deed, but to restore a lost one, the execution and delivery of which is not denied, the rights of the parties would not be altered or destroyed, but would be left in statu quo by the restoration. Under such circumstances, it has been held that neither laches, limitations, nor the illegality of the original instrument constitutes a good defense to the suit. *Encyc. Pleading & Practice*, vol. 13, p. 354; *Com'rs of Suwannee Co. v. Com'rs of Columbia Co.*, 18 Fla. 78. *Rockwell v. Servant*, 54 Ill. 251. The execution and delivery to the appellee of the deed from his children vested the title to the land in him, and the loss of the deed has not deprived him of his title or revested it in the children, and they have therefore not been injured by the delay in bringing this suit. The restoration of the lost deed will not deprive them of any interest of value, but it will supply the appellee with appropriate evidence of the title which he now has. Under such circumstances, the doctrine of laches cannot be successfully invoked in their favor. *Demuth v. Old Town Bank*, 85 Md. 326, 327, 37 Atl. 266, 60 Am. St. Rep. 322; *Sinclair v. Auxiliary Realty Co.*, 99 Md. 234, 57 Atl. 664. The record does not show a sufficient lapse of time between the loss of the deed and the institution of this suit to make limitations, if it be available to the appellants, a sufficient defense, for by analogy the period of 20 years would be requisite to extinguish the appellee's claim for the restoration of the lost deed of the land. *Balto. & Ohio R. R. Co. v. Trimble*, 51 Md. 110-112; *Baldwin v. Trimble*, 85 Md. 406, 37 Atl. 176, 36 L. R. A. 489; *Crook v. Glenn*, 30 Md. 70.

A more serious objection by the appellants to the propriety of the decree from which they have appealed is that the lost deed on its face recited a consideration of \$2,000, which the record shows was never paid, and that the decree makes no provision for its payment. They insist that the appellant was estopped, by the allegation in his bill that the consideration mentioned in the deed was \$2,000, from showing that it was in fact made upon some other consideration. The

defendants rely, in this connection, especially upon *Thompson v. Corrie*, 57 Md. 197, and *Christopher v. Christopher*, 64 Md. 583, 3 Atl. 296, and upon the general proposition, frequently asserted by this court, that it is not competent for the parties to a deed to prove a consideration different in kind from that stated in the instrument itself. Those two cases are quite distinguishable from the one before us. In *Thompson v. Corrie*, the grantor, under a deed which stated on its face that it was made for a money consideration, filed a bill to have it set aside for fraud. The fraud alleged in the bill was not proven, and the defendant offered evidence tending to prove that the deed was made voluntarily, upon the understanding and agreement that the grantor should have a home with the grantees in the property, and that they were willing to let her have the home then, if she desired it. That testimony was excepted to by the appellant. The court sustained the exception, holding that the parties must be bound by the terms of the writing into which they had voluntarily entered. Although the plaintiff had failed to make out her case of fraud, and the court did not set aside the deed, they retained the bill to allow her to assert a claim for a vendor's lien for the purchase money under the prayer for general relief. In *Christopher v. Christopher*, the grantor, under a deed stating on its face a money consideration, filed a bill to enforce a vendor's lien on the land conveyed for the purchase money, which was alleged to be unpaid. The grantee admitted in his answer that he had not paid the purchase money called for by the deed, but by his own testimony sought to prove that the real consideration for the deed was "moneys advanced, services rendered, and necessities furnished" by him to the grantor, without showing how much money was advanced or the value of the services or necessities. This testimony was contradicted, but the report of the case does not show whether it was excepted to or not. The court held that proof was not admissible to show a consideration different in kind from that stated in the deed, and that the plaintiff was entitled to the vendor's lien.

In the first place, it is to be observed that in both of the cases just mentioned proof was held to be inadmissible to show, against a plaintiff insisting that a deed truthfully stated a money consideration, that the consideration was of a different kind. In the present case, all of the defendants aver in their answers, and testify as witnesses, that the deed was not made for a money consideration, and the plaintiff testifies to the same fact. No exceptions were filed by the defendants to testimony or to the sufficiency of the averments of the bill. Under section 36 of article 5 of the Code of Public General Laws, prohibiting any objections to be made in this court to the admissibility of evidence or the sufficiency of the averments of a bill,

unless it shall appear by the record that such objection was made by exceptions filed in the court below, this court has repeatedly held that on appeals from courts of equity, where no exceptions were taken below to the testimony, the case will be determined according to the evidence, whether it corresponds with the allegations of the bill or not. *Schroeder v. Loeber*, 75 Md. 195, 23 Atl. 579, 24 Atl. 226; *Engler v. Garrett*, 100 Md. 387, 59 Atl. 648; *Harwood v. Jones*, 10 Gill & J. 419, 32 Am. Dec. 180.

The appellants also contend that the appellee should be denied the relief for which he asks, because his own testimony shows that he had the deed of 1868 from Schaeffer made to his wife in order to defraud his creditors, and that he kept the lost deed from his children off of the public records for a similar purpose. The only evidence in the record on that subject is his own, and he testified that the suit on his bond, which caused him, under the advice of counsel, to have the first deed made to his wife, was decided in favor of the defendants, and no liability to any creditor arose from that source, and that he paid off the contested debt, which caused him to omit recording the second deed. There being no creditor before the court, and neither allegation nor proof of any existing creditor of the appellee who could be prejudiced by the execution of the proposed deed, we see no reason for reversing the decree appealed from on that ground. Nor do we think that the appellants are entitled to a vendor's lien on the land for the \$2,000 consideration mentioned in the lost deed, when all of the parties to the suit agree that the lost deed was not in fact executed for a pecuniary consideration.

We find in the record no sufficient reason for reversing the decree appealed from, and it will be affirmed.

Decree affirmed, with costs.

(105 Md. 630)

TURPIN et al. v. DERICKSON et al.

(Court of Appeals of Maryland. April 2, 1907.)

1. APPEAL—RIGHT OF REVIEW—PERSONS ENTITLED—PRIVITY WITH PARTIES.

A trustee reported to the court and had ratified a sale of a farm to two parties. Afterwards he made a deed to only one of them. This grantee subsequently deeded all his property to a trustee for the benefit of his creditors, who sold the farm to various persons. A decree was rendered reforming the ratification of the sale by the court to conform to the deed, and ratifying the sale by the grantee's trustee. *Held*, that the grantee should not be deprived of an appeal from the decree because he had deeded his interest to a trustee, who had admitted the allegations of the bill upon which the decree was rendered, in his answer thereto, and had proved their truth as a witness, where by the terms of his deed to the trustee the latter was to reconvey to him the surplus remaining after his creditors' claims had been satisfied.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, §§ 934, 938.]

2. SAME—PARTIES INJURED OR AGGRIEVED.

The fact that a decree in an action against a defendant reforms a ratification of sale by the court to make it conform to defendant's deed, thus benefiting him somewhat, does not deprive him of an appeal therefrom, where the decree provided for other relief, and he had filed an answer thereto denying most of its material allegations.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, §§ 947, 950.]

3. SAME—REVIEW—APPEAL FROM JUDGMENT BY CONFESSION.

Code Pub. Gen. Laws, art. 16, § 143, provides that a defendant against whom a bill has been taken pro confesso may appear before final decree and file his answer, and such proceedings shall be had as might have been had in case the answer had been filed before the passage of the decree. Section 140 gives the court power to require that the allegations of a bill taken pro confesso be supported by proof. *Held*, that where the defendant appeared, demurred, and pleaded, and testimony was taken, he was entitled to have the action of the court on the demurrer and pleas reviewed as well as the decree.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3464.]

4. PLEADING—PLEAS—AFFIDAVIT OF TRUTH.

Under the express provisions of Code Pub. Gen. Laws, art. 16, § 149, no plea or demurrer will be allowed to be filed, unless supported by affidavit that it is true in point of fact.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, § 861.]

5. SAME — AMENDED AND SUPPLEMENTAL PLEADINGS—LEAVE OF COURT TO AMEND.

Where a party in default was granted leave "to appear and answer the allegations," and filed an answer to which exceptions were sustained, and he was granted leave to file another answer, he cannot, in place of an answer, file a demurrer or plea without obtaining leave for that purpose.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, §§ 575, 832, 833.]

6. PARTIES—PLAINTIFFS—INTEREST.

Purchasers at a trustee's sale have no such interest in the properties before the sales are ratified as to give them the right to apply to a court of equity to correct the title to the property sold them by the trustee.

7. SAME.

A party who had held a mortgage on property, and had assigned it before proceedings were commenced to correct the title to the property, has no interest therein that would entitle him to appear as a plaintiff in the cause.

Appeal from Circuit Court, Wilcomico County, in Equity; Henry Lloyd, Judge.

Bill by James C. Derickson and others against John W. and H. Gale Turpin. From a decree for plaintiffs, defendants appeal. Decree reversed, and appeal dismissed.

Argued before BRISCOE, BOYD, PEARCE, SCHMUCKER, BURKE, and ROGERS, JJ.

S. R. Douglass and Robt. P. Graham, for appellants. F. Leonard Wallis, for appellees.

BOYD, J. In 1894 E. Stanley Toadvin, trustee, reported to the circuit court for Wilcomico county the sale of a farm in that county to John W. Turpin and H. Gale Turpin, which was duly ratified by the court. On September 20, 1895, he made a deed to John W. Turpin for said farm, in which he

recited that the sale had been made to him, and that the purchase money had been fully paid. On August 28, 1900, Mr. Turpin made a deed of trust to Alonzo L. Miles, by which he conveyed all his property for the benefit of his creditors. Mr. Miles sold part of that farm to Messrs. L. E. and J. D. Williams, and the rest to Messrs. W. K. Leatherbury and D. J. Elliott. John W. Turpin gave a mortgage on the farm to Jas. C. Derickson for \$1,500, the proceeds of which were used in part payment of the purchase money paid Mr. Toadvin. This bill was filed by Mr. Derickson and the four purchasers above named against the two Turpins, E. S. Toadvin, trustee, and Alonzo L. Miles, trustee, in which they prayed: (1) That the order of ratification of the sale made by Toadvin to the Turpins be set aside and reformed, so that John W. Turpin be shown to be the sole purchaser; (2) that the sales of Alonzo L. Miles, trustee, to the four purchasers, be ratified and confirmed; (3) that he be ordered to convey the lands to them free, clear, and discharged of any claim of the Turpins; and (4) for general relief. John W. Turpin and H. Gale Turpin filed separate answers to the bill. Exceptions were filed and sustained to each of the answers, but leave was granted to them to file sufficient answers by January 19, 1905. John W. Turpin filed another answer and H. Gale Turpin filed a demurrer to the whole bill, excepting as to a part of the fifth paragraph, to which he filed a plea, and a plea to the whole bill, in which he alleged that the case was *res adjudicata*. The plaintiffs filed objections to the demurrer and pleas of H. Gale Turpin being allowed and a general replication to the answer of John W. Turpin. The court afterwards passed an interlocutory decree against H. Gale Turpin, and granted the plaintiffs leave to take testimony. The trustees each answered, and testimony was taken. The docket entries show that exceptions of John W. and H. Gale Turpin were filed to the testimony, but they are not in the record. The court passed a decree in accordance with the first and second prayers of the bill, and from that decree John W. and H. Gale Turpin appealed.

The appellees have made a motion to dismiss the appeal. It is contended that John W. Turpin has no right of appeal because (a) his trustee, Mr. Miles, is in privity with him, holding his title and admitted in his answer the allegations of the bill, and proved their truth, as a witness, and (b) because the decree does not injure him, but enlarges his estate; therefore, if there was any error, it was not harmful but beneficial to him. If John W. Turpin was injuriously affected by the decree, the reason first mentioned (a) would not necessarily preclude him from appealing. The deed of trust not only recites that he claims to be able to pay his debts in full, but cannot without a sale of part of his property, but it expressly provides that, after payment of all the debts, claims, and de-

mands against him, the trustee shall pay the surplus over to him and reconvey the property which may remain. John W. may therefore be interested in several ways. In the first place, it is not shown by the record that it was necessary to sell all of the farm, if it be decided that he owns the whole of it. His answer alleges that Gale has paid and satisfied the debt due to James C. Derickson, who assigned his mortgage to him. If that be true, he will be subjected to unnecessary costs and expenses by a sale of the whole farm, if Gale does not require it, yet this decree not only provides for the reformation of the report of sale, by Toadvin to John W., but it ratifies and confirms the sales made by Miles. But, independent of that, the bill specifically charges John W. with fraud and made him a party defendant. He filed an answer denying most of the material allegations of the bill, and now, when the decree is against his contention, and in favor of the plaintiffs, it does not come with very good grace from the plaintiffs to insist that his appeal should be dismissed, because the decree benefited, and did not injure, him, although the bill shows him to be adverse to the contention of the plaintiffs. The motion as to him must be overruled.

The ground for the motion to dismiss the appeal of H. Gale is that there was a decree *pro confesso* against him, and hence it is contended he cannot appeal. As both sides seem to treat the interlocutory decree passed in this case as a decree *pro confesso* against Gale, we will not now stop to determine whether it is technically such. It simply decreed "that the plaintiff is entitled to relief in the premises as to the said H. Gale Turpin," and gave the plaintiffs leave to take testimony to sustain the allegations of the bill; but, whether or not that should be regarded as taking the bill as confessed, we are of the opinion that the motion must be overruled as to Gale. There seems to have been some apparent conflict between the early decisions in this state. In *Ringgold's Case*, 1 Bland, 12, the chancellor, in discussing the right of appeal, said: "Nor can any appeal be made generally available from a decree by default, * * * or, as it would seem, from a decree taking the bill *pro confesso*." See, also, page 19 of that volume, where the chancellor further considered the question, where, however, he added: "But this is a matter which yet remains to be carefully considered and finally determined by the proper tribunal." In *Chesapeake Bank v. McClellan*, 1 Md. Ch. 329, it was held that "an appeal will lie from every decision which settles a question of right between the parties, no matter whether the decision was adverse, or by consent, or default," although in *Gable v. Williams*, 59 Md. 46, it was held that an appeal would not lie from a decree by consent. In *Lippy v. Masonheimer*, 9 Md. 310, it was held that "a defendant, in an equity case, has the right of appeal, notwith-

standing he failed to appear, and an interlocutory decree was passed against him under Acts 1820, c. 161, in pursuance of which the cause was conducted to a final decree." It will be observed that the decree in that case was similar to the one now before us, as was the one in the case there relied on by the court. *Oliver v. Palmer*, 11 Gill & J. 137. Section 143, article 16, Code Pub. Gen. Laws, which embraces some of the provisions of Acts 1820, c. 161, in effect places a defendant in default in the same position as to his right to answer, whether there be merely an interlocutory decree, with authority to proceed ex parte, or a decree pro confesso against him, and section 140, which provides for cases where there is default in not appearing or not answering, is also liberal in its treatment of defendants, even after an order that the bill be taken pro confesso, and the practice requiring plaintiffs to support the allegations of the bill or petition by proof is very generally followed by the courts of this state. The subject is thus referred in 5 Ency. of Pl. & Pr. 1001: "In most jurisdictions, a defendant, against whom a final decree pro confesso has been rendered, may review the same by appeal or error. The legality of the proceedings prior to the order taking the bill as confessed is then open to inspection in the appellate tribunal, and the decree and bill may be examined to ascertain if the decree is warranted by the case made by the bill. But the decree cannot be attacked on appeal for the want of testimony or the sufficiency of the evidence." See, also, *Phelps' Jur. Eq.* § 57. Under our practice, when a bill is taken pro confesso, and the court requires testimony, the final decree must be sanctioned by the evidence, and not be based upon the allegations of the bill alone. *Miller's Eq. Proc.* 343; *Purviance v. Barton*, 2 Gill & J. 311; *Oliver v. Palmer*, 11 Gill & J. 436. In this case, as *Gale Turpin* did appear, demur, and plead, he would be entitled to have the action of the court on the demurrer and pleas reviewed, as well as the decree, under the principles above stated. We will therefore overrule the motion to dismiss his appeal.

The demurrer and pleas filed by him cannot avail him for several reasons. The pleas could not properly have been allowed, because there was no affidavit that they were "true in point of fact," as required by section 149 of article 16. *Wagoner v. Wagoner*, 76 Md. 311, 25 Atl. 338. If the second plea had been valid, the demurrer would have been overruled, as both were to the whole bill (*Miller's Eq. Pro.* 173; *Frederick Com'rs v. Frederick City*, 88 Md. 662, 42 Atl. 218); but, as it was invalid, it could not have had that effect, if the court below had stricken it out for want of a proper affidavit. The record does not show that the court took any action on the motion of plaintiffs not to allow the demurrer and pleas, but it seems to have proceeded on the theory that the de-

fendant had no right to file them. While the better practice would have been to have passed some order specifically disposing of them, the court was not required to allow them, under the circumstances. *Gale* was in default and upon his petition the court granted him leave "to appear and answer the allegations" of the bill by September 1, 1904. He filed an answer within that time, which was excepted to, and, the exceptions being sustained, he was granted leave "to file a good and sufficient reason," the record states, but doubtless the order said or meant "answer"; but, instead of filing an answer, he filed the demurrer and pleas, without obtaining any further leave of the court. As he had answered, and exceptions to the answer were sustained, the plaintiffs had the right to require him to answer further, and he could not, without leave of court, then file a demurrer and pleas. If a party in default desires to make his defense by way of demurrer or plea, he ought to obtain leave of the court to do so, and when, notwithstanding his default, he asks and is granted leave to answer, then files an insufficient answer which is excepted to, and leave is given to answer further, he cannot then file a demurrer or plea, without obtaining leave of the court. Our statutes granting indulgence to defendants in default were not intended to furnish them with the means of harassing and unnecessarily delaying plaintiffs, although, when the court sees that it is proper to permit pleas or demurrers to be filed, even after default, it can and ought to do so.

John W. Turpin, not being in default, was entitled to notice of the taking of the depositions; but we find nothing in the record to show that he did not receive notice, and, as we have already said, there are no exceptions to the evidence in the record. The examiner's return states, "Due notice thereof having been given," etc. Nor is there any evidence of a former adjudication of the questions involved. Indeed, the plea of res adjudicata filed by *Gale* was stricken out, and the pleadings that are in do not present that question. We will not, therefore, further refer to those matters, which were relied on by the appellants.

We have no hesitancy in holding that the purchasers at the sales made by Mr. Miles can have no standing in this proceeding, to obtain the relief sought. We know of no authority or practice that would justify such a proceeding by purchasers at trustee's sales. They have no such interest in the properties, before the sales are ratified, as would give them such right to apply to a court of equity to correct the title to the property sold thereby by the trustee, as is sought to be done by this bill, and it would be a novel proceeding under our practice to permit purchasers to file an original bill to obtain the ratification of a sale made and reported in another case. But, if Mr. Derickson was still a creditor, the

could, under the circumstances set out in the bill, apply for such relief as is sought, and could make the purchasers parties. They might have been made defendants, but Gale, being in default, cannot now take advantage of any error in reference to that (5 Ency. Pl. & Pr. 986; Luckett v. White, 10 Gill & J. 480), and John W. has not raised the question in such way as to give him the benefit of it.

The real difficulty in the way of the plaintiffs is the fact that, although the answer of John W. Turpin distinctly sets up the defense that James C. Derickson no longer had any interest in the mortgage, there is no evidence in the case to show that he had, and the copy of the mortgage in the record distinctly shows that he assigned the mortgage to H. Gale Turpin on August 16, 1904—a few weeks after the bill was filed and over two years before the decree was passed. It is not very clear as to how that certified copy of the mortgage got in the record; but it is the only one there, and the report of the examiner shows that the plaintiffs offered in evidence “land records in Wicomico county, Liber J. T. T. No. 14, folio 504 & 505, containing the deed from E. Stanley Toadvin, trustee to John W. Turpin and mortgage from John W. Turpin to James C. Derickson, both dated the 20th day of September, 1905. To be read and used as evidence in said cause.” Certified copies of those instruments are in the record, and they correspond with the descriptions given by the examiner as to dates and places of record. As the land records of Wicomico county could not be filed, we take for granted that these copies were filed in their place, although the proper practice was to file the copies with the examiner, inasmuch as they had not been filed with the bill, or to make some arrangement on the subject if all the parties were represented. We thus have proof by the plaintiffs themselves that, over two years before this decree was passed—some time before any testimony was taken—the only one of the plaintiffs who could possibly have any standing in court to obtain the relief prayed for had assigned the mortgage by which he claimed to be interested to the defendant against whom the proceeding was mainly directed. In short, he was no longer a creditor, and had no interest of any kind in this property, so far as disclosed by the record. Upon what principle such a decree could be passed at the instance of Derickson against H. Gale Turpin, after the former had assigned to the latter the mortgage, which was the sole foundation upon which he based his claim for relief, we confess our inability to understand. The facts alleged in the bill did present a strong equity in favor of Derickson, and, if proven, would undoubtedly have entitled him to relief; but, when he received his money and assigned the mortgage to Gale, what right did he have to take from

Gale any interest he had acquired in the property through the ratification of the report of sale made by Toadvin? It is not shown, or even alleged, that there are any other creditors of John W. who were such when he made the deed of trust; but, if there are, they are not parties to this bill, and Derickson does not represent them. From what we have said, it will be seen that the other plaintiffs had no right to obtain such a decree. How they got possession of the property, or why they expended large sums of money in improving it, as alleged in the bill, before the sale was ratified, is not explained; but it is clear that they neither had the right to possession, nor were under any obligation to improve the property, until the sales were confirmed, and hence neither of those facts could give them ground for the relief sought by this bill.

It follows that the decree must be reversed, and, as neither of the plaintiffs are entitled to the relief prayed, the bill must be dismissed.

Decree reversed, and bill dismissed; the appellees to pay the costs.

(105 Md. 435)

KING v. ZELL & MERCERET.

(Court of Appeals of Maryland. April 2, 1907.)

1. APPEAL.—HARMLESS ERROR.

The error in striking out the answer of a witness for defendant was harmless, where defendant was thereafter permitted to fully testify as to the conversations regarding which the witness had testified in his answer.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4194, 4200, 4201, 4203.]

2. GAMING—ACTION BY STOCKBROKER—CONTRACT FOR SALE OF STOCK—BURDEN OF PROOF.

In an action by stockbrokers to recover a balance due for certain stocks alleged to have been purchased for defendant, the burden of showing that the contracts were mere gambling contracts was on defendant; the law presuming their validity.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 24, Gaming, § 100.]

3. BROKERS—ACTIONS FOR ACCOUNTING.

Where, in an action by stockbrokers to recover a balance due for certain stocks alleged to have been purchased for defendant, there was no evidence of the market value of the stocks at the time of an alleged order to sell, an instruction that, even though plaintiffs failed to execute defendant's order to sell certain shares of stock, there was no evidence to show that defendant suffered any damage by reason thereof, was correct.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Brokers, § 33.]

4. SAME—FAILURE OF BROKER TO OBEY INSTRUCTIONS—DAMAGES.

A stockbroker, failing to obey the orders of a customer regarding the sale of stocks, is liable only for the actual loss which the customer sustains by reason of such failure.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Brokers, § 36.]

Appeal from Baltimore City Court; Daniel Giraud Wright, Judge.

Action by Zell & Merceret against Ernest F. King. Judgment for plaintiffs, and defendant appeals. Affirmed.

Argued before BRISCOE, BOYD, PEARCE, SCHMUCKER, BURKE, and ROGERS, JJ.

James McEvoy, Jr., and George R. Willis, for appellant. W. G. Bowdoin, Jr., and Frank Gosnell, for appellees.

SCHMUCKER, J. The appellees, Zell & Merceret, who are stockbrokers, obtained a judgment in the Baltimore City court against the appellant, Dr. E. F. King, for a balance due for certain stocks purchased for him, and he took the present appeal therefrom. The record contains four bills of exceptions, two to rulings on evidence, and two to the court's action on the prayers. There is evidence in the record tending to prove the following facts: On January 25, 1900, Zell & Merceret purchased on margin for Dr. King 10 shares of Cotton Duck common stock, and on February 8th they purchased in the same manner for him 20 shares of Guardian Trust Company stock. While these stocks were being carried on margin, the corporations which had issued them were merged into other companies, with the result that 9 shares of the Cotton Duck common stock were converted into six shares of stock of the United States Cotton Duck Company, and the 20 shares of Guardian Trust Company stock were converted into 10 shares of Maryland Trust Company stock, and the remaining 1 share of Cotton Duck common stock was sold. Zell testified that King consented to these conversions and sale of stock, and King denied consenting to them, but admitted that he had acquiesced in them, after they had been made, and continued to put up margins with Zell & Merceret for carrying the converted stocks, and received credit on his account for the dividends declared on them. Statements of account, 11 in all, of the dealings between the parties in reference to these stocks were from time to time rendered by Zell & Merceret to King, who received them and made no objection to their contents. On these statements, some of which appear in the record, King was charged with the price paid for the stock and interest thereon, and was credited with the amounts from time to time paid by him on account and interest, and a balance was struck. The Maryland Trust Company stock, which represented the Guardian Trust Company stock that had been purchased at a cost of \$126.58 per share, amounting in the aggregate to \$2,531.70, declined heavily, and Zell & Merceret made successive demands upon King for additional margin thereon. For a time he responded to these demands, putting up in all \$750 of margins in addition to the dividends credited to him; but thereafter he failed to respond to any further demands. Zell & Merceret thereupon, after giving notice to King, sold the Maryland

Trust stock, and credited the account with the proceeds of sale, and sued King in the Baltimore City court for the balance due on the account, and recovered the judgment from which the present appeal was taken.

Zell & Merceret both testified positively that the stocks involved in the account were actually purchased at the Stock Exchange in Baltimore, in which they held a membership, and paid for by them for the account of King, and Merceret testified explicitly that the firm were ready at all times to deliver the certificates to King, and would have done so at any time upon receipt from him of the balance due them thereon, and their testimony was uncontradicted. King testified that Merceret, before he went into the firm of Zell & Merceret, had frequently solicited and obtained from him orders for bucket-shop dealings in stocks, and that he (King) had indulged in bucket-shop stock transactions with several different parties, but in none of those ventures had there been any actual purchases of the stocks. He said: "I had it with several men of that kind, in what they call bucket shops, but I never dealt in any regular board way before on the exchange. That is the first I ever had in that way." King also testified that, after he had put up all the money he could spare as margins, he went to Zell & Merceret's office, and told Mr. Zell that he (King) had put up money enough on this thing, that it was no good, and further said to him: "I want you to sell it at the market price." He (Zell) replied: "It is suicidal to try to sell out at any such price as this. It is outrageous to think of doing so." I said: "I do not care whether it is outrageous or not. I want it sold, and I ain't going to put up any more money. I don't want it any longer." He said we are not going to sell it, but 'will carry it.' I said, "Then you will carry it at your own expense," and I went out." King said this occurred a few days after he paid the last \$100 on October 1, 1903. There is no evidence in the record showing what was the market price or the value of the stock at that time. Merceret, when on the stand, was asked in cross-examination whether he had any conversation with King after the purchase of the Guardian Trust stock, and, if so, what King said. The witness replied: "He said to me one day he met me on the street, he said: 'Frank I came to your office to see you, but you were not about.' He seemed very much worried at the time, Dr. King was. He said: 'I gave Mr. Zell the order to sell my Maryland Trust stock, and he said that it would be suicidal, and not to do it, that he would carry it.'" The court, upon motion of the plaintiff, struck out this answer, and its action in so doing forms the subject of the first exception.

The appellees, in support of their objection to this answer, rely mainly on section 3 of article 35 of the Code of Public General Laws, which in part provides as follows:

" * * * Nor shall it be competent in any case for any party to the cause who has been examined therein as a witness to corroborate his testimony when impeached by proof of his own declaration or statement made to third persons out of the presence and hearing of the adverse party. * * * " But there was here no attempt on the part of King to corroborate his own testimony, for he had not yet gone upon the stand when the answer of Merceret was made. We think the answer should not have been stricken out; but the defendant was not injured by the court's action, as he himself testified fully as to what he told Zell to do with the stock, and Merceret later on in his testimony said, without objection, that King told him that he had told Zell what to do with the stock.

The second exception was to the court's overruling the objection of the defendant, and allowing Zell, when on the stand, to answer the question whether he had said to King that he would carry the stock at his own risk, when King told him to sell it. The answer to the question, if there was any answer, does not appear in the record, and we cannot therefore say whether it tended to injure the defendant or not. It may be observed, in this connection, that Zell elsewhere in his testimony denied that any interview between him and King in reference to the sale of the stock ever occurred.

At the close of the case, the plaintiffs offered the two following prayers, both of which the court granted: "(1) The plaintiffs pray the court to instruct the jury that there is no evidence in this case legally sufficient to show that, when the orders to buy the stocks mentioned in the evidence were given by the defendant to Merceret, one of the plaintiffs, said transactions were understood and intended by the parties to be a dealing in the rise and fall of the market prices of said stocks, and that the stocks were not intended by them to be bought in fact for delivery to the defendant, and that the difference in the rise and fall of said market prices of said stocks, and the profits and losses, as the case might be, was to be settled and adjusted between the plaintiffs and the defendant by the payment by the plaintiffs to the defendant of the amounts of any rise in the market prices of said stocks, and by payment by the defendant to the plaintiffs of the amounts of any losses on account of any fall in the market prices; that is to say, the jury are instructed that said dealings between the parties were not gaming or wagering transactions, and the jury are further instructed that there is no evidence in the case legally sufficient to show that said transactions were other than bona fide and lawful business transactions. (2) The plaintiffs pray the court to instruct the jury that, even though they may find from the evidence that the defendant directed the plaintiffs in the month of October, 1903, to sell his 10 shares of Maryland Trust Company stock, and that the plaintiffs

failed or neglected to execute such order, there is no evidence in the case legally sufficient to show that the defendant suffered or sustained any pecuniary loss or damage by reason thereof."

There was no error in granting either of these prayers. We have already referred to the positive testimony of Zell & Merceret that the stocks were actually bought and paid for and carried by them. That testimony is uncontradicted. Even King did not undertake to say that he intended these stock purchases made through Zell & Merceret to be merely fictitious, and not actual ones, or to be mere deals in the rise and fall of the market prices of the stocks; the losses or profits to be adjusted between the parties. The law presumes the validity of the contracts, and the burden of proof to show that they were mere gambling contracts is upon the defendant. *Dryden v. Zell & Merceret* (decided by this court November 18, 1906) 65 Atl. 83. The second prayer is correct, because, there being no evidence in the record of the market value of the stocks at the time of the alleged order to sell them, the jury could not determine what, if any, loss was suffered by the defendant through the failure to execute the order, if they should find that the order had in fact been given.

The defendant offered the following three prayers, which the court rejected.

"(1) The defendant prays the court to instruct the jury that if the jury shall find that the transactions between the plaintiffs and the defendant were intended to be dealings in the rise and fall of the market prices of the stocks, and the same were not to be delivered, but the differences between the prices on the day of the purchase and the prices on the day of settlement to be adjusted, then the plaintiffs cannot recover. (2) That if the jury believe from the evidence that the defendant gave to the plaintiffs an order to purchase the stocks mentioned in the account in this case, and that the defendant, upon the receipt of a demand on behalf of the plaintiffs for the payment of further margin, called upon the plaintiffs and declined to make any further payment, and directed the plaintiffs to sell the stocks, and that the plaintiffs declined to so sell the stocks, and did not sell the same in accordance with the direction of the defendant, then the plaintiffs cannot recover in this case. (3) That unless the jury believe from the evidence that the stocks mentioned were actually purchased by the plaintiffs, and were in the possession of the plaintiffs from the date of the purchase of the same, and ready to be delivered to the defendant upon the payment of the balance of the purchase money therefor, their verdict must be for the defendant."

The plaintiffs excepted specially to each one of the defendant's prayers. They excepted to the first for want of legally sufficient evidence to support its hypothesis, or to show that the stock transactions between

the plaintiffs and defendant were intended to be mere dealings in the rise and fall of the market price of the stocks. They excepted to the defendant's second prayer: (1) For want of evidence legally sufficient to support its hypothesis, and (2) because there is no evidence in the case to show that the market value of the stocks referred to at the time the alleged order to sell the stocks was given was any higher or greater than the market value of the said stocks at any period subsequently thereto, and (3) because there is no evidence in the case to show that the defendant suffered any damage by reason of the failure of the plaintiffs to execute the order for the sale of the stocks alleged to have been given by the defendant to the plaintiffs. They excepted to the third prayer because it ignores the sale of one share of Cotton Duck common stock and the conversion of the remaining nine shares of that stock into six shares of United States Cotton Duck stock and the merger of twenty shares of Guardian Trust stock into ten shares of Maryland Trust stock, and the alleged order of the defendant to the plaintiffs to sell the stocks.

There was no error in rejecting the defendant's first and third prayers. Nor was there error in rejecting his second prayer, unless it be the law, as contended by the appellant, that the failure of a broker to execute an order to sell stocks which he is carrying for a customer, instead of making him responsible to the customer for any loss caused by his failure to execute the order, releases the customer from liability to him for loss incurred in carrying the stocks before the order to sell was given. We are aware of no authority to support that contention. The cases of *Zimmermann v. Heil*, 33 N. Y. Supp. 391, 86 Hun, 114, affirmed in 156 N. Y. 703, 51 N. E. 1094, *Rogers v. Wiley*, 131 N. Y. 527, 30 N. E. 582, and *Jones v. Marks*, 40 Ill. 313, cited by the appellant in that connection, do not support it. On the contrary, they treat contracts between stock-brokers and their customers like contracts between other persons, and support the sound and rational doctrine that a customer, in an action against his broker for failure to obey his instructions, can only recover the actual loss which he has sustained by reason of such failure.

Finding no reversible error in the rulings of the learned judge below, we will affirm the judgment appealed from.

Judgment affirmed, with costs.

(105 Md. 452)

MURPHY v. PENNIMAN et al.

THOMAS v. SAME.

(Court of Appeals of Maryland. April 2, 1907.)

1. CORPORATIONS — OFFICERS — MISMANAGEMENT OF CORPORATE AFFAIRS — ACTION TO ENFORCE LIABILITY — PLEADING.

A bill in equity by the receivers of an insolvent corporation to enforce the liability of

the directors for certain losses was not demurrable on the ground that one of the receivers was also a director of the company, the suit being in reality under the control of attorneys appointed by the court to institute the same in the name of the receivers, though the practice of a person in his representative capacity, suing himself as an individual, is not to be commended.

2. SAME.

The bill, in a suit against the directors of an insolvent corporation to hold them personally liable for certain losses sustained by the corporation, alleged that the directors and each and all of them failed to perform their professional duties to diligently and carefully administer the affairs of the company as they were bound to do; that they permitted the assets of the company to be wasted and the corporate property lost by negligence so culpable as to amount to a legal breach of trust; that their acts and omissions were abuses of their authority; that they failed to do what men of ordinary caution ought to have done to protect the interests of the corporation; that they disregarded not only the charter and by-laws of the company and general laws of the state, but the ordinary rules of business. The bill made specific charges of negligence which were alleged to have resulted in loss to the company, alleging the failure to attend meetings, failure to use due diligence in the selection of subordinate officers, and to watch the acts of executive officers and agents, and alleged abuses of authority in making loans to officers and directors of the company, in contravention of its charter and by-laws. *Held*, on a demurrer to the bill by one of the directors, that the bill was not demurrable as being indefinite and uncertain and not stating with sufficient certainty any fact which would give the plaintiffs cause of complaint against him.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, § 2280.]

3. EQUITY — BILL — MULTIFARIOUSNESS.

A bill in equity by the receivers of an insolvent corporation, to enforce the liability of the directors of the company for certain losses, made charges of negligence which were alleged to have resulted in great loss to the company against the directors and each and all of them, in that they failed to attend meetings, failed to use due diligence in the selection of subordinate officers and agents, and to watch the acts of the executive officers and agents, and to do what men of ordinary caution ought to have done to protect the interests of the corporation, and alleged abuses of authority and breach of their contractual relations with the corporation in wasting its assets and in making loans to officers and directors of a company in contravention of its charter and by-laws. *Held*, on a demurrer to the bill by one of the directors, the bill was not demurrable as being multifarious.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Equity, § 340.]

4. SAME — PLEADING — DEMURRER — SUFFICIENCY OF DEMURRER.

A demurrer to a bill in equity, on the ground that it combines matters triable by a court of equity with those triable at law, should specify what is alleged to be triable at law.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Equity, §§ 506, 510.]

5. CORPORATIONS — OFFICERS — MISMANAGEMENT OF CORPORATE AFFAIRS — ACTION TO ENFORCE LIABILITY — PLEADING.

A bill in equity by the receivers of an insolvent corporation, to enforce the liability of the directors of the corporation for certain losses, alleged that the loans on which the losses occurred were made with the approval of the board of directors, in direct violation of its charter and by-laws, which prohibited loans to any

officer or employé of the company, and that all the directors had constructive, if not actual, notice of loans. It alleged that the loans were never fully paid, but that an amount named, which was less than 18 per cent. of the amount of the loans alleged, was a loss to the corporation. *Held*, on a demurrer to the bill by one of the directors, that their liability depending not upon the provisions of the statute alone, but, so far as the director demurring was concerned, merely upon his alleged negligence in not attending meetings of the board, and especially since plaintiffs relied on constructive notice of the loans of such of the defendants as did not have actual notice, the bill was demurrable as not specifying the particular loans on which the losses occurred.

6. SAME—LIABILITY FOR CORPORATE ACTS—MISAPPROPRIATION OF CORPORATE FUNDS.

Where the charter of a corporation provided that no loans should be made to any officer or employé of the corporation, and for any violation of that provision declared that the parties consenting thereto should be liable for the amount so loaned and all losses or expenses that might result therefrom, mere absence of a director from a special meeting of the board at which certain forbidden loans were made was not sufficient to show his consent to the loans; nor can his absence from the next succeeding regular meeting at which the loans were ratified be so construed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, §§ 1376, 1377.]

7. SAME.

Where an officer of a corporation, who had misappropriated corporate funds, offered to give, and it was agreed by the directors to accept, his notes with certain securities as collateral in satisfaction of the misappropriations, the taking of the notes did not constitute a making of loans of corporate funds, within the meaning of the charter, prohibiting loans of corporate funds to corporate officers or employées.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, § 1377.]

8. SAME—ACTION TO ENFORCE LIABILITY—NATURE OF ACTION.

Where the charter of a corporation prohibited loans of corporate funds to its officers and employées, and declared that the parties consenting to any such loan should be liable for the amount so loaned and all losses or expenses that might result therefrom, "the losses and expenses" incurred should be recovered in equity, although not "the amount so loaned," independent of actual losses and expenses, as that would be a mere penalty.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, § 1416.]

9. SAME.

Where directors of a corporation, with knowledge that an officer of the corporation had squandered assets of the corporation, continued him in actual control and management of its affairs as its treasurer, and thereafter promoted him to another position of greater responsibility, in which position he continued to act, and this manner of dealing with the officer was one of the causes of wrecking the company, they were responsible for the losses so sustained by the corporation.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, §§ 1352, 1355.]

10. SAME.

Where the directors of a corporation, as a result of their negligence, failed to renew the bond of a corporate officer, as required by the by-laws, and negligently allowed it to lapse and become void, they were liable for the loss thereby resulting to the corporation.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, § 1352.]

11. BANKRUPTCY—INVOLUNTARY PROCEEDINGS—CORPORATIONS—APPOINTMENT OF RECEIVERS—JURISDICTION.

Bankr. Act July 1, 1898, c. 541, § 4, subd. b, 80 Stat. 547 [U. S. Comp. St. 1901, p. 3423], as amended by Act Feb. 5, 1903, c. 487, § 3, 32 Stat. 797 [U. S. Comp. St. Supp. 1905, p. 683], provides that any corporation engaged principally in manufacturing, trading, printing, publishing, mining, or mercantile business shall be subject to involuntary bankruptcy proceedings, and the section further provides that private banks, but not national banks or banks incorporated under state laws, may be adjudged involuntary bankrupts. Code Pub. Gen. Laws, art. 23, § 376, provides that, whenever any corporation shall have been determined by legal proceedings to be insolvent, it shall be deemed to have surrendered its corporate rights and franchises, and may be adjudged to be dissolved on bill filed for that purpose. Section 377 provides that whenever any corporation mentioned in section 376 shall have been determined to be insolvent, all payments, etc., which would be void if made by an individual person shall, to like extent, be void when made by the corporation, and that, when the corporation shall have been adjudged dissolved, all its property shall be distributed to creditors in the same manner as that of an insolvent person. *Held*, that the bankruptcy act had no application to a corporation whose charter authorized it to deal in notes, loans, and bonds, and, if it had, it did not take away any jurisdiction of the state courts to appoint receivers to take charge of the assets of such a corporation when insolvent, especially where no proceedings in bankruptcy had been commenced against the corporation.

12. CORPORATIONS—INSOLVENCY—POWER OF RECEIVERS.

The receivers of an insolvent corporation having been directed to enforce the liability of the directors thereof for certain losses, thereafter one of them filed a provision with the court, stating that a proposed settlement with part of the directors would be beneficial to the estate; that it was to be made on the distinct understanding that the other directors were not to be discharged, but that the suits against them were to be prosecuted to a decree as if settlement had not been made, and the receivers were thereupon, by order of the court, authorized to enter into settlement and compromise, as set forth in the petition. *Held*, that the receivers had no authority, under the order of the court, to execute a release, under seal, and that such a release was ineffective, and that a settlement made in pursuance of the order of the court would not have the effect of wholly discharging the other directors.

Appeals from Circuit Court of Baltimore City; Alfred S. Niles, Judge.

Bill by George Dobbin Penniman and another, receivers of the City Trust & Banking Company, against Frank J. Murphy, William B. Thomas, and others, to enforce their liability as directors for certain losses. Frank J. Murphy filed two pleas which were overruled, and William B. Thomas filed demurrers to the bill which were also overruled, and they appeal. Order overruling demurrers and pleas affirmed, excepting in so far as it overruled the demurrer to the nineteenth paragraph of the bill, and order reversed as to that, and cause remanded for further proceedings.

Argued before BRISCOE, BOYD, PEARCE, SCHMUCKER, and BURKE, JJ.

William S. Bryan, Jr., for Murphy. Francis Neal Parke and Jas. A. C. Bond, for

Thomas. Clifton Doll Benson and Thomas Hughes, for Penniman and others, receivers.

BOYD, J. The bill of complaint was filed in this case in the name of George Dobbin Penniman and Campbell Carrington, receivers of the City Trust & Banking Company, against 17 of the 18 directors of that company, who were elected at the annual meeting held on January 14, 1903. The company was placed in the hands of the receivers on June 6, 1903, by an order of circuit court No. 2 of Baltimore City, on a bill filed by John A. Sheridan Company and others, which, amongst other things, alleged the insolvency of the company, which the answer admitted. The bill in this case alleges that the defendants were all of the directors of the company from the election on January 14, 1903, excepting one Frank J. Kohler, who left the state in the early part of June, 1903, and whose whereabouts is unknown to the complainants. Thomas Hughes and Clifton Doll Benson, attorneys, were directed by the court to institute and conduct, in the name of the receivers, the legal proceedings necessary for the enforcement of the liability of the directors of the company for certain losses, and this bill, as well as another against the directors elected in 1902, which will be considered in a separate opinion, was accordingly filed by them. Frank J. Murphy, one of the defendants, filed two pleas, which were overruled, and Wm. B. Thomas, another defendant, filed demurrers to the bill, which were also overruled. Appeals taken by those defendants from the order overruling their pleas and demurrers, respectively, present the questions for our consideration. We will consider that of Mr. Thomas. There are 12 causes for the demurrers assigned, some of which can be considered together.

1. It will be well to first consider the cause assigned which is numbered 2. It is that Campbell Carrington is both a party plaintiff and a party defendant, and that his position as defendant is wholly antagonistic, inconsistent, and irreconcilable with his position as plaintiff. Mr. Carrington was one of the directors of the company, and was also one of the receivers. It is not a practice to be commended to have a person in his representative capacity sue himself as an individual, especially under such circumstances as this bill discloses. It would generally be better for a receiver so situated to resign, or, in case he declined to do that, for the court to remove him, and appoint another, if necessary, for, even if suit be brought in the name of the corporation, the receiver has such control over its books, papers, effects, etc., as to make it very undesirable to continue in that control when a suit, particularly of this character, is being carried on against him. But in this case the court, having jurisdiction of the trust, authorized and directed Messrs. Hughes and Benson to institute and conduct the proceedings in the

name of the receivers, and hence, although the receivers are the technical plaintiffs of record, the solicitors in reality have control over the case. Any interference or obstruction placed in the way of the solicitors by the receivers, or either of them, could be reported to and corrected by the court having jurisdiction over them, and hence the reason for the rule prohibiting, or at least disapproving of, the same individual being on both sides of the record, does not have the same force as it ordinarily would. Of course, we do not mean to intimate that either of these receivers have acted, or would act, improperly about the suit, as there is no such suggestion in the record, but we are speaking of what might happen under such conditions. While the practice of a person appearing on both sides of the record was condemned in *Owens v. Crow*, 62 Md. 497, it was referred to as one "which has to some extent prevailed," and neither in that case nor in those of *Stein v. Stein*, 80 Md. 306, 30 Atl. 703, and *Loney v. Loney*, 86 Md. 655, 38 Atl. 1071, did this court refuse to consider the questions involved by reason of such practice. Of course, such a suit at law would present another question (*Grahame v. Harris*, 5 Gill & J. 489), but in a court of equity, "where the court can determine the respective rights of the parties without much regard to whether they appear as plaintiffs or defendants" (15 Ency. Pl. & Pr. 482), the rule is not of such importance as to require the court in all cases to dismiss a bill, or sustain a demurrer to it, because such practice has been followed. The other defendants cannot be injured, and we do not deem this a sufficient cause for the demurrer, under the circumstances of this case.

2. The first, third, and fourth causes assigned are to the whole bill, and may be considered together. They allege that the bill does not state a case which entitles the plaintiffs to such discovery or relief as is sought against this defendant; that it is vague, indefinite, ambiguous, uncertain, and argumentative, and does not state with sufficient certainty any fact which would give the plaintiffs cause of complaint against him. There is no longer any question in this state about the jurisdiction of equity in cases of this character. *Emerson v. Galther*, 103 Md. 564, 64 Atl. 26, and cases there cited. In *Booth v. Robinson*, 55 Md. 438, Alvey, J., in delivering the opinion, said that the cases "all concur in holding that, in equity, the directors are personally liable for the consequences of their frauds or malfeasance, or for some such gross negligence as may amount to a breach of trust, to the damage of the corporation or its stockholders." That principle has been repeated in *Fisher v. Parr*, 92 Md. 245, 48 Atl. 621, and *Emerson v. Galther*, supra. There is no charge of fraud against the defendants in this bill, and, with the possible exception of the charge of making loans to officers and directors, it can

hardly be claimed that there is any malfeasance charged which resulted in loss. So the question really is whether there is such negligence charged against Thomas as makes him responsible, if proven. The bill is undoubtedly very skillfully drawn, although it is difficult to avoid the impression, when reading it, that some of the allegations have been made in a way that may make them sufficient on demurrer, but will be very difficult to prove. The expression running through the bill of "the said directors, and each and all of them," was evidently used to meet one of the questions raised in *Fisher v. Parr*, as to whether all of the defendants were charged with the acts of negligence, etc., relied on; but the use of it in some connections would seem to be inappropriate, and to make some of the allegations uncertain as to the meaning of the pleader. For example, in paragraph 7, division "a," the several defendants are left in great uncertainty as to whether they are charged with permitting loose conduct of the affairs of the company by being absent from meetings of the board, or by being present and taking part in them. Paragraph 8 is in direct conflict with that statement in 7a which alleges "the failure of each and all of said directors to keep in touch with its management by attendance upon meetings of the board," so far as W. F. Wheatly is concerned, for it shows that he attended every meeting during the year 1903, and it also shows that Messrs. Schulze, Pollock, Reitz, Blake, and Carrington attended six out of the eight meetings; there being only five general and three special meetings that year. But, while we see this and other apparently conflicting statements, the demurrers we are now considering are to the whole bill, and, under the well-established rules of equity practice, cannot be sustained, if there be sufficient in the whole bill to require the defendant to answer, although some parts of it may be defective.

If we are to be governed by the decision of *Fisher v. Parr*, which we must be, it seems clear that the grounds of demurrer now under consideration, being to the whole bill, cannot be sustained. The bill alleges that the said directors, and each and all of them, "failed to perform each and every of their official duties to diligently and carefully administer the affairs of the company, as they were" bound to do; that "each and all of them permitted the assets of the company to be wasted and the corporate property lost and squandered by negligence so culpable as to amount to a legal breach of trust"; that "their acts and omissions were not mere defaults or mistakes of judgment, but were inattentions to the duties of their trust and abuses of their authority"; that "they failed to do what men of ordinary caution and prudence ought to do to protect the interests of the corporation"; that they disregarded, without good cause, not only the charter and by-laws of the company and general laws

of the state, which prescribed the limits of their authority, but the ordinary rules and habits of business, by which even fairly prudent men are guided; and many other similar charges. But it does not stop there. It undertakes to make specific the charges of acts of negligence which are alleged to have resulted in great loss to the company. It specifies, amongst other things, the failure to attend meetings, failure to use due diligence in the selection of subordinate officers and agents, and to watch and scrutinize the acts and doings of the executive officers, agents, and fellow directors, abuses of authority and breach of their contractual relations with the company, in wasting the assets and in making loans to officers and directors of the company, in contravention of its charter and by-laws, and alleges many other acts of omission and commission. It goes into considerable detail, and, as most of the charges are covered by *Fisher v. Parr*, they cannot be reached by demurrers to the whole bill. We are therefore of opinion that these causes are not sufficient to authorize the demurrer to be sustained.

3. The fifth, sixth, and eighth grounds are that the bill combines and unites separate and distinct demands against the defendant, and improperly joins wholly independent matters; that it joins the defendant with other defendants with whom he has no concern and no joint liability, as appears by the complainants' own showing. These present the question as to whether the bill is multifarious. But there can be no doubt that the bill charges the defendant with responsibility for these acts alleged. All of the defendants, according to the allegations, were directors from the election of January 14, 1903, until the receivers were appointed. The case therefore differs materially in that respect from *Emerson v. Gaither*. In that case there were 17 defendants, 5 of whom were directors from January 1, 1898, to December 22, 1900, when the bank closed, while the others served for different periods of that time. Some of the loans resulting in losses were not made until after some of the defendants ceased to be directors, others before some of them became such, and there were 30 separate and distinct transactions relied on. The bill failed to show that some of the defendants were in any way connected with or responsible for many of those transactions, or that others had anything to do with other acts alleged. That bill was clearly multifarious as to the defendants whose demurrers were sustained; but we overruled that of Joshua Horner, on the distinct ground that he had been a director throughout the period involved in that case—from January 1, 1898, to the failure of the bank. We said: "Mr. Horner and some others were directors from the organization of the bank to the day it failed. We do not think that such of the defendants can complain by reason of there being so many different causes of action alleged in the bill,

as all of them are more or less connected and related to the same general question—the negligence and misconduct of the directors in the discharge of their duties from January 1, 1898, to December 22, 1900, when the bank closed.” That applies to all of these defendants (excepting in so far as hereinafter stated), and in this bill it was distinctly alleged that all of them were connected with or in some way responsible for all of the acts complained of, some by acts of commission, and others of omission—failure to discharge the duties which they had assumed as directors. We therefore are of the opinion that the fifth, sixth, and eighth causes assigned are insufficient to sustain the demurrer.

4. The seventh ground alleges that the bill combines matters triable and determinable by a court of equity with those triable and determinable at law. It is only necessary to say that, if that be a ground for demurrer, it should specify what is alleged to be only triable and determinable at law. In short, the demurrer should have been aimed at those matters, and not at the whole bill, because it contains them, although the demurrer admits that there are other matters within the jurisdiction of a court of equity.

5. The ninth ground is that in the eighteenth and nineteenth paragraphs certain matters are alleged, which, if they give complainants cause of complaint, are matters of complaint against the other defendants, but not against him, nor of relief against him, and the tenth ground is that these paragraphs allege certain matters which, if they give any cause of complaint against the defendant, are triable and determinable at law, and ought not to be inquired of by this court. The eighteenth paragraph sets out section 7 of the charter of the company, which authorized it, amongst other things, to deal in notes, loans, and bonds, and concludes: “Provided, that no loan shall be made directly or indirectly to any officer or employé of the said corporation: and for any violation of this provision, the party or parties consenting thereto, directly or indirectly, shall be liable to said corporation for the amount so loaned and all losses or expenses that may result therefrom.” The nineteenth paragraph alleges that at various and frequent times divers loans were made through the executive committee, “with the sanction and approval of its board of directors, and each and every of its directors, and in direct violation of its charter and by-laws, and that all the aforesaid directors had constructive, if not actual, notice of the said loans, and are in consequence chargeable and responsible therefor.” It alleges that the loans were never fully paid, but still continue as a loss to the company, to the extent of \$22,378.48. It then sets out a number of loans made by the executive committee, and in each instance those of the directors present when the loans were made are stated, and it is alleged that they

were ratified and approved at the next succeeding meeting of the board of directors, and the members of the board present are named. Mr. Thomas was not alleged to have been present at the board meetings, excepting when one loan of \$2,500 to Pollock was ratified and approved. Then, under head of “Loans Made by the Board of Directors,” it is alleged that on February 1, 1903, or thereabouts, “loans were made to Frank J. Kohler, who was treasurer of the company, amounting to \$50,000, at a special meeting of the board,” and those present are named. It then alleges that they were ratified and approved at the next succeeding regular meeting of the board, held February 11th, and those then present are named. In neither instance was Mr. Thomas present. Then follows a list of “Loans Made by President and Treasurer,” and the names of those present when they were made, as well as all the directors present at subsequent meetings of the board when they were ratified and approved. Thomas was present when two of those were ratified and approved. Six loans are alleged to have been made to Cochran and Stevens, amounting to \$25,400, which were indorsed by Frank J. Kohler as security, and ratified and approved February 11th, when Thomas was not present; two on February 14th, to Baltimore Building & Construction Company, of \$2,550 and \$5,000, and one on March 7th, of \$2,550, which were indorsed by Robert H. Pollock, a director, and Frank Kohler, who was treasurer, which were approved on March 11th, when Thomas was present. It is then alleged that other illegal and improper loans and investments of funds were made in violation of the charter and in disregard of their duty as directors, the particulars of which the complainants have not been able to ascertain with such certainty as to warrant them setting them forth at length; but they allege that great loss was occasioned by reason thereof.

The loans thus specified in paragraph 19 amount to \$127,400, out of which the plaintiffs only claim there is still due \$22,378.45—less than 18 per centum of the whole. Inasmuch as the bill undertakes to give, to the very cent, the amount of alleged loss on these loans, it is difficult to understand why it did not specify the particular loans which caused that loss. It might work great hardship on Mr. Thomas, as well as other defendants, to withhold from them the knowledge that the plaintiffs must have, if they correctly state the precise sum lost and thereby require them to defend loans amounting to \$127,400, instead of only those by which the loss is alleged to have been incurred. Such practice should not be permitted by a court of equity in a case where the liability of defendants depends not upon the provisions of a statute alone, but, so far as Mr. Thomas is concerned, merely upon his alleged negligence in not attending meetings of the board,

and especially when the bill shows on its face that the plaintiffs rely on the constructive notice of the loans to such of the defendants as did not have actual notice. For that reason alone, we would feel called upon to hold the nineteenth paragraph bad on demurrer; but that is by no means the only ground for so holding it.

The alleged loans of \$50,000 to Frank J. Kohler on February 1, 1903, "or thereabouts," were made at a special meeting of the board, at which the bill shows Thomas was not present. Conceding, as we must under the decision in *Fisher v. Parr* and other authorities, that directors may be liable for losses occurring through their habitual nonattendance of meetings of the board, the principle should not be carried to the extent of holding a director (especially one living at a distance from where the company's business is conducted) liable over what occurred at a special meeting, at which he was not present, unless there be some allegation (and proof when evidence is taken) to connect him with the illegal acts beyond his mere absence. We are not willing to give our approval of any doctrine that would require directors to attend every regular meeting of the board, much less every special meeting. If such principle is announced as the law of this state, it will be impossible in many cases to obtain responsible persons as directors. In the city of Baltimore, it is, doubtless, true that financial institutions have often had the benefit of the advice and aid of the most competent men in the city, for little or no compensation, although their holdings of stock were small as compared with other stockholders; but such men would hesitate to continue as directors in such institutions, if they are to be held responsible for such losses as are alleged in this paragraph, on the theory of this bill. We do not mean to intimate that directors should be free from liability simply because they were not present at a meeting of the board when some unlawful or improper act was done, which resulted in loss to the company, if it was their duty to be there, and their absence in any way caused the loss, nor do we mean to say that there may not be cases in which the burden would be on the directors to allege and prove sufficient excuse for nonattendance, although the bill does not specifically allege the contrary; but we do say that there is nothing in this bill, as to these loans, which shows that W. B. Thomas was "consenting thereto, directly or indirectly," to use the language of the charter. Certainly his absence from a special meeting, of which it is not alleged or suggested that he had notice, which the by-laws expressly require, was not sufficient, and his mere absence from the next succeeding regular meeting (February 11th), at which it is alleged that the loans were ratified and approved, were not sufficient to show his consent, as contemplated by the charter. As the bill affirmatively shows he was not present

on either occasion, there must be some allegation to show his consent, directly or indirectly, and his mere absence from the meeting, if it be assumed he had notice, cannot be fairly said to be "consenting thereto, directly or indirectly," to an act for which the statute imposes a penalty on parties so consenting.

The bill does not disclose the effect of the loans being subsequently "ratified and approved" at a regular meeting. It is not easy to see how that could have caused any loss to the company, for if Kohler got \$50,000 on February 1st, the subsequent approval or disapproval of it would in all probability have been of little consequence, as Kohler already had the money; but, assuming that it did in some way cause some loss, we are of the opinion that Thomas' absence from that meeting does not make him liable, under that provision of the charter, as it cannot be properly so construed. We have not thought it necessary to refer to the fact that February 11th was the first regular meeting after the organization for 1903. It would be extending the doctrine of requiring the attendance of directors very far to hold one responsible for such a statutory liability for nonattendance on that occasion.

There is another matter suggested, although not very clearly shown by the bill, with reference to this \$50,000 which would relieve the directors of any responsibility for loss on account of that sum, if the facts are as they appear in the bill to be. The date and names of those present at the time of this loan are the same as those set out in paragraph 12, where it is alleged that it was agreed to accept notes of Kohler for \$78,000, with certain securities as collateral, in satisfaction of his admitted misappropriations of the assets of the company, and that the receivers realized upon those securities a sum not exceeding \$50,000; there being a large balance still due and owing by Kohler. If the \$50,000 of loans referred to in paragraph 19 be part of those mentioned in 12, as they seem to be from what is stated in the bill, surely there can be no principle of justice or equity which would hold the directors who made that settlement responsible, under the provisions of the charter forbidding loans to officers or employes—much less any of them who were not present. They could not properly be said to be "loans," within the meaning of that section. If, as the bill alleges, Kohler had misappropriated \$78,000 of the company's assets, can it be that the directors could not take his notes, with collateral security, for the purpose, not of making loans to him, but of securing the company? If they had the opportunity to thereby secure the company, and had neglected to do so, would not this bill have charged them with such neglect? It certainly could have justly done so, unless it were shown to have been within their discretion to determine whether or not it was best for the company. This

may be illustrated by the law applicable to national banks. They cannot make loans on real estate; but it is very generally, if not universally, held that a national bank may take a mortgage on real estate to secure a loan previously made. Of course, a corporation would not be permitted to evade the provisions by permitting officers to take the funds of the company, and then afterwards give notes to secure them; but this bill shows that Kohler appropriated the assets of the company without any authority from it or any of its officers. It alleges that he acknowledged "the defalcations," and offered to give, and it was agreed to accept, "the personal notes of the said Kohler dated February 3d and 7th, and aggregating \$78,000, with certain securities as collateral, in satisfaction of his said misappropriations." If, then, the loans of \$50,000 referred to in paragraph 19 were a part of these notes, the directors could not be held liable, under its charter, for making loans to Kohler, but they were simply doing their duty, in endeavoring to secure the company against his defalcations.

So without determining whether the alleged loans to Cochrane and Stevens, indorsed by Kohler, and those to the Baltimore Building & Construction Company, indorsed by Pollock and Kohler, referred to in this paragraph could be held to be loans, within this section of the charter, as the bill gives very little information about them, there were loans of at least \$50,000, out of the \$127,400, for which the defendant could not be held, yet the bill does not show on which of the loans the losses amounting to \$22,378.45 were incurred, as it should, and the demurrer to the nineteenth paragraph should have been sustained, as presented by the ninth ground stated in the demurrer. We think the tenth ground was properly overruled, as "the losses and expenses" incurred could be recovered in equity, if at all, although not "the amount so loaned," independent of actual losses and expenses, as that would be a mere penalty. *Fisher v. Parr*, supra.

6. The eleventh ground of demurrer alleges that paragraphs 11, 12, 13, and 14 do not give the complainants any cause of complaint against the defendant or of relief against him. We have already said sufficient about the \$78,000 to indicate our views on those alleged loans; but, regardless of any responsibility for them, the bill alleged, in paragraph 12, that "the aforesaid settlement with the said Kohler on account of his appropriations of the funds of the company made by and with the connivance and through the procurement of the said directors, each and all of them, of the said company * * * was only a colorable and stimulated repayment of the corporate funds, * * * and taking Kohler's notes was only a shift and device to conceal the waste of the said assets by an officer of the company, made possible by a breach of duty of its aforesaid

directors in failing to use due diligence in the supervision of the company's affairs and the acts of its officers and agents." It then alleges (13) that the defendants, each and all of them, with the knowledge of the manner of squandering the assets of the company by said Kohler, continued him in actual control and management of the affairs of the company, as its treasurer, and afterwards, on May 23, 1903, he was promoted to the position then created of fourth vice president and assistant to the president, which was a position of greater responsibility than that which he had previously occupied; that in the latter position Kohler continued to act; "that the aforesaid manner of dealing by the said Kohler, made possible and acquiesced in by the said directors, each and all of them, was one of the causes of ultimately wrecking the said company and causing great loss to its creditors and stockholders." It then alleges in 14, a large number of losses through Kohler, subsequent to the settlement with him for his previous misappropriations, which are set out in the bill. Whether or not they, or any of them, are in fact such as the defendant Thomas is responsible for can only be determined by evidence; but the allegations in the bill are sufficient to require an answer, for, if he be, not liable for any of the \$78,000, the bill alleges such knowledge on his part of Kohler's conduct to require an explanation of the subsequent alleged losses. This ground of demurrer (11) was therefore properly overruled.

7. The next ground (12) is that the bill by its sixteenth and seventeenth paragraphs seeks to hold the defendants liable for the amount of Kohler's bond for \$20,000, on which the United States Fidelity & Guaranty Company was security, although the bill shows on its face that it was not enforceable by the company. It is alleged, in paragraph 17, that the bond expired on April 15, 1903, and that the directors, each and all of them, as a result of their negligence, in violation of their trust, in breach of their duty, and with want of due care in supervising the acts of their officers and agents, failed to renew the bond as required by the by-laws, and negligently allowed it to lapse and become void. Knowledge on the part of each of the directors of the many and large misappropriations of Kohler is alleged, and it is charged that they negligently failed to make, or cause to be made, demand upon the bonding company "as they should and as they had a right to do under the terms of the said bond," etc. Whether or not in point of fact the bond was discharged of all obligations it was liable for, by the settlement in February, can only be determined by evidence; but the bill alleges it was still liable for misappropriations of Kohler, and that the defendants allowed it to lapse. There is therefore sufficient in this paragraph to require an answer.

Our conclusions on the demurrers are that there was error in not sustaining the one to

paragraph 19, for reasons we have stated; but the others were properly overruled. Whether or not the allegations of the bill, or any of them, can be sustained, can only be determined after the evidence is taken, and the case will require extraordinary care to see that no injustice is done, as there are so many defendants and so many different transactions involved; but the charges are such as to require the defendants to answer and to give the plaintiffs an opportunity to offer testimony in support of them.

8. We will now consider the pleas of Frank J. Murphy. The first is to the effect that, inasmuch as the receivers were appointed under a bill alleging insolvency and an answer admitting it (under sections 376 and 377 of article 23 of the Code of Public General Laws), and the national bankrupt act was in force, the court was without jurisdiction to entertain the bill and appoint receivers. The bankrupt act did not, in our opinion, in any way interfere with the action of the court. In the first place, we held, in *Oldtown Bank v. McCormick*, 96 Md. 841, 53 Atl. 934, 60 L. R. A. 577, 94 Am. St. Rep. 577, that the state insolvent law remained operative as to cases or classes of persons which are not provided for by the bankrupt law, and that when that law provides that a certain class of persons may apply voluntarily for its benefit, but that such class should not be adjudged involuntary bankrupts, the involuntary feature of the state insolvent law as to them remains in force, because not in conflict with the bankrupt act. By subdivision "b" of section 4 of Bankr. Law July 1, 1898, c. 541, 30 Stat. 547 [U. S. Comp. St. 1901, p. 3423], as amended by Act Feb. 5, 1903, c. 487, § 3, 32 Stat. 797 [U. S. Comp. St. Supp. 1905, p. 693], amongst those subject to involuntary bankruptcy proceedings is "any corporation engaged principally in manufacturing, trading, printing, publishing, mining or mercantile business," and the section concludes: "Private bankers, but not national banks or banks incorporated under state or territorial laws, may be adjudged involuntary bankrupts." The amendment of 1903 simply added the word "mining" to the act of 1898. Without determining whether this company would be deemed a "bank," within the meaning of that provision, it seems clear that it does not come within either of the corporations named as liable to the involuntary proceedings in bankruptcy. This act is not as broad as that of 1867 in respect to corporations. Gould & Blakemore on Bankruptcy, pp. 18-22; 5 Cyc. 283.

Then, in *Mowen v. Nitsch*, 108 Md. 685, 62 Atl. 582, we had occasion to refer to Acts 1896, p. 643, c. 349, now section 377 of article 23 of the Code of Public General Laws, and said that prior to that act "a corporation was not in any respect within the scope of the state insolvent laws, nor is it yet amenable to that system; but since the adoption of the act, and on the terms therein prescribed, all corporations, other than railroad com-

panies, upon appropriate proceedings against them in a court of equity, are brought within the operation of a provision of that system (but not under the system itself), in so far only as respects the preference of one creditor over another when the corporation is insolvent." And while sections 376 and 377 of article 23 do refer to insolvent corporations, and the proceedings are based on their insolvency, the bankrupt act, and decisions concerning it, would have to be given great latitude, to prohibit a state court from appointing receivers of a corporation and dissolving it, even if it was one included by that act, especially when, as in this case, no proceedings in bankruptcy had been instituted against the corporation. The present bankrupt act never contemplated prohibiting a state court from dissolving one of its own corporations which had become insolvent. Section 376 of article 23 makes no provision for setting aside preferences, and it was not until what is now section 377 was passed that our equity courts had such jurisdiction as is therein conferred on them. This case is a good illustration of the results that might follow the construction contended for. There were no proceedings against this company, within the time required by the bankrupt act, and, if the state court had no jurisdiction to appoint receivers and take charge of its assets, the little that was left on June 6, 1903, might have been wasted. We are therefore of opinion that this plea was properly overruled, because the national bankrupt act had no application to this company, and, if it had, it does not take away jurisdiction of the state courts to appoint receivers to take charge of, collect, and recover the assets of an insolvent corporation—certainly not when there has been no proceedings in bankruptcy against the corporation.

9. The second plea presents this question: Did the release under seal to five of the defendants by one of the receivers, after the bill was filed (the receivers being authorized by order of court to enter into settlement and compromise as set forth in a petition filed with the court), have the effect of discharging the other defendants? As Mr. Carrington, the other receiver, was also a defendant, and was one of the five to be released, the petition was filed by Mr. Penniman. It, in substance, stated that he and his counsel were of the opinion that the proposed settlement of \$3,000 would be beneficial to the estate, by reason of the financial condition of those five defendants; that it was to be made on the distinct understanding that the other defendants were not to be discharged, but the plaintiffs would prosecute the suits to a decree, as if the settlement had not been made; that all claims against the five by the receivers, or by the other defendants for contribution, should be extinguished by payment of said sum, and, if it be held that the other directors have the right of contribution against them, then to the ex-

tent of such right the settlement should operate to release the other directors from the liability imposed on them by said decree, and in like manner extinguish the liability of the five settled with. It concludes: "It being further understood that this agreement is to be treated as if made subsequent to such order or decree and such adjustment of liability as among the directors themselves, although the money called for by the present settlement is to be paid at once."

If the release relied on be a technical, valid release, the effect of it would seem to be well settled in this state. In *Gunther v. Lee*, 45 Md. 60, 24 Am. Rep. 504, it was said by Alvey, J., that: "All the cases, both English and American, maintain the doctrine that satisfaction from one joint tort-feasor, whether received before or after recovery, extinguishes the rights against the others. * * * And as a consideration is always implied in a release under seal, though not expressed on its face, the release by deed of one joint trespasser will discharge all. And this has been the law from very early times." Then, in that case, it was further decided that: "The proviso in the release, by which the right to recover for the same injury against the other two defendants was attempted to be reserved to the plaintiffs, is simply void, as being repugnant to the legal effect and operation of the release itself." In *Berkley v. Wilson*, 87 Md. 219, 39 Atl. 502, we held that if an injured party had recovered judgment against one of several tort-feasors, which has been paid or tendered, he cannot maintain an action against another tort-feasor for the same injury. In *Abb v. North. Pac. R. R. Co.*, 68 Pac. 954, 28 Wash. 428, 58 L. R. A. 293, 92 Am. St. Rep. 864, there is a very full and excellent note on the "effect of release of one joint tort-feasor on liability of the other," and the summary of the note is not only in accord with the principles announced in *Gunther v. Lee*, but states what is a very just rule to be adopted when the release is not under seal, and it is shown that the intention was not to discharge the other tort-feasors. We have a number of cases in this state relating to the release of one of a number of joint debtors, among the latest of which are *State v. Gott*, 44 Md. 341, *Valley Bank v. Mercer*, 97 Md. 458, 55 Atl. 435, and *Commercial Bank v. McCormick*, 97 Md. 703, 55 Atl. 439; but, as appellant so contends, we will assume that this bill treats the defendants as tort-feasors, as it certainly does as to most, if not all, of the claims.

The copy of the release in the printed record has no seal after Mr. Penniman's name; but, as both sides treated it at the argument as if it was under seal, we suppose it is so in the original. But it is manifest that the court never intended the receivers, or either of them, to execute a paper which would have the effect now claimed for this, and hence neither intended nor authorized the execution of a release under seal. The receivers

were authorized "to enter into the settlement and compromise set forth in the foregoing agreement on the terms and conditions herein set forth," by an order written on the petition signed by Mr. Penniman and which referred to that petition. The petition shows distinctly that the right to proceed against the other defendants was expressly reserved, and it is clear that a release under seal was not authorized or contemplated by the court. "The court itself has the care of the property, by its receiver, and that officer, being the mere creature of the court, has no powers other than those conferred upon him by the court, or derived from its established practice." *Gaither v. Stockbridge*, Receiver, 67 Md. 224, 9 Atl. 632, 10 Atl. 309. The order of the court in this case, in appointing the receivers, uses the same language, in substance, as that used in *Gaither v. Stockbridge*. It is clear, therefore, that a release under seal (if it must be given the effect claimed by appellant) was not only not authorized, but was in effect prohibited, as the settlement was to be made on terms altogether different from that, and hence must be treated as of no effect, as any unauthorized act of a receiver would be, unless afterwards sanctioned by the court. The release under seal not being effective, there can be no reason why a court of equity should be required to give an effect to the settlement that is directly contrary to that intended and in terms attempted to be guarded against. This is not like a case of several joint tort-feasors being sued for an injury done by them, such as a suit for assault and battery, slander, injury to the person, etc. In such case, a settlement by one may release the other, because if the injured party has been compensated once he cannot be again, and, especially in cases where punitive or other damages not fixed can be recovered, it would oftentimes be difficult, if not impossible, to show with any certainty that the settlement did not include all damages sustained. But, in a case such as this, the losses, if any, can be accurately ascertained. For example, if the defendants are liable for losses by reason of unlawful loans, the liability being once established, the amount can be definitely fixed, and they cannot be held for damages beyond the actual losses caused by their acts of omission or commission. In this connection we might add that, although it is assumed by the appellant that there can be no contribution between the directors in such cases, we do not understand the authorities to be by any means settled to that effect, if there be no positive wrong involving a guilty scienter, but the wrong consists of mere negligence and inattention. While there are cases deciding that there can be no contribution, there are many excellent authorities to the contrary. See 10 Cyc. 897; 3 Am. & Eng. Dec. in Eq. 205; 5 Am. & Eng. Dec. in Eq. 426; and cases cited in them. It is not necessary to now determine that question, but we cannot admit

that the weight of authority is clearly against contribution between directors, and it is undoubtedly true that in this class of cases directors are not in all respects treated as ordinary tort-feasors.

We are, then, of the opinion that the settlement made did not have the effect of wholly discharging the other defendants; but, in the event of any decree against them, they must be credited with such portion of the amount paid by the five directors as they may in law, and under the terms of the agreement of settlement, be entitled to. See *Abb v. North. Pac. R. R. Co.*, supra, summary of note. If, however, it be shown to the court below that the money was paid by the five directors on the understanding by them that a release under seal was to be executed, it could consider an application of those five to have the money returned, and let the case proceed as if such an arrangement had not been entered into. Of course, that should only be granted if the court be satisfied that the money was paid on the distinct understanding that the release under seal was to be given them. We think this conclusion not only in accordance with well-considered authorities, but especially applicable to a proceeding of this character. It may not be out of place to suggest that, inasmuch as a settlement has been authorized to be made with those who were probably most responsible for some, if not all, of the conditions complained of in the bill, it would only be just and proper to allow a settlement with the other defendants, if a reasonable one can be made, and thereby save the estate from further costs and possibly additional loss.

For reasons given, we will affirm the order, in so far as it overruled the pleas of the defendant Murphy.

Order overruling demurrers and pleas affirmed, excepting in so far as it overruled the demurrer to the nineteenth paragraph of the bill, and order reversed as to that, and cause remanded for further proceedings; one-fourth of the costs in this court to be paid by Frank J. Murphy, one-fourth by Wm. B. Thomas, and the remainder by the receivers out of the estate, and the costs below to abide the result of the suit.

(105 Md. 475)

THOMAS v. PENNIMAN et al.

(Court of Appeals of Maryland. April 2, 1907.)

CORPORATIONS—OFFICERS—PARTICIPATION IN WRONGFUL ACTS.

Where the charter of a corporation provided that no loans of the corporate funds should be made to any officer or employé of the corporation, and for a violation of that provision declared that the parties consenting thereto should be liable for the amount so loaned and all losses or expenses that might result therefrom, mere breach of a director's duty to attend meetings of the board was insufficient to impose on the director liability for prohibited loans made at such meetings.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, § 1454.]

Appeal from Circuit Court of Baltimore City; Alfred S. Niles, Judge.

Bill by George Doblin Penniman and another, receivers of the City Trust & Banking Company, against William B. Thomas and others, to enforce their liability as directors for certain losses. From an order overruling the demurrers of Thomas to the bill, he appeals. Affirmed, excepting in so far as the order overruled the demurrer to paragraph 15, and reversed as to that, and cause remanded for further proceedings.

Argued before BRISCOE, BOYD, PEARCE, SCHMUCKER, and BURKE, JJ.

Francis Neal Parke and Jas. A. C. Bond, for Thomas. Clifton Doll Benson and Thomas Hughes, for Penniman and others, receivers.

BOYD, J. It will not be necessary for us to express our views at length on the demurrers of Wm. B. Thomas to the bill in this case, as the opinion filed in the previous case of *Thomas et al. v. Penniman et al.*, 66 Atl. 232, sufficiently states them as to the most of the questions raised. The principal difference between this bill and that in the other case is the charge against these directors, who served during the year 1902, that they declared two dividends, which impaired the capital stock, contrary to section 5 of the charter of the company. They are referred to in paragraphs 10 and 11 of the bill, which are specially demurred to. Paragraphs 14 and 15 are also specially demurred to, and they refer to alleged illegal loans made to officers of the company.

1. Mr. Thomas was present at the meeting of directors on June 26, 1902, at which a dividend was declared, and although he was not at the meeting on December 10, 1902, at which the other dividend complained of was declared, the bill alleges that the directors who were not present received the dividends upon the stock held by them, assented thereto, and ratified the same. The mere fact that directors declared dividends, when subsequent developments show they ought not to have done so, does not, of course, make them liable, under such a provision as that in this charter. Some of the acts relied on in the bill, as reasons for not declaring dividends would not of themselves reflect much, if any, upon the question. For example, it is difficult to see how the failure of officers of the company to make the reports required by chapter 109, p. 153, of the Acts of 1892 (now section 94 of article 23 of the Code of Public General Laws), can properly be used against the directors to show negligence, or that they were not informed as to the company's condition. That act requires officers, as the State Treasurer may designate, to make the report to him, and, unless he brings it to their attention, it would not be fair to draw any inference of neglect on the part of the directors, from the failure of officers to make such report,

and surely the directors are not expected to go to the Treasurer of the State to ascertain the condition of the company with which they are connected. But in paragraph 11 there are such charges of negligence on the part of the directors in failing to inform themselves of the condition of the company before declaring the dividends, as demand some explanation from them, and we therefore think the demurrers to paragraphs 10 and 11 were properly overruled.

2. The demurrers to paragraphs 14 and 15 present some of the same objections as were referred to in considering those to paragraphs 18 and 19 of the other bill. The loans mentioned in paragraph 15 amount to over \$59,000, while the losses alleged by reason of them amount to only \$32,466.10. As we said in the other case, we can see no reason why the plaintiffs cannot point out the precise loans by which the losses were incurred. They profess in the bill to be able to state the exact amount of the loss, and it is but fair to the defendants that such information be given. We do not want to be understood as intimating that the defendants can be held responsible for loans to the Baltimore Construction & Building Company and Edward H. Glidden merely because they were indorsed by Pollock or Kohler, who were directors. The charter does not in terms prohibit the indorsement of notes, etc., by officers or employees of the company, and it cannot be extended to include such indorsements, unless the loans be made directly or indirectly for the benefit of such indorsers. In order to hold the directors liable under this provision of the charter, it must be shown that they consented directly or indirectly to loans to some officer or employé, and for that character of liability a director cannot be held simply because it is his duty to attend meetings of the board. It must be shown that any director sought to be held for such a loan consented thereto, directly or indirectly. In 10 Cyc. 879, it is said of a statute making directors liable for unlawful loans that: "If the statute imposes the liability on 'the directors assenting thereto,' obviously the creditor must allege and prove that the defendant did assent thereto." There are only two instances in the list of loans in which it is alleged that Thomas was at a meeting of the board which approved and ratified such loans (only amounting to \$5,080), and yet he is sought to be held responsible under this statute for over \$59,000 of loans. How they were ratified and approved is not shown; but in order to show the consent of a director sought to be charged, who the bill shows was not present, there must be some more definite allegations than are to be found in this paragraph. So, without further discussing the subject, we are of opinion that the demurrer should have been sustained to paragraph 15.

Order overruling demurrers affirmed, ex-

cepting in so far as it overruled the demurrer to paragraph 15, and reversed as to that, and cause remanded for further proceedings; each side to pay one-half the costs in this court, and the costs below to abide the result of the case.

(23 R. I. 204)

HYDE et al. v. SUPERIOR COURT.

(Supreme Court of Rhode Island. Jan. 4, 1907.)

1. CERTIORARI—PROCEEDINGS—JURISDICTION.

A court of common law, as such, has no power to issue a writ of certiorari to review the proceedings in a court of equity.

2. SAME—CONSTITUTIONAL AND STATUTORY PROVISIONS.

Const. Amend. art. 12, § 1, provides that the Supreme Court shall have final, revisory, and appellate jurisdiction upon all questions of law and equity. It shall have power to issue prerogative writs, and shall also have such other jurisdiction as may be prescribed by law. Court and Practice Act 1905, c. 1, § 2, provides that the Supreme Court shall have general supervision of all courts of inferior jurisdiction to correct and prevent errors and abuses therein when no other remedy is expressly provided. It may issue writs of certiorari, etc., * * * and all other extraordinary and prerogative writs and processes necessary for the furtherance of justice and the due administration of law. Chapter 3, § 33, provides that the Supreme Court has power to issue such writs as may be necessary or proper to carry into full effect all the powers and jurisdiction which are or shall be conferred upon it by the Constitution or law. *Held*, that the Supreme Court is not simply a court of common-law jurisdiction, but has general supervision of all courts of inferior jurisdiction to correct and prevent errors and abuses therein, and can issue a writ of certiorari to review proceedings in the superior court sitting in equity, when there exists any error or abuse in that court without other remedy expressly provided, and the issue of the writ is necessary for the furtherance of justice and due administration of the law.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Certiorari, §§ 46-50.]

3. SAME—EXISTENCE OF OTHER REMEDY.

Under Court and Practice Act 1905, c. 1, § 2, providing that the Supreme Court may issue certiorari to review proceedings in an inferior court and prevent errors and abuses therein, when no other remedy is expressly provided certiorari will lie from an interlocutory decree when there was no appeal therefrom, and the parties by reason of the action of the court after having spent all the time necessary and incurred practically all the expenses incident to the partition of an estate are thrown back into a situation where all this must be done over again.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Certiorari, §§ 4, 32.]

4. EQUITY—DECREE ON CONSENT—SETTING ASIDE.

Court and Practice Act 1905, c. 23, § 423, providing that the court entering a decree in equity may for cause shown set it aside, does not warrant the superior court in setting aside decrees entered by consent.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Equity, § 1039.]

Certiorari by William Hyde and others to the superior court to review the proceedings in that court sitting as a court of equity. Writ issued.

Argued before DOUGLAS, C. J., and DUBOIS, BLODGETT, JOHNSON, and PARKHURST, JJ.

Hugh J. Carroll, for petitioner. James L. Jenks, for certain respondents. Lellan J. Tuck, for respondent Lucy J. Hyde.

PARKHURST, J. This is a petition, addressed to this court, asking that it issue a writ of certiorari to the superior court sitting in equity. The petition is as follows: "To the Hon. Supreme Court:

"(1) William Hyde, Anne Anderton, and Mary Anderton, of Pawtucket, in said county, respectfully represent that they, together with John Hyde, Oswald Hyde, Alice Pearson, and Elizabeth Elliott, also all of said Pawtucket, are the children and sole heirs at law of John Hyde, deceased, late of said Pawtucket, intestate, and that Lucy A. Hyde, of said Pawtucket, is the widow of said John Hyde.

"(2) Your petitioners further represent that said John Hyde, the father of the parties hereto and husband of said widow, deceased at said Pawtucket, intestate, on the ——— day of ———, A. D. 1903, leaving a large amount of real estate in said Pawtucket, to which the petitioners and the other children herein named are the sole heirs, and in which said Lucy A. Hyde, widow, was entitled to dower.

"(3) Your petitioners not being able to have the said other children of said John Hyde to agree upon a partition of said real estate, filed their bill for partition in our superior court on the 28th day of March, A. D. 1906, entitled 'William Hyde v. John Hyde et al.,' No. 944, in due form, and a subpoena was duly issued to said John Hyde, Oswald Hyde, Alice Pearson, and Elizabeth Elliott, and to said Lucy Hyde, widow, as respondents. And Louis Lescault, mortgagee of the undivided interest of said Oswald Hyde, was afterwards duly made a party respondent to said bill for partition.

"(4) And your petitioners further show that on the 9th day of June, A. D. 1906, by written consent of all the parties plaintiff and defendant to said bill for partition, a decree was entered in said superior court by which it was decreed that the widow's dower in said land was reduced to an annuity in cash, payable quarterly, which said decree was consented to by said widow's solicitor. Said decree assigning dower contained a further provision that the said heirs should give a bond to secure said annuity, and that said bond should be given before partition should be made of said real estate. But no time was fixed within which said bond should be given.

"(5) After the entry of said decree, said John Hyde, Alice Pearson, Oswald Hyde, and Elizabeth Elliott refused to give said bond, and it being agreed that the deposit of money to create and maintain a fund out of which said widow's annuity should be paid was a more acceptable and beneficial method of fixing said annuity, all of the parties to said

bill, including said widow, appeared personally or by counsel before said superior court, Mr. Justice Stearns presiding, on the 30th day of June, A. D. 1906, and a further decree was entered in said cause by agreement in open court, fixing the time in which said bond should be filed, or in the alternative permitting said heirs to deposit a certain sum towards and constituting a fund out of which said annuity should be paid.

"(6) On the same day, to wit, June 30, A. D. 1906, after said decree fixing said time had been entered, said heirs by their counsel consented to the entry of a decree for partition, in which said decree the former decree fixing said annuity fund was confirmed, and in which the title of said heirs was declared to said real estate, and each of said heirs selected a commissioner to partition said real estate, which said commissioners were named in said decree. Said decree after directing said commission to act further ordered said commission to make report of its doings to said superior court, there to await further proceedings.

"(7) Said commission duly organized and notified all parties interested, held many hearings, and prepared plats of said real estate, which real estate consists of over 100 acres, and a great amount of costs and expense have accrued.

"(8) Said John Hyde, Alice Pearson, Oswald Hyde, and Elizabeth Elliott still refused to give said bond or to deposit money to constitute said fund for said annuity, and, July 10, A. D. 1906, these petitioners, who have always been ready either to give said bond or to deposit cash for said fund, prayed said superior court to declare said John Hyde, Alice Pearson, Oswald Hyde, and Elizabeth Elliott to be in contempt for refusing to comply with said decree. Said motion was heard before Mr. Justice Baker of said superior court in chambers on the ——— day of August, A. D. 1906, and was denied on the ground that the petitioners had no right to ask for said finding, as the widow was the party alone interested. On the ——— day of September, A. D. 1906, said John Hyde, Alice Pearson, Oswald Hyde, and Elizabeth Elliott petitioned said court to have said decree fixing dower amended, but said petition was dismissed, and on the ——— day of October, A. D. 1906, said Lucy A. Hyde, widow, petitioned said court for a writ of sequestration because said John Hyde, Alice Pearson, Oswald Hyde, and Elizabeth Elliott had not complied with said decree fixing the dower, but said petition was denied before Mr. Justice Brown on the ground that said parties had not yet been adjudged to be in contempt.

"(9) And now your petitioners show that, on the 10th day of November, A. D. 1906, said Lucy A. Hyde, widow, presented her petition to said superior court asking to have set aside the two decrees entered by consent on the said 30th day of June, A. D. 1906, to wit: The decree fixing the said annuity, and the

time in which the fund was to be contributed; and also the decree appointing commissioners of partition, and declaring the interests of the parties in said real estate. Said petition of said widow was heard on said day before Mr. Justice Brown in chambers and was granted, and a decree setting both of said decrees of June 30, A. D. 1906, was ordered to be entered against the protests of your petitioners, William Hyde, Anne Anderton, and Mary Anderton, who then and there protested that said decrees were consent decrees, and that said court did not have power to set aside the same.

"Wherefore your petitioners represent and show that said superior court had no jurisdiction to set aside said decrees, or of the petition to set aside the same, and its acts in setting aside said decrees, and the records thereof, are erroneous and illegal in the several particulars, and for the several reasons which are recited and annexed to this petition, and made a part hereof, upon which your petitioners will rely for its support. Your petitioners therefore pray that this court will issue its writ of certiorari ordering the said superior court to certify its records relating to said decrees setting aside said decrees of June 30, A. D. 1906, that they may be presented to this court, to the end that the same, or so much thereof as may be illegal, may be quashed."

"Causes of Error.

"(1) It appears of record that the decree entered June 9, A. D. 1906, by which the widow's dower was reduced to an annuity, was a decree entered by the consent of all the parties, and such a decree cannot be set aside without consent of all the parties. The provision in said decree that the parties (heirs) should give bond before partition is made is simply a method by which the annuity is to be secured, and as it is mandatory, it can be enforced by proceedings in contempt.

"(2) The decree called 'Decree Fixing Time' for giving bond does not on its face show that it was entered by consent, although all of the parties in open court agreed to it, because it substituted the raising of a fund as an alternative to giving the bond mentioned in the decree of June 9th, aforesaid. If the court had jurisdiction to set aside said decree fixing time, the decree of June 9th still remained in force as a consent decree.

"(3) The second decree entered June 30, A. D. 1906, after the decree fixing time for giving bond, was signed by counsel for all of the heirs, and was a consent decree, although it was not signed by counsel for the widow. The dower rights of the widow had already been provided for in the decree of June 9th. This was a consent decree by which the rights of the heirs were determined, and commissioners were appointed. These commissioners were selected by the parties, and have completed their work at great expense, and are now preparing their report as required by the decree

appointing them, to await the further action of the court.

"The superior court had no jurisdiction to alter or set aside this decree without the consent of the parties."

Upon this petition citation was ordered, issued, and served upon the solicitors of record for parties named in the citation (being the respondents in the original cause), requiring them to show cause why the prayer of the petition should not be granted. Upon hearing, after return of this citation, the several parties appeared by their solicitors; and upon the argument the allegations of the petition were not denied, but the respondents raise the following questions, viz.:

"(1) Will the common-law certiorari lie to review proceedings in a court of equity?

"(2) Will any kind of certiorari lie from an interlocutory decree?

"(3) Is not the act complained of in the petition one of judicial discretion, within the provisions of chapter 23, § 428, of the Court and Practice Act of 1905?"

1. In order to answer these questions we must look to the jurisdiction conferred upon this court by the Constitution and the statutes. Article 12, § 1, of the amendments to the Constitution reads as follows:

"Article 12.

"Section 1. The Supreme Court shall have final revisory and appellate jurisdiction upon all questions of law and equity. It shall have power to issue prerogative writs, and shall also have such other jurisdiction as may, from time to time, be prescribed by law. A majority of its judges shall always be necessary to constitute a quorum. The inferior courts shall have such jurisdiction as may, from time to time, be prescribed by law."

Court and Practice Act 1905, c. 1, §§ 1, 2, reads as follows:

"Section 1. The Supreme Court shall consist of a chief justice and four associate justices.

"Sec. 2. The Supreme Court shall have general supervision of all courts of inferior jurisdiction to correct and prevent errors and abuses therein when no other remedy is expressly provided; it may issue writs of habeas corpus, of error, certiorari, mandamus, prohibition, quo warranto, and all other extraordinary and prerogative writs and processes necessary for the furtherance of justice and the due administration of the law," etc.

It is plain that the "final revisory and appellate jurisdiction" of this court applies equally to "all questions of law and equity," and no form of words could confer broader and more complete powers of "supervision of all courts of inferior jurisdiction to correct and prevent errors and abuses therein where no other remedy is expressly provided."

Court and Practice Act 1905, c. 3, § 33, reads as follows:

"Sec. 33. The supreme and superior courts

shall have power to enter such judgments, decrees, and orders, and to frame and issue such citations, executions, and other writs and processes, as may be necessary or proper to carry into full effect all the powers and jurisdiction which are or shall be conferred upon them respectively by the Constitution or by law. They shall have power to punish, by fine or imprisonment, or both, all contempts of their authority."

In the exercise of the jurisdiction thus conferred this court is not confined to any narrow technical definition of the office of the extraordinary writs named in section 2; but it may use those writs in their accepted forms when adapted to the purpose sought, or it may adapt them or modify them, or it may frame new writs and processes, as above expressly provided. So that if this court finds that the form of the writ of certiorari as commonly used is adapted to the purpose of the court in a proper case, it is not concerned to inquire or decide whether the common-law writ of certiorari was ever used or could have been used in such a case. An extended examination of cases in the various state courts, wherein the writ of certiorari has been granted or refused at law, furnishes no instructive rule in a case of this kind, but simply shows that the courts of any particular state are governed by the provisions of their own Constitutions and statutes and rules of practice as to the granting or refusal of the writ, subject to the general rule as to all extraordinary process, that it is to be used only where no other remedy is expressly provided by law, or where the remedy by certiorari is itself an express remedy.

As to the first question raised by the respondents, "Will the common-law certiorari lie to review proceedings in a court of equity?" such a question must, in strictness, be answered in the negative, for the reason that courts of common law, as such, never had at any time, so far as we are advised, any such power, and it is inconceivable that such power should ever have been granted. But a glance at the provisions of our Constitution and statute above quoted will show that this court is not simply a court of common law, but has "final revisory and appellate jurisdiction upon all questions of law and equity," and "general supervision of all courts of inferior jurisdiction to correct and prevent errors and abuses therein when no other remedy is expressly provided"; so that if this court issues a writ of certiorari to the superior court sitting in equity, it does not issue a common-law writ of certiorari, but an extraordinary process appropriate to its revisory and supervisory powers, and the only questions which this court must determine as preliminary to the exercise of its extraordinary powers under this writ are whether there exists any error or abuse in the exercise of inferior jurisdiction, without other remedy expressly provided, and whether the exercise of the power is "necessary for

the furtherance of justice and the due administration of the law."

2. The second question raised is: "Will any kind of certiorari lie from an interlocutory decree?" Ordinarily this question would be answered in the negative, because in most cases in equity, where an appeal lies from final decree only, as in this state (Court and Practice Act 1905, p. 95, § 328), excepting interlocutory appeals in matters of injunction and receivers (section 337), such appeal carries the full record to the final court of appeal, and any injury done by interlocutory decree can generally be fully dealt with by that court, whose final decree or order will correct all errors of the court below. In this case, however, we have this peculiar situation: The parties to the bill, by decrees entered June 9 and June 30, 1906, with full consent of all parties interested, first ascertained and commuted the widow's dower interest in the land to a specific annual income to be secured by the other parties by bond or deposit of money; then by further decree of June 30, 1906, by consent of all parties interested (other than the widow, whose dower rights had been so ascertained and commuted), proceeded to the appointment of commissioners to partition the real estate, and these commissioners have proceeded under the said decree with their duties, spending much time and incurring much expense in hearings, in making plats, and otherwise preparing to make their report under the said decree, and in the meantime the superior court, having refused to enforce the decree relating to securing the widow's dower by compelling the parties to the said latter decree to either give bond or deposit money according to their obligations, finally, upon application of the widow, and against the protests of these petitioners, on November 10, 1906, set aside its decree of partition entered June 30, 1906, and also its decree entered June 30, 1906, fixing the time for carrying out the provisions for the security of the widow's annuity in lieu of dower. The parties to the bill, by reason of this action on the part of the court, after having spent all the time necessary to arrive at a partition of the estate, and having incurred practically all the expenses incident thereto, are thus, if this action of the court is to be deemed proper and lawful, thrown back into a situation where all this work is to be done over again, unless they shall dismiss their bill and make a compromise; and this not through any fault of the petitioners, who have always been ready to carry out the terms of all the decrees, but solely because some of the respondents have refused to abide by the same, and the court has not seen fit to enforce them. Is this action of the superior court such an error or abuse, where "no other remedy is expressly provided," as comes within the purview of chapter 1, § 2, of the Court and Practice Act of 1905? We think it is plainly so, from the very fact

that such action was interlocutory, and hence there was no appeal therefrom. Court and Practice Act 1905, p. 95, § 328 et seq. In fact, such action tends to postpone an appeal indefinitely; and if such action can be deemed lawful and proper, it may be repeated from time to time, so that the cause will never be ripe for appeal, while the entire value of the estate may be dissipated in costs and expenses.

3. The third question raised is: "Is not the act complained of in the petition one of judicial discretion within the provisions of chapter 23, § 428, of the Court and Practice Act of 1905?" The section referred to reads as follows:

"Sec. 428. In case of judgment by default, or in case of judgment entered by mistake, or in case of decrees in all equity causes, and causes following the course of equity, the court entering the same shall have control over the same for the period of six months after the entry thereof, and may, for cause shown, set aside the same and reinstate the cause, or make new entry and take other proceedings, with proper notice to parties, with or without terms, as it may direct by general rule or special order."

We do not find in the petition or statements of counsel in argument any such "cause shown" as should have warranted the superior court in setting aside the decrees, even if they were decrees entered by the court after the contest between the parties in litigating disputed rights. But in this case the decrees were entered by consent, and it is well settled in this state, as in other jurisdictions, that a decree entered by consent in an equity cause cannot be set aside or revoked except by consent. *Bristol v. Bristol & Warren Water Works et al.*, 19 R. I. 631, 35 Atl. 884; *Hazard v. Hidden*, 14 R. I. 356. The third question must therefore be answered in the negative.

Jurisdiction to review by writ of certiorari any case "made final in the Circuit Court of Appeals" was conferred upon the United States Supreme Court, under Act March 3, 1891, c. 517, 26 Stat. 626 [U. S. Comp. St. 1901, p. 547], entitled "An act to establish Circuit Courts of Appeals," etc. That act does not contain any express provision relating to the use of the writ of certiorari to review interlocutory proceedings in equity; but the United States Supreme Court in construing the act, in the equity case of *American Construction Co. v. Jacksonville, etc., Railway Co.*, 148 U. S. 372, 13 Sup. Ct. 758, 37 L. Ed. 486, where the matters in question related to certain interlocutory decrees, says, at page 384 of 148 U. S., page 763 of 13 Sup. Ct. (37 L. Ed. 486), through Mr. Justice Gray: "Whether an interlocutory order may be separately reviewed by the appellate court in the progress of the suit, or only after and together with the final decree, is matter of procedure rather than of substantial right; and many orders made in the progress of a

suit become quite unimportant by reason of the final result, or of intervening matters. Clearly, therefore, this court should not issue a writ of certiorari to review a decree of the Circuit Court of Appeals on appeal from an interlocutory order, unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause. In such an exceptional case the power and the duty of this court to require, by certiorari or otherwise, the case to be sent up for review and determination, cannot well be denied, as will appear if the provision now in question is considered in connection with the proceeding provisions for the interposition of this court in cases brought before the Circuit Court of Appeals. In the first place, the Circuit Court of Appeals is authorized, 'in every such subject within its appellate jurisdiction,' and 'at any time,' to certify to this court 'any questions or propositions of law,' concerning which it desires the instruction of this court for its proper decision. In the next place, this court, at whatever stage of the case such questions or propositions are certified to it, may either give its instruction thereon, or may require the whole record and cause to be sent up for its consideration and decision. Then follows the provision in question conferring upon this court authority 'in any such case as is hereinbefore made final in the Circuit Court of Appeals' to require, by certiorari or otherwise, the case to be certified to this court for its review and determination. There is nothing in the act to preclude this court from ordering the whole case to be sent up, when no distinct questions of law have been certified to it by the Circuit Court of Appeals, at as early a stage as when such questions have been so certified. The only restriction upon the exercise of the power of this court, independently of any action of the Circuit Court of Appeals, in this regard, is to cases 'made final in the Circuit Court of Appeals,' that is to say, to cases in which the statute makes the judgment of that court final, not to cases in which that court has rendered a final judgment. Doubtless this power would seldom be exercised before final judgment in the Circuit Court of Appeals, and very rarely indeed before the case was ready for decision upon the merits in that court. But the question at what stage of the proceedings, and under what circumstances, the case should be required, by certiorari or otherwise, to be sent up for review, is left to the discretion of this court, as the exigencies of each case may require."

The powers of certification vested in the superior court by Court and Practice Act 1905, § 339, are as follows:

"Sec. 339. If, upon making any interlocutory decree or order, or if otherwise in the course of the proceedings in any case, any question of law shall arise which in the opinion of the court is of such doubt, importance, and so affects the merits of the controversy, that it ought to be determined by

the Supreme Court before further proceedings, the superior court may certify such question to the Supreme Court for that purpose, and stay all further proceedings except such as are necessary to preserve the rights of the parties."

This power is very similar to that conferred upon the United States Circuit Court of Appeals by Act March 3, 1891, c. 517, as quoted in the case cited above.

In view of the provisions of the statutes above quoted, it is quite clear that there is a close analogy between the powers conferred upon the Supreme Court of the United States to review by certiorari certain cases "made final" in the United States Circuit Court of Appeals and the general and broader powers conferred upon the Supreme Court of Rhode Island. Few other authorities in any way touching upon the main questions involved in this case have been called to the attention of the court by counsel, and few have been found by the court after a somewhat extended examination. In our own state, from the adoption of the Constitution in 1843 down to the adoption of article 12 of the amendments thereto, in November, 1903 (Laws 1903, p. 2, c. 1069), the Supreme Court had original and final jurisdiction in equity, so that there could be no occasion for the exercise of any extraordinary jurisdiction such as is here invoked. This case is, therefore, one of new impression so far as this state is concerned.

In other states it has seldom been attempted to invoke the exercise of such jurisdiction by writ of certiorari issued out of the court of final jurisdiction to an inferior court sitting in equity; and the reason is quite plain, for it is most unusual that there should arise in an equity cause in an inferior court any error or abuse which will not be fully and adequately remedied upon appeal. Even in the few cases where such jurisdiction has been invoked, it has been generally found and decided that there was another and adequate remedy by appeal, or that the case made was one which did not warrant the exercise of such extraordinary relief, in the sound discretion of the court. In *Berry v. Hardin*, 28 Ark. 458, a complaint in equity was filed to restrain the collection of a tax levied by a county court, and as ancillary to this relief a writ of certiorari was asked for to bring up and quash the proceedings of the county court in regard to the levy and collection of the tax. The complaint was dismissed for want of equity, and it was held that the court had no power to issue the writ of certiorari in equity, the matter not being of equitable cognizance; and that, even if the application had been made on the law side of the court, the writ would not have been issued on the grounds alleged in the complaint. In *Payne v. McCabe*, 37 Ark. 318, the right of appeal furnished all the remedy needed to protect the right of the petitioner, and the writ was refused on that

ground. In *Sanders v. Plunkett*, 40 Ark. 507, the act complained of was the dissolution of a temporary injunction by the same chancellor who had ordered it was held to be within the discretion of the chancellor, under the statute, and the writ was refused. In *Re Haney*, 14 Wis. 417, attempt was made to review, by means of a writ of certiorari, the proceedings of a circuit court in chancery, granting leave to sell the real estate of an infant. It was held that the interests of the infant in the court below were duly protected by guardians lawfully appointed, that the infant was bound by the proceedings, and that it was not a proper case for extraordinary relief by certiorari. The last case cites *Peters v. Peters*, 8 Cush. 529, where the proceedings attempted to be called in question were of the same character as in *Re Haney*, supra, in a probate court which had granted leave to sell real estate of a minor, whose guardian ad litem, duly appointed, assented to the proceedings sought to be quashed. It was held that the statutes granting appeals from probate courts to the Supreme Judicial Court furnished all the remedy required in such probate cases, and that in the case at bar the infant was duly protected and was bound, and the writ was refused. In *Kern's Adm'r v. Foster*, 16 Ohio, 274, it was held that an appeal lay from the order of the court of chancery, confirming a sale of lands made under a previous decree of that court, and therefore certiorari was not a proper mode of bringing the question of the legality of such order of confirmation before the Supreme Court. In *Galloway v. Stophlet*, 1 Ohio St. 434, the writ was asked for to review an order overruling exceptions to the admission of a deposition taken for use in equity in the court below. The court very properly refused to interfere in such a matter while the case was still pending below. In *Gilliland v. Sellers*, 2 Ohio St. 223, the Supreme Court refused to interfere by certiorari with certain proceedings in a probate court, part of which it held to be absolutely void and part of which it held to be within the exclusive jurisdiction of that court, and not subject to revision.

Although in each of the above cases the writ was refused, yet it nowhere appears broadly stated that in no case will the court of final revisory, appellate, and supervisory jurisdiction interfere by certiorari directed to an equity court. On the contrary, such reservations appear in several of them as to imply that in a proper case such writ may be issued, although its issue will be very infrequent and only where no other adequate remedy exists. Somewhat analogous to the jurisdiction here invoked, and similar in principle, though not in all respects, similar owing to the differences between the relations of our courts, governed as they are by constitutional provisions and statutes, and the relations between the High Court of Chancery and the inferior courts of equity jurisdic-

tion in England, was the practice, well recognized in the English Court of Chancery, of entertaining a certiorari bill, which is described as follows: "Certiorari Bill. This species of bill derives its name from a special writ of certiorari being prayed for the purpose of removing a cause already commenced in an inferior court of equity from that into the Court of Chancery. And the prayer of this bill is grounded upon a suggestion necessarily arising from one or some of the following circumstances: That by means of the limited jurisdictions of the court, or by reason that the cause is without the jurisdiction of the inferior courts, or that the witnesses live out of the jurisdiction, or that the defendants do, and are not able by age or infirmity, or the distance of place, to follow the suit, or that upon some substantial reasons shown, equal and impartial justice to the parties is not likely to be obtained in the inferior court; and for this purpose the bill should state the proceedings in the court below, the incompetency of that court to decide between and administer justice to the parties, and pray the writ of certiorari." Harrison's Chancery, pp. 100, 101. See, also, Bacon's Abr. p. 166; Williams' Law Dict. tit. "Certiorari"; Jacob's Law Dict. tit. "Certiorari." It thus appears that from very early times in England there obtained a practice of certiorari in equity closely analogous in principle to the practice at common law, though of much less frequent application.

Upon the case, therefore, as made by the petition herein, we are of the opinion that the petition sets forth such matters as may be properly reviewed, and should be reviewed, by this court by means of its writ of certiorari, and that this court has full power to issue such writ in accordance with the prayer of the petition.

Let the writ of certiorari issue accordingly.

(28 R. I. 234)

**EASTERBROOKS v. RHODE ISLAND
SUBURBAN RY. CO.**

(Supreme Court of Rhode Island. March 19, 1907.)

CONTINUANCE—GROUNDS.

When the discussion of a motion asking for an increase of the ad damnum at the beginning of the trial, in a case where the damages are unliquidated, is permitted in the presence of the jury, it is good ground for a continuance if defendant desires it.

Exceptions from Superior Court, Providence County.

Trespass on the case for negligence by Ida V. Easterbrooks against the Rhode Island Suburban Railway Company. To the refusal of the court to grant a continuance, defendant excepts. Exceptions sustained.

Argued before DOUGLAS, C. J., and DU-BOIS, BLODGETT, JOHNSON, and PARKHURST, JJ.

Orrin L. Bosworth, for plaintiff. Henry W. Hayes and Lefferts S. Hoffman, for defendant.

PER CURIAM. We think that the defendant was entitled to a continuance in this case, and that its exception to the refusal of the court to grant the motion to that effect must be sustained.

The practice of asking for an increase of the ad damnum at the beginning of the trial, in a case where the damages are unliquidated, is not to be commended, and as we said in *O'Clair v. R. I. Co.*, 27 R. I. 448, 63 Atl. 238, when the discussion of such a motion is permitted in the presence of the jury who are to decide the case, it is good ground for a continuance if the defendant desires it.

Case remanded to the superior court for a new trial.

(28 R. I. 235)

HARDACRE v. SAYLES.

(Supreme Court of Rhode Island. March 13, 1907.)

1. MASTER AND SERVANT—NEGLIGENCE—INJURIES TO SERVANT—ASSUMPTION OF RISK.

Where an experienced steam fitter had notice that at a "T" joint in a steam pipe there was a leakage, and that to prevent the same and the danger incident thereto the joint and threads therein where the pipe was engaged in the "T" had been calked repeatedly for years, but had no knowledge that there had been a slipping of the joint where the pipe and the "T" came together, he could not be held to have assumed the risk arising from the pulling apart of the pipe and the "T," and the explosion thereon ensuing.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 574-600.]

2. SAME—NEGLIGENCE OF MASTER—DUTY TO WARN.

Where a servant was injured by the explosion of a steam pipe, the act of defendant's foreman, who, with knowledge that there had been a slipping of a joint in the pipe rendering the same liable to explode, ordered the servant, without notifying him of such slipping, to place a dripping pan under the joint, was negligence imputable to defendant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 297-309.]

Exceptions from Superior Court, Providence County.

Trespass on the case for negligence by William Hardacre, as administrator, against Frank A. Sayles. Verdict for plaintiff, and defendant excepts to a denial of his motion for new trial. Exceptions overruled.

Argued before DOUGLAS, C. J., and DU-BOIS, BLODGETT, and PARKHURST, JJ.

John W. Hogan, for plaintiff. Edwards & Angell and Lewis A. Waterman, for defendant.

PARKHURST, J. This is an action of negligence for damages for death of plaintiff's intestate, James Allen, brought, under the statute, for the benefit of Elizabeth Allen, the widow, and William Allen and Isabella

Allen, only surviving children of said deceased.

Plaintiff's intestate was employed by the defendant as a piper in Sayles Bleachery, and was at work, assisted by one Michael Mitchell, hanging a dripping pan upon the main steampipe, which runs from the boiler room to the engine room of the bleachery, shortly before 7 o'clock in the morning of Tuesday, December 8, 1903, when the accident happened, which resulted in the instant death of both men. This large main was about 14 inches in diameter, and had been in use for over 15 years prior to the accident. Its purpose was to carry the steam from the boilers to the engine, a distance of several hundred feet; also to the kiers where the goods were boiled in the bleaching process. A heavy "T" joint was provided on this pipe at the place of the accident. This joint had leaked intermittently ever since its installation, as shown by the testimony. The joint and threads therein where the pipe was engaged in the "T" had been "calked" repeatedly for years, so that a groove or slot, running entirely round the rim of the "T," was formed upon the side of the "T" next the engine room. Copper wire had been used in this calking, and several of the outer threads had become entirely destroyed by the calking process. Prior to the accident a winding or folding machine had been lately installed, directly under this joint, in the unoccupied space there, and the leakage and drippings from the joint damaged the cloth running through and over this winding machine. In the afternoon of Monday, December 7, 1903, the day before the accident, the attention of both the master mechanic, Alexander Stewart, and the mechanical engineer, Kenneth F. Wood, had been called to this joint, and they then came there together and looked over the pipe and inspected this joint at the "T," and some calking was done during that afternoon by Allen, the plaintiff's intestate, and by Mitchell. The engineer, who had full charge and control of all the defendant's machinery, ways, and works, and the repair thereof, just after this examination and as the result thereof, gave orders to his master mechanic to take measures for a new pipe and then to take down this pipe and install a new pipe in place of it. These facts are undisputed in the testimony, though the parties are at variance as to the true reason and significance of this determination to take down and replace this offending joint and pipe. During the night preceding the accident pipers and calkers in the "night gang" labored with this joint, endeavoring to stop the leakage, now markedly excessive in degree. Steam was shut off in this main pipe, at their request, about 3 o'clock in the morning on the day of the accident. One witness, Cooney, who assisted Brassell about the calking of the joint between 8 and 5 o'clock a. m. in the morning of December 8th, the day of the accident, testified that he saw evidence

that there had been a slipping of the joint where the pipe and the "T" came together between the time when he first saw the joint, when the steam was still at full pressure, on the previous evening, and the time they went to work after the steam was shut off at 3 o'clock a. m., and that he called the attention of Brassell to this fact, and that this occurrence was reported by Brassell to one Rooney, who had charge of the piping and repairs there, as soon as he came in the following morning. This report was made to Rooney about 6.25 a. m. and Allen and Mitchell, who came to work at 6.30, went up on ladders to hang a new dripping pan thereon within 20 minutes after the report was made. No warning or notice of any kind was given to either of them by Rooney, or otherwise, of the condition of the joint, or of the fact that it was believed to have slipped. Within three minutes after they went up to the joint the pipe and "T" pulled apart and exploded, and both were killed by the escaping steam. Upon trial of this case in the superior court, before Mr. Justice Brown and a jury, a verdict was returned for the plaintiff for \$10,500. Thereafter the defendant duly filed his motion for a new trial, upon the usual grounds that the verdict was against the law and the evidence and because of excessive damages and newly discovered evidence, which motion was denied by the superior court, and no newly discovered evidence has been produced.

It is urged by the defendant, and nowhere denied, that Allen, the plaintiff's intestate, was an experienced steam fitter; that he had frequently worked upon this joint, and he had full knowledge of its leaking from time to time, and that he had as much notice as any one could have had of the danger incident to the condition of the joint, and therefore that he assumed the risk of danger, and that no recovery can be had. This argument, however, falls to take into account the most important and vital element of the case, namely, that Rooney, who was the foreman over him, had notice of something which had not been brought to Allen's attention, regarding Cooney's statement about the slipping of the pipe in the "T." Whether that slipping did in fact occur or not, it was a matter of such importance and, if true, so significant of radical and dangerous impairment of the holding power of the joint, as agreed by all the experts, that, in our opinion, Allen and Mitchell should not have been allowed to go upon the ladders in close proximity to the joint to hang the dripping pan in place. On the contrary, in our opinion, the steam should have been shut off at once, until a complete investigation and test could have been made.

Rooney admits receiving this notice, but attempts to say that he made an examination of the joint after getting this report as to the slipping, but as it is undisputed that a "climax clamp" of brass with rubber packing had been placed about the joint by Bran-

sell and Cooney after they finished calking in such manner that the joint was completely covered by the clamp, so that no part of the joint could be seen, and there is no evidence that Rooney took this clamp off or could have taken it off in the time at his disposal, and no attempt by Rooney either to deny that it was there or that it covered the joint as stated, it is impossible to believe that Rooney made any examination whatever of the joint other than to see how much it was leaking at the time.

We are of the opinion, therefore, that the plaintiff's intestate did not assume any risk as to conditions unknown to him at the time of the accident, that Rooney took the risk in ignoring the information given him by Brassell, and that this was negligence of the grossest character which must be imputed to the defendant as the master.

Numerous exceptions have been taken by the defendant, both as to admission and exclusion of testimony, and as to the charge and refusals to charge. We have examined them all carefully, and find that no useful purpose can be served by discussing them serialim. We find no error in any of them of such important character as in any way to have affected the verdict injuriously to the defendant. The charge as given to the jury was an admirable and clear statement of the law of the case, and the court did not err in refusing the special requests, as in no particular would they have added to the clearness of the charge, and many of them would have been misleading.

We think the evidence is sufficient to support the verdict of the jury both as to liability and as to the amount of the verdict, which we do not find to be excessive.

The exceptions are overruled, and the case is remanded to the superior court, with instructions to enter judgment upon the verdict.

(28 R. I. 280)

GREENOUGH, Atty. Gen., et al. v. LUCEY et al.

(Supreme Court of Rhode Island. Feb. 16, 1907.)

1. QUO WARRANTO—PUBLIC OFFICE—WARD COMMITTEEMEN.

The office of Democratic ward committeemen of a city is not a public office, and hence the Attorney General is not entitled to maintain a petition in equity in the nature of a quo warranto in order to oust certain incumbents therefrom.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Quo Warranto, § 8.]

2. SAME—PRIVATE PETITIONERS.

Gen. Laws 1896, c. 263, § 1, as amended by Court and Practice Act 1905, § 1160, declares that the title to an office, to determine which the writ of quo warranto lies at common law, may be brought in question by petition in equity in the Supreme Court. Section 2 declares that the Supreme Court may entertain informations in the nature of quo warranto and petitions in equity to determine title to any office.

Held, that the latter section did not enlarge the power of the court conferred by the former, and hence the Supreme Court by such a petition had no jurisdiction to determine the title to an office of Democratic ward committeemen, which was not a public office, but, at most, an office of a political party.

Petition in equity in the nature of quo warranto, on relation of William B. Greenough, Attorney General, and others, against Dennis Lucey and others. Petition dismissed.

Argued before DOUGLAS, C. J., and DUBOIS, BLODGETT, JOHNSON, and PARKHURST, JJ.

John Doran and James H. Thurston, for relators. Irving Champlin and James Harris, for respondents.

DUBOIS, J. This is a petition in equity in the nature of quo warranto under Gen. Laws 1896, c. 263, as amended by Court and Practice Act 1905, § 1160. It is brought not only by the Attorney General of the state at the relation of Timothy P. Dwyer, Dennis J. Sugrue, Daniel J. Hanley, Bernard I. McElroy, James P. Lyons, Michael J. O'Brien, and John E. Hurley, but also by the relators themselves, as petitioners, to cause Dennis Lucey, John Deignan, John F. Turbidy, Daniel J. Lowney, Timothy Mahoney, Thomas F. Doyle, and John J. Shea to be ousted from, and said relators to be declared elected to, the office of Democratic ward committee of the First Ward of the city and county of Providence, in the state of Rhode Island.

The fact that the Attorney General is a party to this proceeding naturally calls forth the inquiry: Is membership in a ward committee of one of the cities of the state a public office? for, if it is not, the Attorney General cannot intervene. A similar question has been answered in the negative in the case of Attorney General v. Drohan, 169 Mass. 534, 48 N. E. 279, 61 Am. St. Rep. 301, in which Morton, J., speaking for the court, said: "The first question is whether the relators, as members of the Democratic city committee, of Boston, hold public offices. If they do not, this information cannot be maintained, since the Attorney General can intervene in matters of this nature only so far as they relate to public offices. * * * Except for the fact that several acts have been passed by the Legislature which relate, amongst other things, to political committees, no one would contend, we presume, that the members of a political committee belonging to one of the political parties hold public office by reason of their being members of such committee. We do not think that the effect of these statutes has been or is to make that a public office which was not one before their enactment. Without attempting an exhaustive definition of what constitutes a public office, we think that it is one whose duties are in their nature public—that is, involving in their performance the exercise of some portion of the sovereign power, whether great

or small—and in whose proper performance all citizens, irrespective of party, are interested, either as members of the entire body politic, or of some duly established division of it. *Brown v. Russell*, 166 Mass. 14, 43 N. E. 1005, 32 L. R. A. 253, 55 Am. St. Rep. 357; *United States v. Hartwell*, 6 Wall. 385, 18 L. Ed. 830; *People v. Nostrand*, 46 N. Y. 375; *People v. Brooklyn*, 77 N. Y. 503, 33 Am. Rep. 659; *Opinion of the Justices*, 3 Greenl. (Me.) 481. A distinction has been taken between public office and public employment to which it is not necessary now to do more than to refer. *Brown v. Russell*, *ubi supra*. Manifestly membership in a political committee belonging to one party or another does not come within the above description of what constitutes public office. The fact that the Legislature has deemed it expedient to regulate by statute the election and conduct of political committees does not make the office a public one. The members of them continue to be, as before, the officers of the party which elects them, and their duties are confined to matters pertaining to the party to which they belong, and which alone is interested in their proper performance."

We are satisfied with the correctness of the foregoing reasoning, and are convinced that the proceeding so far as the Attorney General is concerned was improperly brought; and also that the petition itself cannot be maintained by the relators as petitioners under the provision of Gen. Laws 1896, c. 263, which, as amended by Court and Practice Act 1905, § 1160, reads as follows: "Section 1. The title to any office, to determine which the writ of quo warranto lies at the common law, may be brought in question by petition in equity in the Supreme Court." The scope of quo warranto was well stated by Ames, C. J., in *State v. Brown*, 5 R. I., at page 7, as follows: "The writ, or information in the nature of a writ, of quo warranto, is in the nature of a writ of right, we are told, for the king or state, against him who claims or usurps any office, franchise, or liberty, to inquire by what authority he supports his claim, in order to determine the right (3 Black. Com. 262); and it lies for usurping any office, whether created by charter of the crown alone, or by the crown with the consent of Parliament, provided the office be of a public nature, and a substantive office, and not merely the function or employment of a deputy or servant, held at the will or pleasure of others. *Darley v. Regina* (In Error) 12 Cl. & Fin. 520." Membership in the Democratic ward committee of the First Ward of the city of Providence is not a public office, but it is an office of a political party. The very act under which the petitioners lay claim to the office, viz., Pub. Laws, p. 35, c. 1078 (passed December 12, 1902), recognizes that there is a difference between public officers and officers of a political party, and in section 18 provides for the punishment of

members of either class who shall offend against its provisions. It is therefore evident that the petitioners have not brought a case within the purview of quo warranto at the common law. We do not think that the Court and Practice Act, § 2, which, among others things, provides that "the Supreme Court * * * may entertain informations in the nature of quo warranto and petitions in equity to determine title to any office," enlarges the power of the court in this regard, as section 1160 of the same act defines the right to apply by petition in equity and the limits of it, while section 2 gives original jurisdiction to the court of such petitions when properly brought. We are without authority to determine the title of the petitioners to the office which they claim. In this respect our jurisdiction is less ample than that conferred upon the courts of Massachusetts, as appears in the following extract from the opinion of the court in *Attorney General v. Drohan*, 169 Mass. 536, 48 N. E. 281 (61 Am. St. Rep. 301): "Neither is it necessary, in order to protect the rights of members of political committees, that the office should be regarded as a public one. As already observed, that may be done by proceedings instituted in their own names by those whose rights have been interfered with, and this court and the superior court are expressly given full powers at law and in equity to enforce the provisions of the statutes relating to political committees and caucuses."

While the case of *Sherry v. O'Brien et al.*, 22 R. I. 319, 47 Atl. 690, is apparently in point, in reality it is not, for it seems to have been decided upon its merits with the consent of, or at least without objection on the part of, the respondents, and without solemn argument calling the attention of the court to the radical objections to the proceedings which have been considered in the case at bar. Hence we do not regard it as a binding authority in the present case.

Petition denied and dismissed.

(28 R. I. 125)

STATE ex rel. EGAN v. McCRILLIS.

(Supreme Court of Rhode Island. Feb. 1, 1907.)

1. MUNICIPAL CORPORATIONS—STREETS—ORDINANCES—CLEANING SIDEWALKS.

Under Charter of City of Providence, § 9, cl. 1, providing that the city council may make ordinances for the government of the city relative to the sidewalks and to cleaning the same, the city has authority to pass an ordinance providing that owners, occupants, or persons having the care of buildings and lots bordering on streets, etc., within the city, shall, within the first four hours of daylight after snow had ceased falling, cause the snow to be removed from the sidewalks adjoining the property, etc.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, § 1456.]

2. SAME.

A city ordinance enacted within the scope of its charter, requiring owners, occupants, and persons having charge of property to remove the snow from adjoining sidewalks, does not violate

Const. R. I. art. 1, § 2, declaring that all laws should be made for the good of the whole, and the burdens of the state ought to be fairly distributed among its citizens, since that section expresses no more than would be implied without it, and is merely advisory, addressed to the Legislature, rather than to the judicial department; and, moreover, the ordinance provides for a police regulation, rather than a tax.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, § 1457.]

3. EMINENT DOMAIN—NATURE AND EXTENT OF POWER—ACTS CONSTITUTING APPROPRIATION—CARE OF SIDEWALK BY ADJACENT OWNER.

The provisions of a city ordinance, providing that owners, occupants, and persons having charge of property shall remove the snow from adjoining sidewalks, does not violate Const. R. I. art. 1, § 16, declaring that private property shall not be taken for public uses without just compensation, as it is not unreasonable to require the performance, without pay, of a duty incident to citizenship and the ownership of real property.

4. CONSTITUTIONAL LAW—EQUAL PROTECTION OF LAWS—TAXATION—CARE OF SIDEWALKS.

A city ordinance requiring owners, occupants, and persons in charge of property to remove the snow from adjoining sidewalks, does not contravene Const. U. S. Amend. 14, by denying equal protection of the laws, since, if the requirement is a tax, that amendment was not intended to prevent a state from adjusting its system of taxation in all proper and reasonable ways.

5. SAME—DUE PROCESS OF LAW.

The ordinance does not violate that amendment in depriving a person of property without due process of law.

Case certified from Superior Court.

J. Wilson McCrillis was convicted for violation of a city ordinance, and appeals. The questions raised are certified by the superior court to the Supreme Court for its opinion. Ordered sent back with decision to the superior court for further proceedings.

Argued before DOUGLAS, C. J., and DUBOIS, BLODGETT, JOHNSON, and PARKHURST, JJ.

Albert A. Baker and Henry C. Cram, for complainant. Littlefield & Barrows, for defendant.

BLODGETT, J. The questions raised by the appellant in his reasons of appeal from a conviction in the police court of the city of Providence for a violation of section 33 of chapter 20 of the Ordinances of that city have been considered of such doubt and importance that they have been certified by the superior court to this court for its opinion thereon. The ordinance in question is as follows: "Sec. 33. The owner or owners, occupant or occupants, or any person having the care of any building or lot of land bordering on any street, square, or public place within the city, shall within the first four hours of daylight, after the ceasing to fall of any snow, cause the snow to be removed from the sidewalk adjoining said building or lot of land, and each and every hour after the expiration of said four hours that the snow shall remain on said sidewalk shall be

deemed to be a separate violation of this section. The provisions of this section shall also apply to the falling of snow from any building." The questions certified by the court are: "(1) Whether an ordinance of the city of Providence, to wit, section 33 of chapter 20 of the Ordinances of the city council of said city, requiring owners and occupants of real estate to remove snow and ice from the sidewalks adjacent to such real estate under a penalty, was illegal and void because said city of Providence at the time of the passing of said ordinance had no power or authority under the laws of the state of Rhode Island to pass such an ordinance. (2) Whether said ordinance is contrary to article 1, section 2, of the Constitution of the state of Rhode Island, which declares that: 'Laws, therefore, shall be made for the good of the whole and the burdens of the state ought to be fairly distributed among its citizens.' (3) Whether said ordinance is contrary to article 1, section 16, of the Constitution of the state of Rhode Island, which declares that: 'Private property shall not be taken for public uses without just compensation.' (4) Whether said ordinance is contrary to the fourteenth amendment of the Constitution of the United States, which declares that: 'No state shall deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction equal protection of the laws.'"

It is clear that the city council had abundant authority to provide by ordinance for the clearing of the sidewalks in said city, as appears by clause 1 of section 9 of its charter, viz.: "The city council of said city shall have power to make laws, ordinances and regulations for the government of said city relative to * * * the streets, sidewalks and highways of said city, and to the ordering of the same to be made, and to amending, paving, cleaning and lighting the same." See, also, section 9, cl. 2, and section 1, cl. 1. It follows that this contention cannot avail the appellant.

It is next objected that this ordinance is repugnant to the provisions of article 1, § 2, of the Constitution of this state, as well as of article 1, § 16, thereof, which are as follows:

"Sec. 2. All free governments are instituted for the protection, safety, and happiness of the people. All laws, therefore, should be made for the good of the whole; and the burdens of the State ought to be fairly distributed among its citizens."

"Sec. 16. Private property shall not be taken for public uses, without just compensation."

The questions here raised are presented to this court for the first time, although similar questions have been raised frequently in other jurisdictions, and the decisions thereon are not uniform. Counsel for the appellant contends that the ordinance is invalid, and relies upon

the cases of *Gridley v. Bloomington* (1878) 88 Ill. 554, 30 Am. Rep. 566, affirmed by a divided court (three justices dissenting) in *Chicago v. O'Brien*, 111 Ill. 532, 53 Am. Rep. 640, decided in 1884, and upon the case of *State v. Jackman* (1898) 69 N. H. 318, 41 Atl. 347, 42 L. R. A. 438, and the decision of the Court of Appeals of the District of Columbia in *McGuire v. District of Columbia* (1904) 24 App. Cas. D. C. 22, in support of his contention. The reasoning by which this conclusion is reached may be thus briefly summarized. The state imposes upon the municipalities the duty of constructing highways and of maintaining them in a safe condition for travel under a penalty for failure so to do, and also imposes a civil liability for damages for accident arising by reason of such neglect. This is a public improvement, and is also a public duty for which taxes are properly levied upon a taxing district, which may, indeed, include the whole municipality, or which may be limited to include only those whose property is specially benefited; but in either case the tax must be assessed upon the principles of uniformity and of equality. The sidewalks in a city are undoubtedly part of the highway, and the general duty of removing or rendering harmless the accumulations of snow and ice thereon constitutes a repair of a public highway and a public improvement as to which the same rules of equality and uniformity must be observed when a tax is to be levied therefor. Consequently, a requirement that each abutter shall be required to remove the snow and ice from the sidewalk in front of his premises, whatever their extent, and irrespective of their value, is a violation of this rule of uniformity and equality, inasmuch as it imposes a burden and creates a duty which does not bear on all citizens alike; nor equally upon all abutters, inasmuch as it is a uniformity of system only, and not a uniformity of result. The argument would seem to rest upon the postulate that "taxation must be uniform and equal," and this is doubtless true when it is so expressed in the Constitution; but it is not a fundamental maxim of government, limiting the Legislature, unless it is so expressed therein.

In *Chicago v. O'Brien*, supra, cited by the appellant, it was said (page 535 of 111 Ill. [53 Am. Rep. 640]) that: "In *City of Chicago v. Larned*, 34 Ill. 203, a case very elaborately argued by able counsel, the principle involved in the decisions of these cases was carefully considered, and it was held they could not apply here, that they were decided under Constitutions so materially different from ours that the same line of reasoning is not applicable to both." This statement is the more clearly apparent upon referring to the decision in *Chicago v. Larned*, where it appears by the opinion (page 268) that section 5 of article 9 of the Constitution of Illinois contained a provision requiring "such

taxes to be uniform in respect to persons and property within the jurisdiction of the body imposing the same"; the court adding (page 275): "The framers of our Constitution have taken unexampled pains by these separate sections to affirm the principles of 'equality' and 'uniformity' as indispensable to all legal taxation whether general or local. Section five, supra, is believed to be peculiar to our Constitution, and manifests the great anxiety of its framers to place every possible species of taxation upon the only equitable basis conceivable, and is believed to be more stringent than any provision in any other state Constitution on the same subject." It is obvious, accordingly, that the decision in *Chicago v. O'Brien* was rendered in accordance with special requirements of the Constitution of Illinois. A similar consideration seems to have controlled the decision in *State v. Jackman*, 69 N. H. 318, 329, 41 Atl. 347, 348, 42 L. R. A. 438, in which the court refers with approval to the decision in *State v. Express Co.*, 60 N. H. 219, 237, in which latter case the court said: "But this general principle of equality, which, independent of any constitutional provisions, underlies and forms the basis of all taxation, is enforced here by the provision of the Constitution that requires that 'all assessments, rates and taxes shall be proportional and reasonable.' It is not left to the discretion of the general court to determine what is equal and reasonable, and to impose such as they may consider equal, but any other than equal and reasonable taxes, rates, and assessments are prohibited; and the equality intended is 'that the same tax shall be levied on the same amount of property in every part of the state, so that each man's taxable property shall bear its due proportion of the tax according to its value.' 4 N. H. 568." The remaining case cited by the appellant is *McGuire v. District of Columbia*, 24 App. Cas. D. C. 22, in which an act of Congress passed in 1904 and applicable to the District of Columbia, because of certain inequalities and exceptions therein, was thus characterized by the court: "We find only one section in it, that which repeals the act of 1897, which does not in some way contravene the principles of common right and the fundamental law." The court continuing (page 31): "The act is entirely destitute of any provision for the removal of snow and ice from the sidewalks of adjoining improved property that happens to be vacant or untenanted at the time, and this class of property and its owners escape all liability under the act. This exemption or omission, whichever we call it, would be fatal to the act, even if there were no other defect, for the duty required to be performed is one which requires the most absolute uniformity with respect to all property within the so-called fire limits of the District adjoining the paved sidewalks." And page 32: "But probably the most glaring infirmity of this en-

actment is its sharp discrimination between the tenants and occupants of improved lots and the owners of vacant or unimproved lots. * * * To punish the one owner, for failure of compliance with the act, by fine and imprisonment and an assessment upon his property, and to exempt the other from all duty and from all liability for the same precise thing, is a species of inequality which is repugnant to the principles of natural justice." And it appears the decision is clearly based upon the inequalities and discriminations appearing in the act, as is evidenced by the statement (page 35): "It is for this inequality and for this discrimination that we are constrained to hold the enactment to be a nullity."

The grounds for the foregoing decisions have thus been set forth at some length, in order that the reasoning in all the cases cited by the appellant, and all that we have found, after an extended examination, might be clearly set forth in order to an examination of their relevancy to the case at bar. Clearly, they do not apply to the case at bar, unless similar inequalities and discriminations appear in the ordinance in question, or unless the Constitution of Rhode Island contains restrictions similar to the Constitutions of Illinois and New Hampshire. We find no such obnoxious discriminations in the ordinance of the city of Providence, and proceed to a consideration of those provisions of the Constitution of this state which are said to be controlling in this respect. In *Cleveland v. Tripp*, 13 R. I. 50, 62, *Durfee, C. J.*, said: "But our Constitution is extremely latitudinarian. It contains no restriction, except what is implied in the declaration that 'the burdens of the state ought to be fairly distributed,' and this declaration, as was said in *Matter of Dorrance Street*, 4 R. I. 230, 249, expresses no more than would be implied without it, 'from the fact of our free institutions and the general principles of constitutional law.'" And in *Crafts v. Ray*, 22 R. I. 179, 183, 46 Atl. 1043, 49 L. R. A. 604, this court said, of the same provision, "the form of this clause is advisory, not mandatory," and that it was "addressed rather to the General Assembly, by way of advice and direction, than to the courts, by way of enforcing restraint upon the lawmaking power. * * * The form is 'ought to be.' The word is fairly distributed, not 'equally' even—unless equality be fair, which is not always in any sense, and never in some senses. * * * Had the Constitution been wholly silent upon this subject, a greater latitude could not have been given by these principles than seems to have been studiously implied in the form, spirit, and general terms of the sentence."

Hence it is evident that the expressed provisions of the Constitution of this state cannot avail the appellant here. It is obvious that there is no specific provision that taxation shall be uniform and equal, expressed in

the Constitution of this state, and it is equally obvious that it is not our province to determine what ought to be there, but is not there. As was said in *State v. Travelers' Ins. Co.* (1900) 73 Conn. 255, 262, 47 Atl. 299, 301, 57 L. R. A. 481: "Is this maxim necessarily implied from any provisions of our fundamental law? Unless the vague notion of a higher law is claimed as a constitutional provision, we are pointed to no provision, nor to any combination of provisions, from which it is claimed that such a maxim is a necessary implication. To controvert a claim which rests on no definite proposition is ordinarily like fighting the air. But fortunately in this case the task of proving a negative is not difficult. The provisions of our Constitution exclude the possibility of a limitation of legislative power by any implied mandate that taxation shall be equal and uniform." The reasoning in the cases cited by the appellant, as also his contention set forth in his brief and at the argument, alike proceed upon the assumption and the theory that the legislation in question is in substance and effect the imposition of a tax. Thus, in *State v. Jackman*, supra, the court says (page 329 of 69 N. H., page 348 of 41 Atl. [42 L. R. A. 438]): "True, the ordinance is not strictly a law levying a tax, the direct or principal object of which is the raising of revenue (*Goddard, Petitioner*, 16 Pick. [Mass.] 504); but it is such a law practically, both in substance and in effect, and should fairly be so regarded. The amount of expense from which the city is relieved by the operation of the ordinance is equivalent to so much revenue derived from taxation. The additional burden to which the lot owners are subjected is none the less a tax because it is exacted in labor and not in money [citing authorities]; and the fine imposed for its nonperformance is as useful to the city as a tax of equal amount." The correct view, however, seems to us to be expressed in *Goddard, Petitioner*, supra, cited in *State v. Jackman*, supra. There *Shaw, C. J.*, says (page 509 of 16 Pick. [Mass.]): "It is not speaking strictly to characterize this city ordinance as a law levying a tax, the direct or principal object of which is the raising of revenue. It imposes a duty upon a large class of persons, the performance of which requires some labor and expense, and therefore indirectly operates as a law creating a burden. But we think it is rather to be regarded as a police regulation, requiring a duty to be performed, highly salutary and advantageous to the citizens of a populous and closely built city, and which is imposed upon them because they are so situated as that they can most promptly and conveniently perform it, and it is laid, not upon a few, but upon a numerous class, all those who are so situated, and equally upon all who are within the description composing the class." Nor are decisions wanting in other states in which similar legislation has been sustained

as valid. *Carthage v. Frederick*, 122 N. Y. 268, 25 N. E. 480, 10 L. R. A. 178, 19 Am. St. Rep. 490; *Reinken v. Fuehring*, 130 Ind. 882, 30 N. E. 414, 15 L. R. A. 624, 30 Am. St. Rep. 247; *City of Helena v. Kent*, 82 Mont. 279, 80 Pac. 258; *State v. McMahon*, 76 Conn. 97, 55 Atl. 591; *City of Lincoln v. Janesch*, 63 Neb. 707, 89 N. W. 280, 56 L. R. A. 762, 98 Am. St. Rep. 478; *Flynn v. Canton Co. of Baltimore*, 40 Md. 312, 17 Am. Rep. 603; *Taylor v. Lake Shore & Mich. S. Ry. Co.*, 45 Mich. 74, 7 N. W. 728, 40 Am. Rep. 457. It would serve no useful purpose to further multiply citations from these authorities. Suffice it to say that the reasoning in support of them may be summarized as based upon the following just and sound principles.

As all property is held and enjoyed subject to the police power of the state, so all law-making power is vested in the Legislature, subject to the limitations contained in the Constitution. Governments are instituted and laws are enacted, in large measure, in order that the respective rights and duties of citizens to each other and to the state may be determined and enjoyed, and these duties, within proper limitations, may be determined and changed from time to time by the Legislature, according to the status or occupation or temporary relation of the citizen, without being obnoxious to the charge of arbitrary partiality or of unfair discrimination. For example, the ordinary duty which a bailee owes to his bailor is increased when the bailee is a common carrier, as the liability of a principal for the acts of his agent is also enlarged when the two stand in the relation of master and servant; and, as it is true that the Legislature may enlarge or diminish the duties which it imposes upon men engaged in certain employments or engaged in certain occupations, so it may create, enlarge, or diminish the duties which accompany the ownership and use of land, and legislation is not necessarily invalid because it affects such persons only. These observations are true also of the duties and limitations which are attached to the ownership of land. These may, indeed, be changed from time to time by the Legislature, but they are not of necessity void because they apply to landowners only. Obviously, an act which apparently seeks to accomplish such a purpose, but nevertheless in fact and in effect works a confiscation of property, or is an arbitrary and partial discrimination between persons who are equal before the law, is invalid. From the fact of his citizenship, every citizen is under obligation to render some unpaid service to the state which protects him, reasonable, of course, in view of the exigencies which require such a service from him, and a law which simply defines and enforces such an obligation is entirely within the scope of the legislative power. The wisdom and the expediency of such a requirement are, commonly speaking,

legislative questions, while the function of the judiciary is rather to determine whether such an act in fact and in effect violates the constitutional limitations imposed upon the lawmaking power. But it cannot be successfully contended that such legislation is confiscation, simply because there is no provision for payment for the services rendered, nor that it makes unequal and arbitrary discriminations, because different burdens are imposed upon persons differently employed or owning different kinds of property.

The creation of a municipal corporation, such as a city of Providence, confers special corporate powers and privileges for the common welfare, and it of necessity involves the imposition of special limitations upon the individual in the use of his property, as well as in his action or in his employment, and these limitations are the foundation of rights which the same individual owes to his fellows and to the corporate community of which they are alike members. This is specially true of the highways of a municipality. It is true that they serve as means of public travel for all; nevertheless, that travel is largely, if not mainly, incident to the use and the enjoyment of the land upon which they abut. Were it not for the highways of the city, small, indeed, in comparison with their present value, would be the value of city lots, to which no access could be had. And so it may be said, in a large way, that those who own and those who occupy the land within the limits of the city are collectively the inhabitants of the city, so that the relation of the land in a city to the plexus of streets by which the land is surrounded and entered, and which so greatly increases its value and its use, is a peculiar and special relation. It is not to be questioned that sidewalks are a part of the highway, and it is of common knowledge that they are commonly laid within the lines of the street, and indeed they sustain a relation which is even closer and more immediate to the adjoining land and buildings, and hence are properly made the subject of special authority, and may be made the subject of special regulations. It is obvious that a city of very small area may have several hundred miles of sidewalks, and it is of the greatest importance to the public safety that these entrances to the land should be kept safe, as indeed, such safety of access increases the value of all the land which they adjoin. It was conclusively shown at the argument that a purely corporate oversight of all these sidewalks could not adequately meet all the emergencies which in this latitude the action of the elements often creates, and it was shown with equal clearness that the inhabitants, being, as already stated, practically those who are the owners and the occupiers of the land, are alone so situated as to be enabled to render those services which are essential alike to the public welfare, as well

as promote their individual interest, and we see no constitutional objection to the validity of such legislation. As said in *State v. McMahon*, 76 Conn. 97-106, 55 Atl. 591, 594: "To say that it is possible for the Legislature, under cover of a law purporting to be of this kind, to accomplish actual confiscation of property, or the subjection of citizens to partial and arbitrary discriminations, is to state a proposition which may be sound, but is not relevant to the facts of this case. To say that a law defining the duties of citizens in serving the state is necessarily a violation of the constitutional guarantees against the confiscation of property and partial and arbitrary discriminations, because the service is unpaid, or is one that all citizens are not in a situation to render, is to state a proposition which is radically unsound. Such a theory of selfish immunity from all duties inherent in citizenship is supported by no principle of political ethics, and cannot safely be reduced to practice under any government."

There remains the final objection urged by the appellant: That this legislation violates the provisions of the fourteenth amendment to the Constitution of the United States. The contention apparently proceeds upon the assumption that the legislation in question is of the nature of a tax, and is objectionable because of the inequality of burden imposed thereby. Even so, the contention cannot avail the appellant. Says Mr. Justice Miller, in *Davidson v. New Orleans*, 96 U. S. 97, 105, 24 L. Ed. 616, in speaking of unequal taxation: "The federal Constitution imposes no restraint upon the states in that regard." And it is stated by Mr. Justice Brewer, in *Merchants' Bank v. Pennsylvania*, 167 U. S. 461, 464, 17 Sup. Ct. 829, 830, 42 L. Ed. 236: "Indeed, this whole argument of a right under the federal Constitution to challenge a tax law on the ground of inequality in the burdens resulting from the operation of the law is put at rest by the decision in *Bell's Gap Railroad v. Pennsylvania*, 134 U. S. 232, 237, 10 Sup. Ct. 533, 535, 33 L. Ed. 892, in which case Mr. Justice Bradley, speaking for the court, said: 'The provision in the fourteenth amendment, that no state shall deny to any person within its jurisdiction the equal protection of the laws, was not intended to prevent a state from adjusting its system of taxation in all proper and reasonable ways. It may, if it chooses, exempt certain classes of property from any taxation at all, such as churches, libraries, and the property of charitable institutions. It may impose different specific taxes upon different trades and professions, and may vary the rates of excise upon various products. It may tax real estate and personal property in a different manner. It may tax visible property only, and not tax securities for payment of money. It may allow deductions for indebtedness, or not allow them. * * * We think that we are safe in saying that the

fourteenth amendment was not intended to compel the state to adopt an iron rule of equal taxation. If that were its proper construction, it would not only supersede all those constitutional provisions and laws of some of the states, whose object is to secure equality of taxation, and which are usually accompanied with qualifications deemed material; but it would render nugatory those discriminations which the best interests of society require, which are necessary for the encouragement of needed and useful industries, and the discouragement of intemperance and vice, and which every state, in one form or another, deems it expedient to adopt.' See, also, *Jennings v. Coal Ridge Improvement Co.*, 147 U. S. 147, 13 Sup. Ct. 282, 37 L. Ed. 116."

We are of opinion, therefore, that the ordinance in question is an ordinance which the city council of Providence was authorized to enact, and that it does not violate the provisions of the Constitution of this state or of the Constitution of the United States, and, so holding, our order is that the papers in the cause be sent back to the superior court, with our decision, for further proceedings in accordance therewith.

(23 R. I. 223)

STATE v. CUSTER.

(Supreme Court of Rhode Island. Feb. 18, 1907.)

1. ELECTIONS—VIOLATION OF ELECTION LAWS—COMPLAINT.

Gen. Laws 1896, c. 14, § 2, provides that every person who at any election shall fraudulently vote or attempt to vote, not being qualified, or shall vote or attempt to vote in a town, ward, or voting district other than that in which he has his residence, etc., shall be punished. *Held*, that a complaint alleging that defendant, at a certain meeting of electors of the town of North Providence, held for the choice of town and state officers and a representative of Congress, knowing that he did not have his residence in such town, willfully and fraudulently did give in his vote for persons to serve in said office, etc., was not objectionable for failure to aver the particular office or officers for whom or for which he so voted.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Elections, § 358.]

2. SAME.

Under Gen. Laws 1896, c. 14, § 2, providing that a person voting or attempting to vote in a town, ward, or voting district other than in the town, ward, or voting district where he has his residence and home, etc., shall be punished, a complaint alleging that defendant did not then have his residence and home in the town where he voted sufficiently alleged his disqualification to vote in such town.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Elections, § 357.]

3. EVIDENCE—JUDICIAL NOTICE—GENERAL ELECTION—DATE.

The court will take judicial notice that the 6th day of November, A. D. 1906, was the date prescribed by Gen. Laws 1896, c. 12, § 3, and by Const. art. 11, § 2, of amendments (Public Laws 1900, p. 86), for the holding of an election for congressional, state, and township officers.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 36.]

4. ELECTIONS — OFFENSE — COMPLAINT — DESCRIPTION OF ELECTION.

A complaint for illegal voting in violation of Gen. Laws 1896, c. 14, § 2, alleging that defendant was guilty of illegal voting at a meeting of the electors of the town of North Providence duly and in due form of law had and held for the choice of town officers, state officers, and a representative of Congress, sufficiently described an election within such section.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Elections, § 358.]

5. SAME.

Where a complaint for illegal voting charged that defendant voted illegally at a meeting held in North Providence for the choice of town officers, state officers, and a representative of Congress, it sufficiently apprised defendant that the town officers were for the town of North Providence, the state officers for the state of Rhode Island, and that the representative was to serve in the Congress of the United States.

Case Certified from District Court, Providence County.

William Custer was charged with illegal voting in violation of Gen. Laws 1896, c. 14, § 2. On certified questions from a district court of the Sixth judicial district.

Argued before DOUGLAS, C. J., and DUBOIS, BLODGETT, JOHNSON, and PARKHURST, JJ.

James C. Collins, Jr., Green, Hinckley & Allen, and Guy Metcalf, for the State. John I. Devlin, for defendant.

BLODGETT, J. Under the provisions of section 478 of the court and practice act the district court of the Sixth judicial district for 1905 has certified for our determination certain questions arising upon a demurrer to the following complaint for an alleged violation of chapter 14, § 2, Gen. Laws 1896, viz.: "Joseph Wells, a citizen of North Providence, in the county of Providence and state of Rhode Island, on oath complains, in the name and behalf of the state, that at said North Providence, in said county, on the sixth day of November, A. D. 1906, with force and arms, William Custer, of said Providence, laborer, did then and there at a meeting of the electors of said town of North Providence duly and in due form of law had and held for the choice of town officers, state officers, and a representative in Congress, not being and knowing himself not to be then and there fully qualified to vote thereat, by reason that he did not then and (there) have his residence and home in said town of North Providence, willfully and fraudulently, on said day and and year, at said North Providence, give in his vote for persons to serve in said offices as though he were and as pretending to be qualified, against the statute and the peace and dignity of the state," etc. The provisions of the statute in reference thereto are thus expressed: "Sec. 2. Every person who, in any election, shall fraudulently vote or attempt to vote, not being qualified, notwithstanding his name may be on the voting-list at the polling-place where he shall so vote or attempt to vote; or who shall fraudulently vote upon

the name of any other person, or, having voted in one town, ward, or voting-district, shall vote or attempt to vote in the same or in another town, ward, or voting-district; or who shall fraudulently vote or attempt to vote in a town, ward, or voting-district, other than in the town, ward, or voting-district wherein he has his residence and home at the time of his voting or attempting to vote, shall be punished by a fine of not less than one hundred dollars nor more than five hundred dollars, or by imprisonment not less than sixty days nor more than one year, or by both such fine and imprisonment in the discretion of the court; and no person after conviction of such offence shall thereafter be permitted to exercise the privilege of voting for any military or civil officer."

1. The first question is this: "(1) Is it necessary for the complainants to allege for whom the defendant voted or how his ballot was marked, or even that it was marked, or anything more than that he did 'give in his vote' or that he had voted?" The answer to this question obviously depends upon the significance of the word "vote" as used in the statute and in the complaint. In considering the meaning of the word "vote," it was said in *Gillespie v. Palmer et al.*, 20 Wis. 544, 553: "What is the meaning of the word 'vote'? It is the expression of the choice of the voter for or against any measure, any law, or the election of any person to office. At a general election, there are several officers, both state and county, to be elected, and there may be measures to be voted on. The expression of the choice of the voter in favor of any candidate for office by depositing a ballot for him is a vote for such candidate; and, if there are several candidates for different offices, and the voter votes for each, he casts in so doing as many different votes as there are candidates for whom he votes, and it makes no difference that they are all on one piece of paper or ticket." Again, in *Davis v. Brown*, 46 W. Va. 716, 723, 34 S. E. 839, 841, the court says: "While the terms 'ballot' and 'vote' are sometimes confused, and while they may sometimes be used synonymously, the ballot is, in fact, under our form of voting, the instrument by which the voter expresses his choice between two candidates or two propositions; and his vote is his choice or election between the two, as expressed by his ballot, and when his ballot makes no choice between any two candidates, or on any question, then he casts no vote for either of these candidates or on the question. Those ballots are not votes." The distinction here made is aptly illustrated in the provisions of article 8, § 2, of the Constitution of this state, as follows: "The voting for Governor, Lieutenant-Governor, Secretary of State, Attorney-General, General Treasurer and Representative to Congress shall be by ballot." Indeed, our statute punishing illegal voting is older than the present Constitution of the state, and it follows that the meaning which attached to the word

"vote" at the time it was first so used should properly be considered in the construction of the statute now under consideration. The difference between the act and the method of voting prior to the adoption of the Australian ballot, so called, and the method now provided by law, is thus described in *State ex rel. Runge v. Anderson*, 100 Wis. 523, 530, 76 N. W. 482, 484, 42 L. R. A. 239 (1898): "The word 'ballot' and the expression 'vote by ballot' had a well-understood and universal meaning at the time of the adoption of the Constitution, and it must be taken as the law that the thought which was in the minds of the framers of the Constitution was in harmony with such meaning. Any attempt to go outside of that would be usurpation, not interpretation or construction. It would be a method of judicial procedure that would render any legislation, however plainly worded, subject to change by judicial construction to suit the judgment of courts as to the best legislative policy. The word 'ballot' means, in the election of public officers, and always meant, a paper so prepared by printing or writing thereon as to show the voter's choice, and 'vote by ballot' the deposit of such paper in a box in such a way as to conceal the voter's choice if he so desires. * * * The official ballot, so called, is not complete when furnished to the elector as he enters the booth to prepare his ballot. It is a mere form for a ballot. When marked and prepared by the voter so as to show his choice at the election, then, and not till then, does it become his constitutional ballot." The provisions of our statute are widely different from the provisions of the federal statute formerly in force (section 5514, Revised Statutes of the United States), as follows: "Sec. 5514. Whenever the laws of any state or territory require that the name of a candidate or person to be voted for as representative or delegate in Congress shall be printed, written, or contained, or any ticket or ballot with the names of other candidates or persons to be voted for at the same election as state, territorial, municipal, or local officers, it shall be deemed sufficient prima-facie evidence to convict any person charged with voting, or offering to vote, unlawfully, under the provisions of this chapter, to prove that the person so charged cast or offered to cast such a ticket or ballot whereon the name of such representative or delegate might by law be printed, written, or contained, or that the person so charged committed any of the offences denounced in this chapter with reference to such ticket or ballot." To the foregoing observations there may be added the provisions of section 38 of chapter 11 of the General Laws of 1896, as amended by section 6, c. 1229, p. 172, of the Public Laws, passed April 26, 1905, and in force at the time of the alleged commission of the offense charged in the complaint under consideration. It is there prescribed what shall be done by an elector: "If he desires to vote for all the candidates of one political party" as well as

what he shall do, "In case he desires to vote for a candidate whose name is not printed under the circle," etc., specifying further that an elector "shall vote for the candidate of his choice by making an X in the square opposite the name of the candidate of his choice," etc., and further providing, "He shall vote in the manner provided by law before leaving the enclosed space," etc. Inasmuch as the word "vote" as here used imports *ex vi termini* a ballot marked according to law, it follows that it is sufficient to charge that the defendant did "give in his vote," inasmuch as it follows that his ballot was thus marked for some or for all of the officers then to be voted for, and is sustained by the proof of such voting for any one of them without an averment of the particular office or officers for whom or for which he so voted.

2. The second question is: "Is the allegation of the complaint that the defendant 'did not then have his residence and home in said town' a sufficient allegation of disqualification to vote at an election then held in said town?" This is unquestionably sufficient. The language of the statute *supra* is specific, and prohibits every person from "voting or attempting to vote in a town, ward, or voting district other than in the town, ward, or voting district where he has his residence and home at the time of his voting or attempting to vote."

3. The third question is: "Do the words of the complaint, 'at a meeting of the electors of said town of North Providence duly and in due form of law had and held for the choice of town officers, state officers, and a representative in Congress' sufficiently describe an election within the meaning of the statute?" We are of the opinion that this is sufficient. The court can and should take judicial notice that the date of the alleged offense is the date prescribed by the statute, by section 3 of chapter 12 of the General Laws of 1896 for a congressional election, and the language of section 2 of article 11 of amendments (Pub. Laws 1900, p. 86) to the Constitution not only provides for the date of the state election, but provides also that certain officers "shall be elected at town, ward and district meetings," as follows: "Sec. 2. The Governor, Lieutenant-Governor, Secretary of State, Attorney-General, General Treasurer, and Senators and Representatives in the General Assembly shall be elected at town, ward, and district meetings on the Tuesday next after the first Monday in November annually."

The fourth question is thus framed: "Is the allegation that a meeting was held for the choice of town officers, state officers, and a representative in Congress sufficient without further allegation that the town officers were for the town of North Providence, the state officers for the state of Rhode Island and a representative in Congress for the Congress of the United States, and further

a choice for approval or rejection of the Metropolitan Park loan?" We think the allegation in the complaint is sufficient in these respects. Article 8, § 2, of the Constitution, *supra*, speaks of "representatives in Congress" without further description. Chapter 12 of the General Laws is thus entitled "Of the Election of Representatives in Congress"; and the same term is used in section 3 of that chapter. We are of the opinion that the defendant is sufficiently apprised that the town officers were the officers of the town in which he is alleged to have voted, the state officers were officers of this state, and the "representative in Congress" a representative in the Congress of the United States.

The papers will be remanded to the district court of the Sixth judicial district, with our decision thereon, for further proceedings not inconsistent therewith.

(28 R. I. 228)

STATE v. CUSTER.

(Supreme Court of Rhode Island. Feb. 18, 1907.)

1. INFORMATION—DEFECTS—DUPLICITY.

A complaint for repeating at an election charged that defendant, at a meeting of the electors of the town of N. and at an election for town, state, and congressional officers, having already once voted for persons to serve in said offices, willfully and fraudulently having so voted, corruptly returned to the place of voting and surreptitiously again so voted against the state, etc. *Held*, that the complaint charged that both votes so deposited were illegal, and was therefore duplicitous, as charging two offenses in a single count.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Indictment and Information, § 334.]

2. SAME.

The complaint expressly negated defendant's right to vote in the first instance, and was therefore not cured by the presumption that he was entitled to vote once.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Indictment and Information, §§ 395, 396.]

Case certified from District Court, Providence County.

William Custer was charged with illegal voting in violation of Gen. Laws, c. 14, § 2, and questions were certified to the Supreme Court by the district court of the Sixth judicial district.

Argued before DOUGLAS, C. J., and DUBOIS, BLODGETT, JOHNSON, and PARKHURST, JJ.

James C. Collins, Jr., Green, Hinckley & Allen, and Guy Metcalf, for the State. John I. Devlin, for defendant.

BLODGETT, J. This complaint charges an alleged violation of section 2, c. 14, of the General Laws, and certain questions arising upon demurrer thereto have been certified to this court for determination under the provisions of section 478 of the court and practice act of 1905.

The complaint is as follows: "Joseph Wells, a citizen of North Providence, in the county of Providence and state of Rhode Island, on oath complains, in the name and behalf of the state, that at said North Providence, in said county, on the sixth day of November, A. D. 1906, with force and arms, William Custer, of said Providence, laborer, did then and there, at a meeting of the electors of said town of North Providence duly and in due form of law had and held for the choice of town officers, state officers, and a representative in Congress, having then and there at said meeting on said day in said North Providence already once voted for persons to serve in said offices, willfully and fraudulently having so voted, retire, corruptly return to the place of voting and surreptitiously again so vote, against the statute and the peace and dignity of the state," etc. The statute in question is set forth in *State v. Custer*, 28 R. I. 222, 68 Atl. 306, and the first, second, and fourth questions are the same as the questions considered in that case.

The third question is as follows: "Is the allegation in the complaint of a first and second voting sufficient without a further allegation that he was or was not qualified to vote, either the first or the second time?"

The allegation in the complaint is fatally defective. It clearly charges the first voting to have been willful and fraudulent, and then alleges the second voting also to be illegal. It thus charges two offenses in one count; and is bad for duplicity. In *State v. Fitzpatrick*, 4 R. I. 269, it was held by Ames, C. J., that the supposition is that the accused was qualified to vote once, and that it is the voting a second time at which this clause of the statute is pointed, "and not the voting without a qualification to vote," but the express language of this complaint negatives a legal voting in the first instance, and hence is not curable in the manner suggested by the question proposed.

The answer to this question disposes also of the fifth question submitted, and the papers will be remanded to the district court of the Sixth judicial district with our decision thereon, and with direction to quash the complaint.

(102 Me. 140)

EDWARDS MFG. CO. v. FARRINGTON et al.

(Supreme Judicial Court of Maine. Nov. 24, 1906.)

1. MANDAMUS—WHEN ISSUES.

The writ of mandamus is an extraordinary writ to be issued, not to vindicate a mere abstract, theoretical right, but only when necessary and effective to secure some substantial relief or benefit.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Mandamus, §§ 37, 48.]

2. SAME—TO ASSESSORS.

The writ of mandamus should not be issued to compel municipal assessors of taxes to act upon an application made to them for an abate-

ment of a tax, when it appears from the petition for the writ that the application is barred by the unjustified omission of the applicant to furnish the assessors with a list of his taxable property "at the time appointed."

3. TAXATION—ABATEMENT—FAILURE TO FURNISH LIST TO ASSESSORS.

To justify such omission, the applicant for abatement must show that he "was unable to offer it at the time appointed." Rev. St. c. 9, § 74. That the applicant in good faith supposed he was a nonresident, and had been so regarded by the assessors for a series of years, including the year of the assessment complained of, does not justify his omission to furnish such list, if, in fact, he was a resident and liable to taxation as such.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Taxation, § 549.]

(Official.)

Report from Supreme Judicial Court, Kennebec County.

Petition by the Edwards Manufacturing Company for mandamus against Frank L. Farrington and others, assessors of the city of Augusta. Case reported. Petition denied.

Petition by plaintiff company for a writ of mandamus to compel the assessors of the city of Augusta to take action upon its application to them for an abatement on the taxes assessed against the plaintiff company for the year 1904.

This petition was filed in the Supreme Judicial Court, Kennebec county, and, after its filing, the following agreement in relation to the matter was made: "In the above petition for mandamus, it is stipulated and agreed between counsel for the petitioner and for the respondents that the case shall be heard on the 14th day of September, 1906, before Spear, J., upon the petition, and answer by the respondents then to be filed and upon the evidence as upon the alternative writ and return; that all questions of law arising thereon, concerning the granting or denial of the peremptory writ, be reserved for the determination of the full court as upon report; and that for that purpose the case shall be forthwith certified to the Chief Justice of the Supreme Judicial Court for the final decision of that court in the manner provided by Rev. St. c. 104, § 18, the full court then to determine whether a peremptory writ of mandamus shall issue or the petition be dismissed."

In accordance with the aforesaid agreement the cause was heard by Mr. Justice Spear, who, after the hearing, made the following order in relation thereto: "In the opinion of the justice hearing the cause, important questions of law having arisen, this case is hereby certified to the Chief Justice in accordance with the agreement of counsel hereto annexed." Thereupon the cause was certified to the Chief Justice as provided by Rev. St. c. 104, § 18. There was no report of evidence or any finding of facts.

Argued before WISWELL, C. J., and EMERY, SAVAGE, POWERS, PEABODY, and SPEAR, JJ.

Orville Dewey Baker, for plaintiff. Frank L. Dutton and Williamson & Burleigh, for defendants.

EMERY, J. This is a petition by the Edwards Manufacturing Company for a writ of mandamus to the tax assessors of the city of Augusta to compel them to act upon its application to them for an abatement on its taxes for the year 1904. The case comes before the law court on report, but without any finding of facts or report of evidence. From the petition and answer, however, the following appear to be the material facts:

The Edwards Manufacturing Company, the petitioner, is a Maine corporation, and had property taxable in Augusta on the 1st day of April, 1904. Assuming that it was not an inhabitant of Augusta, it for that reason omitted to furnish the assessor of that city with the list of its taxable property required by the statute, Rev. St. c. 9, §§ 73, 74. Being dissatisfied with the assessment, it afterward, on November 17, 1904, made written application to the assessors under Rev. St. c. 9, § 76, for an abatement on its tax. The assessors refused to make the abatement asked for, and gave to the company written notice of their decision as required by section 77 of the same chapter. The company thereupon applied to this court sitting for Kennebec county for the desired abatement. This application was dismissed by the court upon the ground that the company was an inhabitant of Augusta for taxing purposes, and, having omitted to furnish the assessors with the statutory list of its taxable property at the time appointed, was thereby barred from making application for abatement, according to Rev. St. c. 9, § 74.

Thereupon, on May 7, 1906, within the two years, the company again made written application to the assessors for an abatement on the 1904 tax, and, with the application, offered the statutory list of its taxable property for that year. The assessors have refused and still refuse to act upon this application, either to grant it, deny it, or even dismiss it. This petition to this court is for a writ of mandamus to compel them to act and dispose of the application in some way. The petitioner argues that such action is necessary under Rev. St. c. 9, § 78, to enable it to apply to the county commissioners, or to this court, for the desired abatement, and have a hearing on such application should the assessors refuse to abate.

Granting, arguendo, that the assessors should have acted upon the application to them, at least to the extent of dismissing it or otherwise refusing it, and should have given the statutory notice of their decision, it does not follow that the writ of mandamus should now issue to compel them to do so. The writ is not an ordinary writ to be sued out as a matter of course. It is an extraordinary writ, to be issued only when it is made to appear clearly to the court that the

writ is necessary to secure some substantial right, and also that it will be effective to secure that right. As said in 19 Am. & Eng. Ency. 757, 758, the writ should not be issued "where, if issued, it would prove unavailing, fruitless, and nugatory."

"A mere abstract right, unattended by any substantial benefit to the relator, will not be enforced by mandamus." See *Rex v. Justices*, 2 B. & A. 391; 22 E. C. L. 108; *Mitchell v. Boardman*, 79 Me. 469, 10 Atl. 452; *Tenant v. Crocker, Mayor*, 85 Mich. 328, 48 N. W. 577; *State v. Board of Health*, 49 N. J. Law, 349, 8 Atl. 509.

In this case the ultimate object of the petitioner is to procure an abatement of its tax. Its immediate object is to obtain a hearing by some competent tribunal upon the merits of its application for abatement. It seeks a decision by the assessors upon the application made to them in order that, if such decision be unfavorable, it may make application to another tribunal. It may be conceded that a decision by the assessors is a statutory prerequisite to such application (Rev. St. c. 9, § 78), but the question remains whether a decision by the assessors, if unfavorable, would enable the petitioner to obtain a hearing upon the merits of the application to such other tribunal. If not, then it would be useless to compel a decision by the assessors. The mere right to make application to another tribunal, where no hearing could be had on the merits of the application, would be "an abstract right, unattended by any substantial benefit to the petitioner."

It has been adjudicated that the petitioning company was and is to be regarded as an inhabitant of Augusta for taxing purposes. The company practically admits that it did not furnish the assessors with the statutory list of its taxable property at the time appointed, though due notice was given. It is therefore barred from its otherwise statutory right to make application for abatement either to the assessors, or to the county commissioners, or to this court, unless it can satisfy the tribunal that it "was unable to offer it [the list] at the time appointed." Rev. St. c. 9, § 74.

It is practically conceded in the petition itself, including exhibits, that the only excuse the petitioner has to offer to either tribunal for its omission to furnish the list seasonably is that it had supposed it was not an inhabitant of Augusta for taxing purposes, and that the assessors and the city for many years had regarded it as a nonresident, and had so treated it in assessing taxes upon its property, and, indeed, did so in the assessment of 1904. The argument is that, beside believing that no list was required by law, the company was led to believe by the assurances and action of the assessors that no list was required by them; hence it should

not be held barred from making application for abatement.

If the statute permitted an application for abatement to be entertained upon "reasonable excuse" or "good cause," being shown for the omission to furnish the list seasonably, the above statement of the reason or cause for the omission might perhaps be held sufficient for entertaining the application; but the statute requires proof that the applicant "was unable" to furnish the list. It is evident that the facts stated do not show, nor tend to show, that the petitioner was unable to furnish the list, however good in reason and morals its excuse for not doing so. The company was bound to know that a list was required by law; was bound to know that the assessors could not lawfully have dispensed with the list. The action of previous assessors and the prior action of the present assessors or of the city did not suspend the law nor excuse the company for not obeying it. After all is said, the company appears to have deliberately elected not to furnish the required list. Though it made this election under a misapprehension of its right and duty in the premises, it cannot escape the consequences.

If it be suggested that, if the petitioner can get to the county commissioners, that tribunal may adjudge upon the facts stated that the company "was unable" to furnish the list, the answer is that, should the commissioners by any possibility do so, their proceedings would be quashed upon certiorari. *Fairfield v. County Commissioners*, 68 Me. 385. If it be suggested that the petitioner can perhaps prove to the tribunal other facts showing its inability to furnish the list, the answer is, as stated above, that the petition and its exhibits indicate affirmatively that the only excuse relied on is that above considered. It is a fair inference from the whole case that no other exists.

It appearing from the whole case that neither the assessors, the county commissioners, nor this court could lawfully hear and decide upon its merits an application by the company for an abatement of the 1904 tax, that the company is in law and fact barred from making such an application, that it can gain no "substantial benefit" from a decision by the assessors, the writ asked for should be refused.

Petition denied, with costs.

(102 Me. 185)

LANCEY et al. v. PARKS.

(Supreme Judicial Court of Maine. Nov. 22, 1906.)

1. ADVERSE POSSESSION—DISSEISIN.

To work a disseisin of the true owner possession must be adverse.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Adverse Possession, §§ 279-281.]

2. SAME—NOTICE.

Where one enters into possession of another's land by the owner's consent, such owner is not dispossessed, but at his election, until he has notice actual or constructive that the occupancy is adverse.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Adverse Possession, § 290.]

3. SAME.

To constitute such constructive notice, there must be some visible change in the character or nature of the occupancy calculated to put the owner on his guard, and notify him that the land is in the possession of a hostile claimant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Adverse Possession, § 290.]

4. SAME—EVIDENCE.

Where one first enters upon land after bidding in the same at a tax sale, his intention to occupy adversely during the year allowed for redemption from such sale must be shown by some unequivocal act hostile to the owner's title, brought home to his knowledge, or which he ought to have known in the exercise of reasonable care and diligence in regard to his property.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Adverse Possession, §§ 288-290.]

(Official.)

Report from Supreme Judicial Court, Somerset County.

Action by Ann M. Lancey and others against David M. Parks. Case reported. Judgment for plaintiffs.

Real action to recover two lots of land situate in the town of Detroit. Writ dated August 31, 1903. Plea, the general issue, with a brief statement claiming title to the demanded premises under certain tax deeds, and also by adverse possession.

The parties agreed upon the facts, and then agreed that the same should be reported to the law court under the following stipulations:

"If, upon the aforesaid agreed statement of facts, the plaintiffs are entitled to recover, then the defendant is to be defaulted, and the plaintiffs are to have judgment for the possession of the above-described premises and for their costs; otherwise, the defendant is to have judgment and for his costs."

Argued before WISWELL, C. J., and EMERY, WHITEHOUSE, SAVAGE, POWERS, and SPEAR, JJ.

James M. Sanborn and E. N. Merrill, for plaintiffs. Morse & Anderson, for defendant.

POWERS, J. Real action to recover two adjoining lots; 49 containing 65 acres and 51 containing 110 acres, in range 4 in the town of Detroit, reported to the law court on facts agreed.

It is admitted that plaintiffs' predecessor in title, Wm. K. Lancey, a nonresident owner, possessed and occupied the premises until May 26, 1883, when they were sold for taxes, and that the plaintiffs are the legal owners unless the evidence establishes a better title in the defendant. The writ is dated August 31, 1903.

At the tax sale the lots were bid in for \$7.02 by the defendant and one Haskell, and

the town treasurer's deed to them was dated May 26, 1883, and recorded May 28, 1884. Haskell made a verbal sale of his interest in the property to the defendant, and has never claimed any title to it. The defendant does not contend that he acquired a good title to the land in question by the tax deeds. It is therefore unnecessary to examine or discuss the regularity of the tax sales. He claims title by disseisin upon the following facts as stated by him:

"I have remained in open and exclusive possession of it [the premises] in manner following from that time [May 26, 1883] to the present time.

"At time I purchased the land, about 50 acres of it had been used by one William Basford as pasture land, and he continued to pasture the same for three or four years after I purchased it, with my permission. This portion of the land was fenced. At time I purchased about 10 or 12 acres of the land so pastured by Mr. Basford was cleared land. The rest of it was bush land, or covered with a young growth. There was no fence around the rest of the land. Since then one Frank Jackson has cut the hay on the premises, from one-half to two-thirds of a ton a year. The consideration he paid me was to look after the property. He had never pastured the land, nor have the fences been repaired by any one since Mr. Basford ceased to occupy as stated. I have never tilled any portion of said premises. The land so pastured by Mr. Basford has been gradually growing up to bushes and trees, and is now practically covered with such a growth. At time I purchased, a large portion of the rest of the land, then not pastured by Mr. Basford, was a second growth of gray birch and small fir, and a lot of that growing up, and some small spruce and pine. The rest of the land was covered with spruce, pine, cedar, and hard wood. I have from time to time cut small amounts of lumber and hoop poles on this land. Fourteen years ago I cut about 25 cords of wood, and 11 years ago I cut 11,000 feet of pine on this land. I did this openly, with the knowledge of William K. Lancey and his assigns. It was generally known in the neighborhood where the land is situated that I claimed to be the owner of it and was in possession of it. Neither William K. Lancey nor his heirs nor grantees have ever occupied or attempted to occupy any portion of said land since May 26, A. D. 1883, but I have occupied said land from said time in manner before mentioned down to the bringing of this action. I have paid the taxes on said land since May 26, 1883, to the present time, 1904, and with the exception of the first two years, the land has always been taxed to me."

Do these acts constitute such open, notorious, exclusive, and adverse possession as are requisite to gain title by disseisin? From the time when the defendant claims to have taken possession May 23, 1883, to the date of the writ, is a few days more than 20 years and

3 months. Without discussing or deciding the character and nature of the defendant's occupation for the remainder of that period, we think it evident that for the first year at least it was clearly insufficient. His only occupation during that year was through Basford pasturing a portion of the land. No other act is shown on the part of the defendant, and no other notice to the true owner that the land was in the possession of a hostile claimant. It is a fair inference from the defendant's own statement that at the time he purchased the land Basford was pasturing it. He says: "At the time I purchased the land about 50 acres of it had been used by one William Basford as pasture land, and he continued to pasture the land for three or four years after I purchased it, with my permission." The date, May 26th, was a season of the year when the land was fit for pasturage. The burden was upon the defendant to establish his alleged title by disseisin. His own statement is accepted as true by the plaintiffs; and it is reasonable to presume that it was as favorable to him as was consistent with the truth. Under these circumstances his use of the words "at the time" and "continued" significantly point to the fact that Basford was pasturing the land at the time of the tax sale. It is admitted, however, that William K. Lancey, the plaintiffs' predecessor in title, was in possession and occupation of said premises until that date. If so, Basford must have entered and occupied under Lancey up to the time of the tax sale, although he may have occupied with the permission of the defendant after that date. It is a just and well-settled principle of law that if one enter into possession of another's land by his consent, or as his tenant, the true owner is not disseised, but at his election, until he has notice that the occupancy is adverse, or there has been some change in the nature of such occupancy calculated to put him on his guard. *Alden v. Gilmore*, 13 Me. 178; 1 Cyc. 1032. Here no election, notice, or change is shown; nothing to notify Lancey in any way that Basford's occupation was not still in subordination to Lancey's title, or had assumed a hostile character. He might well repose in security, believing Basford's possession to be his own. Neither can we believe that the defendant intended during the first year to occupy adversely. He does not so state. He says he was in open and exclusive possession, and that it was generally known in the neighborhood that he claimed to be the owner of it. He did not take possession of it until after the tax sale. His deeds were not delivered to him until a year later. During that year the law, which he is presumed to have known, and the very terms of his deeds, gave to the owner the right of redemption. There is nothing to show that during that time he claimed anything more than a qualified ownership in the land, subject to the owners' right to redeem the same upon payment of a paltry sum. We do not decide that a person

who first enters upon land after bidding it in at a tax sale, and before he has received a tax deed, cannot disseise the owner before the expiration of the year given for redemption. His intention to do so, however, must be shown by some unequivocal act, hostile to the owner's title, brought home to his knowledge, or which he ought to have known in the exercise of reasonable care and diligence in regard to his property. In this case for a year after the tax sale there was no visible change of occupancy—nothing done or said by the defendant to put Lancey upon his guard and notify him that the land was in the possession of an adverse claimant, and nothing stated from which it can be reasonably inferred that the defendant himself, during that period, intended to occupy other than in subordination to Lancey's title and subject to his right of redemption.

The defendant has failed to show that this possession was adverse for the period of 20 years before the commencement of the action. Judgment for the plaintiffs.

(102 Me. 145)

MURRAY v. QUINT.

(Supreme Judicial Court of Maine. Nov. 30, 1906.)

1. LIMITATION OF ACTIONS—ATTESTED NOTES.

A note in which the payor for value received unconditionally promises to pay to the payee, or order, a fixed sum of money, at a fixed date, is a promissory note within the purview of the statute (Rev. St. c. 83, § 89), and, if signed in the presence of an attesting witness, is not barred in six years from its maturity.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Limitation of Actions, § 120.]

2. SAME—PROMISSORY NOTE.

The addition to such promise of a statement of the consideration for the note (not being illegal) and of a stipulation that the goods for which the note was given shall remain the property of the vendor until payment of the note do not affect the character of the note as a promissory note within the statute cited.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Limitation of Actions, § 120.]

3. SAME.

The following instrument is a promissory note within the statute, viz.:

"\$112.85. Springvale, Me., Feb. 17, 1896.

"Four months after date, for value received, I promise to pay to E. G. Murray, or order, one hundred twelve and $\frac{85}{100}$ dollars, with interest at six per cent., the same being for the following named property which I have this day bought of said Murray: One brown horse, 12 years old, weight 1130 lbs.; one top carriage, made by the Watertown Spring Wagon Co.; and one set of one-horse sleds, called the 'Nutter sleds.' Said horse, carriage, and sleds is to remain the property of said Murray until said sum and interest are paid.

"Payable at any Nat. Bank.

"Bradford Quint."

"Attest: Dora A. Murray.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Limitation of Actions, § 120.]

(Official.)

Exceptions from Supreme Judicial Court, York County.

Action by Edward G. Murray against Bradford Quint. From the finding of the trial court, defendant excepts. Exceptions overruled.

Assumpsit on a written instrument of the following tenor:

"\$112.85. Springvale, Me., Feb. 17, 1896.

"Four months after date, for value received, I promise to pay E. G. Murray, or order, one hundred twelve and $\frac{85}{100}$ dollars, with interest at six per cent., the same being for the following named property which I have this day bought of said Murray: One brown horse, 12 years old, weight 1180 lbs.; one top carriage, made by the Watertown Spring Wagon Co.; and one set of one-horse sleds, called the 'Nutter sleds.' Said horse, carriage, and sleds is to remain the property of said Murray until said sum and interest are paid.

"Payable at any Nat. Bank.

"Bradford Quint.

"Attest: Dora A. Murray."

Plea, the general issue, together with a brief statement that the defendant "did not at any time within six years next before the commencement of this writ promise in manner and form as the plaintiff in his writ alleged against him."

Heard without the intervention of a jury, with the right of exception by either party to rulings upon questions of law.

The following facts were agreed upon: "The signatures of the maker and subscribing witness," and "that no payments on said instrument have been made, and no new promise given." The presiding justice found the following facts: "The personal property described in said instrument was delivered to the defendant on the day of its date as a part of the transaction between the parties. The defendant since the date of this transaction has resided in this state."

Upon these facts the presiding justice ruled as a matter of law that the instrument declared on was a good promissory note, and that the plaintiff was entitled to recover the sum named therein, viz., \$112.85, and interest thereon from date. To this ruling the defendant took exceptions.

The case appears in the opinion.

Argued before WISWELL, C. J., and EMERY, WHITEHOUSE, SAVAGE, and SPEAR, JJ.

Geo. A. Goodwin, for plaintiff. Allen & Abbott, for defendant.

EMERY, J. This is an action counting on the following written instrument as a promissory note, viz:

"\$112.85. Springvale, Me., Feb. 17, 1896.

"Four months after date, for value received, I promise to pay E. G. Murray, or order, one hundred twelve and $\frac{85}{100}$ dollars, with interest at six per cent., the same being for the following named property which I have

this day bought of said Murray: One brown horse, 12 years old, weight 1180 lbs.; one top carriage, made by the Watertown Spring Wagon Co.; and one set of one-horse sleds, called the 'Nutter sleds.' Said horse, carriage, and sleds is to remain the property of said Murray until said sum and interest are paid.

"Payable at any Nat. Bank.

"Bradford Quint.

"Attest: Dora A. Murray."

The statute of limitations was set up in defense; but it is admitted that the instrument was signed in the presence of an attesting witness, and that the statute does not apply to this action, if the instrument is a promissory note within the meaning of Rev. St. c. 83, § 89, which declares that the six-year limitations "do not apply to actions on promissory notes signed in the presence of an attesting witness."

The defendant's contention is that the instrument is simply evidence of an agreement by the plaintiff to sell the articles therein named, and an agreement by the defendant to purchase and pay for them; that there is no obligation to pay till the sale is actually made—a circumstance striking the instrument out of the category of promissory notes. The contention cannot be sustained. By the express terms of the instrument the defendant, acknowledging value received, unconditionally promised to pay to the plaintiff, or his order, a fixed sum of money at a fixed time. This is all that is necessary to constitute a promissory note within the statute cited.

The additions of the statement of the consideration (not being illegal) and of the stipulation that the title to the goods bought by the promisee shall remain in the plaintiff until the performance of the promise do not at all modify the explicit terms of the promise itself. There is no intimation in any part of the instrument of any contingency in which the defendant need not pay according to the explicit terms of his promise. The instrument is a promissory note, signed in the presence of an attesting witness, and the statute of limitations does not apply. *Colins v. Bradbury*, 64 Me. 37.

Exceptions overruled.

(102 Me. 148)

FIDELITY & CASUALTY CO. v. BODWELL GRANITE CO.

(Supreme Judicial Court of Maine. Nov. 27, 1906.)

1. APPEAL—CASES ON REPORT—DISMISSAL.

No question arising in a case should be reported to the law court for original decision, unless at such a stage of the case that the decision of question shall in one alternative at least be a final disposition of the case itself, or unless accompanied by a stipulation to that effect.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, §§ 1790-1794.]

2. SAME—INTERLOCUTORY MOTION.

A motion, under Rev. St. c. 84, § 23, to require a party to produce books and papers for inspection, is merely interlocutory. It may be granted or denied, without concluding either party upon any question of law or fact involved in the issue to be tried, and hence, if reported as in this case without such stipulation, the report must be dismissed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, § 1791.]

(Official.)

Report from Supreme Judicial Court, Knox County.

Action by the Fidelity & Casualty Company against the Bodwell Granite Company. Case reported. Report discharged, and case dismissed.

Assumpsit upon four separate employers' liability insurance policies, the first policy running from the 19th day of March, 1900, to the 19th day of March 1901; the second from the 19th day of March, 1901, to the 19th day of March, 1902; the third running from the 19th day of March, 1902, to the 19th day of March, 1903; the fourth running from the 19th day of March, 1903, to the 19th day of March, 1904.

The declaration contained eight counts, two upon each of said policies. The two counts founded upon the first policy are as follows:

"In a plea of the case for that the said defendant in consideration of the agreement and contract of the plaintiff to indemnify said defendant for the period of 12 months, beginning the 19th day of March, A. D. 1900, and ending the 19th day of March, 1901, against loss from liability for damages on account of bodily injuries accidentally suffered within said period by any employé or employées of said defendant engaged as cutters and hewers of granite, or as yardmen or helpers at the yards of said company at Vinalhaven, Jonesboro, and Spruce Head, in said state of Maine, said defendant did pay the plaintiff the sum of \$20 and did contract and agree, if the compensation actually paid to all employées engaged as aforesaid exceeded the sum of \$5,000 it would pay to the plaintiff an additional amount of 40 cents for each \$100 in excess of said sum of \$5,000 paid as compensation as aforesaid.

"And the plaintiff avers that said defendant paid as compensation as aforesaid a large sum in excess of said \$5,000, the exact amount of which is unknown to the plaintiff, but which the plaintiff believes and therefore avers is at least \$20,000, and the defendant then and there promised to pay the plaintiff four-tenths of 1 per cent. on the total amount of the sum paid as aforesaid; yet the defendant has not kept its said contract and agreement, but has broken the same.

"Also for that the said defendant in consideration of the agreement and contract of the plaintiff to indemnify said defendant for the period of 12 months, beginning the 19th day of March, A. D. 1900, and ending the 19th day of March, 1901, against loss from lia-

bility for damages on account of bodily injuries accidentally suffered within said period by any employé or employées of said defendant engaged as cutters and hewers of granite, or as yardmen or helpers at the yards of said company at Vinalhaven, Jonesboro, and Spruce Head, in said state of Maine, said defendant did pay the plaintiff the sum of \$20, and did contract and agree, if the compensation actually paid to all employées engaged as aforesaid exceeded the sum of \$5,000, it would pay to the plaintiff an additional amount of 40 cents for each \$100 in excess of said sum of \$5,000 paid as compensation as aforesaid; and did further contract and agree that the plaintiff should have the right at all reasonable times to examine the books of said defendant so far as they related to compensation paid all employées at work as aforesaid.

"And the plaintiff avers that said defendant paid as compensation as aforesaid a large sum in excess of said \$5,000, the exact amount of which is unknown to the plaintiff, but which the plaintiff believes and therefore avers is at least \$20,000, but the defendant has not paid the plaintiff said additional sum, and, although often requested to allow the plaintiff said right and opportunity to examine its books as aforesaid, said defendant has neglected and refused so to do, and hath not kept its said contract and agreement, but hath broken the same."

The other counts were of the same tenor as the foregoing with the necessary changes of dates, etc.

The writ was returnable at the January term, 1905, of the Supreme Judicial Court, Knox county. At the April term of said court the defendant filed as its plea the general issue. After this plea had been filed, the plaintiff made the following motion:

"And now comes the plaintiff in the above-entitled action and says: That issue has been joined therein; that certain written instruments in the possession of the defendant are material to the issue in said action, namely, the books and pay rolls of the defendant showing the amount paid in wages by the defendant to the several classes of employées described in the declaration in said action, and without the information contained in said written instruments the plaintiff is unable to properly prepare this case for hearing, and that said books and papers are necessary to the proofs of the plaintiff's case.

"That access thereto has been demanded by and on behalf of the plaintiff, and has been refused by said defendant.

"That the same long have been and now are in the possession of said defendant.

"Wherefore the plaintiff moves that after notice to the said defendant and hearing thereon said defendant may be required to produce all of its books and its pay rolls relating to wages paid to the employées described in said declaration."

A hearing was had upon this motion at

said April term of said court, and certain evidence offered by the defendant was taken out. At the close of this hearing, and without any ruling or decision by the presiding justice, it was agreed that the matter relating to the motion should be reported to the law court, and that, "upon so much of the foregoing evidence as is legally admissible, the law court is to make such order as the rights of the parties may require."

For reasons which are stated in the opinion, the law court refused to act on the motion, but ordered the report discharged and the case dismissed from the law docket.

Argued before WISWELL, C. J., and EMERY, SAVAGE, POWERS, PEABODY, and SPEAR, JJ.

Arthur S. Littlefield, for plaintiff. Joseph E. Moore, for defendant.

EMERY, J. In this case after issue was joined, but before any trial of that issue the plaintiff filed a motion under the statute (Rev. St. c. 84, § 23) that the defendant be required to produce for inspection certain books and papers alleged to be in its possession and material to the issue. The presiding justice made no decision nor order on this motion, but by agreement of the parties reported it for the law court "to make such order as the rights of the parties require." There was no stipulation for any disposition of the case as the result of the order of the law court either way.

We think the parties, in causing this motion to be reported in this way by itself before verdict, have misapprehended the function and jurisdiction of the law court. The motion is merely interlocutory. *W. U. Tel. Co. v. Locke*, 107 Ind. 9, 7 N. E. 579. It may be granted or denied without concluding either party upon any question of law or fact involved in the issue to be tried, and no stipulation was made that either party should be so concluded. Cases cannot be thus sent to the law court piecemeal, one question at a time, the case to be returned again to the law court, when and as often as another question may arise. *Monaghan v. Longfellow*, 82 Me. 419, 19 Atl. 857. As said by the court in *State v. Brown*, 75 Me. 456: "If the case be sent to us once in this way, there is no reason why it could not come up in the same way over and over again upon motions possible to be made." That the parties agree to such a course does not make it lawful. It would transform the law court into an advisory board for the direction of the business of the court at nisi prius, a function the law court cannot assume. *Noble v. Boston*, 111 Mass. 485.

All interlocutory motions and other interlocutory matters should be disposed of at nisi prius, saying to the parties their rights of exception or appeal, if any. They should not be sent to the law court, even upon report at the request of the parties, except at such stage of the case, or upon such stipula-

tion, that a decision of the question may, in one alternative at least, dispose of the case itself. The Legislature in constituting the law court and defining its jurisdiction (Rev. St. c. 79, § 46) did not intend it to be used as a substitute for presiding justices nor to relieve judges in the trial courts from the duty of deciding, as they arise, mere interlocutory questions incident to the progress of the trial or the case.

As well might motions for the appointment of auditors or surveyors, or questions of the admissibility of evidence, or requests for instructions, etc., be sent to the law court for original decision. It is evident, however, that, even by agreement of parties, a trial should not be interrupted or postponed in order to obtain the opinion of the law court upon such questions, at least unless the parties stipulate that the opinion in some alternative shall practically end the case. *Noble v. Boston*, 111 Mass. 485. The result of the trial may entirely eliminate the interlocutory matter from the case. Thus, in this case, if the motion be granted, the defendant may yet obtain a verdict and judgment, and vice versa. In such event the ruling upon the motion will become immaterial, and a decision upon it useless. The law court cannot be required, and, indeed, has no jurisdiction, to decide prematurely interlocutory questions which the subsequent proceedings in the case may show to be wholly immaterial, unless, as already stated, the parties stipulate that the decision may, in one alternative at least, supersede further proceedings.

Report discharged.

Case dismissed from the law docket.

(102 Me. 153)

AMERICAN WOOLEN CO. v. KENNEBEC WATER DIST.

(Supreme Judicial Court of Maine. Nov. 30, 1906.)

1. WATERS—GREAT PONDS—POWERS OF STATE.

Lakes and ponds of more than 10 acres in extent are known as "great ponds" and are under the ownership and control of the state for the benefit of the public. The state can at its discretion authorize the diversion of their waters for public purposes, without providing compensation to riparian owners upon the ponds or their outlets. *Auburn v. Union Water Power Co.*, 38 Atl. 561, 90 Me. 576, 38 L. R. A. 188, affirmed to the above extent.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Waters and Water Courses, § 123.]

2. SAME—GRANT BY STATE—DIVERSION OF WATERS.

When the Legislature has directly granted authority to divert water from a great pond for public purposes, without requiring as a prerequisite any proceedings for condemnation or for the ascertainment and payment of damages, the grantee can begin such diversion at once, and a bill in equity to restrain such diversion until such proceedings are had cannot be sustained.

(Official.)

Report from Supreme Judicial Court, Kennebec County. In equity.

Bill by the American Woollen Company against the Kennebec Water District, praying that the defendant, its servants, agents, or attorneys, be enjoined and restrained by temporary and perpetual injunction from taking its supply of water from China Lake, in Kennebec county, until certain condemnation proceedings, which the plaintiff alleges are required by law, shall have been had, and for such other and further relief as the nature of the case may require. To this bill the defendant filed a general demurrer.

At the hearing before the justice of the first instance, and by agreement of the parties, it was ordered that the cause be "reported to the law court to be heard on the bill and demurrer." Bill dismissed.

Argued before WISWELL, C. J., and EMERY, WHITEHOUSE, SAVAGE, PEABODY, and SPEAR, JJ.

Raymond & Gordon and Charles F. Johnson, for plaintiff. Harvey D. Eaton, for defendant.

EMERY, J. This is a case in equity reported upon demurrer to the bill. The material allegations in the bill may be stated concisely as follows: China Lake, in Kennebec County, has an area of some six square miles, and the outlet of its waters is through Mile brook, into the Sebasticook river. The defendant corporation, the Kennebec Water District, composed of the territory and people of Waterville and Fairfield village, had legislative authority, by chapter 200, p. 351, Priv. & Sp. Laws 1899, to take water from China Lake for the purpose of supplying the inhabitants and municipalities of Waterville, Fairfield Village, Benton, and Winslow with pure water for domestic and municipal purposes. Acting under this authority, the water district has laid a large pipe from China Lake to its pumping station in Waterville, with an intake lower than the bed of the natural outlet of the lake, and through this pipe is constantly drawing a large quantity of water from the lake materially lowering its natural level and the natural flow of water through the outlet down Mile brook. This diversion of water from the lake materially reduces the capacity, efficiency, and value of a pre-existing mill privilege and mill of the plaintiff on Mile brook below the outlet.

The water district was not required by its charter to go through any process of condemnation of the right to take water from China Lake, and did not do so. It simply laid its pipe and diverted the water as under a grant from one having the full right. By its charter, however, the water district was made liable for all damages that should "be sustained by any person or corporations in their property by taking of any land whatsoever, or mill privileges within the district

or water from Snow pond, or by flowage, or by excavating through any land for the purpose of laying pipes, building dams or constructing reservoirs. If any person sustaining damages as aforesaid and said corporation shall not mutually agree upon the sum to be paid therefor, such person may cause his damages to be ascertained in the same manner and under the same conditions, restrictions and limitations as are or may be prescribed in case of damages by the laying out of highways." Section 8 of the Charter.

The prayer of the bill is that the water district be enjoined from taking any water from China Lake until it shall have acquired the right to do so by due proceedings for condemnation. Hence the question now presented is, not whether the plaintiff is entitled to any compensation for the injury done its property by the water district's diversion of water from China Lake, but is whether the water district could lawfully begin and continue such diversion for the purposes named in its charter, without first going through some process of condemnation to acquire the right. If it could, then, of course, the plaintiff must be remitted to its claim for compensation, and must assert that claim by some other process than a bill in equity.

China Lake is a "great pond," being of more than 10 acres in extent, and hence, with its waters, is public property owned and controlled by the state for the benefit of the public. The colonial ordinance of 1641-7, reserving to the government full ownership and sovereignty over great ponds, was extended to the territory of Maine with the same force as in Massachusetts. The extent of that ownership and sovereignty came before the court in Massachusetts in the case of Watuppa Reservoir Co. v. Fall River, 147 Mass. 548, 18 N. E. 465, 1 L. R. A. 466. The question there presented was whether the Legislature could lawfully and effectually grant to the city of Fall River the right to take water from North Watuppa pond, a "great pond," for domestic and public uses, without providing for compensation to be made for damage caused thereby to mills and mill privileges on the outlet stream below the pond. In an elaborate opinion, it was held, in effect, that, under the colonial ordinance, except as to grants made prior to the ordinance, the state had full propriety in, and sovereignty over, the waters of great ponds, and could at discretion divert the waters and authorize their diversion for public uses without providing compensation to riparian owners injured thereby; that riparian lands on a river or stream flowing out of a great pond are subject to this right of the state to authorize a diversion of the water of the pond for public purposes, and must bear without compensation any damage caused by the exercise of that right by the state, unless the state shall choose to make compensation; that where the state, in granting authority to

divert the water, has not required compensation to be made to riparian owners for damages sustained, none need be made. True, three justices dissented, but the concurring justices were Morton, chief justice, and sometime governor of the commonwealth, Field, afterward chief justice, Devens, at one time United States Attorney General, and Holmes, now a Justice of the United States Supreme Court—a notable array of eminent jurists. Their opinion has never been overruled. In *Auburn v. Union Water Power Co.*, 90 Me. 576, 38 Atl. 561, 38 L. R. A. 188, the same doctrine in all its extent was without dissent declared to be the law of this state. The grounds of the doctrine are fully and convincingly stated in the cases cited and there is no need to iterate them here. Indeed, the plaintiff's counsel do not now question the authority of the Massachusetts case. They only contend that this court, in the *Auburn Case*, 90 Me. 576, 38 Atl. 561, 38 L. R. A. 188, erroneously went beyond the Massachusetts case and erroneously held that the Legislature could not lawfully require its grantee of the right to take water from a great pond for public purposes to make compensation for property injured thereby. Upon this contention we have now no occasion to express or form any opinion, as the question has not yet been presented.

Such being the settled law, it follows that the authority given to the water district in its charter was not merely authority to exercise the power of eminent domain, authority to acquire by some condemnation proceedings the right to take water from the lake, but was authority to take directly and at once. The grant, as to China Lake, was of authority to take public property, not private property. No proceedings by way of condemnation were necessary to vest in the grantee the right granted, and none were required. Condemnation proceedings of public property or public rights already directly granted would be anomalous and superfluous.

Conceding, arguendo, that by the terms of its charter the water district is made liable to plaintiff for all damages done its mill privilege and mill, nowhere in the charter do we find any stipulation that these damages must be paid, or even adjudicated, before the water district begins to take water. No authority is given the district to initiate proceedings for that purpose. It is for the persons or corporations "sustaining damage" to begin such proceedings. Section 3 of the Charter.

In fine, it does not yet appear that the water district is taking water from China Lake without right. Hence the injunction prayed for should not be ordered. Whether the district should pay the plaintiff for damages caused by such taking is another question, to be determined in another proceeding.

Bill dismissed, with costs.

(27 Pa. 198)

In re SOWER'S ESTATE.

(Supreme Court of Pennsylvania. March 11, 1907.)

WILLS—CONSTRUCTION.

Testator gave his dwelling house to his wife for life, to be considered as part of his residuary estate, with the provision that if his nephew, within a reasonable time after the death of the wife, desired to occupy the dwelling house, he might do so at an annual rental of \$300, and that, if he did not so elect, any member of the family bearing the family's surname could occupy the residence at the same rental, paying all taxes and assessments and making necessary repairs. *Held*, that the nephew merely acquired the right of first choice as to the occupancy of the premises, and, if he so elected, he was bound to pay the annual rental and taxes and assessments.

Mitchell, C. J., and Fell, J., dissenting.

Appeal from Orphans' Court, Philadelphia County.

In the matter of the estate of Charles G. Sower, deceased. From a decree dismissing exceptions to adjudication, Albert M. Sower appeals. Affirmed.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

J. Whitaker Thompson, for appellant. Meredith Hanna, Francis Fisher Kane, and Warren C. Graham, for appellees the Children's Aid Society, Protestant Episcopal Mission, and Women's Christian Association. Joseph S. Goodbread, for appellees Mary E. Stokes, Lillie W. Shipley, and Rev. Malcolm A. Shipley, Jr.

POTTER, J. The question raised by this appeal involves the proper construction to be given to the following paragraphs of the will of Charles G. Sower, deceased: "At the time of the decease of my said wife, Caroline A. Sower, I order and direct that my dwelling house, situate at No. 1928 Arch street, in the city of Philadelphia, and the lot of ground adjoining the same on the west thereof, be considered as part of my residuary estate, subject to the conditions and stipulations hereinafter set forth as follows: If Albert M. Sower shall, within a reasonable time after the decease of my said wife, Caroline A. Sower, express to my trustee a desire to accept said dwelling house and the lot of ground south of the same to Cuthbert street as a residence, he shall be allowed so to do upon the payment to my trustee of an annual rental of 300 dollars. If the said Albert M. Sower shall not so elect to occupy the said house and lot then any member of the Sower family bearing that surname shall be allowed to occupy the same as a residence, provided the person so electing shall pay to my trustee an annual rental thereof of 300 dollars, and shall pay all taxes, water rent, municipal or other assessments which may be levied upon the said premises and shall pay for all gas

consumed upon the premises and shall make all necessary repairs thereto and shall produce to my said trustee or any one representing it receipts for all such payments." The appellant, Albert M. Sower, did elect to occupy the property mentioned, and he contends that under the provisions of the will the trustee should be directed to put the property in good condition for occupancy, and should set aside a sum of money sufficient to meet the taxes, water rent, gas bills, repairs, and municipal and other assessments on the property, so long as he, the said Albert M. Sower, shall continue to occupy it. The orphans' court has decided against this contention, and holds that it was the intention of the testator to impose alike upon the nephew or any member of the Sower family who might elect to occupy the premises the burden of making repairs, payment of gas bills, water rent, and taxes, in addition to the payment of the nominal sum of \$300 annual rental. It holds that Albert M. Sower merely had the first right of choice, as to the occupancy of the premises, but in no other way was he to be favored.

We agree with the construction adopted by the orphans' court. As we view it, Albert M. Sower had an estate for life in the property, subject to the payment of the sum of \$300 per annum to the trustee, and the only duty imposed upon the trustee in this request is to receive the annual rental, and when the proper time comes, exercise the power of sale. The will contains no provision for the retention of funds to meet the charges against the property, nor does it contemplate the withholding of any part of the estate from the distribution provided for in the will. The language used is: "If the said Albert M. Sower shall not so elect to occupy the said house and lot, then any member of the Sower family bearing that surname shall be allowed to occupy the same as a residence." Then follows the provision that the person so electing shall pay the annual rental, all taxes, water rent, gas, repairs, etc.

The auditing judge points out that if "the intention had been to confine the obligation to pay for repairs, taxes, gas bills, etc., to the person taking in the event of the nephew's refusal, the obvious and natural mode of expression would have been 'provided that such person shall,' etc.; but instead of this it is 'provided that the person so electing shall pay,' etc., clearly implying that the person may be the nephew, if he 'elects,' or the other one surnamed Sower, if he should not." This interpretation is not only natural, but it is reasonable. The fair rental value of the property is \$1,200 per annum, and it is hardly conceivable that the testator, if he intended his nephew to pay nothing more than \$300 per year, would anticipate that so advantageous an offer would be declined. On the other hand, it may have seemed to him quite possible that the cost of repairs, taxes, water rent, gas, etc., added to the stipulated rental,

might cause the nephew to hesitate, and perhaps decline; and in that event, naturally enough, the testator held out the same offer to others of the same family name. The conclusion reached by the orphans' court is fully sustained by the reasoning of the auditing judge.

The assignments of error are overruled, the decree of the orphans' court is affirmed, and this appeal is dismissed at the cost of appellant.

MITCHELL, C. J. (dissenting). The construction of the will adopted by the orphans' court is clearly contrary to the grammatical construction of the testator's words, and appears to me to be also contrary to his plain intent. He belonged to a family somewhat noted in the local annals of Philadelphia for a century and a half, and his will manifests his pride in the name and in the continuous occupation of the same property. His scheme of disposition was in accordance with this feeling. The house was given to his widow for life, she paying no rent; after her death to the favored relative, Albert Sower, he paying a rental of \$300. If Albert should not occupy the house, then the option to do so should go to "any member of the Sower family bearing that surname," paying a rental of \$300 and all taxes, water rents, etc. This is the grammatical construction, and it accords with the actual intent. The draughtsman of the will, whether testator himself or another, was plainly an educated man, accustomed to the correct use of the English language. He expressed the classification of beneficiaries above indicated clearly, put a full period after the gift to Albert, and attached the additional burden of taxes, etc., only to the other members of the Sower family who might take the place of Albert. Punctuation is not to control the manifest meaning of a sentence, but it is not to be disregarded lightly, especially in the case of a writer accustomed to its proper use. In the present case a full period is set aside, contrary to the grammatical requirements, and the plain intent of the language, and only in deference to a general intent, assumed, not from anything the testator said, but from what the court think he could not have meant. I would reverse this decree.

FELL, J., joins in this dissent.

(217 Pa. 240)

KEANE v. MOFFLY.

(Supreme Court of Pennsylvania. March 11, 1907.)

CORPORATIONS — REORGANIZATION — ASSESSMENTS—DEFAULT OF STOCKHOLDERS.

The reorganization committee of the stockholders of an insolvent incorporation presented a plan to the stockholders for the reorganization, with a time limit for the payment of assessments on the stock to carry out the plan.

Held, that a stockholder who defaulted on his assessment had no standing thereafter to compel the committee to accept his assessment, because it accepted assessments from other stockholders after the specified time for payment had expired.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, § 2301.]

Appeal from Court of Common Pleas, Philadelphia County.

Bill by Philip Keane against John W. Moffly and others. From a decree sustaining a demurrer, plaintiff appeals. Affirmed.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, and STEWART, JJ.

Wm. O. Armstrong, for appellant. P. F. Rothermel, for appellees. Wm. Meade Fletcher, for Lake Superior Corporation.

POTTER, J. This was a bill in equity filed by the plaintiff against John W. Moffly and others, known as the "Moffly Reorganization Committee of the Consolidated Lake Superior Company," and the Lake Superior Corporation. It is alleged in the bill that plaintiff owned 1,200 shares of the common stock of the Consolidated Lake Superior Company; that said corporation during the latter part of 1902 became insolvent, and shortly afterwards a receiver was appointed therefor; that thereafter, during the year 1903, a committee known as the "Moffly Reorganization Committee of the Consolidated Lake Superior Company" was formed for the purpose of devising ways and means to raise funds to reorganize the said Consolidated Lake Superior Company; that said committee decided that this purpose should be accomplished by assessing upon the owner of each share of the common and preferred stock of the said Consolidated Lake Superior Company an assessment of \$3 per share, to be paid to the reorganization committee to provide working capital, etc., and that a new company should be formed, whose capital stock should consist of one class of stock only, which, together with certain income bonds, should be distributed to the stockholders of the old company in such proportions as were designated by the committee; that the said reorganization committee fixed May 17, 1904, as the last day on which the aforesaid assessment could be paid. The committee officially notified the stockholders of the old company of the plan for reorganization, together with the fact that after said date no more assessments would be received. The plaintiff did not pay his assessment upon the date named, but he avers that on July 19, 1904, immediately upon his discovery that the committee and corporation were receiving assessments of certain other stockholders, notwithstanding the time had gone by, he tendered the assessment upon his shares; but the said commit-

tee and corporation refused to accept it. He therefore prays that the defendants be required to accept from him his stock, together with the assessment of \$3 per share thereon, and that he be permitted to participate in the reorganization. The defendants demurred to the bill, setting forth, among other things, that the bill was defective, in that it did not show privity, or set forth any trust relationship between the committee and plaintiff, with reference to the stock of the old company or the alleged new corporation; that the time for making tender had elapsed at the time plaintiff tendered his stock; that no trust relationship between plaintiff and defendants had been shown; and that, even if defendants did voluntarily accept from other stockholders assessments after the date named, they had a legal right so to do, and to refuse to accept plaintiff's tender. The court below sustained the demurrer without filing any opinion.

It is sufficient for us to say that the bill does not show that the plaintiff participated or was in any way interested in the formation of the reorganization committee, and it does not appear that the plan of reorganization vests any rights in any persons except those who have accepted and agree to be bound by the terms thereof. The members of the committee owe no obligation to any stockholder, as such. They had a right to limit the terms of subscription to the reorganization scheme in any manner which they deemed to be for their best interests. As a matter of fact they did determine to offer the privileges of joining in their plan to such stockholders as would pay the assessment of \$3 a share before May 17, 1904. The stockholders who did make such payment within the time limited had then a clear right to proceed with the plan of reorganization, and those who did not pay the required assessment had no just reason to complain. There was no privity of contract or any relation of trust between the stockholders who formed the reorganization committee and the other stockholders who did not see fit to join them or comply with the terms offered to them by the committee. An opportunity was given to the plaintiff to participate in the new enterprise by coming in within the time fixed and making payment of his proportionate assessment. That he did not do so was, perhaps, his misfortune; but there is no ground in law or equity upon which his claim to force his way into the organization, after the time fixed by the committee, can be sustained. *Landis v. Western Penna. Railroad Co.*, 133 Pa. 579, 19 Atl. 556. We see no error upon the part of the learned court below in sustaining the demurrer.

The assignment of error is overruled, and the decree is affirmed.

(217 Pa. 133)

CITY OF PHILADELPHIA, to Use of PENN
METAL CEILING & ROOFING CO.,
Limited, v. PIERSON et al.(Supreme Court of Pennsylvania. Feb. 25,
1907.)1. MUNICIPAL CORPORATIONS—CONTRACTORS'
BONDS—ACTIONS ON—EVIDENCE.

A contractor for a school building gave a city a bond to secure subcontractors and materialmen. A judgment was rendered against the contractor by default for the proceeds of materials furnished by plaintiff. *Held*, that plaintiff in an action on the bond may introduce in evidence the contract and record of the judgment to establish the amount of the claim without independent evidence as to the market value of the work and materials furnished.

2. PRINCIPAL AND SURETY — REMEDIES OF
CREDITORS—JUDGMENT AGAINST PRINCIPAL
—RES JUDICATA.

A materialman obtained judgment against the contractor for materials furnished. His contract provided that he be paid in proportion as the contractor received his payments from the city for which the building was erected, and that 5 per cent. was to be retained for a year by the city, which time had not expired. *Held*, that the undertaking on the bond given by the contractor to the city to protect materialmen was to pay what came due from the contractor on the former's default, so that the judgment against the contractor was conclusive in an action on the bond.

Appeal from Court of Common Pleas, Philadelphia County.

Action by the city of Philadelphia, to the use of the Penn Metal Ceiling & Roofing Company, Limited, against George W. Pierson and the Lincoln Savings & Trust Company. Judgment for plaintiff, and defendants appeal. Affirmed.

Defendant presented the following points: "(1) Under all the evidence in the case, the verdict of the jury must be for the Lincoln Savings & Trust Company, defendant. Answer: Refused. (2) If the jury believe that only a part of the work which the use plaintiff agreed to perform was finished on October 1, 1903, at the time the architect for the board of public education made his estimate of work done on the schoolhouse on which he based the amount of the payment made by the city on October 13, 1903, then, at the time the use plaintiff brought this suit, it was entitled to sue only for the value of 90 per cent. of the work completed by it on October 1, 1903. Answer: Refused. (3) As the contract between George W. Pierson and the use plaintiff provides that 5 per cent. of the contract price shall be retained until one year after the city of Philadelphia shall have made final payment for the building, and as the plaintiff has shown that it brought suit before the said year expired, the use plaintiff is not entitled to recover 5 per cent. of its contract price. Answer: Refused.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

John Kent Kane, for appellants. George Douglass Codman, Ruby R. Vail, and Edward W. Magill, for appellee.

STEWART, J. George W. Pierson, one of the defendants in the action below, contracted to erect a school building for the city of Philadelphia. The use plaintiff, the Penn Metal Ceiling & Roofing Company, contracted with Pierson to furnish the steel ceiling required by the specifications for the sum of \$1,495. Pierson having failed to complete the building, the work was taken over and completed by the Lincoln Savings & Trust Company, the appellant here, Pierson's surety. The use plaintiff not having been paid for the ceiling, which it had furnished and put in place before Pierson's default with the work, brought this action upon the joint and several bond of Pierson and the trust company, which had been given the city to secure those furnishing labor and materials about the construction of the building. Judgment was taken against Pierson by default, for want of an affidavit of defense, for the sum of \$1,499.23, and the case was proceeded with against the other defendant. On the trial the written agreement between contractor and subcontractor, showing the consideration agreed upon for the ceiling, was offered in evidence, as also the judgment obtained against Pierson in the action; but no independent evidence was adduced as to the market value of the work and materials employed in connection with the subcontract.

1. It is argued that recovery could be had only for the market value of such labor and materials, and, as neither contract nor judgment established this, since presumably the subcontractor's profits were included in the contract price, the plaintiff's claim was wholly unsupported by the evidence. The answer to this is that it is not so written in the bond. The obligation of the trust company was not to pay for labor and materials furnished according to their market value any more than it was Pierson's. The latter's obligation was to pay "any and all persons, any and all sum or sums of money which may be due for labor and materials furnished," etc. Pierson could not have been heard to say in defense of the action that the contract price exceeded the market value of the labor and materials employed; for what was due to the plaintiff, and therefore recoverable, was such sum as he had agreed to pay for the ceiling. No more could the trust company, for the obligation was the same with respect to each. There is no pretense of unfairness in the contract, or that the ceiling came short of the requirements of the specifications. Had mistake or collusion between Pierson and the use plaintiff to defraud the trust company been alleged, the cost and value of the ceiling might properly have been inquired into, and the recovery against the defendant restricted so as to accord therewith.

But there was nothing of the kind. What was due from Pierson was the contract price, and it was what was thus due that the trust company agreed to pay, if Pierson did not.

2. The contention that the action was premature, inasmuch as the contract provided that plaintiff was to be paid only in proportion as Pierson received his payments from the city, and that 5 per cent. was to be retained for a year after final payment by the city, overlooks the significance of the judgment against Pierson. That judgment determined finally that there was then due and owing from Pierson to the plaintiff the sum of \$1,499.23. What it determined cannot be made the subject of further litigation. The result there reached extends to every question in the proceeding which was legally cognizable. *Lancaster v. Frescoln*, 192 Pa. 452, 43 Atl. 961. When it is remembered that defendant's undertaking was to pay what was due from Pierson to the plaintiff on the former's default, it becomes apparent that the question so elaborately argued, as to when a right of action accrued under the contract, has no place in the present inquiry.

3. It was set out in the affidavit of defense that "deponent is informed that at the time the writ was issued in the above-entitled case the city solicitor had not in fact approved the bond of indemnity tendered to the city by the use plaintiff, and defendant therefore denies the allegations to that effect contained in the statement of claim." Such a qualified and indefinite statement in an affidavit of defense would be without any legitimate effect; but, even were it otherwise, it could have no effect in determining the issue to be tried. The only purpose of an affidavit of defense is to avert summary judgment. The issue is determined by the pleadings in the case, and these alone. Here there was a general plea, with notice of special matter. This did not put in issue the fact distinctly alleged in the statement of claim filed, that the required bond had been approved by the city solicitor. Under this general plea nothing was put in issue but the plaintiff's right and title to the thing claimed; that is to say, the right to compensation for the steel ceiling which, at its own proper cost and expense, it had furnished and put in place for the city. The right to recover in a particular action is one thing; the right to the thing itself, the subject of the action, is quite another. Under a general plea the latter right may be contested. If the former be denied, such issue is to be raised by plea in abatement, or notice under the special matter filed. As the case stood on the pleadings, the plaintiff was not called upon to prove affirmatively what appeared in his statement as matter of inducement. It was said in *Horan v. Weller & Ellis*, 41 Pa. 470, in reference to a like question arising on the pleading: "If the defense could avail under any circumstances, it would be in avoidance, and would

present an affirmative step to be taken by the defendant. He would be bound both to plead and prove the matter he relied on." Here the defendant elected to go to trial on an issue of its own choosing, and it is now too late to introduce another.

The assignments of error are without merit. Judgment affirmed.

(217 Pa. 168)

COMMONWEALTH ex rel. CARSON, Atty. Gen., v. WARREN.

(Supreme Court of Pennsylvania. March 4, 1907.)

AGRICULTURE—DAIRY AND FOOD COMMISSIONER—QUO WARRANTO.

Act March 13, 1895 (P. L. 17), providing for the establishment of a department of agriculture, and for the appointment of a dairy and food commissioner, being valid, such commissioner after appointment cannot be ousted from office in quo warranto because illegal powers have subsequently been conferred upon him by the Legislature.

Application by the commonwealth, on the relation of Hampton L. Carson, Attorney General, for writ of quo warranto, against H. B. Warren, dairy and food commissioner. Judgment for respondent.

The petition was as follows:

"And now, to wit, May 1, 1906, comes Hampton L. Carson, the Attorney General of the commonwealth of Pennsylvania, and files this suggestion and gives the court to understand and be informed:

"(1) That on the dates named the Legislature of the state of Pennsylvania enacted the following statutes:

"(a) The act of May 26, 1893 (P. L. 152), entitled 'An act to enlarge the powers of the state board of agriculture, to authorize the said board to enforce the provisions of the act entitled "An act for the protection of the public health, and to prevent adulteration of dairy products and fraud in the sale thereof," approved May 21, A. D. 1885, and of other acts in relation to dairy products; to authorize the appointment of an agent of the said board, who shall be known as the "dairy and food commissioner," and to define his duties and fix his compensation, being supplementary to an act entitled "An act to establish a state board of agriculture," approved May 8, A. D. 1876.'

"(b) The act of March 13, 1895 (P. L. 17), entitled 'An act to establish a department of agriculture and to define its duties and provide for its proper administration.'

"(c) The act of June 26, 1895 (P. L. 317), entitled 'An act to provide against the adulteration of food and providing for the enforcement thereof.'

"(d) The act of June 26, 1895 (P. L. 318), entitled 'An act to amend an act entitled "An act for the protection of the public health and to prevent the adulteration of dairy products and fraud in the sale thereof," approved May 21, 1885, providing for

the payment of one-half of the amount of fines recovered into the county treasury of the proper county and the other half to the dairy and food commissioner for the use of the department of agriculture for the enforcement of the act.'

"(e) The act of July 5, 1895 (P. L. 605), entitled 'An act to enlarge the duties of the state food commissioner, authorizing him to enforce all laws against the adulterations or impurities in vinegar, jellies, cider, evaporated apples and all apple products and the unlawful labeling in the state of Pennsylvania.'

"(f) The act of June 18, 1897 (P. L. 168), entitled 'An act providing for the regulation of the manufacture and sale of distilled and fermented vinegar, prescribing their standard; to prevent the adulteration of the same, providing for the enforcement thereof, and punishment for the violation of the same.'

"(g) The act of June 23, 1897 (P. L. 202), entitled 'An act to prevent fraud and deception in the manufacture and sale of cheese, and defining what shall constitute the various grades of cheese, providing rules and regulations for marking and branding the same, providing for the enforcement of this act, prescribing penalties for its violation.'

"(h) The act of May 2, 1901 (P. L. 123), entitled 'An act relative to adulteration of natural fruit juice and providing penalties for violations thereof.'

"(i) The act of May 29, 1901 (P. L. 827), entitled 'An act to prohibit the manufacture and sale of oleomargarine, butterine and other similar products, when colored in imitation of yellow butter; to provide for license fees to be paid by manufacturers, wholesale and retail dealers, and by proprietors of hotels, restaurants, dining rooms and boarding houses; for the manufacture or sale of oleomargarine, butterine or other similar products, not colored in imitation of yellow butter; and to regulate the manufacture and sale of oleomargarine, butterine or other similar products, not colored in imitation of yellow butter, and prevent and punish fraud and deception in such manufacture and sale as an imitation butter; and to prescribe penalties and punishment for violations of this act, and the means and the method of procedure for its enforcement, and regulate certain matters of evidence in such procedure.'

"(j) The act of July 10, 1901 (P. L. 643), entitled 'An act defining boiled or process butter; designating the name by which it may be known; providing for the licensing of manufacturers and dealers therein, and regulating the sale and labeling of the same so as to prevent fraud and deception in its sale; providing punishment for violations of this act, the methods of procedure for its enforcement, and certain matters of evidence in such procedure.'

"(k) The act of March 28, 1905 (P. L. 64), entitled 'To prohibit the selling, shipping,

consigning, offering for sale, exposing for sale, or having in possession with intent to sell, as fresh, any meat, poultry, game, fish or shell fish which contains any substance or article possessing a preservative or coloring character or action; making the same a misdemeanor; and to prescribe penalties and punishment for violations, and the means and the methods of procedure for the enforcement thereof.'

"(2) That the said act of March 13, 1895, created an official department of the commonwealth of Pennsylvania to be known as the 'department of agriculture,' and established as subordinate thereto an officer to be known as the 'dairy and food commissioner,' which said officer was to be appointed by the governor for the term of four years. Covering the duties of the said dairy and food commissioner, the said act (section 4) provides that the said official shall 'perform the duties prescribed by an act approved May 26, 1893.' The latter act (section 2) provides as follows: 'The said agent (dairy and food commissioner) shall be charged * * * with the execution and enforcement of all laws now enacted or hereafter to be enacted in relation to the adulteration or imitation of dairy products.'

"(3) That, excepting the said acts of May 26, 1893, and of March 13, 1895, all of the acts above named prohibit the adulteration of food and provide that the enforcement of their various provisions shall be undertaken by the said dairy and food commissioner.

"(4) That the Constitution of the state of Pennsylvania, adopted November 3, 1873, contained (section 27, art. 3) the following clause: 'No state office shall be continued or created for the inspection or measuring of any merchandise, manufacture or commodity; but any county or municipality may appoint such officers when authorized by law.' The said Constitution, by virtue of section 1 of Schedule, became operative on January 1, 1874, and still is operative throughout the commonwealth of Pennsylvania.

"(5) That the defendant, B. Harry Warren, was, on April 1, 1903, appointed by Hon. Samuel W. Pennypacker, Governor of the commonwealth of Pennsylvania, to fill the said office of dairy and food commissioner. That since the date of his appointment the said defendant, under color of the acts of assembly above named, has used and exercised, and still doth use and exercise, the said office of dairy and food commissioner, without warrant or lawful authority therefor; and that, under color of the said statutes and of the said office, the said defendant has usurped and exercised, and still doth usurp and exercise, the power of a state officer for the inspection of merchandise, without warrant or lawful authority therefor, to the great damage and prejudice of the commonwealth and its fundamental laws, in the manner following, to wit: The said dairy and food commissioner, between April 1, 1903, and the

present time, has appointed divers agents, chemists, and attorneys, by name unknown to your petitioner. That the said dairy and food commissioner and the said agents, under the authority and direction of the said dairy and food commissioner, have visited various retail grocery stores, wholesale grocery stores, and manufacturing establishments throughout the state, exercising the right of full access, egress, and ingress to such stores and establishments, and also exercising the power and authority to open packages, cans, or vessels, and the power to take from said packages, cans, or vessels samples of the contents thereof. That the said dairy and food commissioner and his said agents, acting under his direction and authority, have procured at said stores and establishments samples of food products, the object of the taking of said samples being the examination and inspection thereof in order to determine whether criminal prosecutions should be instituted against any person by the dairy and food commissioner for the violation of the various pure food statutes of the state of Pennsylvania. That the said samples have been by the said dairy and food commissioner, and by his said agents acting under authority and direction of the said commissioner, placed in the hands of the chemists appointed by the said commissioner. That the said chemists, under direction and authority of the said commissioner, have analyzed and inspected said samples of food products, and following same have rendered to said commissioner reports of the results of said analysis and inspection, with the opinion and advice of said chemists thereon as to whether criminal action, based upon the composition of said samples, as disclosed and revealed by said analysis and inspection, should be instituted against any person. That the said commissioner, acting upon the advice and opinions contained in said chemists' reports, has in many cases authorized and instructed his said attorneys to institute criminal proceedings, under the various statutes previously referred to, against retail grocers, wholesale grocers, and manufacturers; which said criminal proceedings have been instituted by said attorneys, and said defendants mulcted in fines and costs. That in addition to the above, the said B. Harry Warren, dairy and food commissioner; Oliver D. Schock, assistant dairy and food commissioner; Robert M. Simmers, special agent of the dairy and food commissioner; W. A. Hutchinson, agent, together with certain other agents and representatives of the dairy and food department unknown to your petitioner, have visited retail grocery stores, wholesale grocery stores, and manufacturing establishments, after purchasing samples of various food products, have themselves examined and chemically inspected said samples of food, notably butter and milk, using for the examination and inspection of butter a chemical test known as the 'Spoon test,' and using

for the examination and inspection of milk a chemical test known as the 'Tube test.' That if the examinations and inspections thus made by said dairy and food commissioner and his subordinates indicated the adulteration of the said article, samples thereof were taken and placed with the aforesaid chemists for further analysis and inspection as aforesaid.

"Whereupon the said Hampton L. Carson, Atty. Gen., makes this his suggestion and complaint against the said B. Harry Warren, that a writ of quo warranto may be granted by your honorable court, and be directed to issue against the said B. Harry Warren, to show by what authority he, the said B. Harry Warren, claims to possess and exercise the office of dairy and food commissioner, and by what authority he exercises the powers of a state officer for the inspection of merchandise under color of the said office.

"Hampton L. Carson, Attorney General."

The demurrer was as follows:

"And now, to wit, May 11, 1906, B. Harry Warren, defendant above named reserving all rights and legal instructions demurs to the suggestion and complaint for writ of quo warranto in above case, and for cause thereof avers that the same is insufficient in law to justify the demands contained in the writ issued, that he 'show by what authority he * * * claims to possess and exercise the office of dairy and food commissioner and by what authority he exercises the powers of the said office for the inspection of merchandise under color of the said office,' for the following reasons:

"(1) The title of defendant to the office of dairy and food commissioner is admitted, to wit, appointment, thereto by the Governor of the commonwealth.

"(2) The acts of assembly recited and set forth in said suggestion and complaint, as defendant is informed by counsel and believes, are valid and not in conflict with the Constitution of the state.

"(3) Even if certain sections of the said acts of assembly should be held to be unconstitutional, as averred, the validity of said office would not be affected thereby, said sections not applying to the creation of the office, or his appointment thereto, and not being necessary to enable him to perform its duties, and he having official duties to perform other than those charged in the suggestion and complaint as being illegal.

"(4) The acts performed by the defendant and his agents, as set forth in the fifth section of the suggestion and complaint are not those of inspectors of merchandise, and do not evidence that said office is a state office for the inspection of merchandise as contemplated and prohibited by section 27, article 3, of the Constitution, the only examination and analysis being made after the samples of food were procured by purchase, and when the goods were the property of the defendant or his agent; the purpose being to

ascertain whether or not they were adulterated and the pure food laws of the commonwealth violated.

"(5) Even if the acts of said agents in procuring samples be considered illegal, no inspection of merchandise is contemplated or authorized by the said acts of assembly, and they and other acts committed by the defendant and his agents in the enforcement of said acts of assembly could not affect their validity or defendant's title to said office."

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

Elton J. Buckley and John H. Fow, for petitioner. S. J. M. McCarrell, Cyrus Gordon, Hampton L. Carson, Atty. Gen., Chas. L. Brown, and T. L. Vandershire, for respondent.

BROWN, J. This is an original proceeding before us to test the constitutionality of the office of respondent as dairy and food commissioner of the state. The issuance of the writ of quo warranto was requested by the Attorney General because he felt that the questions raised in the complaint required determination here in the first instance, but he properly, as the law officer of the state, associated himself with counsel for respondent in support of the constitutionality of the act under which the Governor made the appointment.

By the act of March 13, 1895 (P. L. 17), the department of agriculture was established. It is administered by an officer known as the secretary of agriculture, appointed by the Governor. This act is neither supplementary to nor amendatory of any other act, but is a piece of independent legislation, creating a new department of state government and providing for its proper administration. By the act of May 23, 1893 (P. L. 152), the powers of the state board of agriculture were enlarged, and, for the purpose of securing the enforcement of the provisions of laws concerning dairy products, the president of that board was authorized to appoint as his agent a dairy and food commissioner; but the appointment to that office, which is now held by the respondent, is made without regard to the act of 1893. Its provisions are not involved in this proceeding except as a reference is made in the act of 1895 to the duties imposed by it upon respondent. After providing for the establishment of a department of agriculture, to be organized and administered by an officer to be known as the "secretary of agriculture," the second and third sections of the act of 1895 define in detail the duties of that officer. He is charged with the administration of all laws designed to prevent fraud or adulteration in the preparation, manufacture or sale of articles of food. By the fourth section the Governor is authorized to appoint a deputy secretary and four

other officers of the department; one being the dairy and food commissioner.

The act of 1895, creating the department of agriculture, contravenes no constitutional provision. It is a piece of legislation passed in the interest of the public health and the general welfare, and neither the head of the department, nor any one of the four subordinate officers, fills an office, the creation of which is forbidden by the Constitution. Nothing is said in the act as to the powers of the dairy and food commissioner, and it cannot therefore be said that the respondent ought to be ousted because he is exercising powers, which the Legislature, in the act authorizing his appointment, attempted to confer upon him in violation of the Constitution. He is simply directed to perform, under the supervision of the head of the department, the duties which had been imposed upon the dairy and food commissioner, when that officer was appointed by the president of the state board of agriculture, under the act of 1893, and that act is to be read in connection with the act of 1895, simply for the ascertainment of what duties had been imposed by it upon the dairy and food commissioner, and which the act of 1895 requires him to perform. Turning to the act of 1893, we find the duty imposed upon the agent of the state board of agriculture, now the dairy and food commissioner appointed under the act of 1895, to be the execution and enforcement of all laws then in force, or thereafter to be enacted, in relation to the adulteration or imitation of dairy products. By the act of 1893, the state board of agriculture was charged with the enforcement of the provisions of the act of May 21, 1885 (P. L. 22), and, for the purpose of securing the enforcement of the provisions of that act or any other act concerning dairy products, it was authorized to appoint an agent, to be known as "dairy and food commissioner," charged under its direction with the execution and enforcement of said laws. The act of 1885, which was the act intended to be enforced, is a constitutional piece of legislation. *Powell v. Commonwealth*, 114 Pa. 265, 7 Atl. 913, 60 Am. Rep. 350; *Id.*, 127 U. S. 678, 8 Sup. Ct. 992, 32 L. Ed. 253. The only judgment that can be entered against the respondent in this proceeding is ouster, and having been appointed by the Governor under a statute authorizing his appointment, which in itself contravenes no clause of the Constitution and confers upon him no powers to be exercised by virtue of his office forbidden to be exercised by any state officer, his title to the office cannot be questioned.

But the complaint of the petitioners, at whose instance this writ was applied for, is that the respondent, under color of the act of 1895, under which he was appointed, and others set forth in the suggestion, has usurped and is exercising the power of a state officer for the inspection of merchan-

dise, in violation of article 3, § 27, of the Constitution, which provides that: "No state office shall be continued or created for the inspection or measuring of any merchandise, manufacture or commodity, but any county or municipality may appoint such officer when authorized by law." If other acts than that of 1895, under which the respondent admittedly was appointed, and by which his duties alone are defined, confer powers upon him which he cannot be permitted to exercise, we are not to pass upon them in this proceeding. If he has been appointed to a lawful office, carrying with it by the words of the act creating it no constitutionally forbidden powers, he is not to be ousted because subsequent legislation may have conferred such powers upon him. His right to hold a lawful office is one thing; his right to exercise enlarged powers which he may not lawfully exercise is another; and, having determined that he is holding a lawful office, we leave the question of his right to exercise alleged forbidden powers to be raised in some other proceeding, in which specific acts said to be performed by him under statutory powers prohibited by the Constitution may be set forth and inquired into and restrained, if unlawful.

In this proceeding the judgment must be for the respondent on his demurrer, and the prothonotary is directed to enter it.

(117 Pa. 173)

ARMSTRONG v. BICKEL.

(Supreme Court of Pennsylvania. March 4, 1907.)

BROKERS—DEALING IN STOCKS—AUTHORITY.

Where a customer authorized certain brokers to sell stock "short," his undertaking being to reimburse them for any payments they might be compelled to make in execution of his order, the brokers, after their customer has refused to put up more margins, can purchase the stock and charge the loss to his account, without considering rumors communicated to them by him that the stock on the following day may be settled for on a lower basis.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Brokers, § 19.]

Appeal from Court of Common Pleas, Allegheny County.

Action by John D. Armstrong, administrator of L. R. Bacon and John D. Armstrong, against Charles Bickel. Judgment for plaintiff, and defendant appeals. Affirmed.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

J. S. Ferguson and E. G. Ferguson, for appellant. William Kaufman, Joseph A. Langfitt, and H. W. McIntosh, for appellee.

BROWN, J. The appellee, John D. Armstrong, and his deceased partner, Lathrop R. Bacon, were brokers doing business in Pittsburgh and New York. The appellant was one of their customers, for whom they sold

"short," in November, 1900, 200 shares of Northern Pacific Railway stock. They borrowed this stock, through Menzeshelmer & Co., their New York correspondents, from Hertzfeld & Stern, a firm of brokers in that city. The "short" sales of the 200 shares of stock had been made at about \$60 or \$70 per share. In May, 1901, there was a most extraordinary rise in this stock, due to the efforts of two rival interests to acquire control of a majority of it. On the morning of May 8th, at about 10 o'clock, the appellant went to the office of his brokers, and was told by the appellee that the stock might go up to \$180 or \$200 per share, and additional margin was asked for the firm's protection. Bickel complied with this demand, and protected the stock by depositing satisfactory collaterals which brought the margin up to \$230 per share. So rapid and abnormal was the rise, however, that within an hour the stock was selling at \$600 or \$700 per share, and Bickel was asked for more margin. To this he replied that he could not margin it at that price; that he had not sufficient margin to give the firm to cover at that price; and that it was all nonsense to request margins, because the firm would not cover the stock. An hour later, at about 12 o'clock, the stock was quoted at \$700 or \$800 per share, and the request for more margin was renewed by the appellee. Bickel states that he said he could not margin the stock at that price. The reply was that if margins were not given they would have to buy. To this, according to his own testimony, he replied: "I told him he ought not to do that; in fact, he must not do it. If he did he certainly would ruin me, and he would hurt himself. And I further told him of a rumor I had heard. * * * I had heard there would be a settlement made at \$150, or something like that, and the answer he gave me was he didn't care about these rumors, and he would pay no attention to them." Shortly afterwards the firm bought the stock on account of the appellant, and this suit is for the loss sustained.

The appellant had other deals with his brokers, but with them we have no concern. The single question which he now raises is whether as to this one transaction the "short" sales of 200 shares of stock, and the subsequent purchase of the same number by the firm on his account to enable them to return the stock they had borrowed for the purpose of making the sales for him, he had submitted on the trial sufficient evidence of their negligence or failure to perform their duty to him to defeat their right to recover the difference between \$350 per share and the sum for which he had protected the stock. Under the facts stated, and which are conceded by the appellant, the court directed a verdict against him, and his complaint is that the jury were not allowed to determine whether there was such a failure on the part of the brokers to perform their duty to him in this transaction as ought to defeat their right to be reimbursed.

ed for their loss sustained in purchasing the stock for him.

When Bickel authorized Bacon & Co. to sell the stock short for him—that is, to sell on his account stock which he did not have, and which they would be compelled to borrow for him—his undertaking with them was to reimburse them for any payments they might be compelled to make in the execution of his order, and to repay them for any losses that might result from it. *Bibb v. Allen*, 149 U. S. 481, 13 Sup. Ct. 950, 37 L. Ed. 819. On the other hand, the duty of the brokers to the customer was to protect him against any loss that might result from disregard of the express terms of their agency, or of an obligation manifestly implied in it. The undertaking of the appellant was to have, at all times, money or securities in the hands of the appellee and his partner sufficient to enable them to buy 200 shares of the stock which they borrowed for him, and which they might at any time be called upon to return. All this he well knew and acknowledged his obligation by increasing his margin to \$230 per share. When the extraordinary situation arose later in the day on May 9th, his obligation to continue the protection of his brokers did not cease. In the rise and fall of the market they could make no profit in the stock they were handling for him. All they had in the transaction was their usual commission. Gain in it was to be for the customer, and loss in it ought not to be theirs. When called upon for additional margin or protection at 11 o'clock, he admits he told the firm that he could not margin the stock at its price at that time. Later in the morning, about 12 o'clock, the appellee called upon him and renewed the request for more margin. This was refused by the appellant. The following is what took place between them at that time, according to his own testimony: "Q. Give us his language. A. He asked me for more margins. I told him I couldn't margin it at that price. Q. What was the price then? A. I believe \$700 or \$800, as far as I can recollect. Q. Did he ask you for any particular amount? A. No, he didn't. Q. Did you tell him you were all in? A. No, I didn't tell him that. Q. What else was said at that time? A. He told me if I didn't give him margins he would have to buy. Q. What did you say? A. I told him he ought not to do that; in fact, he must not do it. If he did he certainly would ruin me, and he would hurt himself. And I further told him of a rumor I had heard. Q. Tell about that. A. I had heard there would be a settlement made at \$150, or something like that, and the answer he gave me was he didn't care about those rumors, and he would pay no attention to them."

At this point, what was the situation? The customer had not asked for a reasonable time to enable him to increase the margin, but there was an absolute refusal to

further protect the stock, because, as he said, he could not do so. True, he testifies that he told his brokers of a rumor he had heard that there would be a settlement of the stock at \$150, and that Armstrong replied he would pay no attention to such rumor. On a mere rumor the brokers would not have been expected as prudent men to delay protecting themselves after their customer had refused to perform his duty of protecting them. He himself did not act on the rumor by putting up more margins, but now complains that the brokers did not out of their own funds protect the stock for him. If they had done so, it would have been at their peril, for if the stock had continued to rise, and if he had been called upon to pay an advanced price for the same, they would have been met by his statement that he had told them he would put up no more margin. Under the circumstances, there was nothing for them to do except what they did. As to this, the learned trial judge most aptly and truly said: "Inasmuch as he had not asked for any definite amount of margin, and Bickel had refused, according to his own statement, to margin at the price the stock stood at (\$700), it was a situation where Armstrong had to protect his own firm, and he waited at his own risk. If the market had advanced, he would have been the loser, and Bickel would have been liable only for a price at which Armstrong could have bought, had he sent in his order at once. As it was, Bickel was a gainer by the delay. It was not, we think, Armstrong's duty to make any further demand under the facts of the case. * * * As for the rumors of a settlement at \$150, the defendant had heard them. If he relied upon them, he should have put up the margins, or at least offered what he could. His information was as definite as any rumors that were proved by the testimony. The only thing that he did not know was that Hertzfeld & Stern had given notice that they would not require deliveries that day, and, as before said, this was no guaranty as to the next day."

In his charge the learned trial judge said: "On the turning point of the case, as I view it, there are no disputed questions of fact." This is true. What the appellant complains of as the negligence of the appellee's firm is their failure to give him notice of information that had come to them about the situation of the market. With the stock jumping, according to the testimony, \$75 and \$100 at a time, reaching \$1,000 per share at 11:30, the brokers were not bound to hunt him up and repeat to him every rumor or piece of information that had come to them before they could take steps for their own protection. After his refusal to protect them, they were not required, in the admitted condition of the market, to go to him, after hearing rumors or receiving information, and give him an opportunity to reconsider his determination not to protect the stock. They

were in peril, placed there by his failure of duty to them, and their right was to go into the market and purchase the stock at the best price for which they could buy it. This is all they did, and there is not even the appearance of any failure of duty by the firm of the appellee to the appellant.

Judgment affirmed.

(217 Pa. 179)

In re MCNEILE'S ESTATE.

(Supreme Court of Pennsylvania. March 4, 1907.)

1. POWERS—POWER OF APPOINTMENT—EXECUTION.

Testator directed that his widow should have power of appointment to divide his estate among his children, or their issue, as she might see best. The widow devised the estate in trust to sell and distribute the proceeds among six named children. Held, that the appointment to the children was valid, and a power of sale to the executors gave them only ministerial authority to carry out the directions after her death.

2. APPEAL—PARTIES IN INTEREST.

Where a widow gave out of her estate certain legacies to three of her children, and gave her residuary estate to six children in whose favor she had made an appointment under the will of her husband, and the six children elected to take their share in land, the other three children could not object on appeal to irregularities in the partition proceedings.

Appeal from Orphans' Court, Philadelphia County.

In the matter of the partition of the real estate of Hugh McNelle, deceased. From an order dismissing a bill of review, and confirming the inquest, H. Howard McNelle and others appeal. Affirmed.

The material portion of the will of Hugh McNelle was as follows: "2. I hereby empower my wife in case she shall continue my widow during her life (but not otherwise) to make a will, or other writing in the nature thereof, directing my said estate to be divided to and among such of my children, or their issue, in such shares and proportions as she may see proper and best." The will of Anna McNelle gave \$4,500 to be distributed amongst John H. McNelle, H. Howard McNelle, and Albert B. McNelle. She further directed as follows: "By the will of my late husband I am empowered to make a will directing his estate to be divided to and among such of my children or their issue in such shares or proportions as to me may seem proper and best, I therefore give, devise and bequeath to my executors and the survivor of them all the said real and personal estate (except 1,935 South Broad street, which I have devised to my daughter Mary). Upon the same trusts and with all the powers and authorities, and for the same uses and purposes as is hereinafter mentioned in this my last will in regard to the rest, residue and remainder of my estate. * * * And as to all the rest, residue and remainder of my estate, * * * I do hereby give,

devise and bequeath unto my executors and the survivor of them in trust to manage and sell the same, * * * and I direct the proceeds of such sales be divided equally between my four daughters, Jane H. Thompson, Mary McNelle, Margaret C. McNelle and Leonore McNelle, and my two sons, Raymond McNelle and Ashton McNelle." On answers filed in partition proceedings by John H. McNelle, H. Howard McNelle, and Albert B. McNelle it appeared that the proceedings had reached a stage in which a rule to accept or refuse the properties at the valuation fixed by the inquest had been obtained, and acceptance of service thereof had been indorsed by all the parties in interest, whereupon the rule was made absolute and the division of the property was decreed. Nineteen days after their acceptance of service the petitioners, three of the children of the testatrix, filed an answer, setting up that no partition can at this time be made, because the testator failed to vest in his widow a legal power of appointment over his real estate, and because the donee of the power failed to legally exercise any power which was given, or attempted to be given, to her by the testator's will. The answer and a petition for a bill of review were dismissed.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

Henry J. Scott, for appellants. Wm. White, Jr., for appellee.

MITCHELL, C. J. Hugh McNelle's will gave to his widow an estate for life with a testamentary power of appointment, if she continued his widow, among such of his children and in such shares as she might see proper, and in case of her remarriage, or in default of appointment, then to all his children equally. Such disposition of his estate was entirely legal. If it were necessary to inquire where the fee was during the life estate, it is clear that it was in remainder contingently to the children appointed, and in default of appointment to all the children in common.

The widow remained unmarried and made a valid appointment among six of her children, naming them. It is true she devised to her executors in trust to sell and distribute the proceeds among her appointees, but this was solely for convenience of distribution. The discretion given her to select the appointees she exercised herself, and delegated nothing but the ministerial authority to carry out her commands. As the power was testamentary and could not be put in effect until her death, the actual execution of it had to be done by another hand, and she did no more than name the hand.

The case of Stephenson v. Richardson, 88 Pa. 40, is relied on by appellant, but the power there in question was narrower than here. The testator there devised real estate to the sole and separate use of his daughter,

not to be subject to sale or mortgage, and after her death to "descend in fee simple, to such of her children as she might direct," etc. It was held that, as there was no power of sale and testator intended that the estate should descend as land, a direction by the daughter to her executors to sell and divide the proceeds was not a good execution of the power. The case is very briefly reported, but the argument of the appellee shows what must have been the ground of the judgment. Even so regarded, it is rather a narrow and technical construction of the will, and does not seem to have been treated as a precedent in any later decision. It is certainly not a precedent for this case.

The other questions argued are not in the case. Whether the partition in the orphans' court was strictly regular, while a bill was pending in the common pleas; whether an inquest should have been awarded while the petition and amended answer were formally undisposed of; or whether the authority of the executors under the will to sell at their discretion was a bar to partition in either form, we need not consider. The objections are raised only by appellants who have no interest in the matter. The money legacies left to them by their mother's will were clearly payable out of her own estate, and were expressly not chargeable even on her own land. The appellants were not therefore in any way interested in their father's estate. The election by the six appointees to take their shares as land closed all objection to the partition proceedings by them, and the appellants had no standing to raise any question on the subject.

Decree affirmed, with costs.

(217 Pa. 123)

ISMAN v. HANSCOM et al.

(Supreme Court of Pennsylvania. Feb. 25, 1907.)

1. LANDLORD AND TENANT—CONSTRUCTION OF LEASE.

Where a lease stipulates as to the ownership of chattels which may be placed on the property by the tenant, the contract is a law made by the parties, and will determine their rights thereunder.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Landlord and Tenant, §§ 574-584.]

2. SAME—IMPROVEMENTS BY TENANT.

A lease provided that "all alterations, additions, and improvements," except movable furniture, should, at the option of the lessor, become his property at the end of the term. The premises were leased for a restaurant. Held, that the lessor may claim under such option such additions as electric light apparatus, gallery, vestibules, dumb-waiters, and toilet rooms.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Landlord and Tenant, §§ 574-584.]

3. SAME—EXERCISE OF OPTION.

Where a lease provides that improvements shall, at the option of the lessor, at the end of the term, become the property of the lessor, but fixes no time for the exercise of the option, notice given four weeks before the end of the term is sufficient.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Landlord and Tenant, §§ 574-584.]

4. SAME—ASSIGNMENT OF REVERSION—RIGHTS OF ASSIGNEE.

On an assignment of a lease by the lessor, the assignee was designated as "agent," and thereafter as such gave three months' notice to the tenant to quit, and also notified him of the exercise of an option given to the lessor in the lease to become the owner of improvements made by the lessee. Held, that such "agent" could maintain a bill to restrain the tenant from removing the chattels in violation of the option.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Landlord and Tenant, §§ 574-584.]

Appeal from Court of Common Pleas, Philadelphia County.

Bill by Felix Isman, agent, against Edward E. Hanscom and Melville Hanscom. Decree for plaintiff, and defendants appeal. Affirmed.

It appeared that fittings referred to in the bill were as follows: Shelving, etc., gentlemen's toilet room, etc., ladies' toilet room, etc., four dumb-waiters, inlaid floor, vestibule, wall decorations, two brick ovens, electric lights, apparatus, etc., gallery.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, ELKIN, and STEWART, JJ.

Edmund W. Kirby and Robert J. Byron, for appellants. Alexander Henry Carver, for appellee.

MESTREZAT, J. The important and controlling question in this case arises out of the construction of the lease between the parties. The question of trade or tenant fixtures does not enter into the case, and hence need not be considered. The lease, which is the contract between the parties, determines the ownership of the property in question, and hence the rights of the parties thereto depend entirely upon the proper interpretation of the instrument. If the lease had been silent as to the ownership of the various items of property in dispute, then it would have been necessary to determine whether the property was trade fixtures, and if so, to whom it belonged—to the landlord or the tenant. When, however, a landlord and tenant stipulate in their lease as to the ownership of chattels which may be placed upon the demised premises by the tenant, the stipulation will be enforced regardless of what might be the rights of the parties at common law. In such cases, the contract is the law made by the parties themselves, and that must determine their rights.

By an agreement dated November 14, 1899, Henry O. Lea leased to the defendants the ground floor, basement, and second floor of the premises at No. 1315 Market street, in the city of Philadelphia, for a term of 5 years and 16 days, commencing on December 15, 1899. The premises were to be used as a restaurant, and were fitted up for that purpose by the lessees, who installed therein the various items of property set out in the bill, and which are in dispute in this controversy. The lease contained the following clause: "And

the said lessees shall not make any alterations, additions, or improvements to the hereby demised premises without first having the consent, in writing, of the lessor, and after such consent having been given, all alterations, additions, and improvements made by either of the parties hereto upon the premises, except movable furniture put in at the expense of the lessees, shall, at the option of the lessor, remain upon the premises at the expiration or sooner determination of the lease, and be surrendered with the premises, without molestation or injury, and become the property of the lessor, or at the option of the lessor, the said lessees shall restore the said premises to the same good order and condition as the same are now." On March 19, 1902, Henry C. Lea assigned to Felix Isman, agent, all his "right, title, and interest in this lease, and all benefits and advantages to be derived therefrom." On August 30, 1904, Isman gave the defendants written notice to quit the premises on December 31, 1904; and on December 8, 1904, he notified them in writing "not to remove any of the additions, alterations, or improvements, * * * 'except to restore to its former condition the party wall between No. 1315 Market street and the building adjoining it on the east.'" In the early part of December, 1904, the defendants having begun to remove some of the structures which they had installed in the demised premises, the plaintiff filed this bill praying for an injunction to restrain them from removing the property specifically set out in the bill. The court below issued a preliminary injunction which was subsequently made permanent. The defendants' contention, below and here, is that the structures were installed by them in the demised premises for the purpose of their business, and are to be considered as trade fixtures which they have a right to remove. The plaintiff claims that the structures were "alterations, additions, and improvements," and not "movable office furniture," within the terms of the lease, and that therefore the defendants could not remove them from the leased premises.

As said above, the rights of the parties in this litigation depend upon the interpretation of the contract. We are clear that the structures erected on the demised premises or the chattels installed therein by the defendants are "alterations, additions, and improvements," within the terms of the lease, and as such belong to the plaintiff, the landlord, at his option. These words are of broad signification, and are sufficiently comprehensive to include the various chattels which the defendants installed in the premises. By reference to the numerous cases cited in the appellee's paperbook, it will be seen that judicial construction has fixed the interpretation of these words, and gives them a significance that will include each and every item of property installed by the defendants in the demised premises. It would unnecessarily prolong this opinion to cite these au-

thorities. It is difficult to see what change in the premises could be made, or what chattel could be installed therein, or what repairs could be made thereto, which would not be included in the words "alterations, additions, and improvements." Every article enumerated in the bill in this case will be found included in the description of property which was to remain on the premises and belong to the lessor at his option.

Aside from the reasons just stated, we think that the exception in the clause in question conclusively shows the chattels which are included in the words "alterations, additions, and improvements." The only property put upon the premises by the lessees which continued to belong to them and they were permitted to remove by the terms of the lease was "movable furniture put in at the expense of the lessees." This exception in the clause is in immediate connection with the declaration that all alterations, additions, and improvements should remain upon the premises at the expiration or sooner determination of the lease, and at his option belong to the lessor. If it had been the intention, as contended by appellants, that trade fixtures should be an exception with the right to the lessees to remove them at the determination of the lease, the parties would certainly have so stipulated in the contract. An inference that such was the intention of either or both of the parties to the contract has nothing whatever to support it in the terms of that instrument. On the contrary, the presumption is that the property excepted by the lease from that which should remain on the demised premises is the only property which the parties intended should continue to belong to the lessees and be removed by them at the expiration of the lease. There is nothing in the lease to justify any other interpretation of the language in question. "Movable furniture put in at the expense of the lessees," and that alone, is the only property which the parties agreed should be excepted from that which should at the option of the lessor remain on the demised premises at the expiration of the lease. Such being the fact, it is wholly immaterial whether any of the chattels or structures placed upon the demised premises were trade fixtures. The contract prevents their removal, and invests the lessor with the title. We cannot, if we would, make a new and different contract for the parties. We can only interpret the contract which they made for themselves. If, as now alleged by the lessees, they are the owners of the property in question, and should have the right to remove it from the demised premises, the answer is that the contract under which they must claim it, if at all, does not support their allegation.

The parties fixed no time in which the option should be exercised, and we think the lessor gave the lessees reasonable notice not to remove the property from the premises. If he had required them to remove the numer-

ous articles instead of permitting them to remain in the building, there would be a better reason for the defendants' contention. It would be unreasonable to hold that under the agreement the lessor was required to exercise his option at the time the property was installed in the premises—over five years before the expiration of the lease. During that time there might be many changes, not only in the business of the present owner, but in the ownership of the demised premises, which would affect and control the exercise of the option. In fact, we see that the title to the property is now in another than Mr. Lea who leased to the defendants. Such changes in the ownership of city property may be anticipated, and to require a landlord to exercise an option affecting it materially, five years prior to the expiration of the lease, might prejudice an otherwise advantageous sale. All that the lessees had the right to demand of their landlord was that he exercise his option so as to give them reasonable time in which to comply with his request; and he having done so, they have no just ground of complaint.

There is nothing in the contention that the plaintiff had no right to file the bill. The lease was assigned by Lea to "Felix Isman, agent," and transferred to him all Lea's "right, title, and interest in this lease, and all benefits and advantages to be derived therefrom." In addition to the fact that Isman, as the agent of an undisclosed principal, is the owner of the lease, it also appears that he gave the three months' notice to the defendants to vacate the premises, and also notified them that he exercised the option to retain the alterations, additions, and improvements which were put upon the premises. The defendants held the property under him as agent, and they are not in a position to contest his title or his right to maintain the bill.

Nor is there any merit in the contention that the plaintiff has an adequate remedy at law, and that, therefore, a bill will not lie to enjoin the defendants from removing the structures erected on the demised premises during the continuance of the lease. Such jurisdiction in equity has been frequently exercised in this and other states, as a reference to the numerous decisions on the subject will show.

The assignments of error are overruled, and the decree is affirmed.

(117 Pa. 144)

FOSTER v. AMERICAN BITUMASTIC ENAMEL CO.

(Supreme Court of Pennsylvania. Feb. 25, 1907.)

NEGLIGENCE—INJURY TO SERVANT—INDEPENDENT CONTRACTOR.

In an action for personal injuries against defendant, having a contract with the employer of the plaintiff, evidence held insufficient to

show negligence on the part of defendant entitling plaintiff to recover.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, §§ 267-273.]

Appeal from Court of Common Pleas, Philadelphia County.

Action by James M. Foster, Jr., against the American Bitumastic Enamel Company. Judgment for defendant notwithstanding the verdict, and plaintiff appeals. Affirmed.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

S. Morris Wain, for appellant. John A. Ward, for appellee.

POTTER, J. The plaintiff in this case was a ship fitter in the employ of the New York Shipbuilding Company in South Camden. The defendant had a contract with the employer of the plaintiff to coat with enamel certain portions of the interior of a large vessel which was in process of construction. This enamel had to be applied hot, as it cooled and solidified very quickly after being applied. It was heated in a cauldron on the upper deck and lowered in galvanized buckets through an open hatchway. The workman in charge usually carried two full buckets from the vat to the opening and put one down on the deck while he lowered the other. He testified that the buckets were not in the passageway, but right at the edge of the hatchway, just outside the line of the passageway. He also stated that the buckets were kept in as rapid motion as possible to get them and their contents to the place of application before the enamel cooled.

On the afternoon of October 15, 1902, the plaintiff found it necessary to leave his work and go ashore. He took two or three steps along the passageway, when he slipped and fell, and in the act of falling his arm was thrust into the bucket of hot bitumastic enamel, injuring it very seriously. He alleged that he slipped on a piece of enamel about as large as a saucer which had fallen on the surface of the deck and solidified. The negligence charged against the defendant was the spilling of this enamel on the floor, and also in leaving a bucket of hot enamel standing near the opening in the passageway. There was no evidence whatever to show how or by whom the enamel had been spilled on the deck, nor how long it had been there. The jury found a verdict for the plaintiff, but the trial judge entered judgment for the defendant non obstante verdicto. The accident happened upon an unfinished vessel; in which both the plaintiff and defendant were at work at the same time, but engaged in entirely different lines. According to the testimony of the plaintiff, the immediate cause of the accident was the presence of the piece of hardened enamel, the size of a saucer, which he alleges was on the surface of the deck at the time he fell. But, as the material hardened very quickly, it may have been

dropped there a very short time before. There is nothing in the evidence to show that it was seen by any one else than plaintiff, or that it had been there long enough for the defendant company, or any of its employes, to know of its existence. It would be going entirely too far to hold the defendant liable for the results of an accidental spilling of material which it was in the very act of handling by experienced employes, and during the course of its conveyance from the heating cauldron to the place of its application. Especially would this be true if the spilling occurred but a short time before the accident. From the very nature of the case, more or less of disorder must have prevailed at the place in question at that time. It could not be expected that the decks of a vessel in course of construction would be absolutely free from litter and rubbish and bits of waste material. The testimony showed that blocks of wood and pieces of metal were often left lying on the deck. If the plaintiff had stumbled over any of these things, it would hardly be suggested that a claim for recovery could be sustained. The fact that in falling he involuntarily thrust his hand into the bucket of hot enamel added terribly to the extent of the injury, but it had nothing whatever to do with the initial cause of his slip or fall. It was the unfortunate result of the fall, and not its cause.

In the opinion of the court below the statement is made that the bucket of enamel could not have been standing where it was left, near the hatchway, more than three or four minutes, because there was evidence that the material hardened within that time. One witness did so testify. But other witnesses, in testifying to the rapidity with which the material hardened, said that it became solid within three or four minutes after it had been applied to the steel with a brush. It is very probable that the material would remain soft for a longer time when kept in larger quantity in the bucket. But we can find nothing in the evidence to show that the bucket was improperly placed, or that it was left near the hatchway any longer than was necessary. As to the spot of enamel alleged to have been on the surface of the deck, we agree with the court below that mere proof of its existence, without showing how it got there, or how long it had been there previous to the accident, was not, under the circumstances, sufficient to sustain the charge of negligence against the defendant.

The assignments of error are overruled, and the judgment is affirmed.

(217 Pa. 151)

In re CHESTNUT ST. TRUST & SAVING FUND CO.'S ASSIGNED ESTATE.

(Supreme Court of Pennsylvania. Feb. 25, 1907.)

1. ASSIGNMENT FOR BENEFIT OF CREDITORS—WHO MAY SHARE IN ASSETS.

Only creditors of an assignor at the time of an assignment for the benefit of creditors

are entitled to participate in the proceeds of the estate.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 4, Assignments for Benefit of Creditors, § 878.]

2. SAME.

Debts payable in the future are claims against an estate on assignment for the benefit of creditors, as are also damages resulting from breach of contract prior to the assignment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 4, Assignments for Benefit of Creditors, §§ 875-879.]

3. SAME.

A claim arising after the date of an assignment for the benefit of creditors cannot participate in the distribution, and holders of claims depending on a contingency in the future cannot enforce their claims against such estate.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 4, Assignments for Benefit of Creditors, §§ 875-879.]

4. SAME.

A trust company made an assignment for the benefit of creditors of all its assets, but continued to administer its trust funds. Certain funds held by it as surety for a guardian were stolen by one of the officers thereafter. Held, that the ward could not participate as a general creditor in the distribution of the funds in the hands of the assignee.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 4, Assignments for Benefit of Creditors, §§ 875-879.]

Appeal from Court of Common Pleas, Philadelphia County.

In the matter of the assignment of the Chestnut Street Trust & Saving Fund Company. From an order dismissing exceptions to the auditor's report, Louisa T. Cochran appeals. Affirmed.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

Edmund Randall and James A. Flaherty, for appellant.

MESTREZAT, J. The learned auditor has found and stated the facts of the case, and we think they sustain his conclusion. We recognize the importance of the principle involved and the hardship to the claimant if unsuccessful, as suggested by appellant's counsel, but, if the principle ruling the case is settled law, as we think it is, we cannot disregard it and permit "a hard case to make bad law." If in such cases *cestui que trust* should have better protection from trust companies which are permitted to become sureties on the bonds of their trustees, the remedy is with the Legislature. The judicial department of the government cannot usurp the functions of the Legislature, and by construction do that which lies exclusively within the province of that department of the government. This is sometimes urged by counsel in the interest of their clients, and also occasionally attempted by courts.

The single question presented for our consideration is the right of the appellant to participate in the distribution of the assigned estate as a creditor by reason of the liability

which the trust company incurred as surety on the bond of the appellant's guardian who failed to account for the funds of her ward. The assignment of error raises but this one question. Whether the appellant has another remedy in this or another forum, and whether the trust company and its assigned estate can be held as agent or trustee for the funds placed in its hands, and are now unaccounted for, are questions which are not raised on this record, and with which we are not now concerned. This claim, as presented in the court below and here, is upon the trust company's bond as surety for the guardian, and, is against the company's insolvent estate for a pro rata share of the amount which the guardian failed to pay her ward. That there can be no recovery on the bond we think is clear.

The bond given by the guardian and the trust company as surety was approved on December 7, 1889, and was conditioned for the faithful performance of the duties of the guardian. The securities of the ward were delivered by the guardian to the trust company which entered them in its book in which it entered property held by it in a fiduciary capacity. The trust company made an assignment for the benefit of its creditors on December 24, 1897. Subsequently, in March, 1901, the treasurer of the trust company fraudulently disposed of the securities for his own use. At the date of the assignment, therefore, there had been no breach of the bond given by the trust company as surety of the guardian. The securities were then intact, and could have been recovered from the company at that time or at any time prior to March, 1901, when they were fraudulently appropriated by its treasurer. Hence there was no breach of, or liability on, the bond of the surety for more than three years after the assignment of the trust company for the benefit of its creditors. This being true, the appellant had no claim against the company on the bond at the date of the assignment, and therefore is not entitled to share in the distribution of the proceeds of the assignor's estate.

The rights of creditors of an assigned estate are fixed at the date of the assignment. Only those who are creditors of the assignor at that date are entitled to participate in the distribution of the proceeds of the estate. A creditor is one who has a definite demand against the estate, or a cause of action capable of adjustment and liquidation upon a trial. *Reading Iron Works*, 150 Pa. 369, 24 Atl. 617. Debts due in present and payable in futuro are, of course, claims against the assignor for which his estate is liable in the hands of his assignee. So, also, are damages resulting from the breach of a contract occurring prior to the assignment. And generally any claim or demand against the assignor which is certain, or may be reduced to certainty at the date of the assignment, is a debt payable out of the assigned estate.

On the other hand, a claim against the assignor arising after the date of the assignment will not be allowed to participate in the distribution of his estate. And it may be added that the possibility of a claim, depending upon the happening of a contingency in the future, will not constitute a demand for which the assigned estate is liable. The holders of such claims are not creditors entitled to payment out of the estate of an insolvent assignor.

Applying these principles to the case in hand, it is manifest that the appellant has no claim on the funds in the hands of the assignees of the trust company. At the date of the assignment the condition of the assignor's bond had not been broken, and the appellant had no claim which she could have successfully asserted against the assignor. Hence, if she had brought an action against the trust company on that date, she would have been nonsuited because she had no claim or demand, and hence no cause for which an action would lie on the bond. The fact that at some time in the future she might have a claim arising out of the breach of the bond would not support an action or give her a demand against the obligor's insolvent estate in the hands of its assignees. A conditional bond, such as the one in question, does not create an indebtedness absolutely payable in the future, but is an obligation which becomes an indebtedness on the happening of a contingency, and, until the contingency occurs, there is no claim or demand which can be enforced against the assignor or his estate. It is apparent, therefore, that under the facts of this case the appellant had no claim against the assignor company at the time of its assignment, and hence can have no claim against the assets which the company assigned for the benefit of its creditors. She is now asserting her right to participate in the fund for distribution as a creditor of the trust company; and her rights are those only of a creditor. As such, she must look for payment to the assignor company, and not to its estate, which passed from it to the company's creditors before it became her debtor.

The doctrine announced in *Jones v. Cooper*, 2 Aikens (Vt.) 54, 16 Am. Dec. 678, is in harmony with our conclusion in this case. That was a claim against an insolvent intestate's estate arising on a bond of indemnity given by the deceased to secure the claimant against liability on a bond, on which he was surety for the deceased as guardian. The administrator denied the right of the claimant to participate in the distribution of the insolvent's estate of his decedent because there had been no breach of the guardian's bond. In sustaining this position, and in discussing what demands may be proved against an insolvent estate, the court said (page 680 of 16 Am. Dec. [2 Aikens (Vt.) 54]): "Where there is no subsisting debt or duty, or where the claim, if payable or to be satisfied at a

future day, rests in contingency, and it is uncertain whether or not any demand will accrue, it cannot be allowed. There must be a present debt or duty, or a demand in present, payable or to be satisfied at all events in futuro. * * * In cases of insolvent estates where there is no present duty, and it depends on some future event whether or not a demand will arise, it is obvious that no claim exists which can be proved before the commissioners. * * * The claim must be one which is capable of being liquidated and valued. A contract for the payment of a certain stated sum, or the delivery of certain articles of property, or for the performance of specific acts or services, if to be performed at all events, though at a subsequent time, may be the subject of valuation; but, where the performance of the contract depends on a contingency which may never happen, it is evident that it cannot be valued. As the bond declared upon in this case is not for the payment of a sum certain, or the performance of an act at all events, so as to raise a present debt or duty, but is conditional, depending on a contingency, it follows that there must at least be a breach of the condition and a consequent forfeiture of the bond to give the appellant a demand against the estate of the intestate."

We have examined the cases cited by appellant and none of them rule this case in her favor. Where the claim was allowed in any of them, it was capable of liquidation at the date of the assignment.

The assignees are not responsible to the appellant as bailees of her securities, for the reason that they had no right to the possession of the securities, and in fact never had possession of them. The trust company acquired possession of the securities and held them as it held other property in a fiduciary capacity, and when it assigned its own assets for the benefit of creditors these securities were not included, and did not pass to the assignees. The assignment did not dissolve the trust company (*German-town Pass. Ry. Co. v. Fidler*, 60 Pa. 124, 100 Am. Dec. 546), and it continued business to the extent of winding up its fiduciary business. It held these securities until they were stolen by its treasurer in March, 1901. If the appellant could trace the securities to the assignees, it would raise another and different question than the one raised on this appeal.

The assignment of error is overruled, and the decree is affirmed.

(217 Pa. 208)

IN re SANSON'S ESTATE.

(Supreme Court of Pennsylvania. March 11, 1907.)

INSURANCE—LIFE POLICY—ASSIGNMENT.

Decedent, having a life policy payable to his estate, assigned it to his wife; the assign-

ment providing that, if the insured survived the tontine period of 15 years, the assignment should be void. The insured had an option at the end of such period to withdraw the accumulated surplus. This option could be exercised by the insured without the consent of the beneficiary. After the exercising of such option, the policy and original assignment remained in the custody of the decedent. There was evidence that the wife joined with the husband in signing the papers necessary to effect the option exercised, and that at the time an agent of the company told them that the assignment would continue in force. *Held*, that no formal reassignment of the policy to the wife was necessary, and that after the death of the husband she was entitled to proceeds of the policy.

Appeal from Orphans' Court, Philadelphia County.

In the matter of the estate of Aaron I. Sanson, deceased. From a decree dismissing exceptions to adjudication, Aaron I. Sanson, Jr., appeals. Affirmed.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

G. W. Pepper and A. W. Sanson, for appellant. Charles F. Ziegler, for appellee.

FELL, J. The question presented by this appeal is whether the sum of \$10,000 paid by an assurance company on a policy on the life of the decedent should have been awarded by the orphans' court to his widow or to his executor. They were the only parties in interest, and under their agreement the money had been paid by the company to the executor, in order that the beneficial ownership might be determined on the settlement of his account. The decedent in 1884 took out a tontine policy, which provided that at the end of 15 years, unless the policy was sooner terminated by his death, the insured should have five options, the first of which, and the one he exercised, was "to withdraw in cash the accumulated surplus apportioned by the company." These options were personal to the insured and could be exercised by him without the consent of the beneficiary. The decedent's first wife was the beneficiary named in the policy. Upon her death in 1889 the policy by its terms inured to his benefit. He married the appellant in 1891, and in 1893 assigned to her the policy and all his rights thereunder, subject to its terms. In 1899 he exercised the option mentioned, and received from the company \$7,161, and continued the policy at reduced premiums. He died in 1903. The assignment was made on a printed blank provided by the company and required by it in case of all assignments, and it contained a provision that, if the insured survived the tontine period, the assignment should be void. After the payment by the company the policy and the original assignment remained in the custody of the decedent's agent, who had before taken charge of it. There was testimony tending to show that, at the time the insured exercised his

option and received the accumulated dividends from the company, he and his wife went together to the office of the company, in pursuance of notice sent to both; that she there joined with him in signing the papers necessary to effect the option exercised; that the agent of the company told them, in reply to their inquiries, that the policy would continue in force and that she would remain the beneficiary; that this was what the decedent desired; and that it was the understanding and agreement between him and his wife at that time. It was found by the learned auditing judge that "it was the understanding and agreement of the decedent that after he received the amount paid to him under the exercise of his tontine option the policy should 'continue' as an ordinary policy for \$10,000 for and as the property of his wife. Their relations were, as they always had been loving and affectionate; the necessity that she should be in receipt of the money at his death was as great as when the assignment was made to her; the sole purpose of the condition was one affecting, and intended to affect, the company, as between itself and persons whom it insured; and this purpose had been fully accomplished, the decedent receiving, as the result of it, an amount nearly equaling the face of the policy. A reassignment was unnecessary. *Malone's Estate*, 8 Wkly. Notes Cas. 179; *Kulp v. March*, 181 Pa. 627, 635, 37 Atl. 913. The purpose of the condition having been accomplished, its consequences by way of divesting the interest of the wife might very naturally be waived by the husband; and the understanding that it 'should continue as it had been' could in their minds have had no other meaning than that the interest of the wife 'continued' with it after the husband had exercised his option, just as it had previously existed; and, as already stated, the evidence shows that this was their agreement." There can be no doubt that the decedent and his wife understood that the limitation in the assignment was a requirement of the company to avoid complications at the end of the tontine period, when an option might be exercised, and that, its purpose being ended, the policy would continue as it before was for the benefit of the wife. They believed that no new assignment was necessary, and that nothing more need be done to give legal effect to the decedent's intention to continue the beneficial ownership in her. What took place amounted to a renewal of the original gift, and equity will consider as done what they understood as already done. "Wherever a person has the legal right to dispose of property, and means to do so, the form of the instrument adopted for the purpose, if at law ineffectual, will be disregarded, and it will be reformed so as to make it effectual." *Lant's Appeal*, 95 Pa. 279, 40 Am. Rep. 646.

The decree is affirmed.

STATE v. MURPHY.

(Court of General Sessions of Delaware. Sussex. April 5, 1907.)

OBSTRUCTING JUSTICE—EVIDENCE.

In a prosecution for assault on a constable while levying execution on defendant's property, where defendant did not know that the person assaulted was a constable or that he held a writ of execution against him, he was not guilty.

Robert Murphy was tried on the charge of assault on an officer. Verdict of not guilty. Argued before SPRUANCE and BOYCE, JJ.

Daniel O. Hastings, Deputy Atty. Gen., for the State. John M. Richardson, for defendant.

SPRUANCE, J. (charging jury). The indictment against the defendant, Robert Murphy, in substance charges that on the 4th day of August, 1906, in Northwest Fork hundred, in this county, the defendant did make an assault upon Richard T. Cahall, a constable of this county, while in the legal execution of the duties of his office of constable, and did knowingly obstruct, hinder, and resist the said officer while in the lawful execution of his said office. It is not denied that the said Cahall, at the time of the said alleged offense, was a duly appointed and qualified constable of this county, and that he went to the premises of the defendant for the purpose of making a levy upon his personal property under an execution against the defendant issued by a justice of the peace of this county, which is in evidence.

It is claimed by the state that the said Cahall, before proceeding to execute the said writ, explained to the defendant that he was about to make a levy upon the personal property of the defendant under a writ of execution against the said defendant, in his hands as a county constable, and that thereupon the defendant ordered him off of the premises and assaulted him with a pitchfork, and that soon afterwards the defendant, or some one aiding him or acting in concert with him, locked the outer door of the building in which he (the said constable) was engaged in the execution of said writ, all of which was done for the purpose of preventing said officer from the performance of his duty under said writ. It is claimed by the defendant that he did not know that the said Cahall was a constable, or that he had an execution against him, and that he ordered the said Cahall off of his premises as one having no right to be there; and he denies that he assaulted him, or locked or caused to be locked the door of the building in which Cahall was.

The testimony as to these contentions is conflicting. If you find the testimony of said Cahall to be true, it will be your duty to render a verdict of guilty. But if you find that at the time of the alleged offense the defendant was ignorant of the fact that Ca-

hall was a constable, or that he held a writ of execution against him, and that he did not knowingly resist or obstruct the said Cahall in the execution of his duty as a public officer, your verdict should be not guilty.

Verdict, not guilty.

STATE v. HANDY et al.

(Court of General Sessions of Delaware. Sussex. April 3, 1907.)

1. ASSAULT AND BATTERY—DEFINITION.

An assault is an attempt or offer, coupled with present ability, to do hurt to the person of another; while a battery includes an assault, and is the actual striking or shooting of another.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 4, Assault and Battery, §§ 68-71.]

2. SAME—EVIDENCE.

Where defendants blockaded a public highway, and as prosecutor approached, one or more of them fired shots, two of which took effect in prosecutor's person, such of the defendants as fired the shots were guilty of assault and battery.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 4, Assault and Battery, §§ 73, 74.]

3. SAME—AIDING AND ABETTING.

Persons who were present, aiding and abetting, at the time shots were fired against prosecutor on a highway, were equally guilty of assault and battery with those who fired the shots.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 4, Assault and Battery, § 87.]

4. CRIMINAL LAW—SEVERAL DEFENDANTS—SEPARATE CONVICTION.

Where, in a prosecution for assault and battery, some of the defendants were charged as principals and the others with aiding and abetting, the jury was at liberty to find any one or all of the prisoners guilty or not guilty.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 2096, 2097.]

John Handy and others were indicted for assault and battery. Verdict of guilty.

Argued before SPRUANCE and BOYCE, JJ.

Daniel O. Hastings, Deputy Atty. Gen., for the State. Robert C. White, for defendants.

BOYCE, J. (charging jury). The prisoners, John Handy, Jesse Gibson, and James Slaughter, are charged with an assault and battery upon Elijah W. Wells. An assault

has been defined to be an attempt or offer, coupled with a present ability, to do hurt to the person of another. A battery includes an assault, and is the actual striking, or, as charged in this case, shooting, of another.

It is admitted that the prisoners and John Long, driving two carriages, went from Salisbury, Md., to Hastings' distillery, near Delmar, in Little Creek hundred, this county, on the night of December 8th last, and that on returning from Hastings', after having gone about a quarter of a mile, they stopped their teams—it being between 7 and 9 o'clock—nearly opposite each other, occupying each of the driveways in the road. While so being stopped in the road, Wells, the prosecuting witness, who with another person had also been to Hastings', came up, and, finding the roadway blocked, he inquired if there was any trouble. Cursing from some of the persons who had stopped followed, and it is not denied that several shots were fired at the said time and place. There is conflict of testimony as to who did the shooting, but it is not denied that Wells was shot twice—one ball penetrating his person in the region of the stomach, and the other his coat over his shoulder. No excuse or justification whatever is offered for the shooting. You have heard the several witnesses, and you doubtless remember their testimony at this point. If you find that any one of the prisoners fired the shots which took effect as the prosecuting witness has stated, such person would be guilty. And if you find that any one of the prisoners did commit the offense charged, and that either or both of the other prisoners were present at the time, abetting, procuring, commanding, and counselling him to commit the offense, then such other person, or both of them, so abetting, aiding, and assisting, would be guilty. The charge made in this case is of a grave and serious character, and you should give the testimony of the witnesses careful and conscientious consideration.

You may find any one or all of the prisoners guilty or not guilty, as the evidence seems to warrant.

Verdict: Guilty.

(79 Conn. 696)

PINNEY et ux. v. BOROUGH OF WINSTED
et al.(Supreme Court of Errors of Connecticut.
April 10, 1907.)**1. BOUNDARIES — DESCRIPTION OF LAND — CALLS—DEFINITENESS.**

A notice of the condemnation of a strip of plaintiffs' land adjoining M. street on the north for the widening of a sidewalk stated that it was proposed to appropriate not more than six feet of plaintiffs' land fronting on the northerly side of the street. In the description of the strip taken the location of the east and west terminal points of the north boundary line of the strip were established, and courses of the four boundaries of the strip were definitely stated in feet and fractions thereof, and by points of the compass, and that the area was 250 feet. There was a dispute between the plaintiffs and the borough authorities as to the location of plaintiffs' south boundary line, and it was not shown that there were any visible indications of the location of such line. *Held*, that such description could not be so construed as to make the south boundary of the condemned strip the line which plaintiffs claimed was the southern boundary of their land, so as to deprive plaintiffs of land which they claimed between the strip condemned and the street.

2. EMINENT DOMAIN—EFFECT OF CONDEMNATION PROCEEDINGS.

Where condemnation proceedings were prosecuted for the purpose of taking a strip of plaintiffs' land, particularly defined, for the widening of a street, such proceedings, vesting title to the strip condemned in the public, did not constitute an adjudication that plaintiffs owned no land between the strip condemned and the street.

3. SAME—AUTHORITY OF APPRAISERS.

Where appraisers were appointed in proceedings to condemn property for the widening of a street, they were only authorized to assess damages for the property actually taken, and neither they nor the warden nor burgesses had any power to decide any question of title to such property.

4. SAME—ESTOPPEL.

Where borough authorities proceeded to condemn certain specifically described property for the widening of a street, neither the statement that the property was needed to widen a highway and sidewalk, nor the fact that plaintiffs accepted an award of \$350 assessed as damages for the taking of such strip estopped them to claim a strip of land between the property condemned and the street.

5. INJUNCTION — TEMPORARY INJUNCTION — MODIFICATION—EFFECT.

Where plaintiff obtained a temporary injunction restraining defendants from using a strip of property claimed by plaintiff for the widening of a street, the modification of the injunction on condition that plaintiffs' rights in the suit should not be prejudiced thereby did not affect plaintiffs' right to relief.

6. MUNICIPAL CORPORATIONS — STREETS—AC-TIONS—PARTIES.

12 Sp. Laws, p. 763, providing a charter for the borough of Winsted, gave the latter control of the construction and widening of sidewalks, the establishing of curb lines and the extension of highways, but the control of the construction and repair of the remainder of the highway remained in the town of Winchester. *Held* that, where suit was brought to restrain the borough from using certain land for the widening of a street, the town was interested in the question whether such land was a part of the highway, and was therefore, properly summoned as a codefendant.

7. PLEADING — BRINGING IN NEW PARTIES — AMENDMENT.

Where, after a town had been made a codefendant in a suit with a borough, the town, by demurrer, raised practically the same issue as that raised by the borough, plaintiffs were not required to further amend their complaint in order to obtain a judgment on that question which would be binding on both defendants.

Appeal from Superior Court, Litchfield County; Edwin B. Gager, Judge.

Suit by Lucien V. Pinney and another against the borough of Winsted and others to restrain defendant borough from taking land of plaintiffs in extending a highway for the purpose of widening a sidewalk and for damages. From an order sustaining defendant's demurrer to the complaint and dismissing same, plaintiffs appeal. Reversed and remanded.

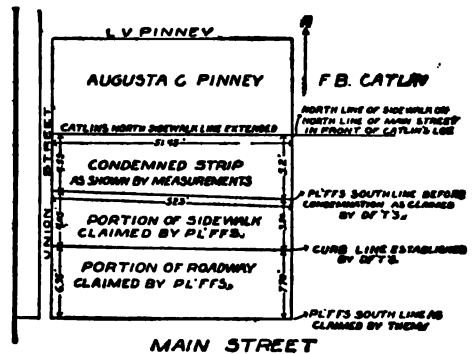
Wellington B. Smith and Frank B. Munn, for appellants. William H. Blodgett, for appellee borough of Winsted. Richard T. Higgins, for appellee town of Winchester.

HALL, J. The complaint contains, in substance, these allegations: That the plaintiff Augusta C. Pinney, wife of the plaintiff L. V. Pinney, has for many years been the owner of a tract of land in the borough of Winsted and town of Winchester, bounded northerly on land of L. V. Pinney, easterly on land of F. B. Catlin, southerly on Main street, and westerly on Union street. That on the 26th of July, 1902, the warden and burgesses of said borough gave due notice to the plaintiffs to show cause at a fixed time and place why Main street should not be widened, not exceeding six feet, for the purpose of widening the sidewalk on the northerly side thereof, not exceeding six feet in front of the plaintiffs' premises, and to show cause why not exceeding six feet of the plaintiff's land fronting the northerly side of Main street should not be appropriated for that purpose. That the warden and burgesses met on the day fixed, and made report that they "had widened said highway and said sidewalk, and laid out the same for said widening, by taking the strip of land on Main street included between the southerly side of said Augusta C. Pinney's lot, and the extension westerly to Union street, in a straight line, of the present northerly line of the sidewalk, on the northerly line of Main street in front of F. B. Catlin's lot; said F. B. Catlin's lot being on the easterly side of the said Pinney's lot." Said strip is described in said report as follows: "Beginning in the line between the lots of F. B. Catlin and Augusta and Lucien V. Pinney, at a point about 50.68 feet distant westerly from the southwest corner of F. B. Catlin's block, 27.2 feet distant from the southwest corner of F. B. Catlin's house, and 24.25 feet from the southeast corner of said Pinney's house on the northerly [side of said Main street; thence S. 6° 57' W. 5.2 feet in said]"—the words in brackets which appear in the report of the committee to the su-

terior court were apparently omitted by mistake in the description in this report—"line between Catlin and Pinney to said Pinney's southerly line; thence N. 86° W. in said Pinney's southerly line 52.3 feet to easterly line of Union street; thence in said easterly line of Union street N. 16° 14' E. 4.55 feet to a point distant 28.55 feet from the southwest corner of said Pinney's house and 37.08 feet from the southeast corner of J. H. Alvord's block; thence S. 86° 51' E. 51.45 feet to place of beginning; containing 250 square feet." That they were unable to agree as to the damages sustained by the plaintiffs by reason of such taking. That upon the application of the warden and burgesses, a committee was afterwards duly appointed by a judge of the superior court "to estimate and assess the benefits and damages accruing to the plaintiffs by reason of taking of said piece of land," who reported in writing to the superior court that, having fully heard the parties and viewed the premises, they estimated and assessed to Augusta C. Pinney the damages "caused by the widening and extending of said highway, sidewalk, and street, and the taking of said land as aforesaid, at the sum of \$350," and that there were no benefits. Said report contained the same description of the land for the taking of which such damages were assessed, so far as it is material to the questions involved in this case, as is given above, in the report of the warden and burgesses. That said report was duly accepted by the superior court, and said sum of \$350 was paid to the plaintiff Augusta C. Pinney. That the strip of land thus condemned runs through the above-described premises of the plaintiffs, and they are the owners of a strip of land on the southerly side of said condemned strip, and between it and the highway, about 11 feet in width, and extending the whole length of the southerly line of the plaintiffs' premises. That after the acceptance of said report and the payment of the damages so assessed the warden and burgesses notified the plaintiffs that the width, course, grade, and curb line of the sidewalk in front of their premises had been established. That the sidewalk was to be 8½ feet wide, the northerly or inside line of the same being the northerly line of the condemned strip above described, and directed the plaintiffs to lay a walk upon said sidewalk and to set a curb along the southerly line thereof, so established in front of their premises, from their easterly line to Union street, for the purpose of allowing the town of Winchester to extend its highway across the plaintiffs' premises outside of said curb line, and notified the plaintiffs that, unless they complied with said order on or before a day fixed, the borough authorities would lay such sidewalk and set said curb, and that, if said work should be done by the city, the expense thereby incurred would become a lien upon the plaintiffs' property. That, if the sidewalk and curb should be

constructed and set as above described, the sidewalk would include, not only the strip of land condemned as above stated, but also a strip of land belonging to the plaintiffs, extending along the south side of the condemned strip, being about 3.30 feet in width at its east end, and 4.05 feet in width at its west end, and also a strip of land belonging to the plaintiffs extending along the south side of said curb line, about 7.70 feet at its east end, and 6.95 feet at its west end, would be thrown into the traveled highway, and that the plaintiffs would be thus deprived of said two strips of land, although they had not been condemned, and although the plaintiffs have not been compensated therefor and that the plaintiffs were willing to lay a sidewalk upon said condemned strip.

The following diagram will illustrate the plaintiffs' claims as they appear to be stated in the complaint:



The trial court having found that the town of Winchester ought to be made a party to the case, upon the motion of the borough, ordered said town to be summoned in as a codefendant, and said town appeared and pleaded as hereinafter stated. The temporary injunction granted at the commencement of the action was afterwards, upon motion of the defendant borough, modified by the judge who had granted it so as to permit the laying of the sidewalk and the setting of the curb by the borough in the manner ordered, but with the provision that the rights of the parties should in no way be prejudiced by such modification. To this complaint, asking for an injunction restraining the defendant borough from laying the walk and curb as ordered, and for damages, each of the defendants demurred.

The following are, in substance, among the grounds of the demurrer of the borough: (1) That it appears by the condemnation and appraisal proceedings that the southerly boundary of the strip condemned, and for the taking of which the plaintiffs had been paid damages, was the southern boundary line of the plaintiffs' land, and that the plaintiffs could therefore own no land south of the condemned strip; (2) that by the condemnation and appraisal proceedings it was adjudicated

that the plaintiffs were not the owners of, and were not entitled to damages for the taking of, the land claimed by the plaintiff south of the condemned strip, or of any land between Main street and the southerly line of the condemned strip; (3) that by said condemnation and appraisal proceedings, and the plaintiffs' acceptance of the sum awarded as damages, the plaintiffs are estopped from claiming ownership of land between the condemned strip and Main street; (4) that by reason of the modification of the temporary injunction no judgment can be now rendered against the borough.

In addition to the grounds stated in the demurrer of the borough, the town demurred upon the grounds that it appeared that it had no interest in the subject-matter of the action, and that it was not properly made a codefendant, and that no judgment could be rendered against it since none was asked for in the prayer for relief, and since there was no allegation in the complaint that the town had done, or intended to do any of the acts complained of, or any of the acts the doing of which was sought to be enjoined. The trial court sustained both demurrers upon the ground, as appears by the judge's memorandum, that under the rule that courses and distances must yield to fixed monuments the southern line of the plaintiffs' land was the south boundary of the condemned strip, and that the plaintiffs could therefore own no land between Main street and strip condemned. The principle upon which the rule invoked by the trial court rests is that the less certainty of description must yield to the greater certainty, unless the apparently conflicting descriptions can be reconciled.

In the dissenting opinion in *Belden v. Seymour*, 8 Conn. 19-25, Judge Peters states that, when a boundary is an imaginary line and not a fixed visible monument, it will not control courses and distances. In *Higley v. Bidwell*, 9 Conn. 447-451, the cases cited with approval hold that, when boundaries are "known and visible monuments," "fixed, known, and unquestionable monuments," "known and fixed monuments," they control courses and distances. In *Benedict v. Gaylord*, 11 Conn. 332-336, 29 Am. Dec. 299, the charge of the trial court "that the courses and distances and fixed and known monuments as contained and described in the deeds ought to control the more general description of the land, viz., that which describes the land as bounding upon the adjoining proprietors," was held to be correct; the court saying that "the limits of another man's land referred to generally, without particularity of description, or known and certain boundaries, are descriptions of great uncertainty and can only be rendered certain by investigation and survey." In *Nichols v. Turney*, 15 Conn. 101-108, the court says that although it is a well-settled rule that as known and fixed monuments will control courses and distances and so the certainty of metes and

bounds will include the land within them, though the quantity vary from that expressed in the deed, it might be otherwise where the whole deed showed that it was clearly the intent to give only a definite quantity. In *Roberti v. Atwater*, 43 Conn. 540-546, Judge Loomis, in giving the opinion of the court, says: "The rule which gives to monuments and boundaries a controlling effect is not inflexible. Boundaries may be inadvertently inserted or omitted. They may contravene all the other terms of description, so that to adhere to them might defeat the evident intention of the parties, in which case the extent of the grant would have to be determined by other portions of the description." And, in speaking of the case then before the court, says: "This is not a case where the limits of another's land are referred to generally, and there are no visible indications of the location of such limits, but the abutting land is found by the jury to have consisted of definite inclosures fenced in on all sides, the existence and location of which were well known. We think, therefore, in this case that such boundaries are more certain and less liable to mistake than the measurements."

In the case at bar it appears that in the notice to the plaintiffs of the hearing relative to the widening of Main street, which was the first step in the taking of the plaintiffs' land, they were informed that it was proposed to appropriate for the widening of Main street not more than six feet of their land fronting on the northerly side of Main street; that in the description of the strip taken in the reports of the condemnation and appraisal proceedings the location of the east and west terminal points of the north boundary line of said strip are indisputably established by stated directions and distances from fixed monuments, and the lengths and courses of the four boundaries of the strip are definitely stated in feet and fractions of a foot, and by points of compass; and that it is stated that the width of said strip on the east is 5.2 feet, and on the west 4.55 feet, and that the area of the entire strip is 250 feet. It does not appear that there were any visible indications of the location of the plaintiffs' "southerly line," which was also named in the reports as the south boundary of the condemned strip, or that the parties were in accord as to the location of that line. On the contrary, it rather appears that the borough authorities and the plaintiffs were in dispute as to the location of the plaintiffs' southern boundary line. Without deciding whether the rule invoked, as to the controlling effect of descriptions by metes and bounds in deeds, is applicable to descriptions in proceedings for the taking of land in invitum, we are satisfied that to so construe the language of the descriptions in these reports as to make the south boundary of the condemned strip the line which the plaintiffs allege in their complaint is the southern boundary of their land would be to make that which is

least certain control that which is most certain, and would defeat the evident intention of all the parties to the condemnation proceedings, and that, therefore, the description by measurements of the southern boundary of the condemned strip must control that describing it as the southerly line of the plaintiffs' land.

The proceedings of the warden and burgesses and of the committee of appraisers was not an adjudication that the plaintiffs owned no land between the strip condemned and Main street. The entire effect of their proceedings and of the acceptance by the court of the report of the appraisers, no objection having been made and no appeal having been taken, was to conclude the parties as to the amount of damages and benefits sustained by and accruing to the plaintiffs from the taking of the particular strip of land described in the reports, and to vest the title to that strip of land in the borough upon its payment to the plaintiffs of the sum awarded as damages. The record of the doings of the warden and burgesses and of the appraisers shows that no damages were assessed for the taking of any other property than that particularly described. The appraisers could only assess damages for the property actually taken, and neither the warden and burgesses, nor the appraisers, possessed the power in the condemnation proceedings to decide that the plaintiffs did not own or were not entitled to damages for the taking of property which was not condemned. They were not authorized to decide disputed questions of title. *Spring Valley Waterworks v. San Francisco*, 22 Cal. 434; *Wilcox v. Oakland*, 49 Cal. 29; *Port Huron, etc., R. Co. v. Voorhels*, 50 Mich. 506, 15 N. W. 882; *O'Hare v. Chicago, etc., R. Co.*, 139 Ill. 151, 28 N. E. 923; *Crangle v. Harrisburg*, 1 Pa. 132; *Charlestown, etc., Bridge Co. v. Comstock*, 36 W. Va. 263, 15 S. E. 69. Evidently the borough authorities acted upon the assumption that the plaintiffs owned no property between the strip condemned and Main street. It is not inconsistent with the averments of the complaint that the plaintiff made a different claim. Certainly it does not appear that the plaintiffs in any way induced the borough authorities to believe that the plaintiffs did not claim to own land south of the condemned strip. The borough authorities, therefore, acted at their peril upon the assumption that the south line of the condemned strip was the southern boundary of the plaintiffs' land; and, if the statement in the condemnation proceedings that the strip condemned was taken for the purpose of widening the highway and sidewalk is to be interpreted as a statement that the plaintiffs own no land between the north line of Main street and the strip condemned, it does not conclude or estop the plaintiffs from asserting the contrary in this action.

The fact that the plaintiffs have accepted and still retain the \$350 assessed as damages

does not estop them from making the claims set forth in the complaint. This sum was voluntarily and intentionally paid by the borough as compensation for the taking of the strip actually condemned only, and was so received by the plaintiffs. The borough still claims title to the strip condemned, and the plaintiffs neither question the validity of the condemnation nor the title of the borough to the strip condemned. That they have received payment for the land condemned does not prevent them from resisting the taking without compensation of their land which has not been condemned.

The plaintiffs' right to relief by this action is not affected by the modification of the temporary injunction. Upon the defendants' motion the modification was granted upon condition that the plaintiffs' rights in this action should not be prejudiced thereby.

The defendant town of Winchester was properly summoned in as a codefendant. By its charter the borough of Winsted is given the control of the construction and widening of sidewalks and the establishing of curb lines and the extension of highways for that purpose, while the control of the construction and repair of the remainder of the highway remains in the town of Winchester. 12 Sp. Laws, p. 763. The town, therefore, had an interest in the question of whether the strip of land claimed by the plaintiffs south of the curb line was or was not a part of the highway. The town was rightly summoned in in order to render the final judgment as to the location of the plaintiffs' south boundary line conclusive upon all the parties interested. Having appeared and by their demurrer raised practically the same issue upon that question as that raised by the borough, the plaintiffs were not required to further amend their complaint in order to obtain a judgment upon that question which would be binding upon the town. Under the allegations of the complaint the plaintiffs may prove facts which will entitle them to equitable relief. The demurrers were therefore wrongly sustained.

There is error, and the case is remanded with directions to overrule the demurrers and proceed according to law. The other Judges concurred.

(217 Pa. 248)

McKIM v. CITY OF PHILADELPHIA.
(Supreme Court of Pennsylvania. March 11, 1907.)

1. MUNICIPAL CORPORATIONS — LEGISLATIVE CONTROL — STREET RAILROADS — USE OF STREETS — GRANT BY CITY.

The Legislature can authorize an electric railway company to lay its tracks and operate its lines on the streets of a city or any other municipality, and may empower the municipality to grant such authority, and to accompany the grant with such restrictions as may seem proper to protect the public in the use of the highways.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, § 175.]

2. SAME—RIGHTS ACQUIRED.

Where an electric company was authorized by ordinance to operate its railway on a certain street, no inference can be drawn that by the grant of the use of such street it was authorized to exclude the public from it or to operate its railway in a manner to render the street unnecessarily dangerous.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, § 1482.]

3. SAME—OBSTRUCTION IN STREET—LIABILITIES.

A street railway, having authority to use a street, planted a trolley pole in the middle thereof; the pole being about 10 inches in diameter and standing on a base about 2½ feet in diameter at the street level and about 18 inches in height. There was no artificial light on the pole. *Held*, that the city was liable for the death of a man whose wagon was upset on a dark night by striking the base of the pole.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, § 1630.]

4. EVIDENCE—OPINION EVIDENCE.

Where a witness described a pole obstructing a street, its size, its location, and all the conditions existing, it was not error to exclude his opinion as to the danger caused thereby.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 2186, 2260.]

Appeal from Court of Common Pleas, Philadelphia County.

Action by Elizabeth McKim against the city of Philadelphia. Judgment for defendant, and plaintiff appeals. Reversed.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, and STEWART, JJ.

Joseph R. Fahy, for appellant. Thos. Raeburn White, Asst. City Sol., and John L. Kinsey, City Sol., for appellee.

MESTREZAT, J. Eleventh street, in the city of Philadelphia, extends north and south, and crosses Federal street nearly at a right angle. At the place of this accident it is 100 feet wide and 70 feet from curb to curb, and in the middle has a single-track electric railway line, on which cars run north. The supply wires of the trolley system are supported by metal poles, placed alternately on the right and left, and near the track, instead of at the curb. One of these poles stood near the west rail, and about 10 feet north of the north house line of Federal street. It was of iron, about 9 or 10 inches in diameter and supported by a conical-shaped base, which was about 2½ feet in diameter at the street level and 15 or 18 inches in height. John McKim, a milk dealer and the plaintiff's husband, drove a one-horse milk wagon east on Federal street about 5:45 o'clock in the morning of January 24, 1903. He entered Eleventh street, and, turning to go north, his wagon struck the base of the trolley pole, was upset, and he was thrown to the ground and received severe injuries, from which he died a few hours later. The morning was very dark, and there was no artificial light on the pole nor in the vicinity of the pole. There is an electric street light located at the southeast corner of Eleventh and Federal streets, but it had not been lighted for at

least a week prior to the accident. McKim's wagon carried a light, as required by city ordinance. This action was brought by the widow of McKim to recover damages for his death, which she alleges was caused by the negligent and improper conduct of the city in not keeping its street, at the place of the accident, in a reasonably safe condition for persons who had occasion to use it. She avers in her statement that the city permitted the pole with its large projecting base to remain in the street for more than two years, without providing "means whereby such structural obstruction should be exposed or made conspicuous by proper light," and during the night of January 23, 1903, "without fixing or placing any light or signal near such obstruction to denote its position." The defense is that the trolley pole was located by authority of law, was a lawful structure, and was therefore not a nuisance, and that it was not an omission of duty on the part of the city to permit it to be constructed or remain on the location where it was placed without providing the necessary means to protect the public, using the street at night, against danger incident to a collision with it. On the trial below, the court directed a verdict for the defendant, and the plaintiff has taken this appeal.

It is conceded by the appellant that the trolley company was authorized by legislative and municipal action to locate and operate its railway on Eleventh street and to place the poles, carrying the wires which supply electricity, along and near its track in the center of Eleventh street; but the line was required to be constructed and maintained subject to municipal regulations and approval, as the city ordinance of August 5, 1886, provides that: "The laying, construction and maintenance of all wires, * * * poles, or cables shall be under the supervision of the chief of the electrical bureau and subject to his approval; and the same shall be laid under the rules and regulations of the board of highway supervisors." There is no doubt of the authority of the Legislature to authorize an electric railway company to lay its tracks and operate its lines on the streets of a city or of any other municipality; and it may do so directly or by authorizing its agent, the municipality, to grant the authority, and it may empower the municipality to accompany the grant with such restrictions and limitations as may seem proper to protect the public in the use of the highways of the city. In 2 Abbott on Municipal Corporations, § 829, it is said: "The Legislature or one of its properly delegated agencies may, by its action, authorize the use of a street in such a manner as will cause obstruction, and which, without authority, would be regarded as illegal and a nuisance. The discretionary power is often given municipal bodies to authorize these encroachments or obstructions, and, where an abuse of discretion is not shown, their action will be sustained if coming with-

in the general principles in respect to the creation and use of a highway." What, therefore, would otherwise be a nuisance if placed in a street may be legalized and relieved of this fault by legislative or municipal action.

Conceding the right of the electric company to place its poles in the center of the street, and that, by reason of municipal permission, they do not create a nuisance by being located there, yet there was a duty imposed upon the electric company to exercise the power conferred by the municipality in such manner and way as not unnecessarily to obstruct the highway or interfere with the purpose for which it was primarily constructed. Unless the intention is manifest, it will not be presumed that the Legislature or its agent, the municipality, intended, when granting the right of the company to locate its poles in the middle of the street, to deprive the public of the right to use the street without danger and with safety to themselves. This is made more apparent by the fact that the city ordinance requires the poles to be located under the supervision and subject to the approval of the municipal officers. When an electric company invokes municipal action for its protection in occupying the streets of a city, it must appear that the company acted strictly in accordance with the authority conferred. In stating the English rule on the subject, Chief Justice Cockburn, in *Vaughan v. Taff Vale Ry. Co.*, 5 H. & N. 679, 685, says: "When the Legislature has sanctioned and authorized the use of a particular thing, and it is used for the purpose for which it was authorized, and every precaution has been observed to prevent injury, the sanction of the Legislature carries with it this consequence, that, if damages result from the use of such thing independently of negligence, the party using it is not responsible." That rule, of course, is limited in this country by the constitutional provision that prohibits the Legislature from taking private property for public use without just compensation. But, aside from this limitation, the rule as stated by the learned chief justice is certainly sound in principle, and clearly indicates that the beneficiary of the authority granted is required to exercise the legislative grant without negligence and with the necessary precaution to prevent injury to another. In a recent work on Nuisances, it is said that the rule may be stated to be that, where one has the sanction of the state for what he does, unless he commits a fault in the manner of doing it, he is completely justified, provided the Legislature has the constitutional power to act. Joyce on Law of Nuisances, § 69. And in section 73 of the same work, citing authorities to support the text, it is said: "So, though a corporation may be authorized by law to do a certain act, it must so use its powers as not to injure another. The fact that a work is a lawful and beneficial one will not relieve the party constructing it

from liability to another who is injured by its improper and unskillful construction. The grant of a franchise by the state to a person does not confer upon him the right to inflict damage upon another which by reasonable caution could have been prevented." Mr. Smith, in his *Modern Law of Municipal Corporations* (section 1097), after announcing the doctrine that the Legislature may authorize a person or corporation to do an injurious act which would otherwise be a nuisance, proceeds to say: "And if the power may be exercised in a way not to seriously injure the public, but is exercised in a way regardless of the public interest, there will be no legislative protection. The grant of power is in all cases to be exercised in such manner as to least interfere with public rights and interests, and by construction the grant or license is construed in favor of the public. Besides there is a high degree of care to be exercised in carrying out the grant of power in such cases." The rule is well stated by Mitchell, J., in *Village of Pine City v. Munch*, 44 N. W. 197, 42 Minn. 342, 6 L. R. A. 763, where he says: "If the Legislature expressly authorizes an act which must inevitably result in public injury, what would otherwise be a nuisance may be said to be legalized; but if they authorized an erection which does not necessarily produce such a result, but such result flows from the manner of construction or operation, the legislative license is no defense. In order to justify a nuisance by legislative authority, it must be the natural and probable result of the act authorized, so that it may fairly be said to be covered by the legislation conferring the power. Wood, Nuisances, 853-861." In *Babbage v. Powers*, 29 N. E. 132, 130 N. Y. 281, 14 L. R. A. 396, the defendant sought to excuse himself for maintaining a nuisance by having procured municipal permission for his act. It was held that he was not liable, in the absence of negligence; but Vann, J., delivering the opinion, says: "The person receiving the license is held to impliedly agree to perform the act permitted with due care for the safety of the public, and is made liable for any violation of duty in this regard." And in a more recent case in New York (*Morton v. Mayor, etc., of New York*, 140 N. Y. 207, 35 N. E. 490, 22 L. R. A. 241), it is held, as stated in the syllabus, that the legislative authority which will shelter an actual nuisance must be express, or a clear and unquestionable implication from powers conferred, certain and unambiguous, and such as to show that the Legislature must have intended and contemplated the doing of the very act in question. "Lawful acts may be performed in such manner, so carelessly, negligently, and with so little regard to the rights of others," says Agnew, J., in *Pittsburg, Fort Wayne & Chicago Railway Co. v. Gilleland*, 56 Pa. 445, 94 Am. Dec. 98, "that he who, in performing them, injures another, must be responsible for the damage."

Applying these principles to the case in hand, we think the learned court below erred in withdrawing the case from the jury and directing a verdict for the defendant city. In this state, as all our cases on the subject declare, the highways are primarily for the passage of persons on foot and in vehicles. It is the duty of the municipal authorities having control of the highways to keep that fact in view, and, while permitting them to be used for other purposes, it should not be done in a manner which would prevent their use by the public or would render them unsafe and dangerous. Seventy years ago the Legislature of this state declared that the public highways should be constantly kept in repair and kept clear of all impediments to easy and convenient passing and traveling. This is the law of the commonwealth to-day, and includes the cities as well as the rural districts. The electric company was authorized by the ordinance to locate and operate its railway on Eleventh street, but there is nothing in the ordinance from which even an inference can be drawn that the use of Eleventh street by the company should exclude the public from it, or that the company was authorized to construct or operate its railway in a manner which would render the street unnecessarily dangerous. As it was the duty of the city to keep its streets clear of unnecessary impediments or obstructions and reasonably safe for public use, we cannot assume or infer that the councils intended to hand over Eleventh street to the electric company with permission to erect and maintain obstructions on it in total disregard of the rights of the public. In view of this duty of the city and of the unquestioned duty of the electric company to construct this line so as to maintain the street in a reasonably safe condition for use by the public, the question arises in this case whether the electric company observed its duty in exercising the authority conferred by the city, or whether it negligently erected this pole or negligently maintained it so as to cause the accident which resulted in the death of the plaintiff's decedent. These were questions for the jury. If the pole, either in its original construction, or in the manner of its maintenance, was dangerous to the public in the use of the street by day or night, municipal consent would afford the company no protection. The city, likewise, would be culpable, and liable to any person injured by reason of its neglect to protect him against the unlawful use of the street. In daylight, of course, the pole could be seen and avoided; but at night, and especially when it is very dark, as on this occasion, and could not be seen, a jury certainly would be justified in finding that it was a dangerous obstruction. If, in the construction of its railway, it had been necessary to leave a hole in the street of equal dimensions with the base of the pole, it could not reasonably be pretended that municipal consent to con-

struct the railway on the street would authorize such action on the part of the company, unless the public was, by some means, warned by day and night of the existence and location of the hole. The hole, however, would not be more dangerous than the base of the pole which caused McKim's death, and both would manifestly be a dangerous obstruction in the middle of a city street of a very dark night with no signals or lights to indicate their location. The rule which requires the streets of a city to be kept clear of dangerous impediments applies to the nighttime, as well as to the daytime, and demands of the municipality action which will maintain the safety of the street during the whole of the 24 hours.

The fact that there was ample space between the pole and the curb for teams to pass and repass, as suggested by the appellee, does not alter the case. This pole stood nearly in the center of the street, where a traveler would presume there was safety, and where instinctively he would go of a dark night in order that he might have safe transit. This was a thickly populated community, and, notwithstanding the width of the street, the city, as well as the electric company, should have expected the frequent use of every part of the street, both by night and day. Care, under the circumstances, therefore, required the company, and on its default, the city, to give notice of the presence of the pole to those who might be using the street at night. It was a question for the company, subject to the approval of the city, to determine what was necessary for this purpose. The only obligation resting upon either of them was that they took reasonable precaution to accomplish the purpose intended. This might have been done by a light on the pole itself, or by lights in the immediate vicinity of the pole, or in other ways that could be suggested. The failure, however, to observe any precaution to protect people using the street during the night became a question of negligence which should have been submitted to the jury.

It is not necessary in this case to discuss or determine the duty of a city to light its streets. The broad question presented for decision here is whether the city, under the circumstances disclosed by the testimony, was guilty of negligence in permitting a dangerous obstruction on one of its streets which resulted in the death of the plaintiff's decedent. That is a question which, under a proper charge by the court, was for the jury.

We are not convinced that the trial court erred in refusing to admit the opinions of the plaintiff's witnesses as to the dangerous condition of the street. There was no difficulty here in the witnesses describing the pole, its size, the manner of its structure, its location, and all of the conditions existing at the place of the accident. Whether, under all the circumstances, the pole either in its original construction or in its mainte-

nance was dangerous to public travel on that street, of a dark night, was as easily determinable by the jury as by the witnesses. Where mere descriptive language is inadequate to convey to the jury the precise facts, or their bearing on the issue, a witness may be allowed to supplement his description by his opinion, to put the jury in position to determine the facts in issue; but, when the circumstances are such that they can be fully and accurately described to the jury, and their bearing on the issue, estimated by persons without special knowledge or training, opinions of witnesses, expert or other, are inadmissible. *Graham v. Pennsylvania Co.*, 139 Pa. 149, 21 Atl. 151, 12 L. R. A. 293.

The eleventh and twelfth assignments are sustained, the judgment is reversed, and a venire facias is awarded.

(217 Pa. 215)

WOLFF CHEMICAL CO. v. CITY OF PHILADELPHIA et al.

(Supreme Court of Pennsylvania. March 11, 1907.)

1. MUNICIPAL CORPORATIONS—RIGHTS AND REMEDIES OF TAXPAYERS.

A taxpayer's bill to restrain illegal acts of city officials in appropriation of a public fund may be brought by a corporation which is a resident and taxpayer, though the fund was raised by a loan authorized by the electors of the city, and not by the taxpayers.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, §§ 2157, 2163, 2169.]

2. SAME—MISAPPROPRIATION OF FUNDS.

A city opened a boulevard, incurring liability therefor, and thereafter the electors authorized a loan for "continuing the improvement." Held, that the city council had no right to divert the fund so raised for the payment of judgments in mandamus for the opening of the boulevard.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, § 1874.]

Appeal from Court of Common Pleas, Philadelphia County.

Bill by the Wolff Chemical Company against the city of Philadelphia and others. From a decree dismissing the bill, plaintiff appeals. Reversed.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

John G. Johnson and Henry P. Brown, for appellant. Ernest Lowengrund, James Alcorn, Asst. City Sol., and John L. Kinsey, City Sol., for appellees.

MESTREZAT, J. By certain ordinances enacted March 28, 1903, the councils of the city of Philadelphia directed notice to be given the property owners thereby affected that the boulevard from Broad to Second street would, in three months, be required for public use to its full width as then on the city plan; also directed that the proper department advertise for proposals for improving the boulevard; and appropriated

\$250,000 to commence the improvement. In pursuance of an ordinance of December 17, 1903, the electors of the city, at an election held in February, 1904, authorized an increase in the indebtedness of the city of \$18,000,000, of which \$1,000,000 were to be "for continuing the improvement of the boulevard from Broad street northeastward." By an ordinance of December, 1904, it was ordained that the city controller transfer \$500,000, set aside for continuing the improvement of the boulevard, to item 18 in the appropriation to the department of city treasurer for the purpose of paying mandamuses for opening the boulevard. This bill was then brought by the Wolff Chemical Company, a corporation duly organized under the laws of Pennsylvania and a taxpayer of the city of Philadelphia, against said city and certain of its officers to restrain the transfer of the money as provided in the last-named ordinance. It avers that the ordinance is illegal, and that the payment by the city treasurer of mandamuses for the opening of the boulevard out of any portion of the \$1,000,000 appropriated for continuing the improvement of the boulevard cannot legally be made. The defendants filed a demurrer to the bill, and assigned, *inter alia*, as grounds therefor, that the plaintiff had no right to maintain the bill, and that the use proposed to be made of the \$500,000 was for the same purpose for which it was authorized by the ordinances of councils and the vote of the electors. The learned court below sustained the demurrer, holding that the "improvement" of the boulevard included the "opening" of the boulevard. The plaintiff has appealed.

The two questions thus raised by the pleadings are (1) whether the plaintiff has the right to maintain the bill; and (2) whether councils have the right to transfer \$500,000 of the \$1,000,000 fund authorized to be applied in continuing the improvement of the boulevard, and use it for the purpose of paying damages to property owners whose lands have been taken by the opening of the boulevard. The plaintiff is a trading corporation, incorporated under the laws of this commonwealth, and is doing business in the city of Philadelphia. It is a taxpayer of the city, and it claims that, as such, it has, like an individual taxpayer, the right to maintain a bill to test the validity of an intended illegal diversion of an appropriation of the funds of the city by authority of councils. The defendants contend that a trading corporation, although a resident and taxpayer, has no standing to file a taxpayer's bill against a city or its officers. But with that contention we do not agree. A corporation may avail itself of any legal and equitable remedy which would be available to an individual under similar circumstances; and it is impliedly authorized to sue in chancery whenever its equitable rights are involved. 1 Morawitz on Corporations, § 357. The de-

defendants' contention overlooks the ground upon which a party is authorized to invoke the aid of a court of equity to prevent the misapplication of public funds. In such case he is accorded a standing in equity because of the reason that he is a taxpayer, and that, if municipal funds are misappropriated, he will be injured pecuniarily, and not upon the ground that he is simply a citizen or an inhabitant or an elector. The invasion of his pecuniary interests is the special injury that gives him a standing to maintain a bill. This is the reason recognized and stated as the ground for permitting any party to object to an illegal diversion or misappropriation of public funds. 2 High on Injunctions, § 1298; 2 Cooley on Taxation, 1427; Page v. Allen, 58 Pa. 338, 98 Am. Dec. 272; Pittsburgh's Appeal, 79 Pa. 317; Frame v. Felix, 167 Pa. 47, 81 Atl. 375, 27 L. R. A. 802. In the Pennsylvania cases the ground for sustaining the bill is said to be "that the interest of a taxpayer, when money is to be raised by taxation, or expended from the treasury, is sufficient to entitle him to maintain a bill to test the validity of the law which proposes the assessment or expenditure." In sustaining a bill filed by taxpayers to restrain action of the city authorities under an ordinance creating a loan for the extension of water-works, in *Sank v. Philadelphia*, 8 Phila. 117, 122, Chief Justice Thompson said: "I have no doubt of their right. We have held this more than once. It seems to me it is most appropriately their province. Some, as well as all, can do it. It would be impossible to make all the taxpayers parties to the bill, and hence some must act, or none will. The taxpayers bear all the burdens of expenditures by the city. They ought, in order to protect themselves from unreasonable burdens, scrutinize the acts of their servants when proposing to increase their burdens." Regarding his pecuniary interest as the ground upon which a party is permitted to file a taxpayer's bill, it logically follows that a citizen, inhabitant, or incorporator of the municipality can have no greater right or higher ground than a resident taxpaying corporation to maintain such bill. An illegal diversion or a misapplication of public funds, raised by general taxation, increases the burdens of a corporation as it does those of a citizen, and therefore it is not apparent why the courts should be closed to the corporation and open to the individual. The effect of the misconduct of the city officials in misapplying the public funds is the same on both, and the remedy and the protection of the law should be afforded alike to both parties. A corporation is simply an aggregation of individuals, and there can be no good reason why their interests in the taxable property of the corporation should not receive the same protection in a court of equity against official misconduct as if the injury had been done against taxable property held by them as individuals. To hold otherwise would be

to deprive a corporation of the equal protection of the laws of the commonwealth which is guaranteed by the fourteenth amendment to the federal Constitution. *Santa Clara County v. Southern Pac. R. Co.*, 118 U. S. 394, 6 Sup. Ct. 1182, 30 L. Ed. 118; *Pembina Consolidated Silver Mining & Milling Co. v. Pennsylvania*, 125 U. S. 181, 8 Sup. Ct. 737, 31 L. Ed. 630.

In addition to the reason suggested, there is another one, having at least some force, why a trading corporation should be allowed to maintain a taxpayer's bill. After a diligent search, we have been unable to find in any American or English decision of a court of last resort where the question has heretofore been raised. In none of the reported decisions of the several states of this country, nor in any decision of any of the federal courts where a corporation has invoked the protection of a chancellor in such cases, has the defendant challenged the right of the corporation as such to maintain the bill. On the other hand, there are numerous cases in the various jurisdictions in which a corporation has successfully maintained a taxpayer's bill to restrain illegal action in the appropriation of public funds. If the question was an open one, or there was any doubt of a corporation's right to protect its property or its funds against the inroads of the misconduct of municipal officials, it is most singular that in the numerous cases which have reached the appellate courts of this country and of England it has not been raised or adjudicated. We can attribute it only to the fact that the profession has universally acquiesced in the right.

It is argued by the learned counsel for the appellees that permission to increase the indebtedness was granted by the electors of the city, and not by the taxpayers, and for that reason a corporation, not being an elector, has no right to invoke the aid of the court to prevent the illegal diversion of the fund. The counsel say in their brief: "The present appellant, being a corporation, is, of course, not an elector, and it may well be asked by what right it might seek to intervene in order that the permissive power granted by the body of the people should be duly carried out, even were a violation thereof attempted." The conclusive answer to that proposition is that, while the electors gave the permission to the city to increase its indebtedness and thereby to impose a tax, the law gives to the individual or corporation who must pay the tax the right to demand that the city officials shall appropriate the fund to the purpose intended, and that it shall not be misappropriated and the burden of the taxpayer thereby increased. In other words, while the authority to borrow money must come from the electors of the city, the taxpayers who are required to repay it have such an interest in the appropriation of the fund as will enable them to invoke the aid of a chancellor to prevent

its diversion to an illegal or unauthorized purpose. The misapplication of the fund is not, as argued by the city solicitor, a matter which lies between the city and its citizens, and as to which the plaintiff corporation is a stranger. No individual can be regarded as a stranger to any action of a municipality or its officers which tends to impose upon him additional taxation. He is a party in interest, and hence has a right to be heard before he is deprived of his property. This rule applies to the corporation and to the individual alike. It is a fundamental principle, and protects the artificial, as well as the natural, person in its property rights.

It is also argued by the appellees that the appellant "is without a monetary interest or concern in the controversy," because, as alleged, if the damages for the opening of the boulevard be not paid out of this loan, they must be paid by the city either by taxation or by some loan to be raised hereafter. If this position is tenable, it will be difficult to find an instance where a taxpayer can enjoin a misappropriation of public funds. The learned counsel, however, are in error in their contention that the appellant has no monetary interest in having the city apply this fund to the purpose for which it was appropriated. The \$500,000 sought to be diverted here was appropriated for the specific purpose of continuing the improvement of the boulevard. If the fund is not applied to that purpose, a like sum must be raised by imposing a tax upon the taxpayers of the city to carry out the improvement of the boulevard. To the extent of its taxes, this corporation is therefore peculiarly interested. It is not to the point that the fund misappropriated will go to the payment of another indebtedness of the city, and hence relieve the taxpayers to that extent. It is sufficient for the taxpayer to know that the diversion of this fund from the purpose for which it was intended and specifically appropriated will impose upon him an additional burden in order to carry out the improvements on the boulevard authorized and directed to be done by the authority of the city. He is concerned monetarily in having the \$500,000 applied to the specific purpose for which it was appropriated, and, should the court refuse to compel the city to so apply it, he will be injured to the extent of the additional taxes he is required to pay. We have no doubt of the right of the plaintiff corporation, being a resident and taxpayer of the city of Philadelphia, to maintain this bill.

The second question raised by the record, and the only one considered and ruled by the court below, is the right of the city councils to transfer the fund appropriated for "continuing the improvement of the boulevard from Broad street northeastward," and apply it "for the purpose of paying mandamuses for the opening of the boulevard." The learned trial judge ruled the question in favor

of the city, and held that it was not a diversion of the fund from the purposes for which it was appropriated. We think this is error. The action of the city councils in dealing with the boulevard, as disclosed by the various ordinances, recognizes a distinction between the opening of the boulevard and the improvement of it. By the ordinance of March 28, 1903, the director of the department of public works was directed to notify the owners of the property through which the boulevard would pass that, at the expiration of three months, "the street will be required for public use to its full width as now on the city plan." This was followed by an ordinance of the same date which authorized the same city department to advertise for proposals for grading, curbing, macadamizing, planting trees, and "other contingent work required to improve the boulevard"; and, in pursuance of the ordinance, the city arranged for the "improvement of the boulevard" by grading, curbing, culverting, macadamizing, bridging, and otherwise. Another ordinance of the same date appropriated \$250,000 "for the commencement of said improvement," and in pursuance of this ordinance, a contract was let in April, 1903, for grading, paving, etc., "and doing such contingent work required to improve the boulevard" as might be ordered by the bureau of highways. It will therefore be observed that prior to the election for determining the question of the increase of the indebtedness the boulevard was on the city plan, was directed to be opened to the full width, and the city had contracted for its improvement by grading, curbing, macadamizing, etc., to the extent of the partial appropriation made for the purpose. Subsequent to the action thus taken in regard to the boulevard, the councils in May, 1904, authorized the creation of a loan, a part of which was to be used for "continuing the improvement of the boulevard," and, in pursuance of the authority granted in that ordinance, the electors of the city voted in favor of the increase of the indebtedness for that purpose. The loan secured in pursuance of this election was likewise partly appropriated "for continuing the improvement of the boulevard." It therefore appears that in all the proceedings of the city council, dealing with the boulevard, a distinction was recognized by the city itself between the opening and the improvement of the boulevard. As thus defined by the city, the opening of the boulevard was the vacation of the ground included within its limits by the property owners and the removal of the buildings therefrom; and its improvement consisted in grading, curbing, macadamizing, the planting of trees, and work of that character upon the ground after the street had been opened.

But, aside from the action of the councils indicating this to be their interpretation of the language of the appropriation, we

think it clear that the appropriation "for continuing the improvement of the boulevard" was not intended to be applied to the opening of the boulevard. "Continuing the improvement of the boulevard" implies the prior existence of a boulevard, a change for the better in its condition, and that some progress had previously been made in bettering its condition when the city councils and the electors authorized the increase of the municipal indebtedness for the purpose. As tersely put by Grey, V. C., in *Ames v. Trenton Brewing Co.*, 56 N. J. Eq. 309, 38 Atl. 858, "in order that there might be an improvement, there must previously have been something to improve." As long as the buildings occupied the site of the proposed boulevard and the damages due the property owners were unpaid or unsecured, there was no street to be improved. A farm may be improved by the renewal of necessary fencing, a manufactory may be improved by the installation of modern machinery, a patented article may be improved by the addition of some useful and necessary device, and a city may be improved by the opening and construction of new streets, by proper waterworks, and sewer systems; but in each instance there is in existence a thing to be improved. Applying this principle here, there could be no improvement of the boulevard until it became a boulevard by being opened in pursuance of the city ordinance. Then, and not till then, was it a street, nor could it have been improved as such. If councils legally could and did make an appropriation for the improvement of the city without specifying the manner in which it was to be done, it may be conceded that the money could be applied in opening as well as constructing a street necessary to the needs of the city. Thus used, the word "improvement" is applied to the betterment of the whole city, and the appropriation could be applied for any purpose which would accomplish the object. On the other hand, if the appropriation was made for the improvement of the waterworks system, it would hardly be contended that the money could be used to open or grade a street or to improve the sewer system, although it certainly would improve the city. The word "improvement" is a relative term, and its meaning must be ascertained from the context and the subject-matter of the instrument or writing in which it is used. It follows that the word, as used in the phrase "for continuing the improvement of the boulevard," does not mean or apply to the opening of the street, but to bettering its condition after it had been opened as laid on the city plan. In other words, the "improvement of the boulevard" consisted in grading, curbing, macadamizing, etc., the street after it had been opened "to its full width as now on the city plan."

In obedience to the requirements of the act of June 9, 1891 (P. L. 252; 2 Purd. 1397), the official proclamation of the election in

February, 1904, contained a statement of "the purposes for which the indebtedness is to be increased." One of the purposes was "for continuing the improvement of the boulevard from Broad street northeastward \$1,000,000"; and on the ticket cast by each voter was stated the same purpose and the amount of the contemplated increase in the indebtedness. It must be assumed that the electors before casting their votes were familiar with the proceedings of the councils dealing with the proposed boulevard. The press of the city gave them full information. They therefore must be regarded as knowing that the boulevard had been declared a city street, and that an appropriation had been made for its partial improvement. Under these circumstances, it cannot reasonably be doubted that each elector, when casting his vote, believed that the street had been opened, and that the increase of the indebtedness was for the purpose stated in the ballot furnished him, viz., "for continuing the improvement." In view of the admitted facts, it is idle to contend that the electorate at that election believed they were voting for or against an increase for the purpose of opening the boulevard. Whatever may have been the actual condition of the street as to having been opened or not at the date of the election, necessarily a very small number of the voters would have personal knowledge of the fact, while the action of the city councils, as given to the public and on which they had the right to rely, gave the assurance that the street was open and in progress of improvement. The votes in favor of the increase of the indebtedness were cast in the belief that such was the condition of the boulevard, and that the increase was for the purpose of "continuing the improvement," and not for the opening of the street. If the ticket had contained a notice that the increase was for the purpose of "opening a boulevard," it is problematic whether a majority of the electors would have supported the increase, in view of the fact that they would have known that a large additional increase would be required to improve the street after it had been opened. It is one thing to present to a voter a proposition to increase an indebtedness for the purpose of continuing or completing a municipal improvement already in progress, and quite another thing to ask him to increase the debt of the city for the purpose of inaugurating a public improvement which will result in the expenditure of large sums of money. For obvious reasons, he might and probably would favor the first proposition; but he might have great hesitancy in supporting the latter. The purpose of the law in requiring full notice to the elector of the object of increasing the indebtedness is to enable him to vote intelligently and with a full comprehension of the purpose to which the money is to be applied. In casting his vote for or against the proposition, he is controlled by

the purpose of the proposed increase as stated in the ballot furnished him by the city itself. Good faith and official integrity, therefore, require the city authorities to apply the fund thus placed in their hands strictly in accordance with the purpose for which it was voted. The language of the notice given the voter is that of the city councils, and, if there is any doubt in its meaning, it must be resolved so as to prevent the application of the fund to a purpose other than that for which the circumstances and the apparent intent of the electors intended it.

The learned counsel for the defendants suggest that, if the city is not permitted to use the appropriation for the opening of the boulevard, it may result in depriving the city of the highway. That argument cannot be successfully invoked to influence a cancellor to divert a fund from a purpose for which it has been voted specifically by the electorate of the city in pursuance of an ordinance of council declaring the use to which it was to be applied. If the city officials have committed an error by failing to make proper provision for the opening of the boulevard prior to asking the voters of the city to vote means to improve it, the responsibility must rest where it properly belongs. It is clearly no reason for a court of equity to decree that a fund voted for a specific purpose shall be applied to and used for another and different purpose. It would in effect abrogate the constitutional and statutory provisions on the subject. They explicitly provide that the debt of the municipality shall not be increased without the assent of the electors, and that before such assent is given public notice of the specific purpose for which the money is required shall be given, and that notice shall also be placed on the ballot which the voter casts. In view of these legal requirements and the manifest purpose to protect the taxpayers against an illegal or unnecessary expenditure of the public funds, it would, indeed, be a strange doctrine to announce that, notwithstanding these safeguards, a fund voted for a specific purpose could at discretion be applied to another and different purpose. The proposition finds no support in precedent, is not sustained by reason, and, if carried out, would be the means of perpetrating a fraud upon the voters who sanctioned the increase of the indebtedness of the city.

We think we must sustain the plaintiff's contention on both propositions submitted for our determination. We are of opinion that plaintiff corporation can maintain the bill, and that the city has no right to apply the \$500,000, voted for continuing the improvement of the boulevard, to payment of the damages due the landowners by reason of the opening of the boulevard. It therefore follows that the prayer of the bill must be granted and that an injunction should be issued.

The decree of the court below is reversed at the costs of the appellees, and it is now ordered, adjudged, and decreed that an injunction issue perpetually restraining the mayor of the city of Philadelphia, the director of the department of public works, and the city controller from doing any act by which the said sum of \$500,000 shall be transferred from the appropriation to the department of public works (bureau of highways) for continuing the improvement of the boulevard from Broad street northeastward to item 18 in the appropriation to the department of city treasurer for the purpose of paying mandamuses for the opening of said boulevard.

(217 Pa. 227)

In re CITY OF PITTSBURG.

Appeal of HUNTER et al.
(Supreme Court of Pennsylvania. March 11, 1907.)

1. STATES—LEGISLATURE—EXTRA SESSION—PROCLAMATION.

Where the General Assembly has been convened by the Governor in extraordinary session to meet on a day named to consider certain designated subjects, the Governor may subsequently before the day stated issue another proclamation submitting additional subjects to the consideration of the extra session.

2. SAME—SUBJECTS TO BE CONSIDERED.

Act Feb. 7, 1906 (P. L. 7), authorizing cities in close proximity to be united, and providing for the temporary government of the consolidated city, and the payment of debts, etc., is within the scope of a proclamation of the Governor calling an extra session for the purpose of enabling cities in close proximity to be united in one municipality.

3. STATUTES—SPECIAL LAWS.

Act Feb. 7, 1906 (P. L. 7), authorizing the consolidation of contiguous cities, is not in violation of Const. art. 3, § 7, forbidding local or special legislation, though at the time of its passage the cities of Pittsburgh and Allegheny were the only ones in the state to which such legislation would technically apply.

4. CONSTITUTIONAL LAW—DUE PROCESS OF LAW.

Act Feb. 7, 1906 (P. L. 7), authorizing contiguous cities to consolidate, is not contrary to the federal Constitution, as not due process of law, in that it authorizes the electors of the consolidated territory to determine the question of the annexation of a smaller city to a larger one, instead of leaving the matter to the electors of the smaller city to decide.

5. OFFICERS—EXTENSION OF TERMS.

Act Feb. 7, 1906 (P. L. 12, § 10), extending the term of councilmen in the city of Allegheny on its consolidation with the city of Pittsburgh, is not in violation of Const. art. 3, § 13, as extending the term of a public officer.

(Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Officers, § 71.)

Appeal from Superior Court, Allegheny County.

In the matter of the petition of the city of Pittsburgh. Appeal by D. Hunter, Jr., and others from a decree of the superior court affirming an order annexing the city of Allegheny to the city of Pittsburgh. Affirmed.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

W. A. Stone, Harvey Henderson, Wm. C. Gill, and Elliott Rodgers, for appellants. D. T. Watson, W. B. Rodgers, John M. Freeman, and J. Rodgers McCreery, for appellee.

BROWN, J. On November 11, 1905, the Governor of the state called the General Assembly into extraordinary session, to meet January 15, 1906, for the consideration of legislation upon seven subjects mentioned in his proclamation. The first was "to enable contiguous cities in the same counties to be united in one municipality in order that the people may avoid the unnecessary burdens of maintaining separate city governments." On January 9, 1906, he issued what he regarded as a second proclamation, for he entitles it a "proclamation." In it, after calling attention to the approaching extraordinary session, he designates additional subjects for the consideration of the General Assembly at said session, one of them being "to enable cities that are now or may hereafter be contiguous or in close proximity, including any intervening land, to be united in one municipality, in order that the people may avoid the unnecessary burdens of maintaining separate municipal governments. This fourth subject is a modification of the first subject in the original call, and is added in order that legislation may be enacted under either of them, as may be deemed wise." The extraordinary session was held, and at it there was passed, among other bills, the one now under consideration, approved February 7, 1906. P. L. 7. It is entitled "An act to enable cities that are now, or may hereafter be contiguous or in close proximity, to be united, with any intervening land other than boroughs, in one municipality; providing for the consequences of such consolidation, the temporary government of the consolidated city, payment of the indebtedness of each of the united territories, and the enforcement of debts and claims due to or from each." The first section is as follows: "That wherever in this commonwealth, now or hereafter, two cities shall be contiguous or in close proximity to each other, the two, with any intervening land other than boroughs, may be united and become one by annexing and consolidating the lesser city, and the intervening land other than boroughs, if any, with the greater city, and thus making one consolidated city, if at an election, to be held as hereinafter provided, there shall be a majority of all the votes cast in favor of such union." The question of the consolidation of the cities of Pittsburg and Allegheny was submitted to their lawful voters at an election held in pursuance of the provisions of the act; the result being a majority of 20,154 in favor of consolidation out of a total vote in the two cities of 55,574. Following this election the court of quarter sessions of Allegheny county, on June 16, 1906, "ordered, adjudged, and decreed" that the city of Allegheny, the lesser city, be annexed to and consolidated with the city of Pittsburg, the greater or larger city,

so that they form but one city and in the name of the city of Pittsburg." From this decree an appeal was taken to the superior court. That court affirmed it ("Pittsburg's Petition," 82 Pa. Super. Ct. 210), and from the decree of the superior court we have this appeal, raising the question of the constitutionality of the act of 1906.

One of the objections of the appellants to the constitutionality of the act is that it is not legislation upon a subject designated in the proclamation of the Governor calling the special session. This objection is based upon article 3, § 25, of the Constitution, which provides that, "when the General Assembly shall be convened in special session, there shall be no legislation upon subjects other than those designated in the proclamation of the Governor calling such session." In the original proclamation the legislation to be considered by the General Assembly on the subject of the consolidation of cities was confined to contiguous cities in the same county, and it may be well contended that, as the mandate of the Constitution is imperative that the Legislature, at the special session, shall pass no law upon any subject not designated in the call, the act is technically without it. The act is not for the consolidation of two contiguous cities, situated in the same county, but for that of any two, contiguous or in close proximity, wherever situated. They may be in different counties. We need not, however, pass upon the sufficiency of the first proclamation to sustain the act as being one of the subjects of legislation designated in it.

Whether the general assembly ought to be called together in extraordinary session is always a matter for the executive alone. How it shall be called, and what notice of the call is to be given, are also for him alone. The Constitution is silent as to these matters, and wisely so, for emergencies may arise, such as riots, insurrections, widespread epidemics, or general calamities of any kind, requiring the instant convening of the Legislature, and, in the power given to the Governor to call it, no time for the notice is too short, if it can reach the members of the General Assembly; and with telephones and telegraphs the uttermost portions of the commonwealth can at any time be reached between the rising and the setting of the sun. In this connection it may be noted as significant that the Governor is not even required by article 4, § 12, empowering him to call the General Assembly together in extraordinary session, to do so by a proclamation, though the same section does provide that in calling the senate in extra session for the transaction of executive business he must do so by proclamation. A proclamation, however, is the proper mode of calling the Legislature together, and the Constitution seems to so contemplate, for section 25, art. 3, speaks of "the proclamation." But no form of proclamation is to be followed, and if, after one has been issued, it occurs to the execu-

tive that other subjects than those designated in it should be passed upon by the Legislature, he can unquestionably issue another, fixing the same time for the meeting of the General Assembly as was fixed in the first, and designate other subjects for its consideration. This is, perhaps, what ought to be done when other subjects than those designated in the proclamation are to be brought to the attention of the Legislature in special session, and, if it had been done in the present case, the objection of the appellants now under consideration would hardly have been raised. This, however, is not for the judiciary, but for the Governor alone. The proclamation of January 9th is in effect a second proclamation. In it the Governor adopts his original call for the purpose of fixing the time of the meeting of the General Assembly, and then proceeds to designate the additional subjects of legislation. With every presumption in favor of compliance by the executive with the constitutional requirements relating to his calling the General Assembly together in extraordinary session, it would be judicial hypercriticism to declare his second notice or proclamation insufficient to authorize the Legislature to pass the act under consideration.

The objection most strenuously urged against the act is that it violates article 3, § 7, of the Constitution, which prohibits the Legislature from passing any local or special law regulating the affairs of cities. Is the act local or special, or is it general in its provisions? It provides for the consolidation of two cities of no particular class, but of any two cities belonging to the same or different classes, wherever situated and whether in the same or in different counties. Whether two cities ought to be consolidated is purely a legislative question, and the general act providing for their consolidation is not forbidden legislation. The power of the Legislature to provide for the annexation of cities is not limited by the Constitution. What it may not now do is to regulate, by a local or special law, the affairs of cities. In providing for the annexation of any two cities of the commonwealth there is no regulation of the affairs of any two particular cities. The provision is simply for such annexation, if certain natural, and, what may be regarded as necessary, conditions exist. The Legislature might, without transgressing the Constitution, have provided for the consolidation of cities without regard to the distance between them, absorbing in their consolidation all the intervening space, whether occupied by boroughs or townships. But such legislation is not conceivable; for the common sense of the people would not tolerate it. In providing for annexation in the act of 1906, the Legislature restrained its power to authorize consolidation in declaring that certain natural, reasonable and necessary conditions must exist, if two cities are to be united. No arbitrary, unnecessary conditions are prescribed. Only reasonable ones are required.

The Legislature might have limited the right to consolidate to contiguous cities, but it extended this right to those in close proximity. While it is purely a legislative matter to determine what cities may be consolidated, it is clear that only those ought to be which are contiguous or in close proximity; and, in making contiguity or close proximity a condition of the right to consolidate, the affairs of no special city are regulated. By the act any two cities contiguous or in close proximity may become one. No two contiguous cities are excluded from its provisions, and any two in close proximity may be united, provided that by their union they do not absorb and swallow up an intervening borough. The act does not prevent the consolidation of cities in close proximity between which there may be a borough, if that borough does not embrace all the land between them, or does not extend as a wedge throughout the entire length of the same. If a borough occupies all the land between two cities, they cannot be united without absorbing such borough. They touch at no point, are not contiguous, and are not in close proximity within the meaning of the act. But, if the land between two cities in close proximity is not wholly occupied by a borough, or a borough does not extend throughout the entire length as a wedge in such intervening land, and there is township land connecting the cities at any point or points, they can be consolidated under the act, the township land becoming a part of the new city and the borough retaining its municipal existence. The act is therefore one, and must be so read, permitting the consolidation of any two cities contiguous or in close proximity, of whatever class and wherever situated, provided only that in such consolidation the separate existence of an intervening borough shall not be destroyed. If a borough occupies all of the space between them, they are not contiguous, and, though in close proximity, they cannot physically unite without wiping out the borough. But, if a borough should not be all of the intervening land, they can unite by absorbing that land which the borough does not occupy—the intervening land beyond the borough limits—leaving it to continue its independent municipal life. At this point it may be well to call attention to the clear line of demarcation between this act, and that of April 20, 1905 (P. L. 221), known as the "Cook Law," and declared to be unconstitutional in *Sample v. Pittsburg*, 212 Pa. 533, 62 Atl. 201. It provided for the annexation of a smaller to a larger city when the two were contiguous and situated in the same county, and, for the purposes of the act, it was declared that "cities separated by a stream, river or highway shall be included under the term contiguous." So clearly was it bald, special, local legislation that it might well have been labeled an act for the consolidation of the cities of Pittsburg and Allegheny.

In forceful language our Brother Mestre-

zat demonstrated the act to be local and special, and we quote at length from his opinion, for the converse of what he says of it is true of the act of 1906: "The title of the act clearly indicates the subject of the enacting part and discloses the local and special features of the statute. It shows that the act was not intended to apply to any two cities of the state so as to make it general in its operation, but conditions are imposed which restrict its application to certain cities, thereby depriving the other cities of the state of the benefit of its provisions. The statute is operative 'where two cities are contiguous and in the same county.' Its provisions can be invoked to annex only two cities and when they are thus situated. Two cities of this description may be annexed to each other, and all others are excluded from the operation of the statute. As we take judicial cognizance of the municipal divisions of the state as well as of their location, we know, as averred in the bill and not denied in the answer, that the cities of Allegheny and Pittsburg, in Allegheny county, are the only two contiguous cities in the state, and that there are no two contiguous cities in any other county in the state. The act therefore is limited in its operation to these two cities, and the effect or result of the legislation is the same, and the act as clearly special, as if the names of the two cities had been written in the statute, instead of the periphrase used in the description of the cities subject to its operation. The identification of the two cities intended to be affected by the act is also aided by the provision of the statute that, 'for purposes of this act, cities separated by a stream, river or highway shall be included under the term contiguous.' Aside from the contention that the act applies only to cities separated by a stream, river, or highway, this clause of the act clearly suggests the two Allegheny county cities as the cities subject to its operation. We judicially know that Pittsburg and Allegheny are the only two cities in the commonwealth separated by a stream or highway, and the fear that that fact would render those cities not contiguous within the meaning of the statute moved the promoters of this legislation to further identify them by inserting this clause in the act. This feature should not and cannot be ignored when the court is called upon to test the constitutionality of the statute, as it clearly earmarks the legislation as local and special. There is no merit in the contention that at some time in the future there may be two other cities which may become contiguous and in that event can be consolidated under the provisions of the act. With a knowledge of the facts, known to the Legislature as well as to the court, this is not within the range of probability, but a possibility so remote that it must be excluded from consideration in determining the constitutionality of

the statute. It could only occur if a community adjacent to any of the cities of the state should become sufficiently populous to enable it to become a city and should take the necessary legal steps to make itself a city and subject to the operation of the act, or if the boroughs lying between and connecting certain cities of the state should, by the requisite legal proceedings, be annexed to those cities or form themselves into a city and thereby connect two existing cities so as to make the act operative. These are simply contingencies within the realm of speculation, and entirely too remote to support legislation otherwise repugnant to the constitutional mandate. The statute requires any two cities desirous of availing themselves of its provisions to be located in the same county. This confines the act in its operation to cities within certain territorial limits, and brings it within the domain of special legislation, prohibited by the Constitution. The act does not attempt to classify cities on any basis whatever. It provides simply that it shall operate upon two cities situated in the same county. It therefore excludes from its provisions and denies its privileges to all cities separated by a county line, or which are not wholly within the same county, although occupying contiguous territory. All cities whose boundaries are coterminous with the county line are perpetually excluded from the operation of the statute, although other cities may adjoin them at different parts of their boundaries. This distinction made in the act between the cities of the commonwealth is not based upon necessity nor upon any grounds which the law recognizes as justifying classification. Its effect is to restrict the operation of the statute to two cities located in the same territorial division of the state; and, when considered in the light of the conceded facts, it fixes with unmistakable certainty the two cities to be consolidated under its provisions. A clearer or more palpable attempt to evade the constitutional prohibition against special and local legislation is not disclosed in any of the numerous bills introduced in the General Assembly since the adoption of the present Constitution, not excepting the statute, which Mr. Justice Paxson in *Commonwealth v. Patton*, 88 Pa. 258, very properly characterized as 'classification run mad.'

But what of this act? Its operation is not confined "to cities within certain territorial limits." It is general in its terms and refers to no classes of cities, but to all cities. It does not provide that it shall operate only, "upon two cities situated in the same county." It does not exclude "from its provisions and deny its privileges to all cities separated by a county line, or which are not wholly within the same county," but extends them to any two cities within the commonwealth having natural, reasonable and necessary conditions of consolidation.

Counsel on both sides of this controversy have cited many cases on the classification of cities. By the appellant we are referred to them as requiring us to declare the act local and special, regulating the affairs of cities, and, for the appellee, they are cited to sustain it; but, as classification is not involved in the act, we need not consider the cases on that subject. That it applies now, and for the present can apply, only to the cities of Pittsburgh and Allegheny, and that it was passed for them can make no difference if the legislation is general in form and substance, and is not within the prohibition of the Constitution. *Wheeler v. Philadelphia*, 77 Pa. 338. Individual needs and requirements are responsible for much legislation which now must be general, and, when it is so, the causes that lead to it, or the particular purposes it is to serve at the time of its enactment, have nothing to do with its constitutionality. It may meet at the time of its passage the wants of but one community, but, if in the future it will meet these same wants in all other communities, the legislation is as general as if at the time of its passage there had been no special reason calling for it.

The method of consolidation is said to be unconstitutional, because it is not by "due process of law," "in that it permits qualified electors of the larger city to overpower or outnumber those of the lesser city, and to annex the lesser city without the vote or consent of a majority of the qualified voters or electors of the lesser city." This is completely answered in the following extract from the opinion of the learned judge speaking for the Superior Court: "In determining whether this act is contrary to that 'due process of law' guaranteed by the federal Constitution, in providing that the electors of the consolidated territory shall determine the question of annexation of the lesser city instead of permitting the majority of the electors of the lesser city to decide it, we have many adjudicated cases which warrant the action taken by the Legislature. The words 'due process of law,' as taken from *Magna Charta* and incorporated in the Constitution, 'were intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principle of private rights and distributive justice.' In each particular case the words mean 'such an exercise of the powers of government as the settled maxims of law permit and sanction, and under such safeguards for the protection of individual rights as those maxims prescribe for the class of cases to which the one in question belongs.' *Cooley's Constitutional Limitations*, 434. The people of the municipalities do not define for themselves their own rights, privileges, and powers, nor is there any common law which draws a definite line of distinction between the powers which may be exercised by the state and those which

must be left to the local governments. 2 Kent's Commentaries, 278, 279. The general principle is that, when the state is acting in its sovereign capacity, it acts for the whole commonwealth, and private rights and interests must yield to this paramount object. Private rights may be and very frequently are interfered with by either the Legislature, executive or judicial departments of the government, and the creation of municipal corporations, and the conferring upon them of certain powers and subjecting them to corresponding duties, does not deprive the Legislature of the state of that general control over their citizens which they before possessed. It still has authority to amend their charters, enlarge or diminish their powers, extend or limit their boundaries, consolidate two or more into one, and overrule their legislative action whenever it is deemed unwise, impolitic or unjust, and even abolish them altogether in the legislative discretion and substitute those which are different. *Cooley's Constitutional Limitations*, 228. Restraints on the legislative power of control must be found in the Constitution of the state, or they must rest alone in the legislative discretion. If the legislative action operates injuriously to the municipalities or to individuals, the remedy is not with the courts. The courts have no power to interfere, and the people must be looked to, to right through the ballot box all these wrongs. *Ervine's Appeal*, 16 Pa. 256, 55 Am. Dec. 490; *Cooley's Constitutional Limitations*, 228, 229, 230. The act in question has been passed with all the forms and ceremonies requisite to make it a valid statute. The Legislature was properly convened and kept well within its powers in regulating the affairs of cities by a general law in accord with the requirements of the Constitution. It follows under the law of the land that neither the municipality as such, or any of the persons residing therein, have any vested rights in the municipal powers, as against the state which created the municipality. It is merely an agency instituted by the sovereign for the purpose of carrying out in detail the objects of government—essentially a revocable agency—subject to legislative control 'which may destroy its very existence with the mere breath of arbitrary decision.' *Phila. v. Fox*, 64 Pa. 169."

Authorities everywhere support the foregoing. In our own cases may be found the following: "The city of Philadelphia is beyond all question a municipal corporation—that is, a public corporation created by the government for political purposes, and having subordinate and local powers of legislation (2 Kent's Com. 275)—an incorporation of persons, inhabitants of a particular place, or connected with a particular district, enabling them to conduct its local civil government. *Glover, Mun. Corp.* 1. It is merely an agency instituted by the sovereign for the purpose of carrying out in detail the objects of gov-

ernment, essentially a revocable agency, having no vested right to any of its powers or franchises—the charter or act of erection being in no sense a contract with the state—and therefore fully subject to the control of the Legislature, who may enlarge or diminish its territorial extent or its functions, may change or modify its internal arrangement, or destroy its very existence, with the mere breath of arbitrary discretion. ‘*Sic volo, sic jubeo*,’ that is all the sovereign authority need say. This much is undeniable, and has not been denied. * * * The sovereign may continue its corporate existence, and yet assume or resume the appointments of all its officers and agents into its own hands; for the power which can create and destroy can modify and change.” Sharswood, J., in *Philadelphia v. Fox*, 64 Pa. 169. “Municipal corporations are agents of the state, invested with certain subordinate governmental functions for reasons of convenience and public policy. They are created, governed, and the extent of their powers determined by the Legislature, and subject to change, repeal, or total abolition at its will. They have no vested rights in their office, their charters, their corporate powers, or even their corporate existence. This is the universal rule of constitutional law, and in no state has it been more clearly expressed and more uniformly applied than in Pennsylvania. * * * The fact that the action of the state towards its municipal agents may be unwise, unjust, oppressive, or violative of the natural or political rights of their citizens is not one which can be made the basis of action by the judiciary.” *Commonwealth v. Moir*, 199 Pa. 534, 49 Atl. 351, 53 L. R. A. 837, 85 Am. St. Rep. 801.

Finally, in a supplemental brief, counsel for appellant contend that section 10 of the act, which will have the effect of extending the term of councilmen in the city of Allegheny, violates article 3, § 13, of the Constitution, which provides that “no law shall extend the term of any public officer.” This objection does not seem to be seriously pressed, and as to it we need only repeat what was said in *Commonwealth v. Moir*, supra: “The substitution of a new system for one under which government has been previously carried on is always accompanied with some shifting of offices and duties, and some inconvenience. To reduce this to a minimum by temporary adjustment of the changes is the province of a schedule. In well-considered legislation which involves such changes a schedule of temporary expedients is usually and properly added, and the expedients provided would need to be very clearly unconstitutional to justify a court in overturning them. In *Lloyd v. Smith*, 176 Pa. 213, 35 Atl. 199, it is said: ‘In an exchange of offices there may naturally be some overlapping of terms and duties, and if in the legislative view the need for a controller was immediate,

but the existing terms of the auditors prevented his present assumption of all the duties that would finally pertain to his office, it would not have been unwise, certainly not unconstitutional, to meet the case by a temporary expedient.’”

The assignments of error are all dismissed, and the decree of the Superior Court is affirmed, at appellants’ costs.

(217 Pa. 260)

TAYLOR v. PENN STEEL CASTINGS & MACHINE CO.

(Supreme Court of Pennsylvania. March 11, 1907.)

MASTER AND SERVANT—INJURY TO SERVANT—CONTRIBUTORY NEGLIGENCE.

A workman falling down an elevator shaft through stumbling over a bolt projecting from a machine at which he was at work cannot recover where he knew of its position, and the elevator shaft was provided with a guard which he refrained from using because of its inconvenience.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 706–709.]

Appeal from Court of Common Pleas, Delaware County.

Action by Joshua C. Taylor, administrator, against the Penn Steel Castings & Machine Company. From a judgment for defendant notwithstanding the verdict, plaintiff appeals. Affirmed.

Argued before MITCHELL, C. J., and FELL, MESTREZAT, POTTER, and STEWART, JJ.

O. B. Dickinson and J. C. Taylor, for appellant. W. B. Broomall and George M. Booth, for appellee.

FELL, J. The plaintiff was employed in the defendant's mill to assist in making iron castings, and had been at this work in the same place for two years before his injury. His duty was to load cars with pig iron on the ground floor, to move the cars to an elevator, to raise them to the second floor, to move them from the elevator to a scale where they were weighed, and then to take them to furnaces. If a car contained too much iron, he removed enough to reduce the load to the desired weight and placed it on a pile nearby. If it contained too little, he made up the deficiency from this pile. The platform of the scale was five feet by six. A triangular piece, the hypotenuse of which was 18 inches, had been removed from each corner, and at the middle of the line of the hypotenuse, and 2½ inches from the opening at each corner, iron bolts had been screwed through the floor and projected from one-half to three-quarters of an inch. These bolts had been placed by the maker of the scale to support the beams below the floor on which the scale rested, in such a way that its platform would be even with the mill floor. On the night of the accident the plaintiff, while carrying a piece of iron from

the car to the pile, struck his foot against one of the projecting bolts, and fell down the elevator shaft.

Judgment non obstante veredicto was entered for the defendant on the ground that there was no defect in the scale, or in the elevator; that the projecting bolt was a part of the construction of the scale; that it was in plain sight; and that it was known to the plaintiff. It may not have been necessary that the bolts should extend above the floor, but they were so placed by the builder in constructing the scale for a purpose deemed to be useful. The master mechanic called by the plaintiff testified that these bolts supported the whole weight of the scale, and the car with its load; that the iron plates of the floor were strengthened by riveting iron pieces on the under sides of them; that holes were drilled through the plates and the pieces, and the thread of the screws extended through both, and the bolts and their load were supported by them; that the bolts were used not only to sustain the scale, but to level it by screwing them up or down. The extension of the bolts through the floor added to the strength of the support and facilitated the adjustment of the scale. It was a part of the construction useful, if not necessary. Any danger arising from it was obvious and fully known to the plaintiff.

The elevator was constructed so that it could be inclosed by the use of iron posts at the corners and chains extending from one post to another. The posts were in place except one, which was lying on the floor by its hole, and the chains were at hand. This means of safety had been persistently disregarded by the plaintiff because of its inconvenience, and all danger from the want of guards was of the plaintiff's creation.

Some two months before the accident the plaintiff called the attention of the foreman of the room to the bolt which caused his fall, who said he would speak to the master mechanic about it. There was no promise to make any change, nor does it appear that there was any defect that it was the duty of an employer to remedy.

The judgment is affirmed.

(217 Pa. 207)

In re HARRISON'S ESTATE.

(Supreme Court of Pennsylvania. March 11, 1907.)

1. TRUSTS—COMPENSATION OF TRUSTEES.

The compensation of trustees is to be determined by the responsibility incurred and the service and labor performed, requiring the amount of the estate and the responsibility thereby imposed to be considered.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 47, Trusts, §§ 433-444.]

2. EXECUTORS—COMMISSIONS—SALE OF REALTY.

A will gave the executors power to sell real estate with a reservation of the ground rent. The executors effected such a sale through a real estate agent, who was paid a commission,

and the executors also received commission on the rentals. *Held*, that they would not be awarded commissions on the capitalized principal of the ground rents.

3. CONVERSION—REALTY INTO PERSONALTY.

Where executors under a will sold real estate for part cash and part reservation of ground rent, there was no conversion of the real estate represented by the ground rent, and the executors would have to account for it in the future as real estate and not as personality.

Fell, J., dissenting.

Appeal from Orphans' Court, Philadelphia County.

In the matter of the estate of Joseph Harrison, Jr. From a decree dismissing exceptions to adjudication, Clara E. Durant appeals. Modified and affirmed.

From the record it appeared that the accountants, who were the executors under the will of Joseph Harrison, Jr., deceased, sold certain real estate in the city of Philadelphia for \$1,000,000, \$100,000 in cash and the reservation of a ground rent capitalized at \$900,000. The accountants claimed as commissions three per cent. on \$1,000,000. The auditing judge, Ashman, J., allowed the commissions. The court in banc overruled exceptions to the adjudication.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

M. Hampton Todd, for appellant. Silas W. Pettit and Townsend, Elliott & Townsend, for appellees.

MESTREZAT, J. In Harland's Accounts, 5 Rawle, 323, 330, Chief Justice Gibson, delivering the opinion of the court says: "Though usually awarded in the form of commission, the rate [of compensation of trustees] is not determinable by any established practice or rule, being graduated to the responsibility incurred, the amount of the estate, and the sum of the labor expended. It may be awarded even in a gross sum, according to a common practice in the country, which I take to be the preferable one, as it necessarily leads to an examination of the nature, items, and actual extent of the services, which the adoption of a rate per cent. has a tendency to leave out of view. To adopt the same rate in all cases would often produce a monstrous overcharge." And in McCauseland's Appeal, 38 Pa. 466, 470, Strong, J., speaking for the court said: "Commissions are given as a compensation for labor and responsibility, and where neither the one has been performed, nor the other incurred, there is nothing to be compensated." In Montgomery's Appeal, 86 Pa. 230, 234, Mr. Justice Gordon, in delivering the opinion, says: "The compensation of a trustee of any character may be arrived at, as a matter of convenience, by the way of a percentage on the amount of receipts and disbursements. But, after all, on all authority, it is a question, not of percentage, but of compensation. When the court has fairly responded to the interrogatory,

how much has the trustee earned? It has discharged its whole duty in the premises. It therefore comes to nothing to say the percentage is large or the percentage is small as compared with the estate, if the executor has received neither less nor more than what his services are worth." After quoting from the cases above cited, the opinion continues: "This same general idea runs through all the cases and it is useless to enumerate them. Whilst a percentage is constantly spoken of and used because of its convenience, yet, it is compensation, nothing more or less, that is steadily kept in view."

It will be observed, therefore, that the rule as to commissions in all cases is compensation for the responsibility incurred and the service and labor performed. In arriving at the compensation to which a trustee in any capacity is entitled, it is necessary to consider the amount of the estate, the labor performed, and the responsibility imposed. These are the elements which enter into and determine, not only the amount of the compensation, but the right to compensation at all. It also necessarily follows that, if there has been no service performed or liability incurred by a trustee, he is not entitled to, and should not receive any compensation whatever. The mere fact that he is a trustee will not support a demand on his part for compensation. The onus is upon him, before he can demand compensation for services, to show to the satisfaction of the court a responsibility incurred and services performed in the execution of his trust.

There is no rate of percentage fixed by law as compensation for a trustee. Frequently compensation is determined by allowing a percentage of the fund under the control or in the possession of the trustee but this rule is not universally adopted in ascertaining a trustee's commission. As suggested by Chief Justice Gibson, in many cases a gross sum is awarded, and that, as he says, is in some respects preferable, as it leads to an inquiry disclosing the extent of the services rendered by the trustee which greatly assists the court in fixing the true compensation due him. A very small percentage which might seem reasonable compensation might result in a very large sum in gross which would suggest a compensation entirely beyond what was adequate and fair to the trustee; while, on the other hand, a large percentage which apparently would be excessive compensation might result in a small sum in gross which would at once disclose inadequacy and unfairness of compensation for the trustee. The safer rule, therefore, to be adopted and followed in remunerating a trustee for his services is the simple one that he be compensated for the services performed and the liability incurred. It should be understood by trust companies, as well as individuals, that the position of a trustee is not to be sought nor granted for the purpose of profit. Fair compensation, to be ascertained under the

rule suggested, is all that a trustee has a right to demand, and all that any court should award.

Turning now to the case in hand, we are of opinion that the learned court below was in error in awarding commissions upon the ground rent capitalized at \$900,000. The question involved here arises on the audit of the thirty-second account of the executors of the estate of Joseph Harrison, Jr., deceased. The will of the deceased provided, *inter alia*, as follows: "I give and devise all my real estate * * * unto my executors * * * in trust, that the same shall be by them sold, disposed of, and converted into money or personality, and to that end I give to and confer upon them * * * the fullest and amplest power, authority, and direction to sell, convey, and dispose of all my said real estate, and all real estate which they may acquire, * * * and with or without the reservation of any ground rents payable to them in trust for the uses of my will; which ground rents, when so reserved, I authorize them to make redeemable upon such terms and stipulations as they may think expedient, and release, assign, or extinguish in fee, at their discretion." By deed dated and acknowledged on December 14, 1904, the executors sold and conveyed to David C. Folwell for the consideration of \$100,000 certain real estate at the northwest corner of Market and Thirteenth streets. In the deed the grantors reserved a ground rent of \$36,000 per annum for 10 years and thereafter at \$54,000 per annum, and extinguishable after 10 years by the payment of \$900,000. In their account out of which this controversy arises, the executors debit themselves with \$1,000,000 as the proceeds of the sale of this property, and take credit for having invested \$900,000 in the ground rent. They claimed credit for \$10,000 paid a broker for negotiating the sale, and 3 per cent. on \$1,000,000, or \$30,000, as commissions for themselves. The auditing judge allowed the commissions. To this adjudication, Mrs. Durant, a legatee, filed exceptions which were overruled and dismissed by a majority of the court in banc, and a final decree was entered. From this decree Mrs. Durant has appealed, and the several assignments of error raise the single question whether the court erred in allowing the accountants a commission on the \$900,000 ground rent reserved in the deed conveying the Market street property to Folwell.

Under the provisions of the will the executors had ample power to sell and convert this real estate into money. If they had done so and had claimed a commission on the proceeds of sale, there would have been no objection to compensation for their services. It will be observed, however, that, while the testator authorized the executors to sell his realty and convert it into money, he at the same time empowered them to sell and convey with the reservation of ground rents which thereafter they were authorized in their discretion to assign or extinguish in

fee. They did not sell this entire property and convert it into money, but, exercising the power conferred by the will, they sold and conveyed it for a certain sum and reserved a ground rent capitalized at another sum, the two sums aggregating the full value of the whole property. In other words, following the directions of the will, they converted part of this real estate into money and part of it they retained as real estate. This is the effect of the sale, and must be so conceded by all parties. It was not a sale of the entire premises at Thirteenth and Market streets, with payment of part of the purchase money and the balance secured by mortgage or otherwise. It is, what the conveyance itself shows it to be, a grant of the premises, with a reservation of a ground rent which, under all our decisions, is held to be real estate. Under these circumstances, what right have these executors to demand commissions upon the capitalization of the ground rent? It is real estate, and, as conceded by the court below, is not the subject of an executor's account. The executors, therefore, have not converted it into money, but it still remains as the testator left it, real estate. The trustees must deal with it and account for it as real estate, and not as personalty. In this view, therefore, they have no right to commissions upon it.

The court below, in support of its position awarding commissions, held that the will worked a conversion. But that of itself would not justify the executors in claiming commissions until an actual conversion had been effected by the trustees. While the will authorized a conversion, it at the same time authorized the executors at their discretion to permit the realty to remain such, by empowering the executors to reserve a ground rent. What the executors did in this instance in reserving a ground rent was within the express powers conferred by the will itself. Hence the general powers conferred upon the executors to convert was modified to the extent of permitting the executors to retain the whole or part of the real estate as such. To the extent of the ground rent reserved in this instance, the estate of the testator retains its original character. Therefore all that these executors could demand would be adequate compensation which could be arrived at by allowing a commission upon the income. The decree of the court below shows that they have been adequately compensated by the commission allowed upon the rents which they have received and which they will receive from this property. We have distinctly ruled that an executor or trustee is not entitled to commissions on the capitalized amount of a ground rent which is an incumbrance on the property and which is included in the price of the real estate sold out of which it is payable. *Moore's Estate*, 211 Pa. 343, 60 Atl. 989; *Brolasky's Appeal*, 3 Penn. 329. According to the weight of authority, if real estate subject to an incum-

brance is sold by an executor or administrator, he is entitled to commissions only on the balance of the price remaining after deducting the amount of the incumbrance. 11 Am. Ency. of Law (2d Ed.) 1299. There is a distinction between the cases cited and the case at bar; but it is a distinction without a difference. In *Moore's estate* the ground rent was in existence when the property was sold and the purchaser took it subject thereto, and subsequently paid the amount to the owner of the rent. Here the property is sold, and that part of it capitalized at \$900,000, remains in it as real estate. All that the trustees received is the sum of \$100,000 out of the \$1,000,000 at which the property was valued. The ground rent remains and the purchaser takes the property subject to its payment. It is immaterial that the owners of the ground rents, are the executors or grantors. It is real property and the title is in the executors for the benefit of the estate.

There is ample reason for holding that these executors are not entitled to commissions on the ground rents. As we have seen, ground rents in Pennsylvania are regarded as real estate. The owner of the rent, like the owner of the land, has a fee-simple estate—the former, in the rents, the latter, in the land out of which the rent issues. The capitalization of the ground rents, \$900,000, is the value of the rents as real estate. During the 10 years the executors will receive \$36,000 annually as rentals of this real estate on which they will receive an annual commission of \$1,080. If, during the 10 years or at any other time while they are the owners of the rent they convey it to the trustees, as provided in the will, they will have no right to commissions. Their right to commissions on the principal of the rent would arise only on the happening of the contingency that the rents were sold and thereby converted into money. Until that time arrives the property is real estate, and they are not entitled to commissions.

There is no proof in this case that the accountants performed any service or assumed any responsibility which entitles them to a commission on the capitalized ground rent. In making this sale, they apparently did nothing except to receive offers made by a broker, employed by the purchaser, and to decline the offers until they reached the accepted price. This broker, as shown by the testimony, was employed by and acting for the purchaser throughout the transaction; yet one of the terms he imposed in making the purchase was that he should receive \$10,000 from the accountants for his services. This was paid him, and the accountants are now asking that \$27,000 additional shall be paid them simply and substantially for reserving a ground rent in a deed conveying the property to the purchaser. The learned judge of the court below says that "there is no proof of unusual or extraordinary labor and services

performed by the executors in securing a purchaser, and no more than ordinary responsibility assumed by them." He should have said that there were no services performed or responsibility assumed which would entitle the executors to any commissions beyond the \$3,000 which they were receiving as compensation for the sale. As we have said, the negotiations for the sale were made on the part of the purchaser by the broker, and the only action of any moment on the part of the executors was to refuse all offers prior to the one accepted. If this property had been unproductive, had required and received attention from the accountants, and thereby imposed upon them care and labor, for which they had received no compensation, the claim for compensation here would be presented in a different light and for very different reasons. If, also, the trust had terminated and the trustees had received no compensation for the care and attention bestowed upon the real estate in question, there would be grounds for claiming commissions. But none of these facts exist here. On the contrary, this property is in the heart of the city of Philadelphia, and for many years has been yielding large rentals on which the executors have been receiving a large commission. In addition to this compensation for the care and attention bestowed upon the property, the court below has awarded the executors a future compensation of 8 per cent. on the ground rent, or \$1,080 annually for their services in receiving and distributing these rents. In view of all these facts, we think the executors have been fully compensated for the responsibility they assumed and for the services they performed, and that to permit them to take an additional sum of \$27,000 from the estate of the decedent as commissions would be simply granting them a gratuity for which neither responsibility has been incurred nor services have been performed.

The fifth assignment of error is sustained, the accountants are surcharged with the sum of \$27,000, for which credit was taken in their account as commissions on the principal of the ground rent, and the decree as thus modified is affirmed.

FELL, J., dissents.

(217 Pa. 275)

CHESTER, D. & P. RY. CO. et al. v.
DARBY BOROUGH.

(Supreme Court of Pennsylvania. March 11, 1907.)

1. STREET RAILROADS — CHANGE OF STREET — RELAYING TRACKS — INJUNCTION — RELAYING STREET CAR TRACKS.

A contract between a street railway company and a borough provided that the company should not remove its tracks without the consent of the borough. Thereafter the county reconstructed a bridge on which the tracks were laid, so that they did not align with those on the road. The street railway company secretly and at night took up its tracks to readjust them,

without any attempt to obtain the consent of the borough. *Held*, that an injunction at the suit of the railway company to enjoin the borough from preventing the railway company from taking up the tracks before such consent was obtained would not lie.

2. SAME — RELAYING TRACKS — CONSENT OF BOROUGH.

Where a county changes a bridge so that a street railway company is compelled to move its tracks to align them with a track on the bridge, the borough whose consent is necessary to such change cannot arbitrarily withhold consent or burden its consent with conditions imposing further pecuniary obligations on the company.

Appeal from Court of Common Pleas, Delaware County.

Bill by the Chester, Darby & Philadelphia Railway Company and others against the borough of Darby, otherwise known as the burgess and town council of Darby Borough. From a decree dismissing the bill, plaintiffs appeal. *Affirmed*.

Argued before MITCHELL, C. J., and FELL, MESTREZAT, POTTER, and ELKIN, JJ.

W. B. Broomall and J. B. Hannum, for appellants. V. Glipin Robinson and Isaac E. Johnson, for appellee.

FELL, J. The plaintiffs, as owners and lessees, have a charter right to operate an electric railway from the city of Chester to Main street in the borough of Darby. The road enters the borough on a county bridge over Darby creek, and extends east on Chester avenue to Main street. Municipal consent to enter the borough was obtained in 1894, subject to the condition that the company should pave Chester avenue with vitrified bricks from curb to curb from Main street to Darby creek and maintain it in repair, and subject to the provision of a general ordinance that it should not "at any time take up or remove any of the tracks or rails laid by it, except for renewal or repair, without the consent of the council first had and obtained." Consent of the county to use the bridge was obtained in 1893, and by agreement the track was located at the middle of the bridge. In 1904 a new bridge was built by the county, and the borough of Darby agreed with it to pay all damages for which it might become liable by reason of the construction and of the widening of the approaches. The new bridge is wider than the old one was, and the railway track located in the middle thereof does not connect with the track on Chester avenue, but is three feet, six inches south of it. The elevation of the new bridge is six inches greater than that of the old one. Without having made any application to the borough council for consent to change the location of the track on Chester avenue, so as to bring it into alignment with the track on the bridge, the plaintiffs attempted to make the change at night. This attempt was resisted by the borough authorities and other citizens, and the plaintiffs

workmen were forced to abandon it. This bill was then filed to restrain the borough, through its officers and agents, from interfering with the change of the track.

The moving of the track of the railway company to make a connection with the track on the bridge would have made necessary the tearing up of the surface of the street for a distance of 80 feet and the elevation of the street to the height of the floor of the bridge. The time and manner of doing this work, as well as the establishment of a new and permanent street grade, were matters under municipal control, and permission should have been asked. Until this had been asked and refused, the appellants had no standing to apply for equitable relief. On this ground the decree of the court dismissing the bill is affirmed.

It is not to be understood that we assent to the proposition that, if municipal consent to move the tracks is refused, the appellants are bound hand and foot, and that the grant obtained, from which they paid in full by paving the avenue, can be made nugatory by the arbitrary withholding of consent, or that a consent given can be burdened with conditions that impose further pecuniary obligations for the right to occupy the street. While permission to change should be asked, yet it should be promptly granted without any burdensome conditions.

The decree is affirmed, at the cost of the appellants.

(217 Pa. 273)

**CHESTER & DARBY TELFORD ROAD CO.
v. CHESTER, D. & P. RY. CO. et al.**

(Supreme Court of Pennsylvania. March 11, 1907.)

1. INJUNCTION — CONTRACTS — SPECIFIC PERFORMANCE.

A contract between a street railway company and a turnpike company will be specifically enforced by a mandatory injunction so as to compel the railway company to lay its tracks at the height and in the location specified in the contract.

2. STREET RAILROADS—LOCATION OF TRACKS—CONTRACT.

A contract between a street railway company and a turnpike company provided that the external portion of the track should be placed 20 feet from and parallel with the center line of a portion of the road, except in running over or under bridges, or where it must from necessity be less than 20 feet. The tracks were laid at one place in the center of the road, and in many places the outside rail was laid 18 feet from the center with the knowledge of the turnpike company. *Held*, that the court, at the suit of the turnpike company, would only compel the removal of the tracks at the point where they were placed in the center of the road.

Appeal from Court of Common Pleas, Delaware County.

Bill by the Chester & Darby Telford Road Company against the Chester, Darby & Philadelphia Railway Company and others. Decree for plaintiff, and defendants appeal. Modified and affirmed.

Argued before MITCHELL, C. J., and FELL, MESTREZAT, POTTER, and STEWART, JJ.

W. B. Broomall, for appellants. Frank R. Savidge and O. B. Dickinson, for appellee.

FELL, J. The bill in this case was to enjoin the defendant and its lessees from maintaining the tracks of its electric railway on the plaintiff's roadway in violation of the agreement under which permission to lay them had been obtained. The Chester & Darby Telford Road Company, prior to 1893, constructed a telford road on the main highway between Chester and Darby. The general width of the highway was 60 feet, but in places it was only 50 feet wide. The improved part thereof was in the center and was 18 feet wide. By agreement between the parties in April, 1893, the railway company was granted permission to lay tracks upon the road subject to the restrictions (1) that the external portion of the track, which should be single, with necessary turnouts, should be placed 20 feet from and parallel with the center line of the telford portion of the road, "except in running over or under bridges or where it must of necessity be less than twenty feet, subject to the approval of the Telford Road Company, and the rail adjoining the center line thereof shall be placed at a point which is in alignment with and in conformity to what would be a proper continuation of the existing camber of the telford road"; (2) "the surface between the rails and that part of the roadway lying between the present telford portion and the track as placed shall be solid, presenting an even and smooth surface, and shall be constructed and maintained with stone or such other material as may be approved by the directors of the Telford Road Company."

The complaint of the bill is that the road was constructed in disregard of the agreement, in that the track was placed too high, the part of the roadway between the tracks, and the telford portion of the road has not been made solid and smooth, by reason whereof the natural drainage and the system of drainage adopted by the telford company have been interfered with, and at the foot of Darby Hill in the borough of Darby the track was laid in the middle of the road instead of on the side as provided by the agreement. The court found that the complaint was established by the testimony, and entered a decree prohibiting the maintenance of the track at any part of the road higher than it should be to align with and properly continue the camber of the road, requiring the removal of the track to the side of the road in the borough of Darby and elsewhere, and requiring the making of the surface between the rails and that part of the roadway between the track and the telford portion of the road solid, with an even and smooth sur-

face, and generally to carry out all the covenants and conditions of the agreement.

We have no disposition to interfere with this decree except to modify it in one particular. While the bill was not filed for six years after the track had been laid, there was never an acquiescence by the telford company to the elevation of the track and the failure to make a hard, smooth surface between the track and the improved part of the roadway. These were the subjects of constant complaint on the one hand, and of unperformed promises on the other. The attitude of the telford company throughout has been tolerant and just. It has not insisted upon a literal, but only upon a reasonable and substantial, compliance with the agreement. It has not insisted that the track should be made to conform to the minor undulations of its road, but that it should be so placed as not to interfere with proper drainage, essential to the preservation of its road.

The respect in which the decree seems to be too broad is in requiring the removal of the track not only at the foot of Darby Hill, but "elsewhere" "upon the side of the turnpike in accordance with the terms of the agreement." If by this it is meant that on the whole length of the road the outside rail is to be placed a distance of 20 feet from the center line of the turnpike, it imposes a burden on the railway company that is unreasonable and inequitable. In many places the outside rail was laid 18 feet from the center line. This was done with the knowledge and apparent acquiescence of the president of the telford company, who for it supervised the construction, and of other officers of the company. As far as we know, it was not made the subject of complaint at any time, and it is not mentioned in the body of the bill, although referred to in one of the prayers for relief. The agreement allowed some latitude in this regard by the exception as to distance "in running over or under bridges or where of necessity it has to be less than twenty feet." This slight variation in distance having been made without objection and acquiesced in, if not authoritatively approved, a strict compliance with the letter of the agreement, which would subject the lessees of the railway to great loss and inconvenience without corresponding advantages to any one, should not now be exacted.

The words "and elsewhere" are struck from the second paragraph of the decree, and in all other respects the decree is affirmed, at the cost of the appellant.

(217 Pa. 363)

PERKIOMEN R. CO. v. BROMER.

(Supreme Court of Pennsylvania. March 11, 1907.)

1. EVIDENCE—PAROL EVIDENCE.

Evidence of an oral promise by one of the parties to a written contract, made at the time and used to procure the execution of the writing,

is admissible, though its effect is to change the writing.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 2049.]

2. SAME.

Parol evidence that the grantor in a deed to a railroad company executed the deed because of a contemporaneous parol promise, made by the president of the company, that it would build a crossing to connect the two portions of defendant's road, is admissible.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 2049.]

3. RAILROADS—RIGHT OF WAY—CROSSINGS—EVIDENCE.

A parol agreement of the president of a railroad company, at the time of the execution of the deed to it of a right of way, to build a crossing over the railroad to connect the two portions of the grantor's land, held sustained by the evidence.

Appeal from Court of Common Pleas, Montgomery County.

Action by the Perkiomen Railroad Company against Albert Bromer. Judgment for defendant, and plaintiff appeals. Affirmed.

At the trial, when the plaintiff was on the stand, the following offer was made: "We propose to prove that, anterior to the execution of the release offered in evidence by the plaintiff, an agreement was entered into between him and the Perkiomen Railroad, represented by Anthony H. Selpt, its president, by which, in consideration of his executing that release, they would pay him \$1,500 and give him an overhead crossing to his lands on the eastward of the proposed railroad; that when the release was drawn up and brought to him for execution he objected to it, because of the omission of any stipulation as to the crossing; that Mr. Selpt then informed him that the insertion of such a stipulation in that release was not necessary, because the railroad company was bound to give him a crossing anyhow, and that it was not customary to insert such a stipulation in a release; that thereupon, and upon the faith of Mr. Selpt's statement, he executed that release; that thereafter, about four months, a subsequent agreement was entered into by him with the said railroad, in the person of its president, Anthony H. Selpt, by which it was stipulated and agreed that, if he would not insist upon the construction of that overhead crossing, the railroad company would suffer him to use and occupy the land then in his possession and included in that release until the railroad company did build him an overhead crossing; and that he would not have signed said release except upon the faith of those representations by Mr. Selpt. Mr. Evans: Objected to. The Court: Are you basing this offer on the fact that Mr. Selpt was the president, or was the agent, or what? Mr. Freedley: Basing it upon the fact that he was the person who represented the railroad company in these negotiations, being by office president of the railroad company and its authorized agent. The Court: I want to know whether

you are basing it upon the fact that he was the agent who negotiated this transaction, or whether he was the president, or whether you are taking both? Mr. Freedley: We are taking both of them; taking the position that he was the only party that we know in this transaction. The Court: The objection is that the offer as made ought to be modified. Mr. Freedley in his offer of the two transactions states that a contract was made. I suppose you mean a parol contract? Mr. Freedley: Yes, sir. Mr. Evans: We object to this offer, because it is an attempt on the part of the defendant to change and modify a written instrument; that all that is proposed has been swallowed in the deed that afterwards followed. (Discussion.) The Court: The objection is overruled. (Plaintiff excepts. Bill sealed.) Mr. Strassburger: Q. On the day that the release was executed, what took place, January 22, 1869—what took place then? A. On that day Mr. Seipt, the president and agent of the Perkiomen Railroad Company, in company with 'Squire William Fox, came to my place of business and said, 'Now we are ready to close up that transaction,' and he said, 'Here is your release that you will have to sign.' I read that release carefully, and I said: 'Mr. Seipt, this release don't say anything about that crossing which you agreed that I should have. You don't mention it at all.' Mr. Seipt said the privilege of a crossing is not a matter of damages. He said the law compels us to give any man a crossing whose lands were cut in two parts. That seemed plausible to me; I believed it at the time, and upon that explanation I signed the release. Now, about four months after that, some time in May, I think, I met Mr. Seipt, the president and agent of the Perkiomen Railroad Company. I met him on the cars. I said: 'Mr. Seipt—' Mr. Evans: We object to this witness testifying to any matter that occurred between him and Mr. Seipt relating to the construction of a crossing or to the use of this land, unless either it was in writing by the company or the authority that Mr. Seipt was acting under is shown. The Court: The objection is overruled for the present. (Plaintiff excepts. Bill sealed.) Mr. Strassburger: Q. Well? A. I asked Mr. Seipt how about my crossing. He told me he would have it ready for me in time to get in my crops from the lowland. 'Why,' he said, 'Mr. Bromer, you know we are trying with all our might to have the railroad extended to Schwenksville and run the first train on the Fourth of July morning. We are short in labor, and it is not hardly possible to get that crossing ready for you.' He said: 'Mr. Bromer, have you no way to get out? Could you find a way to get down there to get your crops?' I said, 'Yes; I can go over the bridge and the mill property and the Perkiomen, and get it off that way; but,' I

said, 'I could hardly haul a heavy load, and it is very unhandy.' 'Well,' he said, 'Mr. Bromer, I wish you would do that, and in the next season you shall have your crossing ready in time for harvest.' 'Well, I considered about this a little, and with the barn and yard as it was then, it was certainly of great importance to me, and especially the barn, and I said: 'Mr. Seipt, how would this do: I would be willing, I would be willing to do without a crossing as long as you let me use this ground and the barn. If I can have the use of that, I will go around and bring over my crops in that way; but,' I said, 'whenever you make me a road, and you want to occupy this ground, I have no longer to build a barn except for the lowland which I have to fill up. Then I want my crossing and must have it.' He said that was all right. He seemed to be very much pleased. He seemed to be more pleased than I was. He extended his hand, and said, 'Mr. Bromer, that is a bargain,' and this was nearly 36 years ago, and I have kept my side of the bargain forthwith."

Verdict and judgment for defendant. Plaintiff appealed.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, and STEWART, JJ.

Montgomery Evans and John M. Dettra, for appellant. Henry Freedley and J. A. Strassburger, for appellee.

FELL, J. This was an action of ejectment to recover possession of a part of the plaintiff's right of way obtained by grant from the defendant in 1869, which has since remained in his possession. The road divided a tract of five acres of land owned by the defendant in a country town so as to prevent convenient access between the parts, and the opening of the right of way to its full width of 80 feet would require the removal of a barn, which for want of space could not be rebuilt on the part on which the house is located. The plaintiff had no occasion to occupy the whole of the right of way, and the defendant remained in undisputed possession of it for 36 years, until this action was brought. At the trial there was no dispute as to the grant or the boundaries. The defense was that, by the original agreement made with the president of the company, who was its agent in procuring rights of way, the defendant, in addition to the money consideration to be paid, was to have a crossing to connect the pieces of his land, which would be separated by the construction of the road; that when the deed was presented to him for execution, he objected to it because no mention was made in it of the crossing, and he was assured by the president that it was unnecessary to mention it in the agreement, as the company would be required by law, irrespective of the agree-

ment, to construct the crossing, and on faith of this assurance he acknowledged and delivered the deed; that subsequently he demanded the crossing, and was told by the president that it would be built soon and was requested not to insist on the crossing while he could have the use of the barn; and that to this he agreed. The assignments of error relate to the admission of this testimony, and to the effect given it by the charge.

While all negotiations and promises and oral agreements are merged in and extinguished by the written instrument which is the final result of the bargainings of parties, yet an oral promise by one of the parties, made at the time and used to procure the execution of the writing, may be given in evidence, although its effect is to change the writing. *Powelton Coal Co. v. McShain*, 75 Pa. 238; *Thomas & Sons v. Loose et al.*, 114 Pa. 35, 6 Atl. 326; *Ferguson v. Rafferty*, 128 Pa. 337, 18 Atl. 484, 6 L. R. A. 33. The instruction as to the standard of evidence required that it must be clear, precise, and indubitable, in the sense that it carries conviction to the mind and by witnesses who know and are credible, was full and accurate. The plaintiff was corroborated as to the making of the contemporaneous oral agreement, and as to its terms by a witness who was present when the writing was executed, and by proof that the defendant has remained in possession of the land 36 years under an arrangement by which his right to insist on a crossing and the duty of the plaintiff to construct one were suspended. Under the testimony, the establishment of a crossing was distinctly a part of the consideration, and until established there was no right of possession.

The judgment is affirmed.

(217 Pa. 375)

LEEDOM v. PHILADELPHIA, B. & T. ST. RY. CO.

(Supreme Court of Pennsylvania. March 11, 1907.)

APPEAL—APPEALABLE ORDER.

No appeal lies from an order of the common pleas overruling defendant's demurrer to plaintiff's statement of claim.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, § 369.]

Appeal from Court of Common Pleas, Bucks County.

Action by Walter F. Leedom against the Philadelphia, Bristol & Trenton Street Railway Company. From an order overruling demurrer to the statement, defendant appeals. Appeal quashed.

Hugh B. Eastburn and Yerkes, Ross & Ross, for the motion. Howard I. James and George Quintard Horwitz, opposed.

PER CURIAM. Quashed at bar.

(217 Pa. 379)

In re FLEMING'S ESTATE.

(Supreme Court of Pennsylvania. March 11, 1907.)

APPEAL—APPEALABLE ORDER.

No appeal lies from an interlocutory decree of the orphans' court overruling a demurrer to a petition to reopen and review an account.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, § 369.]

Appeal from Orphans' Court, Wayne County.

In the matter of the estate of Thomas J. Fleming. From an order overruling demurrer to petition, James R. Fleming and others appeal. Quashed.

Leonard J. Reynolds, L. M. Atkinson, and D. F. Fortney, for the motion. James J. O'Malley, E. C. Mumford, and M. J. Martin, opposed.

PER CURIAM. Appeal quashed at bar.

(6 Pen. 263)

In re LOFLAND.

(Court of General Sessions of Delaware. Sussex. April 6, 1907.)

INTOXICATING LIQUORS—LICENSE AND REGULATION—APPLICATION TO SELL—SUFFICIENCY.

An application to sell intoxicating liquors in less quantities than one quart, at the house known as the "Windsor Hotel," situate in united school districts Nos. 2, 100, 103, and 104, and in colored school district No. 192, was sufficient.

Application by William C. Lofland for a license to sell intoxicating liquors in South Milford. Application sufficient.

Argued before SPRUANCE and BOYCE, JJ.

Charles W. Whitley and Frank M. Jones, for applicant. Henry Ridgely, Charles W. Cullen, and Truston P. Causey, for exceptants.

PER CURIAM. The application was to sell intoxicating liquors in less quantities than one quart, etc., at the house known as the "Windsor Hotel," situate in united school districts Nos. 2, 100, 103, and 104, and in colored school district No. 192. Among the exceptions filed was the following: That the proposed inn or tavern was mentioned in the application of the said William C. Lofland as being located in united school districts Nos. 2, 100, 103, and 104, and in colored school district No. 192, in Sussex county; whereas, in fact there are no such school districts, and the said tavern is actually located in the united school district for white children, known as the "Public Schools of Milford," and in united school district for colored children, known as "United Districts Nos. 163 and 192 in Milford."

The Court held the designation in the application to be sufficient.

(6 Pen. 272)

WHITE v. PENUEL.

(Superior Court of Delaware. Sussex. April 12, 1907.)

ADMINISTRATORS—FRAUD.

Where plaintiff was the daughter, as well as the administratrix of the estate, of a decedent, and the defendant, who was the widow of that decedent and administratrix of another estate, assented to an amicable action to determine an award on a probated claim against the estate of which she was administratrix, and gave testimony favorable to plaintiff, but made no defense to the action, fraud and collusion in procuring the award will be inferred, in an intervention to except to the confirmation of the award.

Intervention and exceptions to an award of referees in an amicable action by Helen P. White, administratrix, against Anna Penuel, administratrix. Verdict that there was fraud and collusion in procuring the award.

Argued before SPRUANCE and BOYCE, JJ.

Charles W. Cullen and Robert C. White, for plaintiff. George N. Davis and Robert H. Richards, for defendant.

BOYCE, J. (charging jury). On the 2d day of May, A. D. 1905, Helen P. White, administratrix of Hiram F. Penuel, deceased, and Anna Penuel, administratrix of Thomas L. Cannon, deceased, appeared in the prothonotary's office in this county in vacation and entered into an amicable action, and by consent and rule of court all matters in controversy between them in their said suits were referred to referees for their hearing and determination. The demand of the plaintiff against the defendant was a probated account of the said Hiram S. Penuel, made in his lifetime, against the estate of the said Thomas L. Cannon for board, washing, and mending from August 17, 1892, to June 25, 1904, less certain credits, amounting to \$3,006.88. On the day the amicable action was entered into the referees made their award in favor of the plaintiff for the whole amount of plaintiff's claim, to wit, said sum of \$3,006.88, with interest from the date of the award, and filed their award with the prothonotary. Upon the return of the award of the referees to this court, at the next term thereof (October 7, 1905), Emory B. Rigglin, one of the next of kin of the said Thomas L. Cannon, deceased, was, upon his certain petition presented to this court, permitted to intervene and file exceptions to the confirmation of the said award on the grounds of fraud and collusion between the parties to said action. Hearing on the exceptions was continued to the April term, A. D. 1906, of this court, when it was ordered by the court that the following issue be tried by a jury of this county, at the bar of this court, namely: "Was there or was there not fraud and collusion between Helen P. White, administratrix of Hiram F. Penuel, deceased, and Anna Penuel, administratrix

of Thomas L. Cannon, deceased, the parties to this suit, in procuring the award therein?" The case has been continued until the present term.

You have been impeached to try said issue. The evidence before you has been adduced in our presence. Without intending to impute anything intentionally wrong or fraudulent on the part of the parties to said action in agreeing between themselves to enter into said amicable action, the defendant was, as widow of the said Hiram F. Penuel, as well as her daughter, the plaintiff in said action, who was the only child of the said Hiram F. Penuel, beneficially interested in obtaining an award in favor of the plaintiff. And we are constrained to say that the said Anna Penuel, administratrix of Thomas L. Cannon, deceased, in assenting to such amicable action, and in giving testimony favorable to the claim of the plaintiff, and necessary to warrant the award, and by making no defense to the action whatever, placed herself in a position in which her interest as a distributee in the residue of the estate of her deceased husband was in conflict with her duty as such administratrix. This the law will neither encourage nor permit. The rule against it "stands upon her great moral obligation to refrain from placing herself in relations which ordinarily excite a conflict between self-interest and integrity." *Michoud v. Girod*, 4 How. 555, 11 L. Ed. 1076; *Sheldon v. Estate of George W. Rice*, 30 Mich. 296, 18 Am. Rep. 136; *Cook v. Collingridge*, 1 Jac. 667 (621).

The testimony which has been produced is not conflicting, and upon the facts of the case as proved we are clearly of the opinion that the law infers such fraud and collusion as require you to answer the question presented to you in the affirmative. And we instruct you to make such answer in rendering your verdict upon the issue now before you.

The jury found accordingly.

(6 Pen. 273)

NEVIN v. DISHAROON.

(Superior Court of Delaware. Sussex. April 16, 1907.)

1. EJECTMENT—PROOF OF TITLE—REQUISITES. In ejectment, legal title to land may be proved by the deeds, wills, and descents under which the title is claimed, or by adverse possession for a period of at least 20 years.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Ejectment, §§ 280-284.]

2. SAME—SUFFICIENCY OF TITLE.

Plaintiff in ejectment must recover on the strength of his own title, and not on the weakness of defendant's title.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Ejectment, § 18.]

3. SAME—EVIDENCE—SUFFICIENCY.

Plaintiff in ejectment is not required to prove his title beyond a reasonable doubt, but it is sufficient if he proves it by the preponderance of the evidence.

4. ADVERSE POSSESSION—SUFFICIENCY—PRESUMPTION OF LEGAL TITLE.

A legal title is in law presumed from an exclusive, adverse, and continuous possession for 20 years.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Adverse Possession, §§ 596, 597, 613.]

5. SAME—CONCLUSIVENESS OF PRESUMPTION.

Where the adverse possession relied upon is for a less period than 20 years, or where it is of a mixed character, no conclusive presumption arises as to ownership of the legal title from such possession.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Adverse Possession, §§ 595, 596.]

6. SAME—BURDEN OF PROOF.

Defendant in ejectment, who relies on adverse possession for a period of 20 years as a defense, has the burden of establishing such possession to the satisfaction of the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Adverse Possession, §§ 661-668.]

7. SAME—UNINCLOSED PROPERTY—SUFFICIENCY OF ACTS SHOWING POSSESSION.

Where property is uninclosed, cutting wood or grass upon the land, pasturing cattle upon it, and other similar acts, are to be regarded as acts proving adverse possession; but such acts must be exclusive and in opposition to the claims of all other persons, and continued for at least 20 years, in order to warrant an inference of title by possession only.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Adverse Possession, §§ 82, 83.]

8. EJECTMENT—TITLE BY ADVERSE POSSESSION—SUFFICIENCY.

Where, in ejectment, the defense of adverse possession is based on mixed possession by both parties, the right of possession is in the party who shows a legal title.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Ejectment, §§ 64, 67, 69.]

9. BOUNDARIES—NATURAL OBJECTS—COURSES AND DISTANCES—CONTROLLING EFFECT.

Where a deed calls for natural and known boundaries which are inconsistent with the description by courses and distances, such natural and known boundaries control.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Boundaries, § 12.]

10. SAME.

Where a deed describes the land by courses and distances, and not by natural and known boundaries, the description by courses and distances is to be adopted.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Boundaries, § 38.]

Action by John W. Nevin against Martha I. Disharoon. Verdict for defendant.

Argued before SPRUANCE and BOYCE, JJ.

Robert C. White and Andrew J. Lynch, for plaintiff. John M. Richardson and Charles W. Cullen, for defendant.

SPRUANCE, J. (charging the jury). This is an action of ejectment, brought by the plaintiff, John W. Nevin, against the defendant, Martha I. Disharoon, to recover the possession of a tract of land situate in Seaford hundred, in this county, containing about 17 acres. The defendant is now in the possession of the said land, as appears by the record of this case.

The plaintiff cannot recover the possession of this land until he shows his right to such

possession by proving his title to the same. A legal title to land may be proved (1) by proving or producing the deeds, wills, and descents under which said title is claimed, or (2) by proving that the claimant and those under whom he claims had adverse, exclusive, and continuous possession of the premises for at least 20 years next before the commencement of this action, in which case the law presumes that he has the legal title to the premises.

The plaintiff, in an action of ejectment, must recover, if at all, on the strength of his own title; and it is not enough for such recovery that the defendant has failed to prove that he has a good title. In order to entitle the plaintiff to a verdict, the jury should be satisfied, from the preponderance or greater weight of the evidence, that the plaintiff has the legal title. It is not necessary, however, that the legal title of the plaintiff be proved beyond a reasonable doubt. It is sufficient if it be proved by the preponderance of the evidence. *Pleasanton v. Simmons*, 2 Penne-will, 484, 485, 47 Atl. 697.

Exclusive, adverse, and continuous possession for 20 years is ground upon which the law presumes a legal title; but where the possession relied upon is for a less period than 20 years, or where it is of a mixed character, as where the possession has been shared with some other person or persons, no conclusive presumption arises as to the ownership of the legal title from such possession. *Pleasanton v. Simmons*, supra.

Where, in an action of ejectment, the defendant claims right by adverse possession of 20 years against the legal title of the plaintiff, the burden of establishing such possession to the satisfaction of the jury rests upon the defendant; and if in such case the defendant fails to prove such adverse exclusive possession for 20 years, and the plaintiff has proved a legal title, the verdict should be in favor of the plaintiff. *Barrett v. Jefferson*, 5 Houst. 477.

The nature or kind of possession from which the law presumes legal title to real estate depends in a great degree upon the nature and character of the property. Where the property is uninclosed, cutting wood or grass upon the land, pasturing cattle upon it, and other similar acts, are to be regarded as acts proving possession; but such acts must be exclusive and in opposition to the claims of all other persons, and continued for at least 20 years, in order to warrant an inference of title by possession only. *Bartholomew v. Edwards*, 1 Houst. 17; *Bright v. Stephens*, Id. 31. If it appears to the jury from the evidence that there was a mixed possession of the premises—that is, if acts of ownership have from time to time been exercised by both parties—the law adjudges the right of possession to be in that party who has shown a legal title. *Inskeep v. Shields*, 4 Har. 346.

Where a deed calls for natural and known

boundaries which are inconsistent with the description given in the deed by courses and distances, such natural and known boundaries control the boundaries by courses and distances; but if, on the contrary, the deed describes the land by courses and distances, and not by natural or known boundaries, the description by courses and distances is to be adopted. *Hunter v. Lank*, 1 Har. 10.

Both the plaintiff and defendant claim that they have shown a good paper title to the premises in dispute. You have in evidence the records of the paper title claimed by each party, and the evidence which, it is contended, identifies the disputed premises with the premises described in said records. You have also heard the testimony on behalf of each party as to the possession of the premises. Your verdict should be for that party in whose favor is the preponderance or greater weight of the evidence.

Verdict: "We find the defendant not guilty of the trespass in ejectment in the said declaration mentioned in the manner and form as the said John Doe hath complained against her."

(6 Pen 261)

STATE v. WRIGHT et al.

(Court of General Sessions of Delaware.
Sussex. April 5, 1907.)

1. BURGLARY—BREAKING AND ENTERING—ELEMENTS OF OFFENSE.

In a prosecution for breaking and entering with intent to commit larceny, the jury must be satisfied beyond a reasonable doubt that defendants broke and entered the store of the prosecuting witness with a felonious intent to carry away goods kept there and to convert them to their own use without the consent of the owner.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Burglary, § 1.]

2. SAME—POSSESSION OF STOLEN PROPERTY—PRIMA FACIE CASE.

Where, in a prosecution for breaking and entering a store building with intent to commit larceny, it was proved that the store in which the stolen goods were kept had been recently broken and entered, and on the morning next after the breaking the goods were found on premises occupied by defendant, such evidence was prima facie sufficient to prove that defendant was guilty of breaking and entering, as well as of the intent to commit larceny.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Burglary, § 104.]

3. SAME—POSSESSION OF STOLEN PROPERTY—EXCLUSIVE POSSESSION—PRESUMPTIONS.

In order that possession of recently stolen property unexplained may create a presumption of guilt of the possessor, it is necessary that his possession of the property should be exclusive.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Burglary, §§ 79, 105, 107.]

4. SAME—JOINT POSSESSION.

Where, shortly after the commission of an alleged breaking with intent to commit larceny, the stolen goods or a part thereof were found in the joint possession of defendant and another, who was indicted with him, the jury were entitled to draw from such possession the same inference of guilt as to defendant as if the goods had been found in his sole possession.

5. CRIMINAL LAW—REASONABLE DOUBT—DEFINITION.

A reasonable doubt is one that naturally arises out of the evidence and may be reasonably entertained by men of ordinary intelligence, impartiality, and judgment after a careful and conscientious consideration of all the evidence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1906-1922.]

Charles Wright, alias Dick Wright, and another, were indicted for breaking and entering a store in the nighttime with intent to commit larceny. Verdict, not guilty.

Argued before SPRUANCE and BOYCE, JJ.

Daniel O. Hastings, Deputy Atty. Gen., for the State. Robert C. White, for defendants.

BOYCE, J. (charging jury). Charles Wright, otherwise known as Dick Wright, and Ira Luff, who has not been apprehended, were indicted jointly at the October term, 1905, of this court. It is charged in the indictment that they did on the 13th day of September, A. D. 1905, in the nighttime, feloniously break and enter into the store, at Georgetown, of Joshua T. Collins, in which said store certain money, goods, chattels, and other things, being the subject of larceny, were then and there kept and deposited, with the intent to commit larceny. The indictment complains of the commission of a statutory offense, which is twofold in its character: (1) The breaking and entering (2) with the intent to commit larceny. In order to convict the prisoner in manner and form in which he stands indicted, you must be satisfied beyond a reasonable doubt (1) that he did feloniously break and enter into the store of the prosecuting witness (2) with the intent to commit larceny; that is, with the felonious intent to take and carry away the goods and chattels kept or deposited in said store with the intent to convert them to his use, without the consent of the owner.

The state has not produced direct evidence of the alleged breaking and entering, but has introduced evidence to the effect that certain of the goods and chattels mentioned in the indictment were found, upon search made by officers and the prosecuting witness, in each of two houses—one in Seaford, and the other at Cannon—which said houses were then said to be held and occupied by the defendant. Collins, the prosecuting witness, identified the said goods so found as his property and as being in his said store on the night of the alleged breaking and entering. The state relies upon this proof as prima facie evidence of the guilt of the prisoner in manner and form as he stands indicted, contending that his possession of the said goods, in the absence of satisfactory explanation, raises the presumption that he did break and enter the said store with the intent to commit larceny. It is a well-recognized principle of criminal law, that, when recently stolen property is found in the possession of a person, that person is presumed

in law to be the one who stole it, unless he accounts satisfactorily to the jury for his possession of the property. This rule is uniformly applied to larceny cases in this state when the person charged was not seen in the act of committing the theft, but soon thereafter is found with the stolen goods in his possession. Applying this rule to the evidence in this case, we say to you that where a store has been recently broken and entered into, in which goods and chattels are kept or deposited, and such goods and chattels, or any part of them, are then and there stolen, the subsequent possession, soon thereafter, of such goods by a person, is *prima facie* evidence of the commission of the breaking and entering, as well as of the intent for which such breaking and entering was committed; that is, that the possessor of such goods is presumed to be the taker, and therefore committed the whole crime, unless he satisfactorily accounts for the possession. In the case of *Com. v. Millard*, 1 Mass. 5, the charge being that the defendant broke and entered a shop in the nighttime, and stole therefrom divers goods, wares, etc., against the statute (a case very similar to this), it was found at the trial that part of the goods stolen from the shop were found in the possession of the defendant. Sedgwick, J., stated this proof to be presumptive evidence, not only that he stole the whole of the articles taken from the shop, but also of his breaking and entering as alleged in the indictment, unless the defendant would give some reasonable account how he came by the goods.

Counsel for the defendant contends that, before there can be any presumption of guilt arising from the possession of recently stolen property unexplained, it is necessary to show that the person charged was in the exclusive possession of such property. And he has requested the court to charge you: (1) That if you find from the evidence that the premises upon which the alleged stolen articles were found were not in the actual possession of the defendant at the time of the alleged offense, you should return a verdict of not guilty. (2) That if you find from the evidence that the premises upon which the alleged stolen articles were found were in the possession of some one other than the defendant, who had the key to the premises and occupied the same as his home, you should return a verdict of not guilty.

We cannot charge you in the language of these prayers. The rule governing a case of this character seems to be very well expressed in 18 Am. & Eng. Ency. of Law, 489, and it is there said: "In order that an inference of guilt may be drawn from the unexplained possession of goods recently stolen, it must be an exclusive personal possession on the part of the accused. This does not mean that the goods must be actually in the hands of the accused, or on his person; but possession of the requisite character may

be established by the fact that the goods were found on premises or in a place of which the accused was in the exclusive occupancy and control. If, however, the place where the goods were found was accessible to others capable of stealing, the inference cannot be drawn, though the fact is entitled to consideration in connection with the other facts in the case." If the stolen goods, or any part of them, were found upon premises of which the accused was the tenant, and if it is proved that he was on said premises on the morning next after the alleged offense was committed, the jury may infer that the goods were upon said premises with the knowledge of the accused, and that they were in fact in his possession, unless the circumstances proved are such as to warrant the jury in inferring the contrary. Whether the stolen goods, or any part of them, were found in the possession of the accused shortly after the commission of the alleged offense, is a question of fact to be determined by the jury from the evidence. And, if they were so found, the jury may infer that they were stolen by the accused by means of his breaking and entering the store of the owner of said goods. If, shortly after the commission of the alleged offense, the stolen goods, or any part of them, were found in the joint possession of the accused and Luff, who was indicted with him, the jury may draw from such possession the same inference of guilt as to the accused as if they had been found in his sole possession.

If, upon the evidence in this case, you entertain a reasonable doubt as to the guilt of the accused, such doubt should inure to his acquittal. By reasonable doubt is not meant a vague, fanciful, whimsical, or even possible doubt, but such a doubt as naturally arises out of the evidence, and such a doubt as may reasonably be entertained by men of ordinary intelligence, impartiality, and judgment, after a careful and conscientious consideration of all the evidence.

With these instructions, you will take this case, and, after carefully and conscientiously considering it, return your verdict in accordance with the evidence.

Verdict, not guilty.

(6 Feb. 1904)

DOWNS v. SHORT.

(Superior Court of Delaware. Sussex. April 8, 1907.)

PARTNERSHIP—ACTION BETWEEN PARTNERS—SETTLEMENT.

An action at law cannot be maintained by one partner against the other for a debt arising out of the partnership, unless there has been an accounting between them and the amount sued for constituted an admitted balance.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Partnership, § 157.]

Action by William H. Downs against James N. Short. Verdict for defendant.

Argued before SPRUANCE and BOYCE, JJ.

R. C. White, for plaintiff. C. W. Cullen and John M. Richardson, for defendant.

BOYCE, J. (charging the jury). The plaintiff brought his action of assumpsit against the defendant to recover the amount alleged to be due him as shown by his bill of particulars, which is as follows:

Plaintiff's Bill of Particulars.

Fall, 1901. To 1 hog.....	\$ 7 00
Interest to April 5, 1903.....	2 52
March 27, 1903. Bal. on settlement..	410 31
Interest to April 5, 1907.....	98 48

Total\$518 31

If you find that the plaintiff sold and delivered the hog to the defendant, and that the latter has not paid for it, then the plaintiff will be entitled to a recovery therefor.

It is admitted that the parties to this action were engaged in the gristmilling business, as partners, at Delmar, this county, during a part of the years 1901 and 1902. Therefore, in order that the plaintiff may maintain his action at law with respect to the second item in his bill of particulars, it must appear that the partnership has been dissolved, and that there has been an adjustment of the partnership accounts, and a balance struck, showing a sum due to him from the defendant. These facts being shown to your satisfaction, the plaintiff will be entitled to a recovery for such balance; otherwise, he cannot maintain his present action. *Robinson v. Green's Adm'r*, 5 Har. 115.

The parties sold their mill in August, 1902. The plaintiff claims that on March 27, 1903, he and the defendant came together and effected a settlement of their partnership transactions, and that a balance in his favor was admitted between them; and he has produced in evidence a paper writing which reads as follows: "March 27, 1903. Short due Downs, \$410.31." He further claims that the said paper writing was handed to him by the defendant, on the occasion and after their said adjustment of their accounts, as evidence of the balance due to him from the defendant. The defendant, however, denies that the alleged settlement was ever made, and he contends that he and the plaintiff did come together on the occasion mentioned to go over their individual accounts, to ascertain what amount each "owed the mill"; and he produced in evidence a paper writing which reads as follows: "Downs and Short's Account. Downs due mill, \$425.89." He further claims that both of said writings—the one produced by the plaintiff and the other by himself—were separately written on a small sheet of paper before they were torn apart; that he kept the one showing the amount which Downs owed the mill, and that Downs took the other, showing the amount which he (the defendant) owed the mill, and not Downs; and that on the paper which Downs took the word "mill" was in the place where the word "Downs" now appears.

and that this substitution was made by some person to him unknown and without his authority after the said writing was delivered to Downs.

You have heard the testimony of the parties, respectively, the only persons to testify in the case, and it is for you to find from the evidence whether they, the plaintiff and the defendant, did, on the 27th day of March, A. D. 1903, come to a settlement of their partnership transactions, and admitted a balance due by the defendant to the plaintiff, as alleged by the plaintiff, or whether on that occasion the parties simply ascertained the amount each was "due the mill," as alleged by the defendant. If you find there was a settlement between them, and an admitted balance due from the defendant to the plaintiff, the plaintiff will be entitled to recover the amount then admitted to be due, with interest from the time of such settlement.

If you believe the testimony of the plaintiff, he will be entitled to recover the amount of his claim as stated in his bill of particulars. If you believe the testimony of the defendant, your verdict should be for the defendant.

Verdict for defendant.

(6 Pen. 274)

ARMSTRONG v. COLUMBIA WAGON CO.
(Superior Court of Delaware. Sussex. April 12, 1907.)

1. SALES—ACTS CONSTITUTING ACCEPTANCE.

In an action for the price of a car load of lumber, it was not material whether defendant knew that it came from plaintiff or not before unloading the lumber, as he had the right to unload and inspect it, for the purpose of determining the quality and quantity.

2. SAME—WARRANTIES—WAIVER OF BREACH.

In an action for the price of a car load of lumber, if the defendant unconditionally accepted the lumber, as in conformity with the contract, after a fair opportunity for inspection, he could not afterwards repudiate the acceptance and refuse to pay the contract price, even though the lumber was not fit for the use intended and not in conformity with the order, as the acceptance was a waiver of defects.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales, §§ 298, 460.]

3. SAME—CONDITIONS IN CONTRACT—LIABILITY OF PURCHASER.

In an action for the price of a car load of lumber, if the lumber is not reasonably fit for the use for which it was ordered, and not substantially of the quality described in the order, defendant is not bound to accept it, nor pay for it if not accepted.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales, §§ 391, 392, 394.]

Action by Daniel C. Armstrong against the Columbia Wagon Company. Verdict for plaintiff.

Argued before SPRUANCE and BOYCE, JJ.

Robert C. White, for plaintiff. John M. Richardson and Charles W. Cullen, for defendant.

SPRUANCE, J. (charging the jury). Daniel C. Armstrong, the plaintiff, brings this action against the Columbia Wagon Company, a corporation of the state of Pennsylvania, the defendant, to recover for 6,257 feet of white oak lumber at \$33 per thousand, less the freight paid by the defendant, together with interest from July 1, 1904, making the total amount of \$199.30. The plaintiff was a lumber dealer residing in Milton, in this county, and the defendant company was engaged in the manufacture of wagons in Columbia, Pa. All of the written papers to which I shall refer, as well as others, are in evidence, and will be subject to your examination.

On April 23, 1904, the defendant wrote to the plaintiff as follows: "In regards to an order for some oak, we have decided to let you get one out and ship it some time in July, as we have all we need now until we take inventory at that time. Inclosed please find the order." The order inclosed in said letter was numbered 4,390 and dated April 25, 1904. The said order, under the heads of "Bolsters" and "Coupling Poles," gave the number of pieces, their sizes, length, and number of pattern, and continued as follows: "Price \$33.00 delivered. This must be white oak lumber, good, clean, tough stock. You have the privilege in cutting them in multiples; or, in other words, take pattern No. 7, you can cut it 9 feet long or 13½ feet long." Under date of June 8th the defendant wrote to the plaintiff that it did not want the lumber shipped before the first week in July. On June 9, 1904, the plaintiff wrote the defendant as follows: "Your favor of the 8th instant just received, and I will ship the car load of bolsters and coupling poles the first week in July as per your request." On July 1, 1904, the plaintiff shipped from Milton to the defendant, in Columbia, Pa., a car load of lumber intended to fill said order. The plaintiff gave no notice to the defendant of said shipment until he sent to them, under date of July 7, 1904, the following letter: "According to your order of April 25th, I have shipped you one car load of bolsters and coupling poles, for which you may either send me note signed by your concern, note for me to sign, or check, 2 per cent. off, for the amount of bill rendered, which please send by return mail, as I told you in some of my former letters that I was unable to hold and dry lumber, which I have partly done in this case. Hoping that the lumber will prove satisfactory, and I may hear from you by return mail, I remain," etc. Inclosed in said letter was the plaintiff's bill against the defendant company for said lumber, on which was written: "Shipped on car P. R. R. No. 12,078. Order No. 4,390."

It appears from the testimony on behalf of the defendant that the said car containing said lumber reached Columbia on the 8th or 9th of July, and before the defendant had received the plaintiff's said letter of July 7th,

and that on its arrival and before the receipt of said letter the defendant unloaded said car under the misapprehension that it was from a customer of theirs in York, and not from the plaintiff, and that when said car was unloaded a large part of the lumber was found to be unfit for the use for which it had been purchased, and not of the quality designated in their said order, and that said lumber, when so unloaded, was piled up in their yard, where it has since remained, and has never been accepted or used by them. Thereupon the following letter was sent by the defendant to the plaintiff: "Your letter of the 7th inst., the bill under July 1st for one car of dimension lumber, just received, and we regret to say that the bulk of this lumber is entirely unfit for our purpose. We are surprised that you send us such lumber, full of knots and inferior quality. The writer, when there, went over this carefully with you, and showed you what stock we could use, and the car you sent us then was all right. We unloaded this car, not knowing who it was from, sorted out what little was good, and put it on a pile by itself. Had we known it was from you, we would not have unloaded it; but one of our old customers asked us to take a car off of his hands, which we [he] told us was only partly good, but it was here by mistake, and we did it to help him out. When the bill came, we then saw that this car was yours. We do not know what to say then [than] that you had better come up and look it over as soon as possible." Pursuant to the suggestion of said letter, the plaintiff shortly afterwards went to Columbia for the purpose of obtaining a settlement for said lumber; but after a protracted discussion of the subject the parties were unable to agree, and the plaintiff returned home, leaving the lumber where it had been unloaded.

For the purpose of this case, it is not material whether the defendant, when the said lumber was unloaded, did or not know that it came from the plaintiff, as the defendant, before accepting said lumber, had the right to unload it and inspect it for the purpose of ascertaining the quantity and quality of the same. The defendant makes no objection to the time when said lumber was shipped to it, and defends this action solely upon the ground that a large percentage of said lumber was unfit for the use for which it was purchased and greatly inferior to that described in the said order. The plaintiff, on the other hand, contends that the said lumber was reasonably fit for the purpose for which it was sold, and that it did substantially conform to the requirements of the said order.

Upon the question as to the quality of said lumber, there is great conflict in the testimony, and it is your duty to determine that question according to the weight of the evidence. If, after a fair opportunity for the inspection of said lumber, the defendant unconditionally accepted the same as in conformity with the contract, it could not afterwards

repudiate such acceptance and refuse to pay the contract price for the lumber so accepted, even though the said lumber was not fit for the use for which it had been ordered, or not in conformity with said order, as such acceptance would be a waiver of all such defects. On the other hand, the defendant was not bound to accept, and is not bound to pay for, said lumber, if he did not accept it, unless it was reasonably fit for the use for which it was ordered, and unless it was substantially of the quality described in the said order.

Verdict for plaintiff for \$170.78.

(6 Pen. 232)

MASTEN et al. v. HERRING.

(Superior Court of Delaware. Sussex. April 17, 1907.)

HUSBAND AND WIFE—MARRIED WOMEN'S CONTRACTS—BONDS TO HUSBAND.

Rev. Code 1852, p. 600, as amended 1893, vol. 14, c. 550, § 9, providing that in any case a married woman, at the age of 21 years, may give a bond, with or without a warrant of attorney, as a feme sole, does not authorize her to execute a bond under seal to her husband for borrowed money; and hence a bond so executed was not enforceable by her husband's executors against her estate.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Husband and Wife, § 220.]

Action by Wilbert Masten and another, as executors of the will of Hezekiah Masten, deceased, against John W. Herring, as administrator de bonis non with the will annexed of the estate of Sallie A. Masten, deceased. Judgment for defendant.

Case stated filed, showing the following facts, viz.:

"(1) That Wilbert Masten and Daniel R. B. Masten are the duly qualified executors of the last will and testament of Hezekiah Masten, deceased.

"(2) That John W. Herring is the duly qualified administrator de bonis non cum testamento annexo of Sallie A. Masten, deceased.

"(3) That on or about the 14th day of February, A. D. 1887, the said Hezekiah Masten and the said Sallie A. Masten were lawfully married; and the said Hezekiah Masten thereby became the husband of said Sallie A. Masten, and said Sallie A. Masten thereby became the wife of said Hezekiah Masten.

"(4) That said marriage continued in force until the _____ day of April, A. D. 1899, at which time the said Sallie A. Masten died.

"(5) That said Hezekiah Masten died on the _____ day of March, A. D. 1901.

"(6) That on the 23d day of October, A. D. 1897, during the existence of the said marriage relation between the said Sallie A. Masten and the said Hezekiah Masten, the said Sallie A. Masten executed and delivered to the said Hezekiah Masten a certain paper, purporting to be a bond, under her hand and seal, a true copy of which said paper is attached hereto and marked 'Exhibit A' and is to be taken as a part of this case stated.

"(7) That neither the amount secured by said bond, to wit, the sum of \$350, with lawful interest thereon from the date thereof, nor any part thereof, was paid by the said Sallie A. Masten, in her lifetime, unto the said Hezekiah Masten, and that neither the said sum nor any part thereof has ever been paid by the present or any other personal representative of said Sallie A. Masten, since her death, either unto the said Hezekiah Masten in his lifetime, or unto his personal representatives since his death, and that neither the said sum nor any part thereof has ever been paid, either unto the said Hezekiah Masten or his personal representatives, by any other person or persons, for either the said Sallie A. Masten or her personal representatives.

"(8) That there are assets undistributed now remaining in the hands of the defendant, belonging to and forming a part of the estate of said Sallie A. Masten, sufficient to pay either all or a part of any judgment that may be rendered against the defendant herein.

"(9) That any judgment that may be rendered against the defendant shall be binding only upon the estate of said Sallie A. Masten, deceased, and shall not bind the defendant personally.

"If, upon the above statement of facts, the court should be of the opinion that the said paper, purporting to be a bond, a copy of which is hereto annexed and marked 'Exhibit A,' upon its execution and delivery by said Sallie A. Masten unto said Hezekiah Masten, became and was a valid obligation legally binding upon the said Sallie A. Masten, and that the present suit to recover the amount claimed to be due thereon can be maintained by the personal representative of said Hezekiah Masten against the personal representative of said Sallie A. Masten, then judgment shall be rendered for the plaintiff for the sum of \$350, with interest thereon from the 23d day of October, A. D. 1897; but, if the court should be of the opinion otherwise than as above stated, then judgment shall be rendered for the defendant for costs."

The bond above referred to as "Exhibit A" was in the usual form; the consideration of \$350 mentioned therein being money borrowed by Sallie A. Masten, wife of Hezekiah Masten, from the latter, "for the purpose of building and completing the house I am now building, situated on the S. E. corner of Washington and Fourth streets, in South Milford, Delaware, and, further, if I fail to pay the amount during my lifetime, it shall be collectible out of my real estate, from my executors, administrators, or assigns, and paid to my said husband if he should survive me; if not, to be paid to his executors, administrators, or heirs, or assigns, without defalcation," etc.

Argued before SPRUANCE and BOYCE, JJ.

Robert C. White, for plaintiffs. Robert H. Richards, for defendant.

BOYCE, J. This is an action of debt. The facts fully appear in the case stated. Counsel for the plaintiff, in support of his claim of right to maintain the said action, relies upon that part of section 9, c. 550, 14 Laws Del. (Rev. Code 1852, as amended in 1893, p. 600), which provides: "And in any case a married woman, at the age of twenty-one years, may give a bond, with or without a warrant of attorney, just as if she were a femme sole." And he cited the case of *Warder, Bushnell & Glessner Co. v. Stewart*, 2 Marv. (Del.) 275, 36 Atl. 88, in which the court held that under the terms of said act a married woman may execute a bond to secure a debt not her own. Undoubtedly the said provision is sufficiently broad and comprehensive to authorize a married woman to give her bond to one other than her husband. But does it authorize her to give a bond to her husband? And, if she does, can he enforce a recovery thereon in an action at law against her? The said act, including the said provision, is in derogation of the common law. It is remedial; the purpose of its enactment being to remove from a feme covert certain disabilities existing at common law. And, while it is true that a married woman may do those acts and things which the act authorizes her to do the same as if unmarried, yet the act should not be construed so as to alter or change the common-law status of husband and wife beyond its clearly expressed scope and purpose. At common law both husband and wife were under such legal disabilities as that they could not contract with or maintain an action against each other.

If it be conceded, as contended by counsel for the plaintiff, that the provision of the act relied upon is in itself sufficiently comprehensive to authorize a married woman of the age of 21 years to give a bond to her husband, as well as to another, still it is obvious that the common-law disability of the husband to contract with his wife has not been removed by the act; but, on the contrary, it still exists. The husband is, therefore, incapable of legally assenting to the execution and delivery of a bond by his wife to him; and he being thus disabled, her bond to him is invalid, and he cannot enforce its collection by an action at law against her. *White v. Wagner*, 25 N. Y. 328; *Heacock v. Heacock*, 108 Iowa, 540, 79 N. W. 353, 75 Am. St. Rep. 273. In the case of *Forbes v. Thompson*, 2 Pennewill (Del.) 530, 47 Atl. 1015, this court said: "It seems not only illogical, but unwarranted by any rule or canon of statutory construction, to hold that an act passed for the benefit of married women gives the husband the right to sue his wife at law, when such power is not clearly conferred by the statute in question."

Our opinion is that the said provision should be construed as clothing a married woman with legal authority to give a bond to another person other than her husband,

but as to him she is not in that respect authorized to act as a feme sole. The bond sued upon in this action being invalid from the time of its execution and delivery, the executors of the deceased husband stand in no better position, in an action at law against the administrator of the deceased wife, than the husband would, if living.

We therefore order that judgment be entered in favor of the defendant for costs.

(5 Pen. 594)

BOWRING v. WILMINGTON MALLEABLE IRON CO.

(Superior Court of Delaware. New Castle. July 19, 1903.)

1. MASTER AND SERVANT—DUTY TO FURNISH SAFE APPLIANCES.

It is the duty of the master to furnish a servant reasonably safe tools, machinery, and appliances with which to work.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 173.]

2. SAME.

The duty of the master to furnish a servant reasonably safe tools and appliances is fulfilled, if the same are reasonably safe and adapted to the purpose of the employment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 172, 173.]

3. SAME—DEGREE OF CARE.

The degree of care that should be exercised by a master in providing safe tools and appliances for a servant must be in proportion to the danger of employment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 171, 173.]

4. SAME—ASSUMPTION OF RISK.

While a servant assumes no risk as to the duty of the master to provide reasonably safe appliances with which to work, he assumes all ordinary risks incident to the employment which are apparent and known, or which may be known by ordinary care.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 550, 574, 577.]

5. SAME—NEGLIGENCE.

Where a master knows, or by the use of due diligence might know, that the tools and machinery in use in his business are not reasonably safe, it is negligence on his part to fail to remedy the defects.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 243, 248.]

6. SAME—NOTICE.

Notice to the person in general charge of the business of the master that the machinery is unsafe or dangerous is in law notice to the master.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 251.]

7. SAME—CONTRIBUTORY NEGLIGENCE.

A master is not liable where the servant, with knowledge of defects in the machinery, continues to use the same.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 706-709.]

8. SAME—BURDEN OF PROOF.

In an action by a servant for injuries through negligence of the master in providing unsafe machinery, the burden of proving such negligence is on the servant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 895-906.]

9. SAME—CONTRIBUTORY NEGLIGENCE.

In an action by a servant for injuries through negligence, the burden of proving contributory negligence rests upon the master.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 903.]

10. SAME—KNOWLEDGE OF DEFECTS.

In an action for injuries to a servant by reason of defective machinery, the burden of proving that plaintiff had knowledge before the accident of the defect is on defendant, unless it appears that plaintiff knew or should have known of the defect complained of.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 907, 908.]

11. SAME—PRESUMPTIONS.

Where a servant engages himself in any specific work, the master has a right to presume that he has all the knowledge and skill necessary to the performance of the work in a reasonably safe manner.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 601, 602, 783.]

12. SAME.

A person, entering on a dangerous employment, not only assumes the risk ordinarily incident thereto, but also the risk he may incur from manifest peril.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 610, 612, 613.]

13. DAMAGES—PERSONAL INJURIES.

In an action for injuries to a servant through negligence of the master in furnishing unsafe machinery, plaintiff is entitled to recover for such sum as will reasonably compensate him for his injuries, including his loss of time and wages, his pain and suffering in the past, and such as may come to him in the future, and for such permanent injuries as he may sustain, as well as any pecuniary loss and disability to earn a living in the future, as the result of such accident.

Action by Sam Bowring, an infant, against the Wilmington Malleable Iron Company. Verdict for defendant.

Argued before LORE, C. J., and PENNEWILL and BOYCE, JJ.

Levin Irving Handy and Herbert L. Rice, for plaintiff. Thomas F. Bayard and J. Harvey Whiteman, for defendant.

PENNEWILL, J. (charging jury). This is an action brought by Sam Bowring, the plaintiff, to recover damages from the Wilmington Malleable Iron Company for personal injuries alleged to have been caused by the negligence of said company. We decline to give you binding instructions, as requested by the defendant in its first prayer.

It is claimed by the plaintiff that the defendant was negligent in furnishing him with an unsafe and dangerous machine, known as a "jointer," or "buzz planer," to be used in connection with the work he was employed and directed to do as a pattern maker; that in using such machine, on the 1st day of January 1904, at the works or shops of the defendant in this city, for the purpose of planing the surface of a board and taking therefrom an eighth of an inch cut, the board was kicked or thrown from his hands, resulting in his right hand being plunged into the revolving knives of the machine, and the fingers and thumb thereof

cut, torn, and lacerated to such an extent that some of the fingers had to be amputated; and that by reason of such injuries he suffered much pain, and also suffered great loss on account of his alleged inability to follow his trade of pattern maker. The plaintiff has averred in his declaration that said machine was unsafe in several respects, but has offered evidence in support of only two of these averments: (1) That the machine was unsafe because the power used to revolve the knives was applied by such a negligent and careless arrangement of the shafts or gearing that the knives revolved at a dangerously slow rate of speed; and (2) because the rear table of the jointer machine, between which and the front or receiving table the knives revolved, was fixed at a lower plane or level than the periphery or highest point reached by the knives in their revolutions. The plaintiff claims that the board he was working upon at the time of the accident was kicked or thrown from his hands, and his injuries happened because of one or the other of such unsafe features of the machine, or a combination of the two; that it was the duty of the master, and not of the servant, to see that said rear table, called by the plaintiff the "permanent table," was at all times in a safe condition and properly adjusted; and that the risk was not such as the servant assumed in the discharge of his duties.

The defendant company claims that the said machine was reasonably safe for the work it was designed to do and adapted to the purpose of the employment. It denies that the company was guilty of any negligence that caused the injury to the plaintiff, and insists that, if there was any such negligence, it was the negligence of the plaintiff, and not of the defendant. The company contends that the plaintiff made application to it for work as a journeyman pattern maker—that is, a pattern maker who had fully served his apprenticeship at such trade and was an experienced and competent workman in the line of the employment he sought; that he was employed as such experienced workman; and that, if the rear table was too low at the time he undertook the work which resulted in his injury, it was his duty to adjust it before commencing his work, and if the knives of the machine revolved dangerously slow, the danger from such cause was not latent and concealed, but patent, apparent, and obvious, and, if the plaintiff saw fit to use the machine under such conditions, he assumed the risk and cannot hold the company liable.

The relation existing between the defendant company and the plaintiff at the time of the accident was that of master and servant, and the primary duty imposed upon the defendant towards the plaintiff in the course of his employment by reason of this relation was to furnish him reasonably safe tools, machinery, and appliances with which to work. The tools or machinery used need not

be of the safest, best, nor of the most improved kind. It is sufficient if they are reasonably safe and adapted to the purpose of the employment. If the master fails to observe this rule of law, and injury results to his servant from such failure, he becomes liable therefor on the ground of negligence. In the performance of this duty the master must use all reasonable care and prudence for the safety of the servant, having regard to the character of the work to be performed. Such care must be in proportion to the danger of the employment. The servant has the right to rely on the master for the performance of this duty, without inquiry on his part. The servant assumes no risk whatever as to such primary duty at the time he enters upon his employment; but he does assume all the ordinary risks incident to the employment, such as are patent, seen, and known, or which may be seen and known by the ordinary use of his senses, and he is required to exercise due care and caution in the course of his employment to avoid dangers and injuries, for the master, having performed the primary duties required of him, is not an insurer of the safety of his servants. It is the duty of the master, also, to maintain said tools and machinery in a reasonably safe condition so long as they are continued in use. If the master knows, or by the use of due diligence, might know, that the tools and machinery in use in his business are not reasonably safe, it is negligence on his part to fail to remedy and correct the defects of which he has knowledge, or by the exercise of due diligence he might discover. Notice to the foreman or person in general charge of the business that the machinery is unsafe or dangerous is, in law, notice to the master; and after the receipt of such notice it would be negligence on the part of the master to fail to make such machinery reasonably safe for the servant in his employment. But in such case the master would not be liable if the servant having knowledge of such defect continued to use such machinery. The servant must always exercise such care and caution to avoid danger as the circumstances reasonably require, and, the greater the danger, the greater the care, diligence, and caution required.

This action is based, as you have doubtless observed, upon negligence; and it will be for you to determine whether it was the negligence of the defendant company that caused the injuries of the plaintiff, because, if they were caused by the plaintiff himself, or by any one else, or from any cause other than the negligence of the defendant, the plaintiff cannot recover. The burden of proving that it was the negligence of the defendant that caused the injury is cast upon the plaintiff, and it must be proved to your satisfaction by a preponderance of the evidence. Negligence is never presumed, and this applies as well to contributory negligence on the part of the plaintiff; and the

burden of proving it rests upon the defendant, if it does not appear from the testimony produced by the plaintiff. The burden of proving that the servant had knowledge before the accident of the particular defect in the machine likewise rests upon the defendant, unless the jury believe from the testimony of the plaintiff, or other evidence in the case, including the knowledge and experience of the plaintiff, that he knew or should have known of the defect complained of.

Negligence, in legal contemplation, is the want of ordinary care; that is, the want of such care as an ordinarily prudent and careful man would use under similar circumstances. It has been defined to be the failure to observe, for the protection of the interests of another person, that degree of care, precaution, and vigilance which the circumstances justly demand, whereby such other suffers injury. To entitle the plaintiff to recover in this action, he must satisfy you that the injuries complained of resulted from the negligence of the defendant, and that at the time of the accident he was himself without any fault which proximately entered into and contributed to his injuries; for if at that time his own negligence proximately contributed to his injuries it would defeat his right to recover. Even though the defendant company may have been negligent on its part, yet if the negligence of the plaintiff contributed to and entered into the accident at the time of the injury, your verdict should be for the defendant, as the plaintiff in such case would be guilty of contributory negligence. Where there is contributory negligence, the law will not attempt to measure the proportion of blame or negligence to be attributed to each party. Where a servant engages himself in any specific work, such as operating the jointer in this case, the master has the right to presume that the servant has the knowledge, experience, and skill necessary for the performance of the work so undertaken in a reasonably safe and proper manner, in the absence of knowledge to the contrary; and especially has the master the right so to presume if the servant represents or holds himself out to the employer as experienced in such work. And when a person enters upon a dangerous employment, he not only assumes the risk ordinarily incident thereto, but also the risk he may incur from manifest peril. Many employments are necessarily dangerous. Some are very dangerous. The servant, however, assumes all the ordinary and usual risks of his employment, and also all the risks which he knows or ought to know, however dangerous the employment may be which he engages in. He is presumed to have contracted with reference to all the hazards and risks incident to the employment.

In determining whether the plaintiff at the time of the accident was exercising due care and caution, the jury should consider all the

testimony in the case having any bearing upon the point. You have heard the testimony in this case. You are the exclusive judges of the credibility of witnesses and of the weight and value of the evidence. You should decide this case according to the evidence you have heard from the witnesses and the law as the court has stated it to you. If you believe from the testimony that the machine upon which the plaintiff was working at the time he was injured was not then reasonably safe for doing the work in which he was engaged, and that the injuries were caused thereby, and shall also believe that the plaintiff did not know that the machine was unsafe, and by the reasonable use of his senses could not have known it, and that the plaintiff was not guilty of any negligence that proximately contributed to such injuries, your verdict should be in favor of the plaintiff and for such sum as will reasonably compensate him for his injuries, including therein his loss of time and wages, his pain and suffering in the past and such as may come to him in the future, and for such permanent injuries as he may have sustained, as well as any pecuniary loss from disability to earn a living in the future, as the result of such accident. If you believe that such machine was reasonably safe for the work in which the plaintiff was engaged, your verdict should be in favor of the defendant; and even though you should be satisfied that said machine was not reasonably safe, yet if you believe that the injuries to the plaintiff were caused by the position of the rear table, and such position of the table was known, or in the exercise of due care should have been known to him, or that it was his duty to properly adjust the same, your verdict should be for the defendant. And, further, if you believe that said injuries were caused by the slow speed of the knives of the machine, and that the plaintiff knew, or in the exercise of due care should have known, that the knives were revolving at a dangerously slow rate of speed, or if you believe that the injuries to the plaintiff were proximately caused by his own negligence, your verdict should be for the defendant.

Verdict for the defendant.

(6 Pen. 247)

STATE v. SOUTHARD.

(Court of General Sessions of Delaware. Sussex. April 4, 1907.)

1. HIGHWAYS — OFFENSES — OBSTRUCTION — TIME.

In a prosecution for obstructing a public road, in violation of Rev. Code 1852, as amended 1893, p. 501, c. 60, § 31, the time of the alleged commission of the offense, as laid in the indictment, is not material; but a conviction may be sustained by proof of the commission of the offense at any other time within two years immediately preceding the finding of the indictment.

2. SAME — FENCES.

The placing of a fence across a public road constitutes an obstruction, within Rev. Code

1852, as amended 1893, p. 501, c. 60, § 31, declaring that, if any person shall obstruct a public road, he shall be deemed guilty of a misdemeanor.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Highways, § 444.]

3. SAME — USE.

Rev. Code 1852, as amended 1893, p. 491, c. 60, § 1, declares that all public roads previously laid out as such, or made by lawful authority, or which have been used as such and maintained at the public charge for 20 years, are public highways. *Held*, that such section was descriptive of public highways existing at the time of its enactment, and did not apply to others subsequently laid out by public authority or private dedication.

4. DEDICATION — REVOCATION.

Where land in controversy had been dedicated to the public for a street by the filing of a plat, a subsequent deed of the dedicator to adjoining property, the description of which included the street, did not constitute a revocation of the dedication, but operated to convey to the grantees the land used as a street, subject to the public easement.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Dedication, §§ 77-79.]

5. HIGHWAYS — FORM OF USE — EFFECT.

Where land was dedicated to the public as a highway, the fact that persons used it for the storage of logs to be loaded on cars was immaterial to the existence of the highway.

6. DEDICATION — PLATS — RECORD.

Where the owner of land laid out a town and put a plan of the streets on record, or used such plan for the purpose of selling the lots, such acts constituted evidence of an actual dedication of the streets to public use according to the plan.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Dedication, §§ 84, 89, 83.]

7. SAME — EVIDENCE — SUFFICIENCY — HIGHWAYS — RIGHT OF USE.

The public acquires a right to the use of a highway over private property by any use of it as a road or street, accompanied by proof of actual dedication, which may be established by the making of improvements on land by the owner tending to carry out the plan of a plat on which lots and streets are designated, such as building fences along the lines of the streets as shown by the plat.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Dedication, §§ 15-19, 85.]

Harry C. Southard was indicted for obstructing a public road. Verdict, guilty.

Argued before SPRUANCE and BOYCE, JJ.

Robert H. Richards, Atty. Gen., for the State. Robert C. White and A. F. Polk, for defendant.

BOYCE, J. (charging jury). Harry C. Southard, the defendant, is charged with obstructing a public road, known as "Front Street," or "Railroad Avenue," in Lincoln City, this county, on the 1st day of March, A. D. 1906, and on divers other days, by erecting a fence in said road or street between Johnson and Greenley avenues. The indictment was found under chapter 60, § 31, p. 501, Rev. Code 1852, as amended 1893, which reads: "If any person shall encroach upon, obstruct, or commit any nuisance in a public road," etc., he shall be deemed gull-

ty of a misdemeanor. The time of the alleged commission of the offense, as laid in the indictment, is not material. If the offense was committed at any other time within two years immediately before the finding of the indictment, it is sufficient. The placing of a fence across a public road or street would constitute an obstruction within the meaning of the act of assembly.

Counsel for the defendant contended that, in order to make said Front street or Railroad avenue a public highway, it should appear that the street had not only been used as a public highway, but likewise that it had been maintained by the public for 20 years, and in support of the contention cited section 1, c. 60, p. 491, of the Code of 1852, amended in 1893, which reads: "All public roads, causeways and bridges heretofore laid out as such, or made by lawful authority, or which have been used as such, and maintained at the public charge for twenty years, are declared to be common highways." Lincoln City has been laid out since the framing of this act, and we do not think the act is applicable to this case. This section was intended to be descriptive of public highways existing at the time of its enactment, and it is not inclusive of other public highways subsequently laid out by public authority or by private dedication. The act was intended to be a modification of the common law respecting roads claimed to be such by the indulgence of landowners, so as to prevent forfeitures of their lands. In the case of *Johnson v. Stayton*, 5 Har. (Del.) 448, the court said: "So many neighborhood roads exist by the indulgence of landowners, that the common law was considered harsh in reference to forfeiting private land by indulgence, and the Legislature has required that such a road shall have not only been used, but maintained and kept up by the public for 20 years, to make it a public road against the owner of the land."

In this case the state claims that Abel S. Small, having previously purchased the site of Lincoln City, laid it out, and caused a plot or plan of it to be made between January and April, 1865; that in the plot he designated lots, streets, avenues, etc.; that among them was the said Front street or railroad avenue, which extended north and south, of the width of 100 feet on each side of the center line of the right of way of the railroad company, the said right of way having at that time been graded, but the road was not completed for some two years thereafter; that Small made an actual dedication of said street, as thus laid out, to public use. It is further claimed that he sold lots according to the said plot or plan, which he caused to be exhibited; that on the 10th day of July, A. D. 1865, he and his wife, by their deed of bargain and sale, conveyed to James J. Jackson all that certain lot, situate at Lincoln, lying south of the Main avenue, running east and west, and extending east to

the railroad, adjoining lands, etc., containing, etc., he having first erected a house thereon and placed a fence on the line between the said lot and the westerly side of said street, and likewise planted shade trees along the said fence; that the fence was rebuilt in 1879, and remained from then until a year or more ago, when, being in a dilapidated condition, the defendant, the present owner of the lot, removed it, and also cut down the shade trees. It is further claimed that the said street has, from the time it was so laid out and plotted, down to the time the defendant, as it is alleged, placed a fence across it, been used as a public street by the public uninterruptedly, so far as Small, or any one claiming under him, is concerned.

Counsel for the defendant contend that the deed from Small and wife to Jackson, conveying as it did all the land described therein east to the railroad, operated as a revocation of the dedication of said street, as evidenced by said plot. We say to you that, if you find that there was an actual dedication of the said street to public use by Small before the sale of the lot to Jackson, then the latter took title to said lot to the line of the railroad subject to such dedication, and the title of the defendant thereto is affected thereby.

Counsel for the defendant also contended that the said street was not and had not been used as a public highway, but simply from license for the purpose of a log yard, and as a convenience to load and unload freight on the railroad cars. We say to you, if you find that there was a dedication of said street as a public highway by Small, then the fact that persons used it, rightfully or wrongfully, for the purpose of dropping logs, etc., to be loaded in the cars, is immaterial.

This court has held that no particular form or ceremony is necessary in the dedication of land to public use, if the assent of the owner of the land be shown, and the fact of use for the purposes intended by the dedication. If the owner of land lay out a town and put a plot or plan of the streets on record, or exhibit such plot and sell lots, it is evidence of actual dedication of such streets to public use according to the plan. *State v. Reybold*, 5 Har. (Del.) 484.

The public acquires a right to the use of a road or street over private property by any use of it as a road or street, accompanied by proof of actual dedication; and the making of improvements on land by the owner, tending to carry out the plan of a plot, on which are designated lots and streets, such as building fences along the lines of the streets as shown by such plot, are evidences of an actual dedication. If you find that Small did make an actual dedication of said Front street or Railroad avenue to public use as a street, and likewise the use of it by the public as a street, or if you find that prior to the erection of said fence across the street by the defendant the public had, so far as Small

or any one claiming through him was concerned, an uninterrupted use of the street as a public highway for 20 years, then such use is evidence of a grant or dedication, and in either case your verdict should be guilty; otherwise, your verdict should be not guilty.

Verdict, guilty.

(6 Pen. 267)

ROGERS v. ROGERS.

(Superior Court of Delaware. Sussex. April 10, 1907.)

1. EVIDENCE—DEPOSITIONS—ISSUES IN EQUITY CASE.

Where, in a suit in equity, issues were sent to the Superior Court for trial to a jury, depositions of witnesses examined and cross-examined before an examiner in the Chancery Court in the same case were admissible on the trial of such issues; the deponents having since died.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 2401-2405.]

2. BILLS AND NOTES—SEALED INSTRUMENT—CONSIDERATION.

An obligation under seal for the payment of money imports a valid consideration, until the contrary appears from the evidence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 7, Bills and Notes, §§ 1652-1662.]

3. GIFTS—VALIDITY.

A person of sound mind and lawful age may dispose of his property by gift, or bind himself by an instrument under seal to pay money to another, without any valuable consideration.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 24, Gifts, § 11.]

4. EVIDENCE—PRESUMPTIONS—BURDEN OF PROOF—SANITY.

Every person is presumed in law to be of sound mind until the contrary is shown, and the burden of showing unsoundness rests on the person asserting it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 83; vol. 27, Insane Persons, §§ 4-6.]

5. BILLS AND NOTES—CAPACITY—PRIOR INCAPACITY.

On an issue as to intestate's soundness of mind at the time he executed a note under seal, evidence as to his mental capacity before and after the time he executed such instrument was material only for the purpose of aiding the jury to determine his mental condition at the time the instrument was made.

6. SAME.

Where it is shown that the maker of a note under seal was mentally unsound and incapable of transacting business by reason of old age before he executed the same, the jury may presume that such unsoundness continued and existed at the time the instrument was executed, unless the contrary is shown.

7. SAME—EXECUTION—CAPACITY.

Where the maker of a note under seal at the time he executed it was capable of exercising thought, reflection, and judgment, knew what he was doing, and had sufficient memory and understanding to comprehend the nature and character of the transaction, he was capable of making the note.

8. FRAUD—PRESUMPTIONS—EVIDENCE.

That defendant fraudulently prevailed on his father by deceit to execute and deliver to him the note in controversy, while inferable from facts proved, if sufficient to warrant such inference, could not be presumed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Fraud, §§ 46, 47.]

9. EVIDENCE—WEIGHT.

Where the testimony is conflicting, it is the duty of the jury to reconcile it if they can; otherwise, to accept that part they deem worthy of credit and reject the balance, having due regard to the opportunity and capacity of the witnesses to know that of which they speak and their apparent fairness or bias.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 2437.]

Suit by William F. Rogers, as administrator of William E. Rogers, deceased, against Nathaniel H. Rogers, deceased. On issues sent to the Superior Court by the chancellor for trial to a jury.

Argued before SPRUANCE and BOYCE, JJ.

Charles W. Cullen, for plaintiff. Charles S. Richards and Frank M. Jones, for defendant.

At the trial plaintiff's counsel asked to be allowed to read to the jury the depositions of two witnesses, examined and cross-examined before the examiner in the Court of Chancery in the same case in which the issue had been framed; said deponents having since died. Counsel for defendant objected, contending that the trial of the issue was a trial *de novo*, that counsel were entitled to re-examine and cross-examine the witnesses, and that the jury should see and hear the witnesses in the case.

THE COURT having first suggested to defendant's counsel that he examine the said depositions with a view of ascertaining whether or not the testimony was relevant, and there being no objection on the latter ground, the objection was overruled, and the depositions were read to the jury.

SPRUANCE, J. (charging jury). You have been impaneled and sworn to try two issues or questions of fact, which have been sent by the Chancellor to this court for trial by a jury. These issues or questions are as follows:

"First. Whether William E. Rogers was of sound and disposing mind and memory and competent to transact business at the time he executed and delivered to his son, Nathaniel H. Rogers, the judgment note or single bill, bearing date the 23d day of July, A. D. 1896, for the real debt of \$1,590, payable on the 1st day of August, A. D. 1896.

"Second. Whether Nathaniel H. Rogers fraudulently prevailed upon his father, by deception and deceit, to execute and deliver to him his judgment note or single bill under seal for the sum of \$1,590, bearing date the 23d day of July, A. D. 1896, payable with interest, on or before August 1, A. D. 1896."

The attesting witness to said judgment note has testified that it was executed in his presence by the said William E. Rogers on the day of its date, July 23, 1896; and the fact that the said William E. Rogers did at

some time execute said note is not denied. The complainant, William F. Rogers, the administrator of his father, the said William E. Rogers, contends (1) that at the time the said note was executed by the said William E. Rogers he was not indebted to his son, Nathaniel H. Rogers, in any sum whatever, and that there was no consideration for said note; (2) that at the time the said note was executed by the said William E. Rogers his mind was so weakened and impaired by old age that he was not competent to transact business of this character; (3) that the said Nathaniel H. Rogers "fraudulently prevailed upon his father by deception and deceit to execute and deliver to him" the said note. The respondent, Nathaniel H. Rogers, contends that on and before the said 23d day of July, 1896, there were unsettled accounts or claims between him and his father; that his father owed him for carpenter work on a house built in 1893, and also for board for several years prior to the said 23d of July, 1896; that he and his father on that day had a settlement, upon which it was ascertained that the balance due to him from his father was \$1,590; and that thereupon his father executed and delivered to him the said note for said balance. The respondent further contends that at the time of the execution of said note his father was of sound and disposing mind and memory, and competent to transact business of that character; and he denies that he fraudulently prevailed upon his father, by deception and deceit, to execute and deliver to him the said note.

An obligation under seal for the payment of money imports or implies a valid consideration until the contrary appears from the evidence. A man of sound mind and of lawful age has the right to dispose of his property as he chooses. He may give it away, or he may bind himself by an instrument under seal to pay money to another, without any valuable consideration whatever. Every person is presumed in law to be of sound mind until the contrary is shown, and the burden of showing unsoundness of mind rests upon the person asserting such unsoundness.

You are to determine from the evidence whether the said William E. Rogers was of sound and disposing mind and memory, and competent to transact business of the character in question, at the time he executed and delivered said note, and the evidence which you have heard as to his soundness or unsoundness of mind and his capacity or incapacity to transact business before or after the time he executed said note is material only in aiding you to determine his mental condition at the time he executed the said note. If you are satisfied from the evidence that the said William E. Rogers, by reason of old age, was mentally unsound and incapable of transacting business before his execution of said note, you may presume that such unsoundness and incapacity continued until, and existed at the time when, said note was ex-

ecuted, unless the contrary is shown by the evidence to your satisfaction. If the said William E. Rogers, at the time he executed the said note, was capable of exercising thought, reflection, and judgment, knew what he was doing and had sufficient memory and understanding to comprehend the nature and character of the transaction, he was capable of making the said note.

In determining the question whether the said Nathaniel H. Rogers fraudulently prevailed upon his father, by deception and deceit, to execute and deliver the said note, you should bear in mind that fraud is not to be presumed, but must be proved by the party alleging it. Such fraud, however, may be inferred from facts proved, if such facts are sufficient to warrant such inference. To warrant you in finding that Nathaniel H. Rogers fraudulently prevailed upon his father to execute the said note, you should be satisfied from the evidence that such influence was fraudulent, and that it was such that the said William E. Rogers was too weak to resist, such as deprived him of his free will, and such as substituted the will of Nathaniel H. Rogers for the will of his father. The degree of influence necessary to control the mind of William E. Rogers would depend upon his mental and physical condition at the time. A man mentally and physically weak would be more susceptible to such influence than one who is mentally and physically strong.

Where, as in this case, the testimony is conflicting, you should reconcile it if you can; but, if you cannot do so, you should accept as true that part of it which you deem worthy of credit, and reject that part of it which you deem unworthy of credit, having due regard to the opportunity and capacity of the witnesses to know of that of which they speak, and their apparent fairness or bias. Your verdict should be given as you find the preponderance or greater weight of the evidence.

Verdict: As to the first issue, "No;" as to the second issue, "Yes."

(102 Me. 168)

STONE v. McLAIN et al.

(Supreme Judicial Court of Maine. Dec. 1, 1906.)

WILLS—CONSTRUCTION—TRUST—TERMINATION OF TRUST—"FAMILY."

The fourth clause of the will of Mary J. Stewart is as follows: "All the rest and remainder of my estate of every kind real and personal I give and devise to said Gertrude, Martha and Cara, wives of my sons Charles, Edward and Rowland; and to my son Harry D. Stewart, equally share and share alike, and I wish that the indebtedness of Thos. J. Stewart & Co. shall be deducted from the shares and property so given and devised to the said wives of my sons Charles, Edward and Rowland, and that the property so as above given to said three wives of my three sons be for the education of their children and the support of their families respectively—and I enjoin them to so use and expend it." Since the death of the

testatrix, Rowland has deceased leaving no children, and the wife Cara has married.

Held, that she is no longer a member of the family of Rowland; that by said clause she took the entire beneficial interest in the estate devised to her subject to a particular and temporary charge; that the purposes of the trust created upon said estate have been accomplished and the trust thereby terminated; and that said estate should be paid and turned over to her. See *Clifford v. Stewart*, 49 Atl. 52, 95 Me. 88.

(Official.)

Case Reported from Supreme Judicial Court, Penobscot County, in Equity.

Bill by Horace A. Stone, trustee, against Cara A. McLain and others. Case reported. Decree rendered.

Bill in equity brought by the plaintiff as trustee under the last will and testament of Mary M. Stewart, late of Bangor, deceased, asking the court to determine whether or not a certain trust created under the last will and testament of said deceased had been terminated, and, if so to determine, to whom the property held by the plaintiff as trustee under said last will and testament should be paid and turned over.

The facts are stated in the bill, which, omitting formal parts, is as follows:

"Horace A. Stone, of Bangor, in said Penobscot county, a trustee under the will of Mary M. Stewart, as hereinafter set forth, complains against Cara A. McLain, of Cannon City, in Fremont county, state of Colorado, and against Milton S. Clifford, of said Bangor, administrator with the will annexed of Mary M. Stewart, late of said Bangor, deceased, and against Arthur Chapin, of said Bangor, administrator of the estate of Rowland W. Stewart, late of said Bangor, deceased, and against Charles M. Stewart, Gertrude H. Stewart, and Harry D. Stewart, all of said Bangor and against Edward L. Stewart and Martha J. Stewart, both of Sault Ste. Marie in the province of Ontario in the Dominion of Canada, and says:

"First. Mary M. Stewart, formerly of said Bangor, died on the 14th day of August, A. D. 1899, and left a last will and testament, which was duly approved and allowed by the probate court of said Penobscot county at the December term of said court, A. D. 1899, and said Milton S. Clifford was duly appointed and qualified as administrator with said will annexed of said Mary M. Stewart. A copy of said will is attached, marked 'Exhibit A,' and made a part of this bill as though fully recited at length herein.

"Second. By the fourth paragraph of said will the testatrix, said Mary M. Stewart, made bequests in the following terms, viz: 'IV. All the rest and remainder of my estate of every kind real and personal I give and devise to said Gertrude, Martha and Cara, wives of my sons Charles, Edward and Rowland and to my son Harry D. Stewart equally, share and share alike, and I wish that the indebtedness of Thos. J. Stewart & Co. shall be deducted from the shares and prop-

erty so given and devised to the said wives of my sons, Charles, Edward and Rowland, and that the property so as above given to said three wives of my three sons be for the education of their children and the support of their families respectively—and I enjoin upon them so as to use and expend it.'

"Third. The defendants Charles M. Stewart, Edward L. Stewart and Harry D. Stewart, together with Rowland W. Stewart (then alive but since deceased), were the only children and heirs at law of said Mary M. Stewart, and all said children survived her. The defendant Cara A. McLain was at the date of the death of Mary M. Stewart the wife of Rowland W. Stewart, and Gertrude H. Stewart was then and still is the wife of Charles M. Stewart and Martha J. Stewart was then and still is the wife of Edward L. Stewart.

"Fourth. As to the property bequeathed to said Cara, wife of Rowland W. Stewart, by the fourth paragraph of the aforesaid will the testatrix, said Mary M. Stewart, created a trust, and said Cara having failed to qualify as trustee upon due proceedings had at the September term of the probate court for said Penobscot county, A. D. 1901, said Rowland W. Stewart was appointed and thereupon qualified as trustee to administer said trust, and received the trust funds and administered them till his death, but no part of the principal or interest of said fund was paid out to or for any cestui que trust.

"Fifth. Said Rowland W. Stewart died the 29th day of September, A. D. 1904, and upon due proceedings had your complainant, Horace A. Stone, was appointed trustee in the place of said Rowland W. Stewart at the April term of said probate court, A. D. 1906, and has qualified as said trustee, and received the trust funds, and is now such trustee.

"Sixth. At the December term of said probate court, A. D. 1904, said Arthur Chapin was appointed administrator of the estate of said Rowland W. Stewart, and has qualified as such and is now such administrator.

"Seventh. For more than three years next previous to the death of said Rowland W. Stewart said Rowland W. Stewart and said Cara did not live together as husband and wife, and since the death of said Rowland W. said Cara A. has married, and her name is now Cara A. McLain. No children were ever born to said Rowland W. Stewart, and his wife, Cara, and the defendants Charles M. Stewart, Edward L. Stewart, and Harry D. Stewart are the sole heirs of said Rowland W. Stewart.

"Eighth. All the property in the hands of the trustee is personal property, and aggregates about eleven thousand dollars (\$11,000).

"Wherefore your complainant prays this honorable court to determine and decree:

"(1) If said trust has been terminated, and, if the court shall so decree, then to determine and decree to whom the property held by

your complainant as trustee as aforesaid shall be paid and turned over.

"2. If the said trust has not been terminated, then to determine and decree to whom he shall pay and turn over the trust property in his hands, and how much thereof, principal and income, and at what times.

"That the complainant may have such other and further relief as the nature of the case may require."

The defendants in their answers admitted the allegations of fact in the bill to be true, and joined in the prayer of the bill.

The will of the said Mary M. Stewart, which is dated July 8, 1899, and was by her duly executed, is as follows:

"I, Mary M. Stewart, of Bangor, Maine, do make this my last will.

"I. I give to my grandchildren one thousand \$1,000 to each one and I wish and direct that this shall be devoted and expended for their education.

"II. I give to each of my sons one hundred dollars, to each (\$100).

"III. I give to Gertrude H. Stewart, wife of Charles my son, to Martha J. Stewart, wife of Edward my son, to Georgina Stewart, wife of Harry, my son, and Cara A. wife of Rowland, my son—being the wives of my four sons, all the furniture, plate, books, in my homestead equally, share and share alike except certain pieces and articles a memorandum of which to be made by me or under my direction which I wish given to the persons named in said memorandum and I enjoin and request my sons and their wives to deliver the articles to the persons as named in said memorandum, which I will have made by Mrs. Eva Parker.

"IV. All the rest and remainder of my estate of every kind real and personal I give and devise to said Gertrude, Martha, and Cara wives of my sons, Charles, Edward and Rowland and to my son Harry D. Stewart equally, share and share alike, and I wish that the indebtedness of Thos. J. Stewart & Co. shall be deducted from the shares and property so given and devised to the said wives of my sons, Charles, Edward and Rowland, and that the property so as above given to said three wives of my three sons be for the education of their children and the support of their families respectively—and I enjoin upon them so to use and expend it.

"I hope that my sons and their wives shall in the settlement of my estate and the division of the property given them act harmoniously and without dissension or dispute.

"I appoint my four sons Edward, Charles, Rowland and Harry and Charles P. Stetson executors under this will and it is my wish that they should not be required to give bonds."

Hearing on the matter was had before the justice of the first instance at the February rules, 1906, where it was agreed that the cause should be reported to the law court

"upon bill and answers for determination thereof."

Argued before WHITEHOUSE, SAVAGE, POWERS, PEABODY, and SPEAR, JJ.

F. H. Appleton and Hugh R. Chaplin, for plaintiff. E. C. Ryder, for defendants Cara A. McLain and Arthur Chapin. Milton S. Clifford, pro se. Terrence B. Towle and Matthew Laughlin, for defendants Charles M. Stewart, Edward L. Stewart, Harry D. Stewart, Gertrude H. Stewart, and Martha Stewart:

POWERS, J. Bill in equity to construe the following clause of the will of Mary J. Stewart:

"IV. All the rest and residue of my estate of every kind real and personal I give and devise to said Gertrude, Martha and Cara, wives of my sons Charles, Edward and Rowland, and to my son Harry D. Stewart, equally share and share alike, and I wish that the indebtedness of Thos. J. Stewart & Co. shall be deducted from the shares and property so given and devised to the said wives of my sons Charles, Edward and Rowland, and that the property so as above given to said three wives of my three sons be for the education of their children and the support of their families, respectively—and I enjoin upon them so to use and expend it."

This clause was before the court for construction in Clifford v. Stewart, 95 Me. 38, 49 Atl. 52, and it was there held "that the testatrix intended to create a trust upon the estate bequeathed to the wives to the extent of securing the education of her sons' children and the support of their families." The court, however, at that time declined to declare what persons had any interest under this clause of the will, and the extent, amount, and nature of such interest. Since then Rowland has deceased leaving no children, and his wife, the defendant Cara A. McLain, has remarried. She never qualified as trustee, but her husband, Rowland, was appointed by the probate court to administer said trust, and since his decease the plaintiff, Stone, was appointed and qualified as trustee in his place. The trust fund in the hands of the trustee amounts to about \$11,000 in personal property. No part of the fund has been paid out to or for any cestui que trust.

This court is asked to determine:

(1) If said trust has been terminated, and, if this court shall so decree, then to determine and decree to whom the property held by said trustee shall be paid and turned over.

(2) If the said trust has not been terminated, then to determine and decree to whom he shall pay and turn over the trust property in his hands, and how much thereof, principal and income, and at what times.

At the date of the will the three sons, Charles, Edward, and Rowland, constituting the firm of Thomas J. Stewart & Sons, were

indebted to the creditors of the firm in a sum exceeding its assets in addition to some \$10,000 owed by them to the testatrix. What she desired was the education of the children, the support of the families of the sons, to save the legacies from their creditors, and that the residue of the estate should be divided equally and fairly among all her sons. To the son who was solvent she gave one-fourth, and to the wives of the other three sons she gave each one-fourth, charged with a trust to the extent of securing the education of the children of the three sons and the support of their families. Thus much appears and is settled in the case above cited.

We find nothing in the will or in the surrounding circumstances to show that the testatrix used the word "family" in any other than its common, ordinary sense, of those who live under the same roof and form the fireside of the father or head of the family. At the date of the will the family of Rowland consisted of his wife and himself. After his death and the remarriage of his wife, his family as a family ceased to exist. The trust was for the education of the children and for the support of the individuals composing the respective families named, so long as they remained members thereof. The testatrix in the case of the children could not have intended that they should not only have been educated and supported while members of the family, but should also be supported from the trust fund during their entire lives, even after they had married, become the heads of their own families, living apart and no longer constituting a part of the families of her sons. Yet such would be the result in case the support provided was for the individuals who at one time composed the family without regard to whether they continued to remain members of it. In the case of Cara, the wife of Rowland, having become by her marriage a member of the family of Mr. McLain, she can no longer be held to be a member of Rowland's family entitled to support out of the trust fund. In the closely analogous case of *Bradlee v. Andrews*, 137 Mass. 50, a trust was created for the support, maintenance, and comfort of the testator's son and three daughters, and their families. It is there said: "The word 'family,' as used by the testator, would include his son and daughters, together with their respective children so long as they should live together and form a portion of the same household, or from their tender years be entitled to be treated as its members. It would also include the wife of the son, if she continued to reside with, or be entitled to support from, him."

The purposes of the trust created upon the estate given to Cara having been accomplished, the trust itself is thereby terminated, and the only question remaining is to whom shall the trustee turn over the property. The answer depends upon whether the property was given to Cara for a particular purpose

with no intent that she should take any beneficial interest, or whether the intention was to give her a valuable interest, subject to a particular and temporary charge. It is claimed for Cara that she took the entire beneficial interest, and by the other defendants that she took no beneficial interest, and that, the trust declared having terminated, there is a resulting trust in favor of the heirs at law of the testatrix. The intention of the testatrix must govern. We have already seen that the testatrix had in mind certain things—that her sons should share equally in the benefits of her estate, and that in the cases of Charles, Edward, and Rowland their shares should not be subjected to the claims of their creditors. She could not accomplish both these purposes by giving the property directly to these three sons. She therefore gave it to their wives, subject to a trust for the education of their children and the support of their families. If the share so given to Cara is to be regarded as intestate property, a large portion might be subjected to the claims of the creditors of Charles, Edward, and Rowland, contrary to the testatrix's intention. The testatrix divided the residuum of her property into four equal shares. The entire interest in one of these shares was given to her son Harry D. Stewart, and we cannot escape the conviction that it was the intention of the testatrix to give to each of the wives of the other three sons the entire interest in one of these shares subject to the trust imposed upon it for the benefit of the children and families of their husbands. As is said in *Stewart v. Clifford*: "No reason is shown why she wished to discriminate in favor of one and against the other three, and the will strongly shows that she did not." A construction which gives a beneficial interest to the wives is more in harmony with her intention to make equal division of the benefits among the sons. The legatees were daughters-in-law, and the relation in which they stood to the testatrix is of some weight in determining whether it was intended that they should take a beneficial interest. In the fourth clause of the will the wives of the sons take the property by the same words in which the entire interest in the share of Harry D. Stewart is given to him, and then, after providing that the indebtedness of each son to the testatrix is to be deducted from the shares "so given and devised to the wives of my said sons," the trust is created upon those shares. Immediately after clause 4 of the will, she again says that she hopes that her sons and their wives in the settlement of her estate "and the division of the property given them" will act in harmony and without dispute or dissension.

Our conclusion is that it was the intention of the testatrix that the wives of her sons Charles, Edward, and Rowland should take the entire beneficial interest in the shares of the residuum given and devised to each of

them severally, subject to the trust created upon it, and that the property held by the plaintiff as trustee should be paid and turned over to Cara A. McLain.

Decree accordingly.

(102 Me. 163)

ALLEN v. FOSS.

(Supreme Judicial Court of Maine. Nov. 30, 1906.)

1. QUIETING TITLE—RIGHT OF ACTION—TITLE OF PLAINTIFF.

Whether a devisee, before probate of will, can make petition to quiet title to real estate, under Rev. St. c. 106, §§ 47, 48, and after probate, maintain the petition—*quære*.

2. SAME—TITLE OF DEFENDANT.

A petition to quiet title to real estate, under Rev. St. c. 106, §§ 47, 48, cannot be maintained, when it appears that the respondent, after the filing of the petition, conveyed his interest in the real estate, or was adjudged a bankrupt.

(Official.)

Exceptions from Supreme Judicial Court, Washington County.

Petition by Caroline G. Allen against Walter H. Foss. To a ruling denying the petition, plaintiff excepts. Overruled.

Petition brought under the provisions of Rev. St. c. 106, §§ 47, 48, to quiet title to real estate, to wit, "certain undivided portions of Cross Island in the town of Cutler," Washington county.

This petition was duly filed in the Supreme Judicial Court, Washington county, and notice thereon was ordered and service thereof was made as provided by Rev. St. c. 106, § 47. The defendant then duly appeared and filed his answer to the petition.

The matter was heard before the presiding justice at the January term, 1906, of said Supreme Judicial Court. After hearing had, the presiding justice ruled that the proceedings could not be maintained and denied the petition. To this ruling the plaintiff excepted.

All the material facts are stated in the opinion.

Argued before EMERY, WHITEHOUSE, SAVAGE, PEABODY, and SPEAR, JJ.

C. B. & E. C. Donworth and H. H. Gray, for plaintiff. William R. Pattangall, for defendant.

SAVAGE, J. Petition to quiet title to real estate, brought under Rev. St. c. 106, §§ 47, 48. The petitioner is the residuary devisee under the will of Richard Allen, who died November 9, 1904. His will was presented for probate at the December term, 1904, of the probate court, in Washington county. Notice was ordered on the petition returnable at the February term, 1905. The probate court admitted the will to probate March 1, 1905. An appeal was taken to the Supreme Court of probate, and at the October term,

1905, of that court, the will was finally admitted to probate.

In the meantime the pending petition was filed December 29, 1904. Notice was ordered thereon returnable at the April term, 1905, of the Supreme Judicial Court. At the January term, 1905, counsel for the respondent entered their appearance upon the docket. On March 27, 1905, the petitioner caused a certificate, setting forth the name of the parties, the date of the petition and the filing thereof, and a description of the real estate in litigation, and signed by the clerk of court, to be recorded in the registry of deeds for Washington county. Personal service of the petition was made on the respondent April 11, 1905. On the same day, but whether before or after the service of the petition does not appear, the premises were conveyed by the respondent to one McRae. On September 28, 1905, the respondent was duly adjudged a bankrupt, on petition of his creditors, and a trustee of his estate was appointed, who duly qualified. The respondent in his answer alleges that he does not claim any estate in the premises, because of the conveyance and the adjudication in bankruptcy.

Upon these facts the court below ruled that the proceedings could not be maintained, and denied the petition. We think the ruling was right. It will be noticed that, when the petition was filed, the will of Richard Allen had just been filed in the probate court. The required notice had not then been given, and the will had not been admitted to probate. It was not admitted until several months had elapsed, and after litigation. It is, of course, true that, when the will was finally probated, the petitioner's title to the premises related back to the death of the testator. She was entitled to the rents and profits from that time. Her deed in the meantime would have conveyed the estate, subject only to the right of the executor to take and sell it to meet the necessities of administration. And it might turn out after the administration that there was no residuum, and hence that the petitioner for that reason took no title, or at best a defeasible one.

But whatever may have been her rights after final probate of the will a different question is presented, when the petitioner, before probate, begins a proceeding of this kind against an outsider to try titles. Her title was not contingent in law, but it was not established in fact. It required proof. It might be sustained; it might not be. While it may be that so far as *prima facie* title is concerned, the petitioner might have maintained a real action commenced when this petition was and tried after the will was probated. (*Rand v. Hubbard*, 4 Metc. [Mass.] 261), it may not necessarily follow that the petition can be maintained. The decree, if for the petitioner, must be based upon a finding "that the allegations in the

petition are true" (Rev. St. c. 106, § 48); that is, the allegations of facts as existing at the date of the petition. And we think that it may well be doubted whether by the statute it was intended to permit one to begin proceedings to quiet title, when his own title is not established, and cannot be without further legal procedure, and perhaps litigation. It would seem hardly just to permit one to hale a supposed adversary into court, when at the time he is unable to prove his own title, and may never be able to prove it. The will may turn out to be void because of the mental incapacity of the testator, or because of the undue influence of some one, or because of the want of essentials in execution. Nor is there need that an expectant devisee should thus seek to protect his estate. The statute (Rev. St. c. 66, §§ 33, 34) provides for the appointment of special administrators, when there is a delay in the granting letters testamentary, and such administrators may preserve and protect all the estate, both real and personal, and for that purpose may maintain suits. *Libby v. Cobb*, 78 Me. 471.

But, without considering this point further, we think there is in another respect an insuperable obstacle to the maintenance of this petition. The respondent has conveyed his interests in the estate. He has also been adjudged a bankrupt. He disclaims any existing estate. The prayer of the petitioner is that the respondent show cause why he should not bring an action to try his title. If the petition is sustained, the decree will be that he bring an appropriate action, which in this case is a real action. He will be directed to become a demandant of the premises. The suit when commenced must have all the ordinary incidents of a real action both in pleading and proof. The allegations and proof must be made with reference to the date of the writ. *Berry v. Whitaker*, 58 Me. 422. It will not be sufficient for the demandant to allege and prove that he was seised at some time within 20 years, but is so seised no longer. The judgment must inevitably be for the defendant. The real cause of litigation will not be tried. Nothing will be decided except that the demandant conveyed before suit was brought. This proceeding is purely a statutory one, and the statute authorizing it does not reach a situation like this. It is *casus omissus*. Whether it would be wise and practicable so to amend the statute as to provide for such a case is not for the court to say.

It is urged, however, that the present proceedings is *lis pendens* as to the purchaser, and that he will be bound by the judgment, if suit is brought, or barred, if the order of the court is disobeyed.

But we do not think so. If the respondent should attempt to obey an order of court to bring an action, the purchaser, even assuming the common-law doctrine of *lis pendens*

to apply, would be bound by the judgment only so far as the litigated issues might be decided, which in this case would be that the demandant had parted with title before suit. That question would lie at the threshold of the case, and must necessarily be the only one decided. The judgment, therefore, would not bind the purchaser upon the question now sought to be litigated. If the present respondent had commenced a real action before he conveyed and the case had been tried upon the general issue, no doubt his grantee would have been bound by the judgment. *Berry v. Whitaker*, 58 Me. 422. But even then, by proper plea and proof, the defendant might have obtained judgment on the ground that the demandant had conveyed. *Rowell v. Hayden*, 40 Me. 582, and the real cause of the controversy would have remained.

Now, since an attempt on the part of the respondent to obey an order to try title would be entirely futile, the order itself would be nugatory, and it would seem that no one's rights would be affected. It would be a strange thing, indeed, for a court to make an order which cannot be executed, when the only purpose for making it is to apply the doctrine of *lis pendens* to a third party, in case of failure to obey. We do not think the statute (Rev. St. c. 106, §§ 47, 48) contemplates such a proceeding.

Exceptions overruled.

(102 Me. 132)

DAVIS v. POLAND.

(Supreme Judicial Court of Maine. Dec. 4, 1906.)

1. TENANCY IN COMMON—TRESPASS BY CO-TENANT—RIGHT OF ACTION.

It is a general rule of law that a tenant in common cannot maintain an action of trespass *quare clausum* against his co-tenant; but to this general rule there are exceptions, and it is well settled in this state that, where the acts of a tenant in common amount to a destruction of the common property or effect a practical destruction of the interest of his co-tenant therein, the injured owner has a right of action, and under such circumstances trespass *quare clausum* is the proper remedy.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Tenancy in Common, § 103.]

2. SAME—EVIDENCE.

The plaintiff was an owner in common of certain premises and in possession of the same. The defendant, her co-tenant, entered the premises and removed from the dwelling house on said premises certain doors and windows, without the consent of the plaintiff. In the absence of any circumstances indicating that this act of the defendant was done in good faith, as for the purpose of making repairs, it must be held that the removal of the doors and windows by the defendant constituted such a destruction of the common property as would make the defendant a trespasser.

3. DAMAGES—INJURY TO PROPERTY—DUTY TO REDUCE.

But the damages awarded to the plaintiff in this case are held to be excessive. There is little or no evidence of injuries beyond that occasioned to the dwelling house by the removal of doors and windows. These could have been re-

placed in a few days at comparatively small cost. The jury must have considered, in estimating the damages, the actual suffering of the plaintiff, who seems to have voluntarily assumed the discomfort of living in the house for several weeks before attempting to make the necessary repairs. She is not entitled to recover for damages which she might have avoided by reasonable diligence. Therefore, unless the plaintiff remits all of the verdict in excess of \$100, the motion for a new trial will be sustained. See *Davis v. Poland*, 59 Atl. 520, 99 Me. 435.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Damages, §§ 124-127.]

(Official.)

Exceptions from Supreme Judicial Court, Knox County.

Action by Alwilda S. Davis against Luther O. Poland. Verdict for plaintiff, and defendant moves for a new trial and excepts. Motion sustained, unless remittitur is filed.

The declaration in the plaintiff's writ is as follows:

"In a plea of trespass, for that on the 8th day of March, A. D. 1904, said defendant, with force and arms, broke and entered the dwelling house of the plaintiff, situate in Cushing aforesaid, on land bounded and described as follows, viz.: Northerly by land formerly owned by James Smith and land of Francis Bradford; easterly by Maple Juice Pond; southerly by land of Almond Condon; and westerly by Friendship river—and then and there thereby greatly disturbed and put in fear the plaintiff in the quiet possession of the said premises and dwelling house, and then and there with great noise and violence broke into said dwelling house, and broke down the doors and split the window stops thereof and unhung the said doors and then and there broke the finish and took out 11 of the windows thereof and took and carried the same away, and did then and there tear down the lace and other curtains and goods connected therewith and trampled the same under his feet, and then and there broke, damaged, and spoiled other goods and furniture therein, and did then and there threaten and put in great fear the plaintiff.

"Whereby and by reason of taking down the doors and tearing out of the windows as aforesaid and carrying the same away the plaintiff has been ever since subjected to great indignity and fear and been exposed to and endured great suffering from cold and exposure, and whereby and by reason whereof she has been made sick and her health greatly injured and otherwise shocked and injured to the damage of the plaintiff (as she says) the sum of \$1,000."

Plea, the general issue, with the following brief statement:

"And, for brief statement of special matter of defense to be used under the general issue pleaded, the said defendant further says that at the time the said acts of trespass charged against him in plaintiff's writ he was and ever since has been the sole owner in

fee of the premises therein described, and his entry upon said premises and all acts committed by him were by force and virtue of said ownership, and that the possession by said plaintiff was unlawful and in violation of his said ownership of the same, and this the defendant is ready to verify."

The case was first tried at the April term, 1904, of the Supreme Judicial Court, Knox county. Verdict for plaintiff. This verdict was set aside by the law court. See *Davis v. Poland*, 99 Me. 845, 59 Atl. 520. At the time of the second trial, the defendant was allowed to amend his brief statement by adding the following thereto: "And that such acts as he did there the defendant had a right to do as the owner in any event of an interest in fee in said premises."

The case was again tried. At the conclusion of the testimony the presiding justice instructed the jury that trespass *quare clausum* was the proper form of action, and upon the evidence directed a verdict for the plaintiff. Thereupon the jury returned a verdict for the plaintiff for \$317.12. The defendant excepted to the aforesaid rulings and directions, and also filed a motion for a new trial.

Argued before EMERY, WHITEHOUSE, POWERS, PEABODY, and SPEAR, JJ.

D. N. Mortland, for plaintiff. Frank B. Miller and Arthur S. Littlefield, for defendant.

PEABODY, J. This is an action of trespass *quare clausum*, and comes before the law court upon motion of the defendant for a new trial, and exceptions to the charge of the presiding justice directing a verdict for the plaintiff.

The plaintiff was in possession and occupation of a dwelling house, claiming as owner of two-thirds in common. The defendant, admitted to be the owner of one-third in common, and claiming title to the whole, entered and removed certain of the doors and windows, for the evident purpose of rendering the house untenable, and thus compelling the plaintiff to vacate. The plaintiff remained in occupation of the premises, and brought this action to recover damages for injury to the freehold and to her other property, and for her own physical discomfort resulting from the acts of the defendant.

The presiding justice, finding that the evidence conclusively established the plaintiff's title to two-thirds in common of the premises, and that the defendant's acts were of such a character that they amounted to trespass as against his co-tenant, directed a verdict for the plaintiff.

Two questions are raised by both motion and exceptions—whether trespass *quare clausum* can be maintained by one tenant in common against another for such injuries to the freehold as are shown in this case, and whether ownership in common existed

between the parties to this action. It is a general rule of law that a tenant in common cannot maintain an action of trespass *quare clausum* against his co-tenant. *Porter v. Hooper*, 13 Me. 25, 29 Am. Dec. 480; *Maddox v. Goddard*, 15 Me. 218, 33 Am. Dec. 604; *Symonds v. Harris*, 51 Me. 14, 81 Am. Dec. 553. But to this general rule there are exceptions, and it is well settled in this state that, where the acts of a tenant in common amount to a destruction of the common property or effect a practical destruction of the interest of his co-tenant therein, the injured owner has a right of action, and under these circumstances trespass *quare clausum* is the proper remedy. *Symonds v. Harris*, *supra*; *Blanchard v. Baker*, 8 Me. 270, 23 Am. Dec. 504. Assuming that the plaintiff was an owner in common and in possession of the premises, the removal of the doors and windows, without her consent, in the absence of any circumstances indicating that the act was done in good faith, as for the purpose of making repairs, must be held to constitute such a destruction of the common property as would make the defendant a trespasser. But the defendant claimed, in justification of his acts, that the plaintiff had lost title to her two-thirds share by the foreclosure of a mortgage given by her to secure the performance of a bond for the support and burial of her father, Edward Crouse. The evidence was not sufficient to show a breach of the conditions of this bond, and therefore the foreclosure of the mortgage was not effective to divest the plaintiff of her title, and the defendant, succeeding by purchase to the rights of the mortgagee, acquired no title thereby. *Davis v. Poland*, 99 Me. 345, 59 Atl. 520. The presiding justice was accordingly right in directing a verdict for the plaintiff.

The motion raises the further question whether the damages are excessive. The jury were correctly instructed by the presiding justice that they should allow the plaintiff two-thirds the value of the windows and doors removed, and two-thirds of any other damages done to the house, also whatever injuries were done to her furniture, and something for what pain and suffering she sustained; but that in estimating this element of damages they were to allow only for a reasonable time required for making the repairs to the house. There is little or no evidence of injuries beyond that occasioned to the dwelling house by the removal of doors and windows. These, without doubt, could have been replaced within a few days, and at comparatively small cost. The jury have considered, as bearing upon the question of damages, the actual suffering of the plaintiff, who seems to have voluntarily assumed the discomfort of living in the house for several weeks in the early spring before attempting to make the necessary repairs. She is not entitled, and the presiding justice so instructed the jury, to recover for damages which she

might have avoided by reasonable diligence. *Fitzpatrick v. B. & M. Railroad*, 84 Me. 33, 24 Atl. 432; *Grindle v. Eastern Express Co.*, 67 Me. 317, 24 Am. Rep. 31; *Miller v. Mariner's Church*, 7 Me. 51, 20 Am. Dec. 341; 8 Am. & Eng. Enc. 605; 13 Cyc. 71, 78.

The verdict in excess of \$100 may be remitted within 30 days after the certificate of this decision is filed; otherwise, the entry will be motion sustained.

Exceptions overruled.

(103 Me. 176)

FROMMEL et al. v. FOSS.

(Supreme Judicial Court of Maine. Dec. 8, 1906.)

1. SALES—TIME FOR DELIVERY—NOTICE BY BUYER.

The defendant, in February, 1904, agreed to deliver to the plaintiffs 10 car loads of potatoes at New York City in the following March, and by another contract in the same February to deliver 10 other cars of potatoes at New York City in the same month of March, and by another contract in the same February, to deliver 15 other cars of potatoes to the plaintiffs at New York City in the same March or the 1st of April, and in the last case, the proposition accepted was to deliver in March, if the defendant could get the cars. All the potatoes were to be shipped on the plaintiffs' orders, and were to be shipped from Aroostook county. Up to the night of March 24th, only five cars had been ordered out by the plaintiffs, and they, one each day from March 22d. On March 24th, the defendant refused to perform the contracts, for the alleged reason that the plaintiffs had not seasonably ordered out the potatoes.

Held, that, the plaintiffs having the option when to order out the potatoes, it was their duty seasonably to order the shipments, so that the defendant could secure the cars, prepare them for use, load them, and deliver in New York, in the month of March, all the potatoes contracted to be delivered there under the first two contracts.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales, § 357.]

2. SAME—PERFORMANCE—ORDERING DELIVERY.

The evidence shows clearly that the plaintiffs failed to order out the potatoes in season for the defendant to obtain cars, fit them, load them, and deliver the potatoes in New York in March; it being practically impossible to do so in the time after March 24th.

3. SAME—TIME FOR DELIVERY—ESSENCE OF CONTRACT.

Time was of the essence of the contract, and that the defendant had a right to be permitted to deliver the potatoes in March, and as the plaintiffs failed to afford him the opportunity so to do, he was justified in refusing to perform.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales, § 263.]

4. SAME.

As to the third contract, the defendant had the right to deliver the potatoes at New York in March, if cars could be had. He was entitled to have an opportunity seasonably to try to secure cars. It was the duty of the plaintiffs, by giving orders seasonably, to afford the defendant a reasonable opportunity to perform his contract in March, or to endeavor to perform it. This they failed to do.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales, § 357.]

5. SAME—RESCISSON BY SELLER—GROUNDS.

By reason of the failure of the plaintiffs to perform their clear duty, the defendant was jus-

tified in canceling the orders, and, upon the evidence, the action for the breaches of the three contracts by way of nondelivery is not sustainable.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales, § 263.]

(Official.)

On Motion from Supreme Judicial Court, Aroostook County.

Action by one Frommel and others against one Foss. Verdict for plaintiffs, and defendant moves for new trial. Motion sustained.

Action of assumpsit to recover damages for the alleged breaches of contracts to deliver to the plaintiffs certain car loads of potatoes which they had bought of the defendant. The plaintiffs were potato dealers in New York City, and the defendant was a potato dealer in Aroostook county, Me.

The declaration in the plaintiffs' writ contained three counts, which are as follows:

"In a plea of the case for that on the 17th day of February, 1904, at Ft. Fairfield, in said county, to wit, at Caribou, in consideration that the plaintiffs, at the special request of the said defendant, had bought of the said defendant a large quantity of potatoes, to wit, ten car loads of the variety known as 'Green Mountain' potatoes, at the price of \$2.70 per barrel for each and every barrel thereof, to be delivered at New York City, in the state of New York, in March, then next ensuing, and had then and there promised said defendant to accept all the said potatoes, and to pay for the same at the price aforesaid, the said defendant then and there promised and agreed to deliver the said ten car loads of 'Green Mountain' potatoes to the plaintiffs at New York City in the state of New York, in March, then next ensuing, at the price of \$2.70 per barrel, as aforesaid, and the plaintiffs aver that they, on the 24th day of March, 1904, requested the said defendant to deliver them the said ten car loads of potatoes, as aforesaid, in accordance with the terms of his agreement, and the plaintiffs aver that they were then and there ready and willing to accept the said potatoes and pay for the same in accordance with the terms of their agreement, and were then and there ready, and offered, to accept and receive the said potatoes from the said defendant. Yet the said defendant then and there refused, and though often thereto requested has ever since neglected and refused to deliver to the said plaintiffs the said potatoes in accordance with the terms of his said agreement.

"Also for that on the 18th day of February, 1904, at Ft. Fairfield, in said county, to wit, at Caribou, in consideration that the plaintiffs, at the special request of the said defendant, had bought of the said defendant a large quantity of potatoes, to wit, five cars of the variety known as 'Green Mountain' potatoes, and five cars of the variety known

as 'Hebron' potatoes, at the price of \$2.70 per barrel for each and every barrel thereof, to be delivered at New York City, in the state of New York, in March, then next ensuing, and had then and there promised said defendant to accept all the said potatoes, and to pay for the same at the price aforesaid, the said defendant then and there promised and agreed to deliver the said five cars of 'Green Mountain' potatoes and the said five cars of 'Hebron' potatoes to the plaintiffs at New York City, in the state of New York, in March, then next ensuing, at the price of \$2.70 per barrel, as aforesaid, and the plaintiffs aver that they, on the 24th day of March, 1904, requested the said defendant to deliver them the said ten car loads of potatoes, as aforesaid, in accordance with the terms of his agreement, and the plaintiffs aver that they were then and there ready and willing to accept the said potatoes and pay for the same in accordance with the terms of their said agreement, and were then and there ready, and offered, to receive the said potatoes from the said defendant. Yet the said defendant then and there refused, and though often thereto requested has ever since neglected and refused to deliver to the said plaintiffs the said potatoes in accordance with the terms of his said agreement.

"Also, for that on the 24th day of February, 1904, at Ft. Fairfield, in said county, to wit, at Caribou, in consideration that the plaintiffs, at the special request of the said defendant, had bought of the said defendant a large quantity of potatoes, to wit, ten car loads of the variety known as 'Green Mountain' potatoes, and five car loads of the variety known as 'Hebron' potatoes, at the price of \$2.75 per barrel for each and every barrel thereof, to be delivered at New York City, in the state of New York, in March, or the 1st of April, then next ensuing, and had then and there promised said defendant to accept all the said potatoes, and to pay for the same at the price aforesaid, the said defendant then and there promised and agreed to deliver the said ten cars of 'Green Mountain' potatoes and the said five cars of 'Hebron' potatoes to the plaintiffs, at New York City, in the state of New York, in March, or the 1st of April, then next ensuing, at the price of \$2.75 per barrel, as aforesaid, and the plaintiffs aver that they, on the 24th day of March, 1904, requested the said defendant to deliver them the said fifteen car loads of potatoes, as aforesaid, in accordance with the terms of his agreement, and the plaintiffs aver that they were then and there ready and willing to accept the said potatoes, and pay for the same in accordance with the terms of their said agreement, and were then and there ready, and offered, to receive the said potatoes from the said defendant. Yet the said defendant then and there refused, and though often thereto requested has ever since neglected and refused to deliver to the said plaintiffs the said

potatoes in accordance with the terms of his said agreement."

Writ dated November 22, 1904. Ad damnum, \$5,000. Plea, the general issue. Tried at the December term, 1905, of the Supreme Judicial Court, Aroostook county. Verdict for plaintiffs for \$2,550. The defendant then filed a general motion for a new trial. Also, during the progress of the trial, the defendant took exceptions to several rulings made by the presiding justice. These exceptions were not considered by the law court.

The case appears in the opinion.

Argued before WISWELL, C. J., and WHITEHOUSE, SAVAGE, POWERS, and SPEAR, JJ.

Herbert T. Powers and Powers & Archibald, for plaintiffs. Ira G. Hersey and Geo. H. Smith, for defendant.

SAVAGE, J. Action for alleged breaches of contracts to deliver to the plaintiffs certain car loads of potatoes which they had bought of the defendant. The plaintiffs were potato dealers in New York City, and the defendant was a potato dealer in Aroostook county, in this state, whence the potatoes were to be shipped. The plaintiffs in three counts in their declaration set up breaches, by way of failure of delivery, of three separate contracts of the defendant, all made on different days in February, 1904; one "to deliver the said ten car loads of Green Mountain potatoes to the plaintiffs at New York City, * * * in March, then next ensuing, at the price of \$2.70 per barrel"; another, "to deliver the said five cars of Green Mountain potatoes, and the said five cars of Hebron potatoes, to the plaintiffs, at New York City, * * * in March, then next ensuing, at the price of \$2.70 per barrel"; and, a third, "to deliver the said ten cars of Green Mountain potatoes and the said five cars of Hebron potatoes to the plaintiffs at New York City, * * * in March or the 1st of April, then next ensuing, at the price of \$2.75 per barrel." The defendant, not denying the various negotiations which are relied upon by the plaintiffs, and which were all by letter or telegram, claims that the effect of the negotiations was to merge the several negotiations into a single contract for the sale and delivery to the plaintiffs, at New York, in March, 1904, of 35 cars of potatoes of the varieties named, to be shipped from Aroostook county in this state. In any event, the defendant did not ship any potatoes covered by these contracts to the plaintiffs, but on March 24, 1904, by telegram, canceled the plaintiffs' orders, and refused to deliver the potatoes. The verdict was for the plaintiffs for substantially all the damages claimed under all three counts, and the case comes before us on the defendant's motion for a new trial and exceptions.

We think the evidence sustains the plaintiffs' claim that there were three separate and independent contracts, although, after they

were made, the parties in some respects treated them as one. The defense is that the contract called for a delivery of the potatoes at New York in the month of March, 1904; that the plaintiffs had the option of saying when the potatoes should be shipped, and therefore that it was their duty to order the shipments seasonably, so that the defendant could procure cars, prepare them for use, and ship the potatoes to New York within the time limited by the contracts. And the defendant says that the plaintiffs failed seasonably to order the shipments of the potatoes, so that he could perform his contract within the month, and that, inasmuch as the time of the delivery was of the essence of the contracts, he was excused from the performance of the contracts, and was justified in canceling them. In other words, he says that the plaintiffs' failure or neglect to order the shipments seasonably put it out of his power to perform his contracts.

Although the correspondence is silent on the point, the parties do not disagree that under the contract, perhaps from the very nature of the business, the shipments were to be at the option of the plaintiffs. They had the right to say when the defendant should ship the potatoes. This being so, it was the duty of the plaintiffs to direct the shipments in season for the defendant to perform his part of the contract within the time limited. He had a right to insist on being permitted to perform his contract within that time. We think time was of the essence of the contract. The defendant could not be driven to postpone the delivery of the potatoes, and thereby be subject to loss by decay or waste, or, as the case shows, to the burden of taxes which would be assessed against him, if the potatoes were in his possession in this state on or after April 1st. A very large part of the testimony in the case is devoted to an attempt to show that, when potatoes in Aroostook county are sold in quantities of 20 cars or over for delivery in a month certain, it is the custom of buyers to order shipments early in that month, so that the delivery may be accomplished during the month; but the custom shown does not affect the question here. It is no more than the law annexes to contracts like these. The law says the shipments must be ordered seasonably, so as to enable the shipper to deliver seasonably. We think the custom goes no further.

The parties do not agree as to whether, under the contracts, the defendant was bound to deliver at New York, or only to ship from Maine, within the time stated, and, as this difference may be of importance, we will consider the contracts in detail. The terms, "March delivery" and "March shipment" appear in the correspondence somewhat indiscriminately. February 15, 1904, the defendant wired the plaintiffs at New York: "Will sell five cars Mountains [Green Mountain potatoes] in sacks of hundred sixty-eight pounds two seventy March delivery." To this, on the

following day, the plaintiffs replied: "If your price is delivered will buy five or ten cars. Advise quick." And the defendant answered on the same day: "Will deliver ten cars at price quoted." This completed the contract, though on the same day the plaintiffs by letter confirmed their order "for March delivery." We think this was a contract for a delivery of the cars, in March, at New York.

On February 17, 1904, the defendant wired the plaintiffs: "Can you use ten cars more Hebrons and Mountains two seventy-five prompt or March delivery?" On the next day, as appears by a confirmatory letter of that date, the plaintiffs wired the defendant that they "would buy five each Mountains and Hebrons, March delivery, at \$2.70." On the same day the defendant answered by wire: "Will book five cars Hebrons, five cars Mountains two seventy March delivery. Will ship the car of Bliss two seventy-five." This acceptance completed the second contract, now in question. The reference to the car of Bliss potatoes grew out of another order, not important here. The next day, February 19th, the plaintiffs wired the defendant: "We have your confirmation of Hebrons, Mountains, March shipment and Bliss spot shipment." And, in a letter of the same date to the defendant, they wrote: "We have your wire confirming five each Hebrons and Mountains at \$2.70 for March delivery and one Bliss quick shipment at \$2.85. We now have you booked for 15 cars Mountains at \$2.70, and 5 Hebrons at \$2.70 all for March shipment delivered New York, also one car Bliss at \$2.85 for spot shipment. These goods are to come forward via Metropolitan Line to New York any time during March, as ordered out by us." Independently of the letter, which was confirmatory of the telegraphic contract, we think that the term "March delivery" in the contract, read in the light of existing conditions, should be held to contemplate a delivery in March at New York. That the plaintiffs so understood it appears clearly from their letter. Though in the letter they used the term "March shipment," as well as "March delivery," their understanding is apparent when they say: "These goods are to come * * * to New York any time in March, as ordered out by us." Furthermore, in their declaration, the plaintiffs allege that the defendant agreed to deliver the potatoes "to the plaintiffs at New York City * * * in March, then next ensuing." The plaintiffs' interpretation of the contract at that time was undoubtedly the true one.

Before we consider the rights and duties of the parties under these two contracts, it will be expedient to state the third: On February 22, 1904, the plaintiffs wired the defendant: "How many more Hebrons and Mountains will you book as for March shipment? * * * " The defendant replied the same day: "Will ship ten cars more

Mountains five Hebrons March or first of April delivery. March if can get cars. You advance me one thousand to secure them with at two seventy-five." Two days later the plaintiffs answered by wire: "Would not make any advances on potatoes would buy fifteen cars offered if you care to book." In answer to this, the defendant wired on the same day: "Will book the fifteen cars as per wire without any advance order, order out as early in March as possible on account of shortage of cars." This completed the third contract, and we think it contemplated that the potatoes should be delivered in New York in March, if the defendant could get the necessary cars; otherwise, in the early part of April.

Then followed a correspondence concerning all the potatoes. In a letter from the defendant to the plaintiffs, dated February 24th, confirming his last telegram, and recapitulating the amounts of all the contracts, "making 85 cars in all," the defendant wrote: "Please order them out as early in March as possible, for it is hard to get cars just as you want them." On February 27th the plaintiffs wrote the defendant "in regard to the 35 cars booked for us in all for March shipment," as follows: "In ordering them out, we will arrange so as to make it convenient for us both." March 4th the defendant wrote: "About when do you think you will order out some Hebrons or Mountains?" And the plaintiffs replied, March 8th, saying that: "It will be the end of this month before we expect to order any out. At the present our market is well supplied, and we do not expect to order any goods out until conditions here show some improvement." Again, March 9th, the defendant inquired, "When do you think you will order out some Hebrons or Mountains?" and the plaintiffs replied, March 11th: "We expect to wire you about the middle of next week to begin to let them come forward. We will advise you the early part of the week by wire just when to start shipping." March 17th the defendant wired: "Must start loading your stock at once will have to pay 5 cents per sack tax April 1st." March 18th the plaintiffs wrote: "We expect to begin to have our goods come forward next week. Just as soon as we hear from you what you mean by five cents tax after April 1st, we will know just what to advise you." March 19th the defendant wired: "Have four cars loaded wire shipping directions." March 22d, three days later, the plaintiffs wrote: "We have wired you to let five cars come forward, one each day. On such of our potatoes as we may not order out for March, whatever the correct expense on them may be, we naturally will have to stand our part of it." On March 23d the defendant wired, "Had to move stock and have sold," and on March 24th, "Shall cancel your orders see letter." Later on the same day the plaintiffs wired: "We will not

allow cancellation as we accepted your tax proposition on all potatoes not shipped in March, also ordered out four cars you had ready. You can ship as many as you can balance of March."

Now, with reference to the first two contracts, we have already stated that the defendant was found to deliver the potatoes at New York in March, and had the right to so deliver them, and that the plaintiffs, though they had the option as to when cars should be ordered out, were bound to exercise that option reasonably, with reference to the defendant's rights; and that it was their duty to exercise their option in season for the defendant to have delivered the potatoes at New York in March. It was their duty to take into account the situation, at least so far as it existed between them and the defendant, for they knew that he had 35 cars to deliver, 20 in March in any event, and 15 more if cars could be obtained. The case shows that cars in such numbers are not easily obtained, and that the plaintiffs were advised of his difficulty. It also appears that cars, when secured, had to be specially fitted or lined by carpenters, at that season of the year, to prevent the potatoes from the cold, and, of course they had to be loaded. The procuring, fitting, and loading of the cars naturally had to be done after they were "ordered out," and it also appears that the average time of carriage from Aroostook county to New York is about eight days.

In view of these circumstances, we think that the delay of the plaintiffs in ordering out cars was clearly unreasonable. Up to the night of March 24th, only five cars had been ordered out, and they, one each day from March 22d, the time when the order was received. The evidence is satisfactory that it was, after March 24th, practically impossible then to procure, fit, and load cars, and ship the potatoes to New York in that month. It was not possible for the defendant then to perform even the first two contracts for 20 cars. The fault of the plaintiffs, then, having rendered it impossible for the defendant to perform these two contracts according to their terms, we think he was justified in declining to perform. *Rhoades v. Cotton*, 90 Me. 453, 38 Atl. 367. Nor is the result affected by the fact, as claimed by the plaintiffs, that they accepted the defendant's "tax proposition." The truth is the defendant made no "tax proposition." He merely called attention to the fact that there would be a liability to tax April 1st, and this was done to induce the plaintiffs to greater diligence in ordering. The willingness of the plaintiffs to pay the tax could not affect the defendant's rights, which he appears neither to have abandoned nor waived.

Under the third contract, the defendant was under the duty, and had the right, to deliver the potatoes at New York in March, if cars could be had; otherwise, in April.

But March was to be preferred, if cars could be had. It was plainly for the defendant's interest to perform the contract in March, if he could. We think he should have had an opportunity seasonably to try to secure cars. It is manifestly impracticable to try to secure cars from a railroad company, especially when cars are scarce, unless the shipper knows approximately when they will be needed; and in this case the defendant could not know, until he received orders from the plaintiffs. He had no reasonable opportunity to perform his contract in March, or to endeavor to perform it. That he had no opportunity was the fault of the plaintiffs. Accordingly, as in the case of the other contracts, he was justified in declining to perform.

Upon these principles, the verdict is clearly wrong, and must be set aside. It is unnecessary to consider the exceptions.

Motion for a new trial sustained.

Verdict set aside.

(108 Me. 213)

BERRY v. BOSTON & M. R. CO.

(Supreme Judicial Court of Maine. Dec. 12, 1906.)

RAILROADS — ACCIDENT AT CROSSING — EVIDENCE — NEGLIGENCE.

The plaintiff was traveling along a highway when she discovered extending nearly across the road a locomotive upon the defendant's railroad. Finding that the locomotive obstructed so much of the highway that it was not safe to pass, she stopped some 400 feet from the crossing, and remained there 10 or 15 minutes. She then moved up to within 315 feet of the crossing, and there waited a period of 15 or 20 minutes more, until the sound of the whistle frightened her horse, and caused the injury of which she complains. The horse was frightened by four blasts of the whistle sounded for the purpose of calling in the flagman, who had been sent out to flag the trains.

Held, (1) that, under the circumstances of this case, it was not negligence on the part of the defendant to blow its whistle according to the rules and regulations governing the operation of its trains; (2) that the injuries received were due to one of that class of accidents that happen without the fault of any one.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, §§ 968-971.]

(Official.)

On Motion from Supreme Judicial Court, York County.

Action by Mavilla Berry against the Boston & Maine Railroad Company. Verdict for plaintiff. Motion for new trial by defendant. Sustained.

Action on the case to recover damages for personal injuries sustained by the plaintiff and caused by the alleged negligence of the defendant.

The plaintiff, accompanied by her mother, was driving a horse attached to a sleigh along a highway in the town of Buxton, which crosses the defendant's tracks at grade near the station known as "Saco River." As the plaintiff approached the crossing, she discovered extending nearly across the high-

way a locomotive and several freight cars upon the defendant's railroad, which made it unsafe to pass. The plaintiff stopped some 400 feet from the crossing and remained there 10 or 15 minutes. She then moved up to within 815 feet of the crossing, and there waited a period of 15 or 20 minutes more, until the whistle of the locomotive was sounded four times to call in the flagman who had been sent out to protect the train while doing its work of shifting cars and handling freight. The horse, being frightened by the whistle, suddenly whirled around and threw the plaintiff and her mother from the sleigh, and caused the injuries to the plaintiff for which this suit was brought.

Verdict for plaintiff for \$3,386.33. The defendant then filed a general motion for a new trial.

Argued before WISWELL, C. J., and EMERY, SAVAGE, POWERS, PEABODY, and SPEAR, JJ.

Cleaves, Waterhouse & Emery, for plaintiff. George C. Yeaton, for defendant.

SPEAR, J. This is an action in which the plaintiff recovered against the Boston & Maine Railroad a verdict for the sum of \$3,386.33 for the alleged negligence on the part of the servants of said defendant in sounding several unusual blasts of a steam whistle from one of the defendant's engines, thereby frightening the plaintiff's horse and causing the accident which produced the injuries complained of. The case comes here on motion by the defendant to set the verdict aside as against the law and the evidence.

The plaintiff's own statement of the case is as follows: "The evidence fairly warranted the jury in concluding that the plaintiff was lawfully upon this public way upon the day in question; that she was a woman of mature years, who had quite a portion of her life been accustomed to the use of horses and for quite a period of time had used this particular horse; that this animal was under all ordinary circumstances well behaved, having been used about the cars under all sorts of conditions and circumstances, driven through the public streets of Biddeford and Saco where the electric cars and automobiles were constantly being met with, and the experience of herself and others with this animal warranted her and them in concluding that this animal was unusually safe. The harness and sleigh were also in the best of condition. She therefore had no reason to expect that this horse would be frightened by any ordinary noises such as might be expected in a public highway of our county and of this particular vicinity. Traveling with her mother along a highway in Buxton, she sees extending nearly across the track a locomotive upon the defendant's railroad. Finding that this locomotive obstructed so much of the highway that it was not safe to pass, this plaintiff stopped some 400 feet away from

the crossing and remained there 10 or 15 minutes, at the end of which time she moved up to within 815 feet of the crossing, and there waited a period of 15 or 20 minutes, until the sound of the whistles frightened her horse and the accident and injury to the plaintiff resulted. Now, then, was this plaintiff negligent?"

Under the plaintiff's own statement of facts and the evidence in the case, it may be equally pertinent to ask: Was this defendant negligent? We have read the testimony carefully, and our conclusion is that neither party could properly be charged with negligence. On the evidence it appears that the plaintiff had perfect confidence in the kindness and training of her horse to withstand any of the motions or noises connected with the operation of a train 815 feet or 105 yards away. Such reliance did she place in his docility that she had moved 100 feet nearer the train than she had been.

If she thus manifested such confidence in the disposition of her horse as to move up nearer the train and there wait for its passage over the crossing, we see no reason why, assuming that the engineer saw the team, he should not have been privileged to place equal confidence in the reliability of the horse with respect to fear of the cars. We think he should, and had a right to infer, even if he saw the plaintiff all the time, that she had halted her horse within what she regarded as a perfectly safe distance from the train. One hundred and five yards is a long distance, and we are unprepared to say that a railroad shall be held to anticipate that the blowing of a whistle, in accordance with the rules and regulations of operating its road, is calculated to frighten an apparently kind and well-behaved horse at such a distance.

Our conclusion is that the injuries received were due to one of that class of accidents that happen without the fault of any one. The plaintiff undoubtedly thought her horse was kind and all right to stand where he was without danger of fright from any of the ordinary noises in the operation of trains. The engineer, if he saw the horse, had a right to presume the same, and, in view of this right, did what he was authorized to do by the rules and regulations of the road, blew the regular steam whistle attached to his engine four times to call in the man who had been sent out to flag the train. Taking into consideration the distance of the plaintiff from the train, we are unable to discover any negligence in this act.

Some evidence has been introduced tending to show that this particular whistle was sharper and shriller than some other whistles used upon the engines operated upon this road; but, even if this is so, it does not charge the act of the defendant with negligence. It cannot be expected that the various whistles used upon different engines would produce a tone of the same pitch, quality, and loudness.

Some would necessarily be sharper and some louder than others; but unless there is such a distinction in the volume of sound as to clearly differentiate this particular whistle from the others, thereby making it a cause of fright which could not have been reasonably anticipated by the plaintiff, the defendant cannot be charged with negligence for using it. That some whistles are louder than others is a matter of common knowledge, of which the plaintiff was as much bound to take notice as the defendant itself. The evidence in this case does not show that the whistle which frightened the horse was of the unusual character above described. Some witnesses say that it was a shrill whistle, but they had heard others as shrill. Others that it was sharp. But no one testifies that the whistle was sharper than they had ever heard before. The usual whistle does not attract attention, but four distinct blasts would, and, by way of contrast, naturally convey the impression of sharpness.

There must be some limit with respect to the relative location of a train and team where the train can blow its whistle without danger of incurring legal liability for frightening the team. While ordinarily this distance is a question of fact, taken in connection with all the other circumstances, we are nevertheless convinced that 315 feet, considered in connection with the circumstances in this case, is beyond the limit. We are unable to find any decided case that holds a railroad responsible for frightening a horse by the blowing of a whistle at such a distance or approximating it. We think the verdict was clearly wrong.

Verdict set aside.

New trial granted.

(102 Me. 186)

MOULTON v. LEWISTON, B. & B. ST. RY.
(Supreme Judicial Court of Maine. Dec. 3, 1906.)

1. MUNICIPAL CORPORATIONS—USE OF STREETS—LEAVING HORSE UNHITCHED—CONTRIBUTORY NEGLIGENCE.

It is not negligence per se to leave a horse attached to a carriage in the street unhitched.

2. STREET RAILROADS—OPERATION—INJURY TO ANIMAL ON TRACK—CONTRIBUTORY NEGLIGENCE.

But, when one leaves a horse attached to a carriage, unhitched, unimpeded by any weight, and unattended by any person near enough to control him by the voice or to reach him before he can escape, in a city street in which there is an electric car line, at a time when the conditions are such that cars may reasonably be expected to run with snow scrapers, calculated to frighten horses both by sound and sight, he is guilty of such negligence as will prevent his recovery in an action against the railway company, if the horse, frightened by the noise or action of the scrapers, runs in front of a car and is injured by it. And this is true, although the horse had never been afraid of the electric cars, and had never run away, though left unhitched.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Street Railroads, § 209.]

3. SAME—NEGLIGENCE OF COMPANY—SUFFICIENCY OF EVIDENCE.

The evidence in the case is held to be insufficient to warrant a finding by the jury that the defendant was guilty of negligence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Street Railroads, §§ 239-250.]

(Official.)

On Motion from Supreme Judicial Court, Sagadahoc County.

Action by Rufus D. Moulton against the Lewiston, Brunswick & Bath Street Railway. Verdict for plaintiff, and defendant files a motion for a new trial. Granted.

Action on the case to recover damages for injury to the plaintiff's horse, pung, and harness caused by the alleged negligence of the defendant. The plaintiff's servant had driven the horse, hitched into a grocery pung, close beside the sidewalk on Washington street, in the city of Bath, about 15 or 18 feet from the defendant's car track, and had left the horse standing there unhitched and unattended while he went to the door of a house for the purpose of taking orders for the plaintiff, who was a grocer. While the horse was standing there, one of the defendant's cars came along from the direction in which the horse was facing. When the car was within two or three car lengths of the horse, he suddenly started, turned around, and ran onto the car track ahead of the car, and was struck by the car, and the injury complained of resulted. The horse was so badly injured that he was afterwards killed.

The action was tried at the August term, 1905, of the Supreme Judicial Court, Sagadahoc county. Plea, the general issue. Verdict for plaintiff for \$94.67. The defendant then filed a general motion for a new trial.

All the material facts appear in the opinion.

Argued before WISWELL, C. J., and EMERY, WHITEHOUSE, SAVAGE, PEABODY, and SPEAR, JJ.

E. C. Plummer, for plaintiff. Southard & Glidden, for defendant.

SAVAGE, J. Case to recover damages for injury to the plaintiff's horse, pung, and harness, which on February 1, 1905, was struck by one of the defendant's cars. The verdict was for the plaintiff, and the case comes up on the defendant's motion.

The plaintiff's cause of action, as set out in his declaration, is, in substance, that the defendant negligently allowed its roadbed to become "cumbered with ice and snow, so as to interfere with the prompt and proper control of cars there being operated"; that upon the track thus cumbered a car was run by the defendant's servants "at an improper and dangerously high rate of speed, and with much noise and with snow and ice flying from the scrapers of said car, rapidly approached the horse of the plaintiff * * * which had been momentarily left by plaintiff's servant

* * * well outside the track of the defendant corporation, so as to be clear of all passing cars"; and that "by reason of the noise and rapid approach of said car and of the snow and ice being thrown from the scrapers of said car" the horse became frightened, turned around and ran onto or across the track, in front of the car, and was struck by it. And it is further alleged that the "car failed to stop as it approached the plaintiff's horse" by reason of the negligently high speed of the car, "and especially of the unsafe condition of the railway track."

The case shows that about four days before the accident snow in considerable quantities had fallen, and there is testimony that at the time of the accident there was snow and ice in places on the rails, although the same or other cars had gone over the track on the day in question. There is also testimony that the rails were "banked in" by snow and ice four or five inches deep in places. Assuming this to be true, and assuming, as claimed by the plaintiff, that the horse was frightened by the noise of the approaching car and by the sight of the snow thrown out by the scrapers attached to the car, the condition of the track was not itself the proximate cause of the accident, and is of importance only as it affected the operation and control of the car. The condition of the track is not shown to be an unusual one in the operation of street cars in winter in Maine. The defendant company was not responsible for the snowstorm or other weather conditions. They had the right to run their cars in winter as well as in summer, and after a snowstorm as well as before. Nor do they appear to have been remiss in the care of their track afterwards, at least so far as they owed any duty to the plaintiff. But the condition of the track is an element to be considered when we come to inquire whether the company was negligent as to the speed at which the car was run. Under some conditions a speed would be unsafe which would not be under others.

The car was equipped with scrapers near the wheels, so adjusted that they could be raised or lowered by the motorman. When lowered, with the car in motion, they had the effect of scraping away any shoulder of snow or ice which may have accumulated beside the rails, and throwing it from the track. The scrapers on the car in question were being operated just prior to the accident, and doubtless made a noise which could be heard, and threw out snow and ice, which could be seen by the plaintiff's horse. But the scrapers were a reasonable appliance, and the defendant company had the right to use them, and there is nothing in the case to show that they were used improperly.

With regard to the speed of the car, the plaintiff claims that it was behind schedule time; that it was making up time; that it was running at an unusual speed, one witness placing the speed as high as 12 miles an

hour. The weight of the evidence is certainly against this proposition, being to the effect that the car was on schedule time and running at an ordinary rate of speed. But the truth of neither proposition settles the question of negligence. The ordinary speed might have been dangerous. An unusual speed might not have been. The question in this case is not whether the speed was dangerous as to passengers on the car, or to teams or persons upon or about to cross the track, as at a street crossing, but whether it was dangerous as to the plaintiff's horse. Unless the defendant failed to perform some duty which it owed to the plaintiff, under existing conditions, it was not negligent as to him.

The plaintiff's servant had driven the horse hitched into a grocery pung close beside the sidewalk, and left it standing there, facing in the direction from which the car came, while he went to the door of a house to take orders. At that point the street from sidewalk to car track was from 15 to 18 feet wide. The plaintiff claims that the horse was kind and well broken, and was not afraid of the cars, and was accustomed to being left standing unhitched, and had never been known to run away. The horse did stand still until the car came near it, say within two or three car lengths, at the outside. He then suddenly started, turned around, and ran onto the track, ahead of the car. The duty of the motorman is to be tested by the appearance of the horse to him. He saw the horse some distance away. But he saw him standing quietly, so far as the case shows, by the sidewalk, until the car came near. He was not thereby relieved of all duty towards the horse, but he had a right to assume that the horse would remain standing. He might so assume until, at least, there was an appearance of fright or movement of the horse. He was bound to anticipate and be prepared to avert any reasonably to be expected movement of the horse, but not more. Measured by these rules, we are unable to see wherein the conduct of the motorman in regulating the speed of the car was negligent as to the plaintiff, even assuming the speed to have been as claimed by the plaintiff. There was no apparent danger until the car had nearly reached the horse, when he suddenly turned onto the track. It was then too late to stop the car. There is no evidence to warrant a finding that the motorman did not use due diligence to stop the car as soon as he could after the horse started. We think, therefore, that the plaintiff failed to show that the defendant was negligent.

But there is another ground equally fatal to the plaintiff's right of recovery. The plaintiff must prove that no want of due care on his own part contributed to the injury. The plaintiff's servant left the horse in the street unhitched and unattended and without any strap and weight, and went up some stairs to a house. It cannot be said that

leaving a horse attached to a carriage in the street unhitched is negligence per se. *Park v. O'Brien*, 23 Conn. 339; *Dexter v. McCreedy*, 54 Conn. 171, 5 Atl. 855; *Wasmer v. Del.*, Lacka. & Western R. R. Co., 80 N. Y. 212, 36 Am. Rep. 608; *Thomas on Negligence*, 1181; *Elliott on Roads and Streets*, 628. And the question of due care is always for the jury (*Bigelow v. Reed*, 51 Me. 325; *Griggs v. Flickenstein*, 14 Minn. 81 [Gil. 62]; *Phillips v. Dewald*, 79 Ga. 732, 7 S. E. 151, 11 Am. St. Rep. 458; *Turner v. Page*, 186 Mass. 600, 72 N. E. 329, and cases above cited) unless the evidence is such that unprejudiced and fair-minded men can reasonably draw only one inference therefrom. *Blumenthal v. Boston & Maine R. R.*, 97 Me. 255, 54 Atl. 747; *Maine Water Co. v. Steam Towing Co.*, 99 Me. 473, 59 Atl. 953. But we are of opinion that when one leaves a horse attached to a carriage, unhitched, unimpeded by any weight, unattended by any person near enough to control him by the voice or to reach him before he can escape, in a city street in which there is an electric car line, at a time when the conditions are such that cars may reasonably be expected to run with snow scrapers calculated to frighten horses both by sound and sight, only one reasonable inference can be drawn. That is this case. We decide no other. It is negligence so clearly that it will bar a recovery by the owner, if the horse, frightened by the action of the scrapers, runs in front of the car and is injured by it. We do not overlook the fact that this horse had never been afraid of the electric cars, and had never run away, though left unhitched. He was nevertheless a horse, and these were conditions to which he was probably not accustomed. The instincts common to the species render him peculiarly liable to be frightened by the sight of snow and ice thrown out from under the car by the scraper, and by the sound of the accompanying noise. These instincts the servant in charge of the horse must be presumed to have known, and, knowing the conditions as to snow and ice which surrounded the track, he should have anticipated the lawful use which was made of the scrapers. The verdict cannot be sustained.

Motion for a new trial granted.

Verdict set aside.

(102 Me. 197)

ATLAS SHOE CO. v. BECHARD.

(Supreme Judicial Court of Maine, Dec. 10, 1906.)

1. SALES—FRAUD—FALSE AND FRAUDULENT REPRESENTATIONS—RESCISSION.

Any vendor induced by false and fraudulent representations to sell goods upon credit, upon discovering the fraud, may rescind the sale and maintain trover for the goods so obtained.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales, § 262.]

2. SAME.

When at the time of the purchase of the goods there is an intent never to pay for them,

the sale may be avoided for fraud, although no false and fraudulent representations are made. When such representations are made, the vendor, who, relying upon them, parts with his property, may equally rescind, although there was at the time of the sale a bona fide intention to pay at some future time.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Fraud, § 93.]

3. FRAUD—FALSE STATEMENTS.

If a person states of his own knowledge material facts which are susceptible of knowledge, and the statement is made with an intent that another party shall act upon it, or in such a manner as would naturally induce him to act upon it, the statement so made, if false, is fraudulent both in morals and law.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Fraud, §§ 8-14.]

4. SALE—DELIVERY—PASSING OF TITLE—FRAUD.

In the sale and delivery of merchandise procured by fraud, it is generally the intention of the parties that the title pass to the vendee; but because of the fraud the vendor can, if he chooses, on discovering the fraud, avoid the sale and delivery, and revent the title in himself, notwithstanding this intention.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales, § 262.]

5. SAME—STATEMENTS AS TO CREDIT—TROVER.

A vendee, for the purpose of obtaining a line of credit, made a written statement of his assets and liabilities, and agreed that it might be considered as a continuing and new and original statement upon each and every purchase of goods thereafter, until he advised the vendor in writing to the contrary. The statement, though true when first made, afterwards became false, and its falsity was or ought to have been within the knowledge of the vendee. No notice was given to the vendor, and he, relying upon the statement as true, sold goods to the vendee after such statement had become materially and essentially false.

Held, that the vendor might rescind such sales and maintain trover against the vendee's common-law assignee for such of the goods so sold as the assignee had in his possession and refused to deliver to the vendor.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales, § 95.]

(Official.)

Exceptions from Supreme Judicial Court, Androscoggin County.

Action by the Atlas Shoe Company against Henri P. Bechard. Judgment of nonsuit. Plaintiff excepts. Exceptions sustained, and judgment for plaintiff.

Trover for the conversion of certain goods sold and delivered by the plaintiff to the firm of Fortier & Marcotte, of Lewiston. The declaration in the plaintiff's writ is as follows:

"In a plea of the case, for that the said plaintiff, at said Lewiston, to wit, at said Auburn, on the 27th day of December, A. D. 1905, being possessed as of its own proper goods of boots and shoes, according to the bill hereto attached, marked 'A,' and of the value set opposite each item, and all of the value of twenty-two hundred and eighty-three dollars and forty-five cents (\$2,283.45), as shown by said bill, thereafterwards, to wit, on the same day, lost the same, which thereafterwards, to wit, on the same day,

came to the possession of the defendant by finding; yet the defendant, knowing the same to be the property of the plaintiff, has not delivered the same to the plaintiff, though requested, but then and there converted the same to his own use, to the damage of the plaintiff (as it says) in the sum of four thousand dollars (\$4,000)." (Bill of Items marked "A" omitted in this report).

Plea, the general issue, with brief statement as follows: "That Messrs. Fortier & Marcotte, of Lewiston, were the owners of a portion of the goods mentioned in the plaintiff's writ, and not the plaintiff, and that in December, 1905, and before the suing out of the writ in this action, the said Fortier & Marcotte made a common-law assignment for the benefit of their creditors to this defendant, and that in his said capacity as such assignee he had in his lawful possession some of the goods that said Fortier & Marcotte had purchased of the Atlas Shoe Company, and which they owned at the date of said assignment to this defendant, and that subsequently to said suit herein as such assignee the defendant herein turned over to the receiver in bankruptcy proceedings instituted against the said Fortier & Marcotte a portion of the goods sued herein under the direction and order of the judge of the United States court for the district of Maine."

At the conclusion of the plaintiff's testimony, the presiding justice ordered a nonsuit. The plaintiff excepted. It was then agreed that, if the law court should decide that the nonsuit was improperly ordered, then that court should "have jury power to decide the question of liability and the amount of damages that this plaintiff is entitled to recover, and shall order judgment for that amount."

Argued before WHITEHOUSE, SAVAGE, POWERS, PEABODY, and SPEAR, JJ.

Oakes, Pulsifer & Ludden, for plaintiff.
H. P. Bechard and McGillicuddy & Morey, for defendant.

POWERS, J. Trover for the conversion of certain goods sold and delivered by the plaintiff to the firm of Fortier & Marcotte. At the close of plaintiff's evidence the presiding justice directed a nonsuit. The plaintiff excepted; and it is agreed that, if the nonsuit was not properly ordered, the court shall determine the amount of damages which the plaintiff is entitled to recover and order judgment therefor.

January 20, 1904, Mr. Fortier, of the firm of Fortier & Marcotte, went to the place of business of the plaintiff, and, for the purpose of obtaining of it a line of credit for his firm, in its behalf made and delivered to the plaintiff the following written statement:

"Statement made this 20th day of January, 1904, to the Atlas Shoe Co., Boston,

Mass., by E. J. Fortier, of the firm of Fortier & Marcotte, town of Lewiston, county of Androscoggin, state of Maine, which firm is composed of the following persons: E. J. Fortier and A. R. Marcotte:

Assets.

Cash value of stock in store at above-named town.....	\$4,000
Cash on hand in bank.....	1,000
Total assets.....	\$5,000

Liabilities.

Owe for merchandise on open account	} \$3,070
Owe in notes or acceptance given for merchandise	
Owe for borrowed money.....	nothing.
Chattel mortgage on stock of merchandise	none.
Total liabilities.....	\$3,070

"The above is a true and accurate statement of all our assets and liabilities, and is presented to the Atlas Shoe Co., as a basis for credit. This statement may be considered by the Atlas Shoe Co. a continuing statement of our affairs, and a new and original statement of our assets and liabilities upon each and every purchase of goods from them hereafter until we advise them in writing to the contrary. Fortier & Marcotte.

"Signed by E. J. Fortier, a member of the firm."

Thereafterwards the plaintiff furnished goods on credit to Fortier & Marcotte from April, 1904, to March 7, 1905, inclusive, which were settled and paid for in full on March 17, 1905. From March 16 to December 13, 1905, the plaintiff continued to furnish them goods on credit to the amount of \$2,283.45, and received payments on account of the same aggregating \$1,130.65, leaving a balance due of \$1,152.80. Applying the payments to the oldest items of indebtedness, as the parties themselves made no application of them, would still leave unpaid for all goods sold from and including May 10 to December 13, 1905. December 26, 1905, Fortier & Marcotte made a common-law assignment for the benefit of their creditors to the defendant of all their stock in trade, including the goods purchased of the plaintiff which they had not disposed of in the regular course of business, and the same was taken possession of by the defendant. The next day the plaintiff's agent, Mr. Murray, called at the store of Fortier & Marcotte, where the defendant was engaged in taking an account of the stock, and demanded of him the goods sold by the plaintiff still remaining in the stock. The defendant did not deliver them, but told Murray he could not allow him to remain in the store. The writ is dated December 28, 1905, and is for all goods sold to Fortier & Marcotte by the plaintiff after the settlement in March previous. January 25, 1906, Fortier & Marcotte went into bankruptcy, and their schedules showed assets \$3,132.65, debts \$6,492.74. Among the latter was \$200 in notes given

for money borrowed of Delina Marcotte and Casimir Marcotte January 27, 1905.

It is conceded that the title to the goods passed to Fortier & Marcotte, and that the representations contained in the statement of January 20, 1904, were true on that date. No notice of any change in their financial condition was ever given to the plaintiff by Fortier & Marcotte. The plaintiff claims to rescind the sales, so far as relates to all goods sold on and after May 10, 1905, on the ground that such sales were induced by the fraudulent representations of the vendees as to material facts affecting their credit. Their right to do so depends, in the first place, upon the construction to be given to the statement of January 20th. That instrument should have the construction placed upon it and the force and effect given to it which the parties themselves intended it should have at the time it was executed. There was evidence that the statement was made in order to get "a line of credit." That means credit for more than one transaction. It reaches forward in point of time, and covers future transactions between the parties until a different arrangement is made. Such is the language of the statement itself. It recites that it is presented to the plaintiff the vendor as a basis for credit, and that it may be considered by it as a continuing statement of the vendees' affairs, "and a new and original statement of our assets and liabilities upon each and every purchase of goods from them [it] hereafter until we advise them in writing to the contrary." This is something more than a representation true at the time and a mere failure to notify of a change of conditions. Such a representation may be relied upon only for a reasonable time. It is here expressly agreed that it may be considered a continuing statement and a new and original statement upon each and every purchase of goods. That can mean nothing less than that it is to have the same force and effect "as a basis for credit" that it would have if it accompanied each order of goods and was made as of the date of said order. The intention of the parties is apparent and unmistakable that the plaintiff might rely upon it the same when the last as when the first goods were sold. The uncontradicted evidence is that it did rely upon it in selling the goods upon credit, and that no notice not to do so was ever given it by Fortier & Marcotte. The fact that the statement, when originally made, was true, cannot determine the plaintiff's rights in regard to goods afterwards sold in reliance upon it when no longer true. The plain intention was that it should continue to be true, and that the plaintiff might consider it as a new and an original statement and one made upon each and every purchase of goods. Language clearer than that used cannot be devised to express that intention. If through any change of conditions Fortier & Marcotte owed more or owned less than therein stated, from that moment as to all sales of goods made

while such change continued it became a false statement made at the time of such sales. There is no claim that they did not comprehend or remember its tenor and effect, and the uncontradicted evidence is that it was fully understood by Mr. Fortier at the time he signed it. The plaintiff, in view of the purpose for which the statement was originally made and the language used, might well rely upon its truth as reiterated upon every subsequent purchase. What difference can there be between a statement like this, and a case where a purchaser makes representations, true at the time, as to his property and financial standing for the purpose of obtaining credit, and obtains goods upon them, and when he wants more goods orally states to the seller that his condition is the same as when he made his previous statement? The last statement adopts the former one as of the time when the last one is made. If it is false and fraudulent as applied to the facts then existing and goods are sold upon the strength of it, we know of no case which has held that the seller's rights as to the last goods sold were affected by the fact that the statement when first made was true. The commercial transactions of mankind are largely based upon the faith given to representations of fact affecting their financial responsibility, made for the purpose of obtaining credit in their business dealings. In order that they may so continue, it is necessary that such representations should be interpreted according to the plain intention of the parties at the time. The defendant is not an innocent purchaser. He is a common-law assignee, Fortier & Marcotte under another name, with no other or greater rights in the goods purchased by them than they themselves had; and we see no reason in law or justice why the paper which they signed should not be interpreted and given the force and effect which they in it said they intended it should have. Certainly with that statement in its possession the plaintiff had a right to regard it as true unless advised to the contrary.

The representations made were of material facts, and were relied upon by the plaintiff. If false and fraudulent, the plaintiff had a right to rescind the sales which were induced by such representations. Fortier & Marcotte were out of business after December 28, 1905, and their bankruptcy schedules show that in January following they were owing \$6,492.74, more than double the amount represented, while their assets had shrunk nearly \$1,900. They represented that their assets exceeded their liabilities nearly \$2,000. The fact was that their liabilities exceeded their assets more than \$3,300. No explanation is offered to show that this was a sudden change due to some particular loss or transaction, and the irresistible inference is that it must have come about gradually in the course of their business. The testimony showed that Fortier & Marcotte purchased

their goods for their fall trade in the summer. A jury might properly find that for many months, certainly as far back as September 1, 1905, there was an actual and material difference between their indebtedness for merchandise as stated and as it actually existed. Moreover, from January 20, 1905, they were owing \$200 for borrowed money, and their statement was that they owed none. Fraud is nearly always a matter of inference from circumstances. Where a person states of his own knowledge material facts which are susceptible of knowledge, and the statement is made with an intent that another party should act upon it, or in such a manner as would naturally induce him to act upon it, the statement so made, if false, is fraudulent both in morals and law. *Wheelden v. Lowell*, 50 Me. 505; *Braley v. Powers*, 92 Me. 203, 42 Atl. 362; *Cole v. Cassidy*, 188 Mass. 437, 52 Am. Rep. 284; *Mooney v. Davis*, 75 Mich. 188, 42 N. W. 803, 13 Am. St. Rep. 425; *Benjamin on Sales* (7th Ed.) American note on page 469.

Any one induced by false and fraudulent representations to sell goods upon credit, upon discovering the fraud may rescind the sale and maintain trover for the goods so obtained. 14 A. & E. Encycl. L. (2d Ed.) 185; 24 A. & E. Encycl. L. (2d Ed.) 1099; *Hall v. Gilmore*, 40 Me. 578; *Ayers v. Hewitt*, 19 Me. 281. When at the time of the purchase of the goods there is an intent never to pay for them, the sale may be avoided for fraud, although no false and fraudulent representations are made by the purchaser. *Burrill v. Stevens*, 73 Me. 395, 40 Am. Rep. 366. When such representations are made, the vendor, who relying upon them parts with his property, may equally rescind, although there was at the time of the sale a bona fide intention to pay at some future time. *Reid v. Cowduroy*, 79 Iowa, 169, 44 N. W. 351, 18 Am. St. Rep. 359, and note; *Judd v. Weber*, 55 Conn. 267, 11 Atl. 40. The decision of the case at bar does not depend upon whether the property passed to the vendees, for that is admitted, or whether the goods were purchased with an intent to pay for them at some future date, or never to pay for them. It depends upon whether the plaintiff was induced to part with its property, upon the false and fraudulent representations of the buyer as to his liability to pay and means of payment, such as false statements as to his debts and assets. If it was, the right of the plaintiff to rescind the sale, revest the property in itself, and maintain trover therefor cannot be denied. "In the sale and delivery of merchandise procured by fraud, it is generally the intention of the parties that the title pass to the vendee; but because of the fraud the vendor can, if he chooses, on discovering the fraud, avoid the sale and delivery, notwithstanding this intention, because in the whole transaction he has been deceived by the vendee." *Thaxter v. Foster*, 153 Mass. 151, 26 N. E. 424. Construing the statement

made on January 20, 1904, as a continuing representation, renewed upon the occasion of each and every purchase of goods, as it was the intention of the parties to it that it should be regarded and considered, there was evidence in support of every proposition necessary for the plaintiff to establish to entitle it to recover for all goods sold since September 1, 1905, and in the defendant's hands at the time of the demand. *Ayers v. Hewitt*, supra; *Ingersoll v. Barker*, 21 Me. 474.

It was early held in this state that, to entitle the seller to vacate the sale and reclaim the goods on the ground of fraud, it is not necessary that the fraudulent representations be made at the time of the sale, but it is sufficient if the goods be obtained by means of false and fraudulent representations, though they were made on a previous occasion. *Seaver v. Dingley*, 4 Me. 306. The case at bar is stronger than that, even considered simply as a representation made January 20, 1904, upon which the seller might rely for a reasonable time. The arrangement that it should be a continuing representation, to be considered as renewed on the occasion of each purchase until notice from the buyer to the contrary, must make a reasonable time include all time until the seller had notice from the vendee or some other source of facts which should put him on his guard against relying longer upon it. Up to that point there is the direct connection between the representation made and the credit given, which must always appear in order that the vendor may avoid a sale on the ground of false and fraudulent representations.

The evidence should have been submitted to the jury, and it is agreed that in that event the court shall assess the damages for the plaintiff. There is evidence tending to show that at the time the demand was made the defendant had in his possession goods to the amount of \$181, which had been purchased of the plaintiff by *Fortier & Marcotte* since September 1, 1905.

Exceptions sustained.

Judgment for the plaintiff for \$181 and interest thereon from December 26, 1905.

(102 Me. 206)

STATE v. INTOXICATING LIQUORS et al.
(Supreme Judicial Court of Maine. Dec. 11, 1906.)

COMMERCE—INTERSTATE COMMERCE—CARRIERS
—WHEN TRANSIT ENDS.

Intoxicating liquors were shipped from Boston, Mass., to Lewiston, Me., by a continuous waybill over the Boston & Maine Railroad and the Grand Trunk Railway of Canada. The consignee named in the waybill and upon the packages was fictitious. The car in which the liquors were being transported by the claimant company, after its arrival in the Lewiston yard, was shifted from track to track, and was finally left upon the "team track" so called, about one hour after its arrival. In about 10 minutes thereafter the liquors were seized, and subsequently libeled. The team track was about 20 rods from the claimant's freight station, and

was commonly used for the purpose of unloading freight directly from cars onto teams. In the ordinary course of business, these liquors, if called for by the consignee or owner within two or three days, would have been unloaded from the car onto a team. But, if not so taken within that time, they would have been taken in the car to the freighthouse, and there unloaded by the claimant. Between the time of the arrival of the car at the team track and the seizure of the liquors by the officer, the car, which was sealed, had been opened by the claimant's servants, and other merchandise which came in the same car was being taken out of it. But the liquors had not been removed or disturbed by any one. It did not appear that the consignee had in any way consented to take the liquors from the car on the team track.

Held, that in the absence of evidence showing a special arrangement, or assent to the contrary, a railroad carrier's contract of carriage contemplates that the freight shall be transported to the carrier's freighthouse, and there removed from the car. So much is to be implied from the general usages of the business of such carriers. In this case there is no evidence that the carrier's duty in this respect was modified or waived by contract or otherwise. If the consignee had consented to take the liquors from the car on the team track, the carrier's duty of transportation would have been ended. Otherwise, it would still have been the duty of the carrier to complete the transportation by taking the liquors to its freighthouse, there to be removed from the car. Under the facts shown, the transportation was incomplete, and the liquors were not subject to seizure under the police power of the state, in contravention of the interstate commerce provision of the federal Constitution.

State v. Intoxicating Liquors, 49 Atl. 670, 95 Me. 140, distinguished.

(Official.)

Report from Supreme Judicial Court, Androscoggin County.

Libel by the state for the condemnation of certain intoxicating liquors. The Grand Trunk Railway interposed a claim. Case reported, and judgment for claimant.

Libel for the condemnation of intoxicating liquors seized and alleged to be intended for unlawful sale in this state, said liquors consisting of six barrels each containing 32 gallons of whisky, three barrels each containing 32 gallons of rum, two barrels each containing 32 gallons of gin, one keg containing 20 gallons of whisky, and 96 bottles each containing one quart of whisky. These liquors had been shipped from Boston, Mass., to Lewiston, Me., by continuous waybill over the Boston & Maine Railroad and the Grand Trunk Railway of Canada. Soon after the arrival of these liquors in Lewiston, and before they had been removed from the car containing them to the freighthouse of the claimant company, they were seized by a deputy sheriff, without a warrant, and held until a warrant was procured from the Lewiston municipal court, as provided by Rev. St. c. 29, § 48. In accordance with the provisions of section 50 of said chapter 29, the officer seizing these liquors then immediately filed a libel against these liquors and the vessels containing the same with the judge of said municipal court, who issued monition

and notice of the same. On the return day of the libel, and in accordance with the provisions of section 51 of said chapter 29, the Grand Trunk Railway Company of Canada appeared and filed in writing a claim to these liquors as follows:

"And now comes the Grand Trunk Railway Company of Canada, a corporation created and existing under the laws of the Dominion of Canada, and a citizen of said Dominion of Canada, said corporation being a common carrier, and specifically claims the right, title, and possession in the items of property hereinafter named, as having a right to the possession thereof, at the time when the same were seized. And the foundation of said claim is that they were in possession of said Grand Trunk Railway Company of Canada, and were in transit from Boston, in the state of Massachusetts, to Lewiston, in the state of Maine, and were taken from the lawful possession of said railway company on the 15th day of December, A. D. 1905, from a car standing on the side track in the yard of said Grand Trunk Railway Company, situated on the north side of Beech street, in said Lewiston, by L. J. Luce, one of the deputy sheriffs of Androscoggin county; and the claimant declares that said items of property were not so kept or deposited for unlawful sale, as is alleged, in the libel of said L. J. Luce, and in the monition issued thereon." (The description of liquors and vessels here follows, but is omitted in this report.)

The matter was then heard by the judge of said municipal court, who found that the liquors seized were intended for unlawful sale, and that the claimant was entitled to no part of the same, and in accordance with the provisions of said section 51 of said chapter 29 declared the liquors and vessels containing the same forfeited. The claimant then appealed to the Supreme Judicial Court as provided by said section 51.

At the conclusion of the evidence and by agreement the case was reported to the law court "to render such judgment as the rights of the parties require."

Argued before WISWELL, O. J., and WHITEHOUSE, SAVAGE, POWERS, PEABODY, and SPEAR, JJ.

Ralph W. Crockett, Co. Atty., for the State.
L. L. Hight, for claimant.

SAVAGE, J. This case of a libel for the condemnation of intoxicating liquors seized, and alleged to be intended for unlawful sale in this state, comes before the law court on report. The liquors in question were shipped by Reuben Ring & Co., of Boston, Mass., from Boston to Lewiston, Me., by continuous waybill over the Boston & Maine Railroad and the Grand Trunk Railway of Canada. The consignee named in the waybill and upon the packages was "John Cram," a name which the state claims is fictitious. In the complaint it is alleged that the liquors "were

unlawfully kept and deposited by some person to your complainant unknown, in a car on a side track in the yard of the Grand Trunk Railway Company situated on the north side of Beech street, in said Lewiston." The claimant is a common carrier, and claims a return of the liquors on the ground that, when seized, they were in its possession as a common carrier and in transit, under the continuous waybill, and were still protected from seizure by the interstate commerce clause of the federal Constitution.

From the evidence we find the following additional facts: The car in which the liquors were being transported by the claimant company arrived in its Lewiston yard at about 10 minutes before 7 in the morning of December 15, 1905. Subsequently it was shifted from track to track in the yard, and was finally left upon the "team track," so called, about one hour after its arrival. In about 10 minutes thereafter the liquors were seized, and held until a warrant was procured under the statute (Rev. St. c. 29, § 48), and afterwards were properly libeled. The team track was about 20 rods from the claimant's freight station, and was commonly used for the purpose of unloading freight directly from the cars onto teams. In the ordinary course of business these liquors, if called for by the consignee or owner within two or three days, would have been unloaded from the car onto a team. But, if not so taken within that time, they would have been taken in the car to the freight-house and there unloaded by the claimant. Between the time of the arrival of the car at the team track and the seizure of the liquors by the officers, the car, which was sealed, had been opened by the claimant's servants, and other merchandise which came in the same car was being taken out of it, but the liquors had not been removed or disturbed by any one. There is little doubt that the name of the consignee as given was fictitious.

Under these circumstances the state claims that carriage had ceased, that interstate transportation had ended, and with it the duties and responsibilities of the claimant as a carrier, and hence that the liquors were then subject to the police power of the state, exercised under the provisions of the prohibitory liquor law. It is claimed that the car had become a warehouse, and that the situation was in no essential respect different from what it would have been if the liquors had been actually unloaded into the claimant's freight-house. The state relies upon *State v. Intoxicating Liquors*, 95 Me. 140, 49 Atl. 670, and *State v. Intoxicating Liquors*, 96 Me. 415, 52 Atl. 911.

In the first case cited the liquors which were consigned to the shipper's own order, arrived at the place of destination, and were transferred by the carrier from the car to its freight-house about 9 o'clock in the forenoon of a certain day, and at about 4 o'clock in the afternoon of the following day they

were seized by the officer, while in the freight-house. There had been no delivery of the liquors, and no notice had been given to anyone of their arrival. The question decided was whether the liquors at the time of their seizure had arrived within the state, so as to be subject to its police powers, within the meaning of the Wilson act, passed by Congress August 8, 1890 (26 Stat. 313, c. 728 [U. S. Comp. St. 1901, p. 3177]), and within the construction placed upon that act by the Supreme Court of the United States in *Rhodes v. Iowa*, 170 U. S. 412, 18 Sup. Ct. 664, 42 L. R. A. 1088. And the court decided that the transportation had been completed, that the liquors had arrived at their place of destination, and that storage had commenced. The liquors were condemned.

In its discussion the court said: "And the question is not whether or not the liability of the railroad company for a loss continued as a carrier up to the time of the seizure, or had become that of a warehouseman. It is simply whether these liquors, when the actual transportation had been entirely completed, and when they had not only arrived at the place of their destination, but had been moved by the employees of the railroad company from the car to the company's freight-house, there to await the order of the shipper, had arrived in the state, within the meaning of the Wilson act, so as to be subject to our laws." And, as already stated, the court answered the question in the affirmative, notwithstanding certain expressions in the opinion in *Rhodes v. Iowa*, which were believed to be unnecessary to the decision in that case, and therefore properly to be regarded as dicta. The court, however, indicated its duty and willingness to follow the determination of the federal Supreme Court, whenever the mooted point should actually be decided by it.

The claimant here contends that that time has now arrived, and claims that the point has been decided, contrary to our former decision, by the federal court in *American Express Company v. Iowa*, 196 U. S. 133, 25 Sup. Ct. 182, 49 L. Ed. 414. In that case the duties, as to delivery, of express companies, as carriers, was considered. The difference in the usages of railroad companies and of express companies as to the ultimate disposition by them of freight is in some respects very marked. These usages are so common and universal that they enter into and form a part of the carrier's contract, and the court may take judicial knowledge of them. It is open to argument, at least, whether, in view of the difference in the contracts of these two different kinds of carriers, the case of *American Express Company v. Iowa* can be considered as deciding the question now before us.

But we do not find it necessary to express our opinion upon this question, for we think the case now in hand must be distinguished from *State v. Intoxicating Liquors*, 95 Me.

140, 49 Atl. 870. In this case we think the transportation contemplated and implied by the carrier's contract of carriage had not ended. In the absence of evidence showing a special arrangement otherwise, a railroad carrier's contract of carriage contemplates that the freight shall be transported to the carrier's freight-house, and there removed from the car. So much is implied. Such is the effect of general usage. It is the duty of the carrier so to transport the goods. It owes this duty both to the shipper and to the consignee, and for breach of this duty it may be responsible to either. The freight-house is the place contemplated where the consignee is to find the goods, and where the shipper is to look for them in case the consignee does not take them. No doubt, in numberless instances, freight is unloaded directly from cars onto teams, without being put into a freight-house. But this is done for convenience, by special arrangement, or after notice to shipper or consignee, assented to. If the goods are not taken by the consignee from the car, or if he does not assent to so doing, they must be taken to the freight-house, unless it is impracticable by reason of bulk or otherwise.

In this case, there is no evidence that the carrier's duty was modified or waived by contract or otherwise. When it took the liquors, it was bound to transport them to their destination at its freight-house. It was not enough to place them upon a side track, where the consignee could come and take them if he chose to do so; not even if the side track was ordinarily used by it for the purpose of enabling consignees, who chose to do so, to remove their goods directly from the cars, nor even if such was the purpose in this particular case. It was not enough that the owner might call for them there. It was only conjectural whether he would or not. The consignee or owner might take the liquors there, or he might not. The case does not show that he was under obligations to do so, or that he had consented to do so. If he had done so, the carrier's duty of transportation would have ended; but, if he had not done so, it would still have been the duty of the carrier to complete the transportation, by taking the liquors to its freight-house to be removed from the car. So long as the transportation was incomplete, the liquors were not subject, by virtue of the Wilson act, to seizure under the police power of the state.

Judgment for the claimant. Order for a return of the liquors to issue.

(74 N. J. L. 673)

SAWYER v. VAN DEREN.

(Court of Errors and Appeals of New Jersey. March 26, 1907.)

COUNTERCLAIM — PLEADING — GENERAL DENIAL.

In an action brought to recover the proceeds of the sale of plaintiff's interest in certain real estate, the declaration was upon the com-

mon counts and the plea interposed was the general issue only. *Held*, that under this plea the defendant cannot set off a counterclaim arising out of an independent transaction.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, § 1294.]

(Syllabus by the Court.)

Error to Supreme Court.

Action by Carrie E. Sawyer against Clarence T. Van Deren. Judgment for plaintiff, and defendant brings error. Affirmed.

McCarter & English, for plaintiff in error. Jerome D. Gedney, for defendant in error.

VROOM, J. This action was brought by the plaintiff against the defendant for money had and received. The declaration was upon the common counts, having thereto attached a bill of particulars of the plaintiff's claim. The plea of the defendant was the general issue alone.

It appeared that the plaintiff and one Galloway owned as tenants in common a factory property in the town of Harrison, in Hudson county. This property they jointly leased to the New Jersey Tube Company, by a lease dated March 1, 1889. This lease contained an option giving to the tube company the right to purchase the premises described in the lease at any time during the term granted for the sum of \$25,000, of which sum \$10,000 was to be paid to Charles T. Galloway and \$15,000 to the plaintiff, Carrie E. Sawyer. The annual rent received was \$1,000. The company exercised the option and bought the property, and received separate conveyances from the owners. The defendant, Van Deren, had arranged the lease of the premises to the tube company and collected the rents. Out of this he paid the taxes, assessments, insurance, and his commissions. The balance he paid, as it appeared, to the plaintiff. The plaintiff's interest was five-ninths and Galloway's four-ninths. The defendant, as the agent of the plaintiff, prepared the deed for her interest in the property, went to her residence at Moore, Pa., where she resided, and she there executed the deed. It was then intrusted to the defendant, who gave his receipt, wherein it was recited that the deed was to be delivered to said company upon payment by them of a certified check to the order of plaintiff for the sum of \$15,319.42. The defendant had from time to time paid to the plaintiff the net rents of the property, so that, when he came to make a division of the moneys received from the sale, there was due to Mr. Galloway the sum of \$363.01 for his share of said rents, which, with interest, amounted to \$408.81, and this sum the defendant claimed the right to set off against the claim of the plaintiff.

The learned trial justice in his charge stated that the amount with which the defendant was chargeable was \$15,227.87; that being the amount which had actually been collected by him. There was no dispute made as to allowance of the credit of \$1,409.50 re-

mitted to plaintiff by check, and of the allowance of the sum of \$344.89 paid on account of taxes of 1908. The other credits claimed by the defendant were properly submitted and passed upon by the jury, excepting the item of \$408.81, which represented the amount aforesaid paid by the defendant to Galloway for his share of the rents which had been paid by him to the plaintiff in excess of her share. The trial justice, in referring to this claim in his charge to the jury, said that it was not a matter in dispute embraced in this issue. "If Mr. Van Deren had a right to set off against this amount of money an obligation which he was entitled to enforce against Miss Sawyer, arising out of his payment to Mr. Galloway, * * * he does not set up that right in this case, and therefore it is not involved in the case, and cannot be determined by your verdict." Counsel for plaintiff, at the close of the charge to the jury, made the following request to charge: "If the defendant, at plaintiff's request, had overpaid her any rents due her, he was justified in withholding from money in his hands which he had collected for her account the amount of such overpayments, and remitting the balance, and the plaintiff in this action can only recover from the defendant such amount as *et æquo et bono* belongs to her from the defendant." Upon the refusal of the court to so charge an exception was prayed. The assignments of error relied upon were based upon the portion of the charge above quoted, and the refusal to charge as requested as to the justification in withholding the moneys overpaid.

The question involved in the case is within a very narrow compass. The plaintiff, having brought an action for money had and received, to which the plea was the general issue, can the defendant, without having given notice of set-off, claim to be allowed for the moneys by him paid to Galloway, upon the ground that the plaintiff had been overpaid her share of the rents? I do not think the correctness of the law as laid down in 25 Am. & Eng. Enc. of Law, p. 492, and cited by defendant, will be disputed: "Upon common-law principles a defendant is in general entitled to retain or claim by way of reduction all payments made by him and all just demands and allowances accruing to him in respect to the same transaction or account, which forms the ground of action. These defenses are clearly distinguishable from set-off; for they do not admit that the demand sued for is just, but, on the contrary, attack the plaintiff's claim itself, and urge matter to defeat it, or at least reduce the plaintiff's demand on account of some matter connected therewith." The limitation, it will be perceived, as to the right to retain or claim by way of reduction payments made, is confined strictly to those relating to the same transaction. The suit here was to recover moneys due the plaintiff on the sale of her interest in the land sold the tube company. Manifestly there

was a right and claim by way of reduction as to the taxes paid to the town of Harrison, the commissions on sale of the property, and the charges and expenses of the deed, and the jury properly so found; but it was only because those claims were all in respect to the same transaction or account which formed the ground of action. I do not understand that the leading case of *Dell v. Sollet*, 4 Burr. 2133, while sustaining the abstract proposition of law as stated in the request to charge above mentioned, is in any way applicable to the claim made to off set the overpayment of rents made by the defendant. In that case the defendant, a ship broker, was the plaintiff's agent in suing for and recovering a sum of money for damages done to the plaintiff's ship, and did recover and receive £2,000 for plaintiff's use and paid him all but £40, which he retained for his labor and service therein, and which a witness thought to be a reasonable allowance, and the jury found the defendant ought to retain the £40 as a reasonable allowance. Lord Mansfield, on rule to show cause, sustained the verdict. He said: "This is an action for money had and received to the plaintiff's use. The plaintiff can recover no more than he is in conscience and equity entitled to, which can be no more than what remained after deducting all just allowances, which the defendant has a right to retain out of the very sum demanded. This is not in the nature of a cross-demand or mutual debt. It is a charge which makes the sum of money received for the plaintiff's use so much less." That this case is authority for the allowance by the jury under the charge of the learned trial justice of the items before mentioned is undoubted, for they cover just allowances permissible to be retained out of the very sum demanded, and, like the charge for labor and services in and about the recovery of the £2,000, allowable only because a part of the same transaction. But in what respect will it be claimed that an overpayment of rents made before the sale of the property had been had is a part of the same transaction as the sale? It matters not whether defendant was misled by plaintiff as to the payment of the rents, or whether he deducted the rents overpaid to save himself from a suit at the hands of Galloway. Such overpayment was a matter in dispute between the parties, and clearly not embraced in the issue in this case, and could only have been raised on a counterclaim against the plaintiff in the nature of a set-off. *Ball & Hill v. Consolidated Franklinite Co.*, 32 N. J. Law, 102. In other words, the collection and alleged overpayment of rents is an independent transaction from the sale of the property, and as a claim it is brought clearly within the definition of what constitutes a set-off in 25 Am. & Eng. Ency. of Law, p. 488: "A set-off is a counter demand, generally of a liquidated debt, growing out of an independent transaction, for which an action might be maintained by the

defendant against the plaintiff." And, as stated by Saunders in 2 Pl. & Ev. 786, "a set-off means a cross-claim for which an action might be maintained against the plaintiff, and is very different from a mere right to a deduction from, or reduction of, his demand, on account of some matter connected therewith, and which may be given in evidence under the general issue, such as payment on account," etc.

It seems very clear to me that the claims of the defendant for rent overpaid is an entirely independent transaction and the subject of a set-off, and the trial justice was correct in holding that under his plea of general issue the defendant had no right to set up this claim against the plaintiff.

I find no error in the record, and the judgment below should be affirmed.

**MCCARTER, Atty. Gen., v. FIREMEN'S
INS. CO. et al.**

Court of Errors and Appeals of New Jersey.
March 29, 1907.)

Suit on information by Robert H. McCarter, Attorney General, against the Firemen's Insurance Company and others. Information dismissed (61 Atl. 705), and relator appeals. Rehearing granted.

PER CURIAM. A reargument of this cause will be ordered, to the end that the court may have the views of counsel upon the following points:

(1) Do the provisions of law that require the business of fire insurance companies incorporated in this state to be managed by their directors (to wit, either the provisions of P. L. 1896, p. 281, § 12, or, if that section be not applicable to such companies, then the provisions of their several charters in that behalf) include the fixing of rates to be charged by such companies for insurance against fire and the terms and conditions upon which the insurance shall be made? Does the agreement of May 15, 1902 (set out in the information herein), whereby the Newark Fire Insurance Exchange was established, amount (if valid) to a delegation of this matter of business management by the directors of the domestic corporations defendant to the body which under said agreement has the exclusive authority to fix rates, etc? Is it an abdication of the duty of the management of the business of said corporations by the directors thereof? Is a combination or agreement that produced this result a violation of the duty of such domestic companies and therefore in excess of their chartered powers? Is such a combination legal?

(2) Is there any distinction in the foregoing respects between insurance companies incorporated in this state and foreign companies admitted to do business in this state pursuant to the statute (P. L. 1902, p. 430, § 58 et seq.)?

(3) If the agreement of May 15, 1902, above referred to, is contrary to public policy, as be-

ing an unreasonable restraint of trade, does it or not follow as a necessary consequence that it is for this reason ultra vires the several defendant corporations that were incorporated in this state? Is it, or not, a limitation upon the chartered powers of every corporation that it is not to make any contract that is contrary to the policy of the law?

(4) Is it, or not, implied in the act pursuant to which foreign insurance companies are admitted to do business in this state (P. L. 1902, p. 430, § 58 et seq.) that such companies shall not be permitted to make contracts or transact business in any manner contrary to the policy of the laws of this state? And are the powers of foreign insurance companies admitted to do business within this state exceeded when they attempt to make an agreement that amounts to an unreasonable restraint of trade?

(5) If such companies (either domestic or foreign) engage in a course of business that is contrary to the policy of the law of this state, and for that reason in excess of the chartered powers of such companies, would or would not the Attorney General be entitled to maintain a quo warranto for the purpose of declaring their charters forfeited, or of restraining such course of business? And, if so, does or does not a bill or information in equity lie at the instance of the Attorney General for the latter purpose?

It is not intended to limit the reargument to the points above suggested.

(39 N. J. E. 215)

WOLTERS v. SHRAFT.

(Court of Chancery of New Jersey. April 28, 1905.)

1. TRUSTS—CONSTRUCTION OF DEED.

N. S. I. conveyed to F. R. W. The grantee was designated "trustee for R. M. W.," and the habendum clause was: "To have and to hold the above-described land and premises, with the appurtenances, unto the said party of the second part (F. R. W.), his heirs and assigns, to the only proper use, benefit and behoof of M. R. W. aforesaid, her heirs and assigns forever." The consideration proceeded from F. R. W., who stood in loco parentis to R. M. W. Held, that, if the statute of uses executed the legal estate in R. M. W., it did not, because the consideration proceeded from F. R. W., make her a trustee for him.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 47, Trusts, §§ 102, 118.]

2. SAME—CREATION.

A trust will not be raised in opposition to the declaration of the person who advances the money, or the obvious purpose and design of the transaction.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 47, Trusts, § 102.]

(Syllabus by the Court.)

Bill by Mrs. Wolters against Robert Shraft. Bill dismissed.

James R. Nugent and Samuel F. Bigelow, for complainant. Elwood C. Harris, for defendants.

STEVENS, V. C. On September 22, 1882, the Newark Savings Institution conveyed to

Frederick R. Wolters a house and lot fronting on Parkhurst street, Newark. The grantee, wherever named, is designated in the deed "Trustee for Rosa Mary Wolters." The habendum clause is as follows: "To have and to hold the above-described land and premises, with the appurtenances, unto the said party of the second part (Frederick R. Wolters), his heirs and assigns, to the only proper use, benefit and behoof of Mary Rosa Wolters aforesaid, her heirs and assigns forever." Mary Rosa was born in 1868. She had lost both father and mother before she attained the age of nine years. She was committed to the care of an orphanage in Brooklyn, and, when 10 years old, was given by the mother superior of that institution to Frederick R. Wolters and his wife, who were childless. The evidence demonstrates that Mr. and Mrs. Wolters treated her in all respects as their child, giving her their own name. She lived with them up to the time of her marriage to Robert Shraft in April, 1895, a period of 16 years. There can be no doubt but that they stood to her in loco parentis. *Brinkerhoff & Wife v. Mersells' Executors*, 24 N. J. Law, 680, 683; *Powys v. Mansfield*, 3 Myl. & C. 367; *Roberts' Appeal*, 85 Pa. 84. Frederick R. Wolters died in 1900. He gave all his property, then consisting of an estate of about \$100,000, to his widow. He made Robert Shraft one of his executors, and calls him "my son-in-law." The bill is filed by the widow, who prays that it may be decreed that she has, as against Mary Rosa, a perfect title to the premises deeded by the savings institution.

The complainant produces no evidence showing mistake or misapprehension at the time of the making of the deed. She bases her right on the following train of reasoning: She says that under the operation of the statute of uses the legal title was at the time the deed was made transferred instantaneously from Wolters, the trustee, to Mary Rosa, the cestui que use; and that thereupon, because the consideration proceeded from Frederick Wolters, she became his trustee under the doctrine of resulting trusts. This argument will not bear a moment's consideration, even if we assume, as I think without warrant from the authorities, that, although Wolters stood in loco parentis, the principle of advancement applied to a wife or child (2 Pom. Eq. Jur. § 1039; *Dyer v. Dyer*, 1 Lead. Cas. Eq. 177; *Sayre v. Hughes*, L. R. 5 Eq. 380; *Read v. Huff*, 40 N. J. Eq. 234; *Hallenback v. Rogers*, 57 N. J. Eq. 221, 40 Atl. 576; *Id.*, 58 N. J. Eq. 590, 43 Atl. 1093) would not have applied to him, had the conveyance of the legal title been directly and in terms to Rosa. The statute of frauds requires declarations of trust to be manifested and proved by some writing signed by the party; the exception being of those cases in which the trust arises or results by implication of law. It is obvious

that, while a trust may result in the absence of express declaration, it cannot, under the operation of this rule, prevail against such a declaration. "It will not be raised," says the author of the American Note to *Dyer v. Dyer* (1 Lead. Cas. Eq. 278 [3d Am. Ed.]), "in opposition to the declaration of the person who advances the money, nor in opposition to the agreement of the parties on which the conveyance is founded, or the obvious purpose and design of the transaction." This would seem to be so obvious as not to require a citation of authority for its support.

In the case at bar the conveyance of the legal title is made, not to Rosa, but to Wolters. The use or trust is expressly declared to be for her benefit. Because under the statute of uses it may have been executed in Rosa, even at law (*Mellick v. Pidcock*, 44 N. J. Eq. 538, 15 Atl. 3, 8 Am. St. Rep. 901), is this court, without anything in the deed to warrant it, to raise up another trust, the exact opposite of that declared? Should it say that, although the deed declared Wolters to be the trustee and Rosa the beneficiary, Rosa was, in fact, the trustee and Wolters the beneficiary? Such a conclusion would be unsupported by authority and contrary to legal principle.

I think the bill should be dismissed.

(89 N. J. Eq. 817)

ARMSTRONG v. ARMSTRONG.

(Court of Errors and Appeals of New Jersey.
March 5, 1906.)

WILLS—CONTEST—CAPACITY TO MAKE—UNDUE INFLUENCE.

The probate of a will, contested on the grounds of lack of testamentary capacity in the testator and of undue influence, sustained.

(Syllabus by the Court.)

Appeal from Prerogative Court.

Proceedings by one Armstrong against one Armstrong to contest the probate of the will of Obadiah P. Armstrong. From a decree of the Prerogative Court, defendant appeals, and, from a decree of the Chancery Court affirming the same, he again appeals. Affirmed.

On appeal from a decree of the Prerogative Court made by Magie, Ordinary, who filed the following opinion:

"This appeal challenges the correctness of a decree of the Sussex orphans' court, made March 31, 1896, admitting to probate two paper writings as the last will and testament and a codicil thereto of Obadiah P. Armstrong, deceased. The attack upon the decree in this court is confined to two points, viz.: (1) That at the time of the execution of the paper writings in question Obadiah P. Armstrong, who executed them, was not possessed of capacity to make a testamentary disposition of his estate; and (2) that the same were executed by him under the pressure of undue influence. Although my attention has been mainly restricted to these

contentions, it is proper to say that the evidence is entirely convincing that the paper writings were executed by Obadiah P. Armstrong in the manner required by law to constitute a valid testamentary disposition of property, and they are not open to the objection on that score, which was pressed in the court below.

"With respect to the contention that Obadiah P. Armstrong at the time of the execution lacked testamentary capacity, I have reached the conclusion that it is not supported by the facts proved, but that, on the contrary, the facts clearly show that he was then possessed of that degree of capacity which, under the settled rules established by our decisions, enabled him to dispose of his property by will. At the time of the execution of the papers in question Obadiah P. Armstrong (whom I will hereafter call the 'testator') was between 72 and 73 years of age. He had always resided in the county of Sussex, and had been an active and intelligent business man. He had received from his father some property and had acquired more, so that at the time in question he was the owner of a mill and various farms and of some personal property, in all of considerable value. He had never married. If he died intestate, his next of kin, under the statute of distributions, were William B. Armstrong, a brother, residing in Iowa, John B. Armstrong, a brother, residing in the county of Sussex, near testator, Obadiah E. Armstrong, Martha Josephine Calvin, and Mary C. Demarest, who were children of a deceased brother, and Martha Elizabeth Cummins, a daughter, and

Cummins, a granddaughter of a deceased sister. John B. Armstrong was married and lived with his wife, having four children, for one of whom testator had considerable respect and regard. Martha Elizabeth Cummins had been a ward of testator, and he had directed her education and maintained with her a correspondence which indicated his regard for her. The granddaughter of testator's deceased sister was the child of William Cummins, deceased, and it appears that testator and others of the family had become somewhat estranged from her mother, the widow of William. The deceased brother had left a widow, Cornelia M., who more than 30 years before had come to Sussex county with her three children above named, who were then young. From about that time the testator and the widow and children of the deceased brother had been one household, living together until the children successively married. Thereafter testator and the widow continued to live in the same manner. Testator's interest in these children and his love for them is manifested by the evidence. He likened his regard for them to that of a father for his own children. The papers in question were both executed on August 27, 1895. For many years testator had been afflicted with stricture, which, however, did not prevent his active attention

to his business in connection with his own property and the affairs of a bank in Newton, of which he was an officer, until about the 6th or 7th of August. He then remained at his home in Lafayette, giving some attention to his own business there, and not confined to his house. He afterwards became so much worse that he summoned his physician, who finally advised that an operation was necessary. That physician, with two others, performed the operation on August 21st. Thereafter testator was confined to his bed, and gradually sank until he died on August 30th. From the time he was first summoned his physician was in attendance upon testator. After the operation he directed what should be administered to him, and what care should be taken of him. Testator was also visited by other physicians during the period between the operation and his death, and for most of the time he had the services of a trained nurse, who administered to testator what was directed or permitted by the physician in charge. He kept a record of what was so administered, which has been put in evidence, and from which it appears that testator had given to him narcotics to allay pain and stimulants of various kinds, principally to stimulate the action of the heart.

"The contention is, not that testator, by age or disease, was laboring under dementia, but that, by reason of the administration of the narcotics and stimulants, his faculties were so affected as to render him incapable of intelligent action. It is particularly urged that during the night preceding August 27th he had been at the very gate of death, and had only been drawn back by the administration, hypodermically, of powerful stimulants, which revived the flagging powers of the heart. The evidence of what occurred during that night is contradictory and by no means clear, but I think the discrepancy only calls for the observation that the real question relates, and must be confined to the period of the day during which testator was engaged in the business of making his will. Evidence of previous weakness and inability, if credited, is admissible and important. But, if evidence of capacity during the period while the business was in hand is convincing and sufficient, the evidence of previous incapacity has no weight. That testator, during the period of the day when he was engaged in this business, possessed sufficient intelligence and capacity, notwithstanding the effect of the operation and of the drugs administered, I deem to be conclusively established by the proofs. The contrary conclusion could not be reached without rejecting or discrediting the evidence of intelligent and indifferent witnesses, for which I can find no ground.

"From the evidence, which is uncontradicted, it is clear that testator did not desire to die intestate, and had, prior to the operation, indicated that he intended to make a will. In 1893 he went to Chicago, and before going he wrote a paper in the form of a will.

and making disposition of all his property not dissimilar from that made by the paper in question. The paper was signed by him, but by only one witness. It was consequently ineffective as a testamentary disposition. It is contended that testator was aware of its ineffective character, and executed it only to satisfy the importunities of those who are respondents in this cause. Experience has shown that many intelligent business men are not well informed as to the requisites of a will. Testator acted, however, as if he believed it was a paper of consequence by directing its safe-keeping. That he did know its defective character at the time of the operation seems clear, because, although he had thereby made his nephew, Obadiah E. Armstrong, his executor, yet on the morning when he was about to submit to the operation he wrote and gave to Mrs. Calvin a paper, indicating his request that, "if worst comes to worst," his nephew, Obadiah, and his niece, Mrs. Calvin, should act as his administrators. But it is proved, without contradiction, that prior to that time, and within one or two weeks, he had written down upon paper his wishes respecting the disposition of his property to some extent. At that time, I conclude, he intended to have a will drawn, and upon the scheme in that paper expressed. He had not done so at the time the necessity of an operation was forced upon him by the progress of his trouble. In the presence of that risk, he made the request as to his administrators, embodied in the paper he wrote and gave to Mrs. Calvin that morning. When the operation had been safely passed, he reverted to his original intention and prepared to make a will. Having come to that determination, he acted in such a manner as to indicate capable judgment as to what he wished done. He sent for a well-known and intelligent lawyer, who had been his legal adviser and personal friend for 30 years. Upon his arrival testator caused to be produced the paper which he had written a week or two before, and said: "I want my will drawn according to that paper as far as it goes." Then ensued a conversation in respect to the contents of the paper and modifications of some of its terms, and, eventually, in respect to the residue which would be undisposed of under the previous instructions. Testator recognized that he had not disposed of all his real estate, and directed one farm to be devised to the wife of his brother John for life, with remainder to her children. His adviser put down a memorandum of this instruction thus: "Ackerson farm to Dorcas Armstrong and her children." Then was brought up the question of the general residue, and testator declared that it had given him some trouble what to do with it. As a final statement, he said he would "put it in four shares," and one share should go to Cornelia M., his brother's widow, and one to each of her children. His adviser jotted

down the result thus: "All rest and residue of my estate—10 shares in Belvidere Nat. Bank, New Bank. Residue to Joe. 1 share to Cornelia. 1 O. E. Armstrong. 1 Josie. 1 Mary C." Furnished with testator's written instructions and his own memoranda, the lawyer drew the will in question and afterwards read it in full to the testator, who signified his approval of each clause, and then it was executed in the manner required by law.

"Appellants' counsel advert to several circumstances appearing from the evidence which, they contend, indicate that testator's faculties must have been affected and his power of observation destroyed. It is first said that the testator's instruction as to the gift to Miss Cummins of the income of the Peters farm was not satisfied by the devise of the farm to her for life; but this was the subject of conversation between testator and the lawyer, who properly pointed out that, as the instruction contemplated her having the farm in fee simple, if she left children surviving her, and a remainder over if she died childless, the devise for life was the most convenient way to provide for the whole devise intended. It is next pointed out that the instructions contemplated that the devise to Mrs. Calvin and the bequests to her were all to be hers absolutely only in case she had issue, while the will bequeaths to her certain shares of bank stock absolutely; but it is obvious that testator did not hesitate to direct deviations to be made in his instruction in various particulars, and, when it appears that the will was read to and assented to by testator, it will be presumed that this change was directed. It is also argued that the devise to Obadiah E. Armstrong of the "Armstrong Homestead" was a devise of property of which the devisee held the title. The instructions drawn by testator expressed the intent to give to the nephew the "incumbrances" upon that property. Testator's meaning, in respect to the gift, was the subject of conversation between him and the lawyer. Both seemed to know that, although the title was in the nephew, the consideration for the transfer to him had been paid by the testator. He therefore had a resulting trust therein, and the expedient of a general devise of the property to the nephew was resorted to with the idea that by this devise the equitable title of testator would pass.

"It is next urged that the memorandum of the lawyer shows that testator instructed him that the residue should go to 'Joe,' by which name Mrs. Calvin was called. Yet the will divides the residue between her and her mother, brother, and sister. This confusion in the memorandum indicates, in my judgment, some original doubt in the mind of the testator. He had not fully determined the destination of the residue. At first he inclined to give it all to Mrs. Calvin. Eventually he determined to divide it. This would ac-

count for the inconsistent entries on the memorandum, and justify the lawyer in drafting the residuary clause according to the last instructions. That this division was determined upon by testator also appears from the fact that a suggestion by the lawyer that Miss Cummins should be given a share in the division met with a decided negative from testator.

"It is lastly argued that testator manifested incapacity because the will as executed did not conform to the instructions and memorandum in two important particulars. In testator's instruction the devise of the farm to Mrs. Calvin was to be accompanied by a bequest of all the personal property he had on the said farm. In the lawyer's memorandum, at the bottom, were these words: 'Ex. O. B. Armstrong and Martha Josephine Calvin'—and these indicated testator's wish as to the executors of his will. Neither of these important matters was contained in the will, yet testator, to whom it was read, did not notice the omission, but assented to and executed it as his will. The effect of testator's failure to take note of the omissions must depend upon whether such failure was due to weakness of faculties or mere temporary inattention, such as was consistent with capacity. That it was due to the latter seems to me indisputable. The omission had escaped the attention of the astute lawyer who had drawn the will. With the memorandum before him he had failed to insert what he was instructed to include. When the omission was disclosed, it was brought to the testator's attention, who reiterated his intention in the two respects, and they were expressed by the codicil in question. Unless I discredit the evidence of the lawyer who drew the will, and the other witness thereto, and the silent proof of the instructions in testator's writing, and the lawyer's memorandum made at the time, I must conclude that testator contemplated and intended to dispose of his property by will, and that he knew particularly what property he had to bestow; that he knew the natural objects of his bounty; that on the day in question he knew what business he was engaged in, and what he intended to do and what he did do by the will and codicil, and so was possessed of testamentary capacity within the doctrine laid down by Chancellor McGill, and approved by the Court of Errors and Appeals. *Westcott v. Sheppard*, 51 N. J. Eq. 315, 25 Atl. 254, 30 Atl. 428.

"The claim that the will and codicil in question were the product of undue influence requires brief consideration. The case before me does not furnish any sufficient evidence that the testator was a man accustomed to yield to influence. It is absolutely wanting in any direct evidence that, during the period of time when testator's mind as to the disposition of his property was being made up, any influence in favor of or against any person was exerted upon him. The uncontradicted evidence is that the memorandum he

had prepared a week or two before, and which he furnished to his legal adviser as containing his wishes, and which served as the basis of the will and codicil, but modified under the information and advice given by the draftsman, was made by himself, without consultation or advice from any one. While some of the beneficiaries under these papers were present at least at parts of the interview between testator and his counsel when the instructions took final shape, and at the execution of the will and codicil, the evidence convinces me that their presence was deemed by them to be requisite for the care of the very sick relative with whom they had lived so long, and that none of the beneficiaries present joined in the conversation between him and his adviser, or made any suggestion or gave any advice in respect to the matter in hand.

"But it is insisted that from the opportunities furnished to those beneficiaries to approach and influence testator by their long intimacy and association in one household, from their presence at the giving of instructions for and the execution of his will, and the fact that it gives to them a greater share of testator's property than is given to others as near or nearer of kin to him, the inference that the will was the product of influence that was undue is justified and required. The evidence shows that testator, by this testamentary disposition, gave something to each of the persons to whom his property would go if he died intestate, except two. Nothing was given to his brother John, but a farm was devised to John's wife for life, with remainder to their four children. Nothing was given to the granddaughter of his deceased sister, probably for a reason which induced him to declare in the paper written by him in 1893 that he desired to "disinherit" her. The evidence does not clearly show that the gifts and devises to the members of testator's household were more valuable than those made to others by this will and codicil, but it is so strongly insisted upon that I will assume it as a fact. Nothing is better settled than that inequality of benefit among those of equal degree of consanguinity to testator will not justify any inference against the will that creates it. Any other doctrine would abolish the power to direct the disposition of one's property after death as between relatives. Nor will such inequality justify of itself any inference of undue influence upon testator; for such inequality may well be induced by the influence of kindly attentions and loving care producing affection and good will. Nor will the fact that these present and former members of testator's household giving attention to him when he sorely needed it, remained in his room while he gave instructions to his lawyer, and while he executed his will, which was so favorable to them (if their conduct in that respect may be characterized as indecorous and improper), justify the inference that such presence constituted

undue influence, because that requires the assumption that their presence operated to destroy testator's free agency, and to so dominate his will as to compel him to do what he did not desire to do. If their presence reminded him of their love and attention, and recalled or stimulated his own feelings of affection for them, the influence thus produced cannot be said to be undue unless it deprived him of the power to do what he wanted to do. That it produced such an effect cannot be justifiably inferred. If the concurrence of the circumstances mentioned be considered, at most, it only incites the mind to a careful scrutiny of the proofs to determine whether it may be justifiably inferred therefrom that testator was coerced or his free agency destroyed so that this will was not his real desire. On this subject I entertain no doubt whatever. The facts are not only consistent with an untrammelled and uninfluenced exertion of the free will of testator, or of such an exertion of will as was induced by kindly offices and attentions, but afford no shred of inference that it was produced by malign and improper influence dominating the testator.

"It should be added that, if upon the whole circumstances I could find ground to impose upon respondents the burden of showing that the will in question was made freely and without coercion, I should be bound to hold that they had sustained that burden. From all the facts proven, proponents of the will, from their opportunities as members of testator's household, might exert influence upon him. Such influence, if arising only from good will and affection, is not undue. Suggestions and persuasions from persons so intimately connected as to what disposition testator should make of his property would not necessarily be improper. They would not constitute the influence which is undue, unless they became importunities so pressing or repeated as to render testator powerless to resist them. Not only is there no scintilla of proof of such importunities, but the uncontradicted evidence of each of these beneficiaries of testator's bounty is that they had held no conversation whatever with testator respecting his will or the disposition of his property. Such evidence might tend to overcome suspicion, if any had been engendered, by the concurrence of circumstances alluded to, but, in the absence of such suspicion, I know no reason for not according to it entire credit. The result is that the decree below must be affirmed.

"Whether, upon this affirmance, I should direct the contesting parties to pay the costs and expenses of the litigation, has given me some difficulty. In the orphans' court the costs and expenses, together with considerable counsel fees, were ordered to be paid out of the estate of deceased. This involved the determination by the court that contestants had reasonable cause to contest the validity of the paper. No appeal was taken from that determination. But that determination does

not affect the question. A contest in the primary court may be reasonable, and yet, after the evidence has plainly disclosed its futility, an appeal may be unreasonable.

"I am, however, inclined to pronounce the contest in this court a reasonable one, and so to direct the costs of appellants, with a fair counsel fee, to be paid out of the estate."

McCarter, Williamson & McCarter and Henry Huston, for appellants. Lewis J. Martin and Charles J. Roe, for respondents.

PER CURIAM. The decree appealed from is affirmed for the reasons set forth in the opinion of the ordinary filed in the Prerogative Court.

The CHIEF JUSTICE, and DIXON, GARRISON, FORT, GARRETSON, PITNEY, BOGERT, VREDENBURGH, VROOM, GREEN, and GRAY, JJ., concur.

(73 N. J. L. 533)

SHELTON v. ERIE R. CO.

(Court of Errors and Appeals of New Jersey. March 26, 1907.)

1. CARRIERS—EXPULSION OF PASSENGER—REFUSAL TO PAY FARE.

The expulsion from a railroad train of a person who refuses to pay to the conductor any fare other than the tender of a limited ticket that on its face has expired is not actionable.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, §§ 1423-1432.]

2. SAME.

This rule is not altered by the fact that the passenger has paid for such ticket the full rate for which the railroad company should have given him an unlimited ticket; nor does the communication of this fact to the conductor render the expulsion of the passenger for nonpayment of fare actionable.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, §§ 1425.]

3. SAME—TERMS OF TICKET.

In the determination of a passenger's right to travel under a railroad ticket tendered by him to the conductor in payment of his fare, conclusive force is to be given to the intrinsic effect of such ticket to pay such fare as expressed on its face.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, §§ 1423-1432.]

4. SAME.

Perine v. N. J. St. Ry. Co., 54 Atl. 799, 69 N. J. Law, 230, overruled.

5. SAME—RATES OF FARE—LIMITED TICKETS.

Section 38 of the general railway law (P. L. 1903, p. 665) is constitutional.

(Syllabus by the Court.)

Error to Circuit Court, Essex County.

Action by Charles H. Shelton against the Erie Railroad Company. Judgment for plaintiff, and defendant brings error. Reversed.

Cortlandt & Wayne Parker and Chauncey G. Parker, for plaintiff in error. Arthur H. Bissell, for defendant in error.

GARRISON, J. This suit is grounded upon the plaintiff's expulsion from a railroad train under the following circumstances: On

December 17, 1903, the plaintiff being a passenger on the defendant's train from Montclair to Upper Montclair, a distance of 1½ miles, tendered to the conductor in payment of his fare a ticket that bore date December 15, 1903, and read as follows: "Good only for continuous passage Montclair to Upper Montclair beginning on day of sale or the next day." The ticket had been sold to the plaintiff on December 15th, and hence by its terms had expired. Upon being informed by the conductor that under the rules of the company the ticket could not be accepted for fare after the date of its expiration, the plaintiff refused to pay any other fare, and, when told that under the rules he must in that case leave the train, replied that he would not do so unless legal force was used. When the train reached the next station, the conductor placed his hand on the plaintiff's shoulder, and the two walked to the rear platform of the car, and when the train had stopped at the station the plaintiff stepped down on the bottom step from which before the train moved off he was given "a last push" by the conductor. For this expulsion the plaintiff brought his action in tort against the railroad company and recovered substantial damages.

Other facts are that the plaintiff had paid 10 cents for his ticket, for which price he should have been given a ticket that was not limited, that the limitation printed on the ticket was one the defendant could not lawfully impose, and that the limitation had not been noticed by the plaintiff. Whether tickets without such limitation were issued by the defendant and on sale at its ticket offices did not appear. The plaintiff also testified that he had with him 20 cents, the amount of the fare and excess fare demanded of him by the conductor, but that "he had paid the full price and refused to pay over again."

The right of the plaintiff to maintain his present action upon the foregoing facts is directly raised by assignments of error based on exceptions to the court's refusal to nonsuit the plaintiff or to direct a verdict for the defendant.

Upon the facts stated, it is entirely clear that whatever injury the plaintiff suffered at the hands of the defendant had its origin in the delivery to him by the ticket agent of a ticket that was limited as to the time when it must be used, whereas for the price that he paid he ought to have been given a ticket that was not so limited. It is equally clear that the present suit is not grounded upon this injurious act of the defendant or its ticket agent, but upon the conductor's denial of the plaintiff's right to travel upon the ticket that was presented to him, viz., a ticket that on its face negatived the right that was claimed under it by the plaintiff. The precise question, therefore, is whether a passenger who has been expelled from a train for refusing to pay his fare may maintain an action for such expulsion, if previously

thereto he had tendered to the conductor a ticket that on its face was not receivable for his fare, provided that he had accompanied such tender with the true statement that he had paid for such ticket the full rate for which a proper ticket ought to have been issued to him. In still narrower form the question is whether the rule that permits the expulsion of a passenger who neither pays his fare nor tenders a ticket that shows his right to ride is abrogated or modified by the circumstances that were communicated to the conductor in the present case.

While this question is one of first impression in this court, the underlying proposition that a passenger may lawfully be ejected for nonpayment of fare must be taken to be entirely established in this state. That "railroad companies are not bound to carry a passenger unless upon payment or tender of his fare, that they may in such case either refuse to permit him to enter the cars or having entered them they may require him to leave them before the termination of the journey, and that if he refuses to leave they may remove him at a suitable time and place using no unnecessary force"—were, more than half a century ago, treated by Chief Justice Green in *State v. Overton*, 24 N. J. Law, 437, 61 Am. Dec. 671, as unquestioned propositions from which to reason with respect to a questionable regulation. The criticism of this case in *Daniel v. New Jersey Street Railway*, 64 N. J. Law, 603, 46 Atl. 625, left untouched these basic propositions, which, indeed, are not now questioned anywhere.

In other jurisdictions for whose decisions we entertain the highest respect the question we are now called upon to decide has been passed upon in a large number of cases.

In a recent case in the federal Court of Appeals Judge Taft said: "The law settled by the great weight of authority * * * is that the face of the ticket is conclusive evidence to the conductor of the terms of the contract of carriage between the passenger and the company." *Poulin v. Canadian Pacific Railroad Company*, 52 Fed. 197, 3 C. C. A. 23, 17 L. R. A. 800.

The Supreme Judicial Court of Massachusetts in *Bradshaw v. South Boston Railroad*, 135 Mass. 407, 46 Am. Rep. 481, held that "It is a reasonable practice to require a passenger to pay his fare or show a ticket, * * * and it would be unreasonable to hold that a passenger, without such evidence of his right to be carried, might forcibly retain his seat in a car upon his mere statement that he is entitled to passage. If the company has agreed to furnish him with a proper ticket, and has failed to do so, he is not at liberty to assert and maintain by force his rights under that contract; but is bound to yield for the time being to the reasonable practice and requirements of the company, and enforce his rights in a more appropriate way."

In a later case (*Dixon v. New England Railroad*, 179 Mass. 242, 60 N. E. 581) the

same court said: "The passenger's right to transportation is no greater than the right and duty of the conductor to enforce reasonable rules, and, for the time being, the passenger must bear the burden which results from his failure to have a proper ticket. A passenger may have a right to transportation between certain stations because of his connection with a certain ticket, and yet, if the ticket itself is not in order, a conductor is not bound to take it in payment of fare."

In *Stocksdale's Case*, 83 Md. 245, 34 Atl. 880, the Court of Appeals of Maryland held that "in all cases when the question as to the right of a passenger to travel arises between him and the conductor of a train the ticket is necessarily the conclusive evidence of the nature and extent of the passenger's right."

"No other rule," said Judge Cooley in *Hurford v. Grand Rapids Railway Company*, 58 Mich. 118, 18 N. W. 580, "can enable the conductor to determine what he may or may not lawfully do in managing the train and collecting fares." And on another occasion the same court held that, "when a passenger receives a defective ticket from an agent of the company by reason of the mistake or negligence of the agent, the conductor may refuse to accept such ticket, and is authorized to compel the passenger to leave the train if payment of fare is refused."

The New York Court of Appeals in *Monnier v. New York Central & Hudson River Railroad Company*, 175 N. Y. 281, 67 N. E. 569, 62 L. R. A. 357, 96 Am. St. Rep. 619, said: "A person who becomes a passenger in a public conveyance must subordinate his conduct to all rules that are reasonable and valid. The simple duty of the conductor is to execute and enforce all reasonable rules, and that of the passenger is to obey them. If there is some fact or omission behind the rules not apparent upon the face of the transaction, the passenger must resort to some other remedy for his grievance besides the use of force against the conductor, and, if under such circumstances he invites a personal collision with the officer in charge of the train resulting in his forcible expulsion, he puts himself in the wrong, and cannot sue the company or the officer for assault and battery."

In *Kiley v. Chicago City Railway Company*, 189 Ill. 384, 59 N. E. 794, 52 L. R. A. 626, 82 Am. St. Rep. 460, the Supreme Court of Illinois held that "the conductor was ordered by his superior not to receive a ticket like the one presented. This order he was bound to obey, and, when the passenger was notified by the conductor that his ticket was not good and would not be received, it was his duty to leave the train in a peaceable manner, and hold the company responsible for the consequences. * * * The passenger should seek redress in the courts, where he will find a complete remedy for every in-

dignity offered and for all damages sustained."

The Supreme Court of Michigan in *Brown v. Rapid Railway Company*, 134 Mich. 591, 96 N. W. 925, held that "the rule of law in this state has been settled that, as between the conductor of a railway train and the passenger, it is incumbent upon the passenger to produce as a ticket one which is apparently good on its face, or pay the fare in cash, and that, failing to do this, the conductor has the right to eject the passenger from the car."

In *McKay v. Ohio River Railroad Company*, 34 W. Va. 65, 11 S. E. 737, 9 L. R. A. 132, 26 Am. St. Rep. 913, the Supreme Court of Appeals of West Virginia said, "if a passenger pay a railroad agent fare for a certain trip, and by mistake of the agent is given a ticket not answering for that trip but one in an opposite direction, and the conductor refuses to recognize such ticket, and demands fare, which the passenger fails to pay, ejection of the passenger from the train without unnecessary force will not be a ground of action against the company as a tort."

The Supreme Court of Alabama in *McGhee v. Reynolds*, 117 Ala. 413, 23 South. 797, held that, "as to the right of a conductor to eject a passenger who is found riding on a train on a ticket void on its face, it is proper to say, and we may announce without elaboration as the proper conclusion sustained by the great weight of authority, that the ticket is the sole and conclusive evidence to the conductor of the passenger's rights as such to be on the train, * * * and when it is void on its face, in default of payment of fare he may deny the right of the passenger to ride on such ticket and expel him in a proper manner from the train."

These cases and a host of others that might be cited concur in holding the general doctrine that the expulsion by a conductor of a passenger who neither pays his fare nor tenders a ticket that evinces his right to carriage is in the absence of unnecessary force not actionable. 6 Cyc. 551; 5 Am. & Eng. Ency. 594; 28 Am. & Eng. Ency. 156; 4 Elliott on R. R. § 1594.

To the doctrine thus stated we yield entire assent. Many of the cases cited, however, by reason of the facts involved, or by force of the line of reasoning pursued, go further than we are required to go in the decision of the present case. In order, therefore, that there may be no uncertainty as to the scope of our decision and the ground upon which it rests, it is deemed best that such ground be explicitly stated.

Railroad companies as they exist in this country are corporations in which private capital is embarked in public; i. e., common carriage. These corporations possess, therefore, a dual nature, having in trust on the one hand the financial interests of their stockholders, and, on the other, the conven-

ience and safety of the traveling public. The two agents of these corporations with which alone the public comes in contact, viz., the ticket agent and the train conductor, represent roughly these two corporate capacities.

Hence the transaction by which a traveler purchases a ticket from one of these agents for presentation to the other is likewise of this same dual nature, and involves an observance on the part of the passenger of all reasonable regulations established for the conduct of each of these departments. These regulations are simple, uniform, and well understood by the public. The ticket agent sells tickets for cash. He cannot give credit. His authority over the business of his company is limited to the issuance of such tickets as have been placed in his hands for that purpose, as incidental to which he may hand out time tables and give such information to prospective passengers as may aid them in the selection of the tickets they require; i. e., tickets that will pay the fare between the points they designate. The obligation of the company with respect to the acts of this agent is that he shall deliver to passengers the tickets for which they ask and pay. If this is not done, whether the fault be that of the agent or the company this obligation is broken, and the company is liable for the damages that result therefrom. The case before us is an illustration of such a breach.

The agency of the train conductor is even more limited for it is all comprised in his duty to collect a fare from every passenger or to eject him from the train.

The fare thus to be collected by the conductor may be a cash sum or it may be a ticket; that is for the passenger to determine. If the passenger proposes to pay in cash, he must be provided with and tender to the conductor a sum that under the established rules of the company is sufficient to pay his fare. If he proposes to pay by ticket, he must be provided with and tender a ticket that under the established rules of the company has the intrinsic effect of paying such fare. This intrinsic attribute of the ticket is the essential quality to which it owes its efficiency. It is the possession of this attribute that distinguishes a ticket from a contract, on the one hand, and from a mere instrument of evidence, on the other. And I may say here that the failure to emphasize this essential feature of a railroad ticket is the chief reason for our unwillingness to place our decision solely upon the authority of the cases that have been cited, in most, if not all, of which the efficiency of such ticket is referred in a somewhat vague way to a hypothetical contract, the precise nature of which is necessarily involved in obscurity.

That this essential attribute of a railroad ticket did not escape the acute observation of Chief Justice Beasley is evident from his

careful description of such a document in the opinion delivered by him in *Petrie v. Pennsylvania Railroad*, 42 N. J. Law, 449. "The plaintiff," he said, "had a passenger ticket, issued by the defendant, which on its face and according to its intrinsic effect did not authorize him after having stopped at a place intermediate the designated termini to use it for the purpose of continuing his journey." This language, which might well stand as a definition, not only recognizes that a railroad ticket has the intrinsic effect expressed on its face, but also that it may have an intrinsic effect that is not so expressed. This is a valid distinction, since it marks the difference between inspection and interpretation as modes for determining the effect to be given to passports of this nature. The implication is that such effect, when not expressly stated, is to be gathered from the well-known customs of the business of which the ticket forms a part. A postage stamp is a good illustration of such mode of interpretation, or, still better, a special delivery stamp: Nothing on the face of these documents expressly states the effect of either of them, but the well-known custom of which they are a part interprets them to the public and to postal agents alike. Theater tickets afford another familiar example, especially the return checks issued during a performance, which, though they may contain only the advertisement of some business house, are interpreted by custom to secure the return of the holder to the theater on the night of their issue. Upon a far more extensive scale promissory notes became early in the history of English law subject to be interpreted solely by the business customs of merchants. Whether I am correct or not in these views as to the interpretation of railroad tickets is, however, of no immediate importance, since in the present case the plaintiff's ticket called for no interpretation, for the reason that is expressed on its face the intrinsic effect to be given to it. The subject, which is one of great importance, is discussed at length and in a most suggestive way by Prof. Beale in an article on "Tickets," in volume 1 of the *Harvard Law Review*, p. 20.

For present purposes, we need to go no further than to say that in the determination of right to travel under a railroad ticket tendered as fare conclusive force is to be given to the intrinsic effect of such ticket as expressed on its face. Such was the force given to it by Chief Justice Beasley in the case just cited, and by Mr. Justice Van Syckel in *Spliss v. Erie Railroad Company*, 71 N. J. Law, 90, 58 Atl. 116, where the judgment was reversed because the lower court had left it to the jury to say "whether the plaintiff believed he had a right to use the ticket." Such was the force accorded to the ticket in *Rogers v. Atlantic City Railway Company*, 57 N. J. Law, 703, 34 Atl. 11, where Mr. Justice Lippincott, speaking for

this court, said: "The ticket is the conclusive evidence of the contract of carriage upon which the conductor had the right to rely," and in the recent case in this court of *McDonald v. Central Railroad Company*, 72 N. J. Law, 280, 62 Atl. 405, 2 L. R. A. (N. S.) 505, 111 Am. St. Rep. 672, which was a time-table case, and not one of the nonpayment of fare, the decision that the plaintiff's expulsion was unlawful was entirely consistent with the face of his ticket.

This intrinsic effect of a railroad ticket was, also recognized in the opinion of Chancellor Magill in this court in the case of *Pennsylvania Railroad v. Parry*, 55 N. J. Law, 551, 27 Atl. 914, 22 L. R. A. 251, 39 Am. St. Rep. 654, when he said, "The ticket is a mere token that fare has been paid, and that the passenger has the right to be carried to the destination it indicates according to the reasonable regulations of the railway company," for a token is a symbol that betokens something, i. e., that carries within itself that which it signifies, which is in effect a paraphrase of the significant term in Chief Justice Beasley's description.

The only case in our courts as far as I can discover that is out of harmony with these views is *Perine v. North Jersey Street Railway Company* decided in the Supreme Court and reported in a per curiam in 69 N. J. Law, 230, 54 Atl. 799. In that case the passenger tendered a transfer ticket that under the rules of the defendant had expired, and was rejected for refusing to pay a fare. The question we are now considering was therefore squarely raised. Judgment in favor of the plaintiff was sustained solely upon the authority of *Consolidated Traction Company v. Taborn*, 58 N. J. Law, 1, 32 Atl. 685. The *Taborn* Case, however, was not an authority for the proposition for which it was thus cited, and has no bearing upon the question we are considering. In the *Taborn* Case the plaintiff was expelled because she had no ticket; hence neither the intrinsic effect of a ticket nor its proper interpretation could possibly arise. What the *Taborn* Case held was that, where the company for its own convenience had established a custom of transferring its passengers to another car because of a temporary break in its road, a change of rules promulgated without notice on the very day the plaintiff was expelled was as to her an unreasonable regulation. The *Perine* Case was therefore unsupported by the only authority cited for that purpose, and, being, as we think, erroneously decided, must be deemed to be overruled by our present decision.

In the light of the foregoing considerations, the grounds for our adoption of the rule that the face of a railway ticket, when it speaks upon the subject, is conclusive upon its sufficiency as a railroad fare, should be clear. That this rule, although upon somewhat variant grounds, is established elsewhere by the great weight of authority, was stated at

the outset of our consideration of the subject.

In the citation of cases then made there was an intentional omission of those cases that hold the opposite view, and for this reason, viz., that such cases are without exception as far as my examination goes, based upon one or the other of two radically unsound propositions, according to which they may be conveniently grouped for criticism.

By far the greater number of the cases thus referred to proceed upon the idea that the delivery of a wrong ticket by the ticket agent or the giving of misleading information establishes a contractual right between the injured passenger and the railroad company, for the breach of which the train conductor must afford redress upon a summary investigation. The fundamental fallacy of this position is that it assumes the authority of ticket agents to make contracts for railroad companies. The authority of such agents is notoriously limited to the sale of tickets and to the doing of acts that are ancillary thereto. By no rule of the law of agency or of evidence can the acts or statements of a ticket agent beyond the scope of his limited authority be erected into a contract binding upon the railroad company. What has been mistaken for this authority to make contracts is the ability of these agents to make trouble for their companies by their negligence in the delivery of tickets, or their mistakes in giving information. For injury resulting from these acts of the ticket agents their principal may, as we have already seen, be held liable in an appropriate action.

The judicial conclusions that have been constructed on this erroneous foundation do not in any way commend themselves to us.

The other proposition that has been characterized as unsound is that the purchase of a ticket by a passenger is the payment of his fare. Such was the precise claim of the plaintiff in the present case. The fallacy of this proposition must be apparent. It is one of fact. Payment of fares is made to the conductor alone. This is true whether such fare be by cash or by ticket. Ticket agents do not collect or receive fares. They issue tickets. A fare is a payment that is made when the right of carriage is claimed. The very word "fare" originally meant "journey." Webster's International Dictionary. Such is still its connotation.

When a ticket is accepted by the conductor, it becomes a fare, but not before. In the case of *P. R. R. v. Parry*, above cited, the plaintiff's ticket had been accepted as fare for part of his return trip; hence the statement (*McGill, Ch., ubi supra*) that it was a token that fare had been paid was strictly correct.

The failure to observe this distinction has resulted in a line of decisions which, while recognizing the right of the conductor to expel a passenger for nonpayment of fare, hold that the company is liable for such expulsion if in point of fact, to use the lan-

guage of these cases, "the passenger has paid his fare to the ticket agent." Extended comment upon this line of reasoning is believed to be unnecessary.

Our conclusion upon the whole case is that the plaintiff was lawfully expelled from the train for nonpayment of fare, and that for such an expulsion no action can be maintained. The facts upon which this conclusion rests having all appeared at the close of the plaintiff's case, the motion for nonsuit then made should have been granted. The judgment must therefore be reversed.

In the preliminary statement of the plaintiff's case the limitation placed upon his ticket was said to be one that it was not lawful for the railroad company to impose. That statement embodied the decision we had reached upon a question raised by the railroad company touching the constitutionality and construction of the thirty-eighth section of the general railroad law (P. L. 1903, p. 665), which reads as follows:

"Any railroad company may demand and receive such sums of money for the transportation of persons on its railroads and connections, and for any other services connected with the business of transportation of persons on or over said railroad or to or from the same, as it shall from time to time think reasonable and proper, not exceeding in the case of railroad companies organized under this act, three cents per mile for carrying each passenger on such railroad and not exceeding in the case of railroads constructed or operated under a special charter, three and a half cents per mile for carrying each passenger on such railroad, and not exceeding the rate per mile limited by the charter, but no charge shall be required to be less than ten cents; tickets for passengers, except excursion tickets or tickets sold at reduced rates shall be good until used; tickets sold at less than the rates herein limited shall be good and shall entitle the holder to passage for a limited number of days only after the date of issue thereof, which limit shall be clearly stated and set upon the ticket; any railroad company owning or operating a railroad may collect an excess of ten cents over the established rate of fare from any passenger who pays his fare on the train, giving him a receipt therefor, which shall entitle the holder to have such excess refunded upon presentation at any ticket office of the company on the line of its railroad."

The argument for the company was that the charter of the Montclair Railway Company under which the plaintiff in error was operating authorized a charge of eight cents per mile; hence, it was contended the ticket in question was issued at a reduced rate and might lawfully be limited. This argument rests upon the contention that the foregoing section of the general railroad law is either unconstitutional or has no application to the case. Neither of these claims is in our opinion well founded.

That the Legislature could by an appropriate enactment alter the charter of the Montclair Railway Company seems to be clear. *Montclair v. New York & Greenwood Lake R. Co.*, 45 N. J. Eq. 438, 18 Atl. 242; P. L. 1885, p. 324.

This being so, we think that section 38 of the general railroad law is not rendered unconstitutional by reason of the provision that railroads constructed and operated as the plaintiff in error is under a special charter are permitted to charge one-half cent more per mile than railroads organized under the general act are permitted to charge. The argument is that this discrimination which in itself is favorable to the plaintiff in error is based upon an illusory classification. The classification is "railroad companies organized under this act, viz., the general railroad law," and "railroads constructed and operated under a special charter." The former of these classes is rendered general for purposes of railroad legislation by section 88; hence it must follow that the residue left after subtracting this general class from the entire class is also general for the like purpose. *Point Breeze Ferry Co. v. Bergen Neck R. Co.*, 53 N. J. Law, 108, 20 Atl. 762.

The contention that the words "good until used" does not mean good "for passage" is in our judgment entirely untenable.

Having reached the conclusion that section 38 of the general railroad law was constitutional, that it applied to the plaintiff in error, and that its effect was to render unlawful the limitation placed on the ticket that was delivered to the plaintiff below, we embodied such result in our original statement of facts, and have throughout the discussion of the case given it consideration in so far as it bore upon the legal questions at issue.

For the reasons already stated, the judgment of the circuit court is reversed.

(74 N. J. L. 615)

ROGERS v. ROE & CONOVER.

(Court of Errors and Appeals of New Jersey. March 29, 1907.)

1. MASTER AND SERVANT—INJURIES TO SERVANT—ASSUMPTION OF RISK—KNOWLEDGE OF DEFECT.

A servant, who knows that a tool or appliance furnished to him by his master is defective, does not on that account assume the risk of injury resulting from its use. It is not the obviousness of the physical condition or situation which charges the servant with the assumption of the risks that arise from it, but the obviousness of the danger which the physical condition or situation produces.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 610-620.]

2. SAME—DEFECTIVE APPLIANCES—KNOWLEDGE OF MASTER.

The fact that a master furnishes to his servant for use by the latter in his work a tool or appliance which is defective will not justify the conclusion that the master did not use reasonable care to furnish a safe tool or appliance unless (1) the defect was of such a character as to suggest to an ordinarily prudent person that

there was danger of injury in the use of the tool or appliance; or (2) unless prior use of the tool or appliance, in its defective condition, had disclosed that it was dangerous, and the master knew, or ought to have known, that this was the case.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 171-174.]

(Syllabus by the Court.)

Error to Circuit Court, Essex County.

Action by Louis H. Rogers against Roe & Conover. From a judgment of nonsuit, plaintiff brings error. Reversed.

Samuel W. Boardman, Jr., for plaintiff in error. Sherrard Depue, for defendant in error.

GUMMERE, C. J. This suit is brought to recover compensation for injuries received by the plaintiff through a fall while at work upon a ladder, and in the service of the defendants, at their store in the city of Newark. The defendants were engaged in the business of selling plumbers' and steamfitters' supplies. These supplies were kept in rows of bins, or pigeon holes, which had been constructed along the walls of their store, and which extended from the floor nearly to the ceiling. The lower rows of bins were deeper than the upper ones, and this method of construction left a ledge, or shelf, about three feet from the floor. For the purpose of affording access to the upper rows, "trolley" leaders were provided, which were each of them suspended by two grooved wheels from a track or iron pipe, running along the walls, and fastened to them near the ceiling. To render the ladders easily movable along this pipe or track, rubber rollers were affixed to their sides at the points of their contact with the ledge or shelf above described, and revolved along it as the ladders were shifted from place to place. As these ladders were originally constructed, there was below each of the grooved wheels by which the ladders were suspended a metal projection or lug, about an inch and a half long and half an inch wide, which extended under, and in close proximity to, the iron pipe or track, for the purpose of preventing the grooved wheels from leaving the track. The ladder upon which the plaintiff was at work when the accident occurred had one of these lugs broken off. The plaintiff had mounted it for the purpose of taking some steamfitters' supplies from a bin in one of the upper tiers. This bin was a little to one side of the ladder, and its position made it necessary for the plaintiff to lean out beyond the side of the ladder to accomplish his purpose. The throwing of his weight to one side caused first one of the grooved wheels to leave the track, and then the other, and the ladder, with the plaintiff upon it, fell to the floor. The plaintiff had no knowledge of any previous occurrence of the kind. This lug had been broken from the ladder more than two years before the occurrence of the accident, and the contention

of the plaintiff at the trial was that the defendants were chargeable with knowledge of its defective condition, and that their failure to repair it was a neglect of the duty which they owed him of using reasonable care in furnishing him with safe appliances for his work. The trial judge considered that the failure to repair the ladder was a neglect of this duty, but held that its defective condition was obvious, and that therefore the plaintiff assumed the risk of dangers resulting from the absence of the lug. For this reason, he directed a nonsuit to be entered against the plaintiff. The plaintiff assigns error upon that instruction.

As will be perceived from the above description of the construction of the ladder and the method of its operation, the location of the lug was at its top, near the ceiling, and we cannot concur in the view held by the trial judge, that its absence was so plainly apparent that every person using the ladder was chargeable with notice of that fact. Taking into consideration its location and its size, the question whether its absence was obvious to persons using the ladder was, in our opinion, one for the determination of the jury rather than of the court. But, even if the absence of the lug should be considered to have been obvious, it cannot be said as a matter of law that its absence made it obvious that the ladder was defective or out of repair in any of its parts. To a person unacquainted with the method of the construction of these ladders, it might very readily appear that the ladder had been originally constructed with a lug under only one of the trolley wheels. The question whether the absence of the lug was an obvious defect was therefore, in our judgment, also one for the determination of the jury. Furthermore, the resolution of each of these questions against the plaintiff is not fatal to his right to recover. It does not necessarily follow that, because the absence of the lug from the ladder was obvious, and the knowledge of the defective condition of that appliance was therefore imputable to the plaintiff, he is to be held to have assumed the risk of injury resulting from its use. It is not the obviousness of the physical situation or condition that charges the servant with the assumption of the risks which arise from it, but the obviousness of the dangers which the physical condition or situation produces. *Burns v. Delaware & Atlantic Telephone Co.*, 70 N. J. Law, 745, 59 Atl. 220, 592, and cases cited. Whether, therefore, the plaintiff assumed the risk of the ladder becoming detached from the pipe, or track, from which it was suspended, while he was using it, did not depend upon his knowledge of the absence of the lug, or upon his knowledge that the ladder was defective by reason of that absence, but upon whether the want of a lug rendered the likelihood of such an accident as happened to him apparent to an ordinarily prudent person. Viewed in the most favorable aspect

for the defendants, this was a doubtful question of fact to be settled by the jury. But it does not necessarily result from the conclusion which we have reached upon this point that the judgment of nonsuit was erroneous; for the plaintiff was not entitled to go to the jury unless the case made by him sustained his contention that the defendants failed in their duty to use reasonable care to furnish him with safe appliances for his work, by permitting this ladder to remain in use without the lug. If—instead of its being obvious that the absence of one of the lugs made it probable that the ladder would become detached from the track upon which it ran, provided a person standing upon it should throw his weight over to one side—no one would reasonably anticipate such an occurrence, then, not only would the plaintiff be absolved from the assumption of the risk of such an accident as befell him, but the defendants would be guilty of no failure in the discharge of the duty which they owed him. It seems to us entirely plain, however, that whether the absence of the lug did or did not afford reasonable ground for anticipation that such a result would follow was (as we have already stated) not so free from doubt as to make it a question for the court rather than for the jury.

Moreover, a witness called by the plaintiff, who had formerly been in the employ of the defendants, testified that during the time when he worked in their store the ladder "used to come off the track once in a while, when you got on it sideways. If you went up sideways it might go off. If you went up in the middle it was all right." The fact that the ladder did become detached from the track when used in the manner described overcame the presumption (assuming it to have existed) that the absence of the lug did not render it unsafe for use; and it was for the jury to determine whether the defendants as employers were not chargeable with knowledge of that fact.

The nonsuit cannot be supported either upon the ground of assumed risk on the part of the plaintiff, or on the ground of lack of proof of failure of duty on the part of the defendants.

The judgment must therefore be reversed.

IN re RAMSEY'S ESTATE.

(Prerogative Court of New Jersey. April 4, 1907.)

1. EXECUTORS AND ADMINISTRATORS — ACCOUNTING—CHARGES AND CREDITS.

Where an executor by signing checks in blank enabled his coexecutor to draw and misappropriate the funds of the estate, he was chargeable with the amount misappropriated.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 22, Executors and Administrators, § 511.]

2. SAME—MORTGAGED PROPERTY—PAYMENT OF MORTGAGE.

Where an executor and his children were equally interested as devisees in the estate, a

sum paid by him in discharging a mortgage given by testatrix on property belonging to the estate, was properly allowed on the passing of his account.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 22, Executors and Administrators, § 548.]

3. SAME—REPAIRS.

Where an executor and his two children were equally interested as devisees in the estate, he was properly allowed on the passing of his account expenditures for repairs on a house belonging to the estate in which he and the children resided.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 22, Executors and Administrators, § 545.]

4. SAME—INSURANCE.

The fact that testatrix had been unwilling to insure certain buildings did not excuse the executor from insuring the building so as to relieve him from liability for loss by fire.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 22, Executors and Administrators, § 440.]

5. SAME—COUNSEL FEES.

An executor is not entitled to an allowance for the services of counsel in making up his account.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 22, Executors and Administrators, §§ 449, 455.]

6. APPEAL—FAILURE TO RAISE QUESTION BELOW.

Where no exception was taken to an executor's account as to a certain item in the orphans' court, it cannot be considered on appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, § 1079.]

Appeal from Orphans' Court, Bergen County.

Judicial proceedings on the passing of the account of George W. Jersey, as executor of the will of Hannah R. Ramsey, deceased. From the decree of the orphans' court, the executor appeals. Reversed.

Peter W. Stagg, for appellant. Clarence Mable, for respondents.

BERGEN, V. O. The Bergen county orphans' court in passing the account of George W. Jersey, as executor of Hannah R. Jersey, deceased, surcharged him with \$1,150 wasted by his coexecutor, and also refused him allowance on the disbursing side of his account of certain items as follows: \$1,000 paid by the executor on the principal of a bond secured by a mortgage on real estate of the deceased; \$56.58, the sum of two items paid for repairs to testatrix's house in Hackensack; \$77.08 for repairs to property in Oradell; \$400.96 for the cost of building a barn on the Oradell property; \$17 paid for nursing the deceased; \$2,100 charged for board of two children of the accountant by his deceased wife; \$810 paid for interest on bond and mortgage of the deceased; \$937.50 paid for interest on another bond and mortgage made by the deceased; \$100 paid counsel for services in making up the account of the executor; \$50 for painting the house in Oradell. In addition to the above there is an item of \$150 claimed to have been paid to R. W. Johnston on account of contract work on decedent's property, but this item was abandoned.

By the last will and testament of the de-

ceased the accountant was appointed testamentary guardian of the two children of the accountant and the deceased and to him was bequeathed \$2,000, to be held in trust with the accumulations until their son Alfred should arrive at the age of 21 years, when the principal and all accumulations of interest was to be paid over to him. A similar bequest was made to the executor of \$2,000 upon the same trust for the benefit of their daughter, Helen, and the rest, residue, and remainder of the estate was devised and bequeathed to the husband and the two children in equal shares. At the time of the death of the testatrix she owned two properties, one in Hackensack and the other in Oradell, in which the accountant and his two children have lived. The Hackensack property, it was admitted on the argument, has been sold under foreclosure proceedings. The first item subject to this appeal is the surcharge of \$1,150. The evidence relating to this item was that the accountant and his coexecutor, Washington I. Kidd, collected moneys which were placed in the bank to their joint credit, and that this accountant by signing checks in blank enabled his coexecutor to draw from this fund and misappropriate \$1,150. As this fund was within the control and charge of the accountant, and he by his act made it possible for his coexecutor to obtain the money, there can be no doubt about the liability of the accountant for this money, and the orphans' court correctly surcharged him with that amount.

The next item in dispute is the payment of \$1,000 on account of the principal sum of a mortgage given by the testatrix to Elbert S. Carman on the Hackensack property. As to this item, I am of opinion that the executor was justified in making the payment. The debt was created by the testatrix, it was her bond, and the payment made was for the benefit of her estate, in which he and her two children were equally interested. The next item of \$56.58 was paid by the executor for painting the Hackensack house, an outlay which it would seem, under the circumstances, the executor was justified in making, and he should be entitled to a credit for that amount. The next item of \$77.08 is an expenditure for repairs on the Oradell property, where the accountant and his two children resided. It was a payment made out of a fund belonging to the three persons who were the owners of the property, and is a payment for which the executor should be credited. The item of \$400.96 is an allowance prayed for erecting a barn on the Oradell property in the place of one destroyed by fire. The evidence shows that the executor neglected to insure the building; his excuse being that his wife in her lifetime was unwilling to have it insured, and he had followed the course pursued by her. This I do not consider to be a justification. It was his duty to insure the property. He did insure the contents which belonged to him, and collected the insurance, which he

says he used for replacing the building. My conclusion is that the accountant is not entitled to a credit for this item. The item of \$17 paid for nursing the deceased should, so far as this testimony discloses, be credited to the executor.

The accountant next prays allowance for \$2,100 for the board of his children. There is nothing in the evidence brought up with this record that justifies this charge. On the contrary, it is quite clear that the accountant never intended to charge for the board of his children, and the item should be disallowed. The next two items, \$310 and \$937.50, are for interest paid by the accountant on mortgages given by the testatrix in her lifetime which incumbered the decedent's real estate, and were paid to protect the property, and in my judgment the executor is entitled to a credit therefor. The item of \$100 paid to counsel for services in making up the disputed account was properly disallowed, for the making up of an account is a part of the duty of the executor. If he chose to employ counsel to do so, he must pay for such services out of his own funds. The last item of \$50 was expended by the accountant in painting the homestead house in Oradell. This I think was a proper charge, and ought not to have been disallowed. The item for \$150 contained in the petition of appeal was abandoned on the argument.

When this case was submitted, the counsel for the respondents insisted that the interest payments ought not to be allowed because the accountant had received the rents from the property and should have applied such rents towards the payment of the interest, and, not having charged himself with any rents in his account, he ought not to be allowed for payments made on account of interest. It is sufficient to say in reply to this that the respondents have taken no exception to the account in that regard, nor is there any appeal from the decree of the orphans' court regarding any portion of the charging part of the account other than the item of \$1,150. If he should have accounted for rents, the account should have been excepted to in the court below for that reason, and no satisfactory proof is here presented as to the amount received for rents; and the presumption must be that the orphans' court was satisfied that he ought not to be charged with rents. The only question presented to me is whether the items to which I have referred, and which are the subject of this appeal, were under this record either improperly charged or disallowed. This record is so imperfect that it is impossible to do more than correct the manifest errors. It would seem from the little that appears in the record that the accountant should have in some way accounted for the rents both as to receipts and disbursements thereof, but no offer was made to supply the deficiency in this testimony by the taking of additional evidence in this court, and the appeal does not question

the decree of the orphans' court on the charging side of the account beyond the single item to which I have referred. The presumption, therefore, is that the judgment of the court below as to the amount chargeable to the accountant is correct, and that he has accounted for all of the estate that has come to his hands for which he is accountable. Assuming that to be the situation, then, the items which he has paid in the way of debts and interest on mortgages would appear to be allowable to him.

The respondents insisted that the accountant being a life tenant was required to keep down the incumbrances and to keep the property in repair, but, as I understand this will, his estate is not that of a life tenant, but he is vested with the absolute title to the property, together with his two children, in equal shares. If as a tenant in common with them he is accountable for rents, issues, and profits, that is a question which cannot be passed upon under this record.

The decree of the orphans' court will be reversed in order that the account may be corrected in the particulars stated, but, as each party has succeeded in part, costs will not be allowed to either party in this court.

(74 N. J. L. 469)

HOLMES v. PENNSYLVANIA R. CO.

(Court of Errors and Appeals of New Jersey. March 7, 1907.)

1. RAILROADS—CROSSING ACCIDENTS—SIGNALS—EVIDENCE—WEIGHT—QUESTIONS FOR JURY.

In an action for death at a railroad crossing evidence that the bell was not rung held insufficient to require submission of such issue to the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, § 1161.]

2. SAME—ISSUES AND PROOF—INSTRUCTIONS.

Where, in an action for death at a railroad crossing the only negligence charged in the pleadings was the failure to ring a bell or blow a whistle as the train approached the crossing, plaintiff was not entitled to have the question whether defendant was bound to use extra precautions for safety of travelers on the crossing because of its unusually dangerous character submitted to the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, § 1195.]

Error to Supreme Court.

Action by Anna K. Holmes, as administratrix of the estate of Joseph J. Holmes, deceased, against the Pennsylvania Railroad Company. From a judgment dismissing the suit, plaintiff brings error. Affirmed.

George Gilbert, for plaintiff in error. Thomas L. Gaskill, for defendant in error.

GUMMERE, C. J. This suit is brought by the administratrix of Joseph J. Holmes, deceased, to recover from the defendant corporation the pecuniary loss sustained by his widow and next of kin through his death. He was killed about 2 o'clock in the morning of the 4th of November, 1902, while driving

along Cooper street, in the town of Beverly, in attempting to cross the tracks of the defendant company in front of an approaching train. The sole ground averred in the declaration for charging the defendant company with responsibility for his death is the failure to use reasonable care in the operation of its train as it approached the crossing at which he was struck down. Upon the trial of the cause the plaintiff attempted to support the averment of negligence by proof that the statutory provision requiring a bell to be rung, or a whistle to be blown, when a train approaches a highway crossing, was not complied with by the employees in charge of the defendant company's train. Two witnesses were called on behalf of the plaintiff to testify to that fact. The first was Samuel Wickward, who testified that he was following Holmes along Cooper street, and heard the crash when the collision occurred. He was asked on his direct examination: "Q. Did you hear any bell rung or whistle blown for the train? A. No whistle at all. Q. Nor bell? A. I don't know. I wouldn't like to say whether I heard any bell or not." On his cross-examination he affirmed the statement made by him in his testimony in chief. The other witness was a Mrs. Wilmerton, who lived about half a square from the scene of the accident. She testified that she had occasion to get up about 2 o'clock in the morning of November 4th, and that about 10 minutes afterward, and before she had returned to her bed, she heard a heavy crash coming from the direction of the crossing. She was asked but a single question upon the point in controversy, viz., "Did you hear the whistle blow or the bell ring?" Her answer was: "No, sir." On the part of the defense the proof was plenary that the bell was rung, if the witnesses who were called to prove that fact were entitled to credit. They were the engineer, the fireman, and one of the brakemen of the train; and they all swore positively that the bell was rung in a way which showed full compliance with the statute. This was the state of the proofs when the case was rested; and upon application made by the defendant, the trial judge directed a verdict in its favor.

The plaintiff now assigns error upon this direction. In our opinion the proofs in the cause afforded no support whatever for the conclusion that the bell was not rung in the manner required by the statute. The testimony of Wickward did not even tend to prove that fact, for it will equally justify a finding that he heard the bell as that he did not. The statement of Mrs. Wilmerton that she did not hear the bell rung may be conceded to have been sufficient to call for proof upon the subject by the defendant, notwithstanding that, for aught that appears to the contrary, her failure to do so may have been due to the fact that her attention at the time was entirely fixed upon some other matter. The testimony which was offered

by the defendants, however, entirely destroyed the probative force of her negative statement. The credibility of the witnesses who proved that the bell was rung was not impeached by any direct evidence; nor does the case disclose any reason for rejecting their testimony. In the case of *Culhane v. New York Central, etc., R. R. Co.*, 60 N. Y. 133, 137, it is said that "as against positive affirmative evidence by credible witnesses to the ringing of the bell, or the sounding of a whistle, there must be something more than the testimony of one or more that they did not hear it to authorize the submission of the question to the jury. It must appear that they were looking, watching, or listening for it; that their attention was directed to the fact, so that the evidence will tend to some extent to prove the negative. A mere 'I did not hear' is entitled to no weight in the presence of affirmative evidence that the signal was given, and does not create a conflict of evidence justifying a submission of the question to the jury as one of fact." *Hubbard v. Boston & Albany R. R. Co.*, 159 Mass. 320, 84 N. E. 459, *Keiser v. Lehigh Valley R. R. Co.*, 212 Penn. 409, 61 Atl. 903, 108 Am. St. Rep. 872, and *Elssing v. Erie R. R. Co.* (N. J. Sup.) 63 Atl. 856 (the latter a decision of our Supreme Court) are to the same effect. We think this principle is sound when applied to the testimony of one who, by reason of his surroundings, would be unlikely to notice the giving of the signal unless his attention was directed to the passing of the train. In the present case the fact that Mrs. Wilmerton lived in close proximity to the railroad, and that the passage of trains to and fro upon it was a matter of frequent occurrence, renders it quite unlikely that she would observe whether a bell upon a given train was being rung as it passed along in the neighborhood of her house, unless her attention was attracted to it at the time. A person who lives in proximity to a railroad where the passage of trains is frequent becomes so accustomed to the noise of their passage that he no more observes the sound produced by them as they move to and fro than he does the striking of a clock in a room in which he is accustomed to sit. We concur in the view taken by the trial judge that the plaintiff below failed to sustain the burden of proof that was upon her to show that the bell was not rung in the manner required by the statute.

It is further contended on behalf of the plaintiff in error that there was testimony in the case which would justify the conclusion that the crossing at which the accident occurred was unusually dangerous by reason of the existence of obstructions to the view in the direction from which the train that collided with the wagon of the deceased was approaching, that the defendant company was responsible for the presence of those obstructions; and that, therefore, it was bound to use extra precautions for the safety

of travelers upon the highway, to do something more to warn them of the approach of trains than to blow a whistle, or to ring a bell; and it is argued that the plaintiff was entitled to have that question submitted to the jury, and to a verdict in her favor in case they should so find the fact. No such issue, however, was raised by the pleadings, and a verdict upon any such theory could not therefore have been supported.

The judgment under review must be affirmed.

(74 N. J. L. 640)

WILSON v. HENDEE.

(Court of Errors and Appeals of New Jersey.
March 12, 1907.)

1. BILLS AND NOTES—INDORSEMENT BEFORE DELIVERY—EFFECT—STATUTORY PROVISION.

Section 63 of the negotiable instruments act (P. L. 1902, p. 594) abrogates the rule declared in *Chaddock v. Vanness*, 35 N. J. Law, 517, 10 Am. Rep. 256, that the signature of a third party upon the back of a negotiable instrument prior to its delivery to the payee creates per se no implied or commercial contract whatever.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 7, Bills and Notes, §§ 542-561.]

2. SAME.

Section 64 of the negotiable instruments act (P. L. 1902, p. 594) deals only with the liability of an irregular indorser to the payee and subsequent parties, and does not define the rights and liabilities of several such indorsers as between themselves.

3. SAME—EVIDENCE—PAROL.

Under section 68 of the negotiable instruments act (P. L. 1902, p. 596) parol evidence is admissible as between several indorsers to show that they agreed to become liable otherwise than in the order in which they indorsed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 7, Bills and Notes, §§ 1719-1722.]

4. FRAUDS, STATUTE OF—PROMISES TO ANSWER FOR DEFAULT OF ANOTHER—AGREEMENT BETWEEN INDORSERS.

The first of two accommodation indorsers of a promissory note having indorsed upon the strength of a verbal agreement made by the second indorser, whereby the latter, in consideration that the maker of the note should place in his hands certain valuable personal property to secure payment of the note by the maker, promised the first indorser to indemnify him against loss thereon, and the maker having furnished the consideration before delivery of the note, and the first indorser having been obliged to pay the note to the holder, *held*, in an action by the first indorser against the second indorser for reimbursement under the agreement of indemnity, that this was not a promise to answer for the debt, default, or miscarriage of another person, within the meaning of the statute of frauds (Gen. St. p. 1603, § 5, par. 2), but an original obligation, founded upon a consideration of substantial benefit to the promisor.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Frauds, Statute of, § 54.]

5. SAME.

Apgar's Adm'r's v. Hiler, 24 N. J. Law, 812, followed; *Hartley v. Sandford*, 66 N. J. Law, 627, 50 Atl. 454, distinguished.

(Syllabus by the Court.)

Error to Supreme Court.

Action by Charles W. Wilson against Harry C. Hendee. From a judgment in favor of defendant, plaintiff brings error. Reversed, and a venire de novo awarded.

Henry S. Alvord and J. Boyd Avis, for plaintiff in error. Henry C. Bartlett and Royal P. Tuller, for defendant in error.

PITNEY, J. On May 12, 1904, one Walter D. Wilson made his promissory note for \$920 payable to the order of the Vineland National Bank. Prior to its delivery to the payee the note was indorsed successively by Charles W. Wilson, the plaintiff herein, and by the defendant Hendee, for the accommodation of the maker. The paper having gone to protest at maturity, the plaintiff was obliged to pay, and did pay, the whole amount of it to the bank.

The present action is based upon an alleged agreement made between Hendee and the plaintiff prior to the indorsement of the note by either of them, to the effect that, if plaintiff would become indorser, Hendee would likewise indorse, and would pay the note at maturity, and indemnify the plaintiff and save him harmless against all loss by reason of his indorsement, in consideration of certain valuable personal property to be placed in his hands by the maker. At the trial plaintiff introduced evidence tending to show the making of such an agreement, and that on the strength of it the note was indorsed by the plaintiff; that before its delivery to the bank the maker gave to Hendee a bill of sale for certain personal property of the estimated value of \$1,000 as a mortgage to secure its payment; and that Hendee at once took possession of this personal property and afterwards disposed of some or all of it. The learned trial justice granted a nonsuit upon the authority of the decision of this court in *Hartley v. Sandford*, 68 N. J. Law, 627, 50 Atl. 454, on the ground that Hendee's promise to the plaintiff to indemnify him was within the statute of frauds, as being a promise to answer for the debt, default, or miscarriage of another person, and therefore was unenforceable because not made in writing. It is contended by counsel for the plaintiff in error that the case is not controlled by *Hartley v. Sandford*, but is rather within the principle of the earlier decision of this court in *Apgar v. Hiller*, 24 N. J. Law, 812.

In order to determine the controversy, it is important to consider precisely what was decided in these two cases, and also to note certain changes made in the law of negotiable instruments by P. L. 1902, p. 583, which enactment antedated the making of the note in question. In the case in *Apgar's Adm'r's v. Hiller*, 24 N. J. Law, 812, there was a joint and several promissory note, payable to the order of one Melick, and signed by one Fisher, by Apgar, and by Hiller as makers. Opposite to the names of Apgar and Hiller the word "sureties" was written by Apgar. Apgar solicited and procured Hiller to sign the note as surety, saying, "If you will sign it, it will be a great accommodation to us, and you shall never pay one red cent." Apgar

and Fisher were partners in business. Hiller, having been obliged to pay the note, sued the administrators of Apgar in the Supreme Court to recover the amount thus paid, and obtained a judgment against them, which, upon writ of error, was sustained by this court. Chief Justice Green, in his opinion, said that upon the face of the note, and in the absence of extrinsic evidence, Apgar and Hiller would be regarded as co-sureties, but that it was competent for the plaintiff to show in what relation the several signers stood to each other; that their relation to each other depended, not upon the form of the note nor upon whether their names were signed first or last, but upon the character in which they became parties and the agreement or contract made among themselves at the time of signing. "This," he said, "was matter in pais, proper to be proved by parol." And, though the memorandum "imports prima facie that Apgar and Hiller were joint securities, it was competent for the plaintiff to show whether they were securities for Fisher alone or for each other also," citing cases. And, again: "If the evidence was believed, it showed either that Fisher and Apgar were the principal debtors and Hiller alone the security, or, if Apgar was security for Fisher, still that Hiller signed, not as joint security with Apgar, and liable with him to contribution, but as security for Apgar also. He stands to Hiller in the relation of principal to surety. It is clear from the evidence that in any event Apgar was to stand between Hiller and loss. If the jury believed that the note was the debt of Fisher and Apgar, and that Hiller alone was security, he is entitled to recover from his principals the amount paid for their benefit. * * * If, on the other hand, the jury believed that Fisher alone was the original debtor and Apgar his surety, but that Hiller became surety at Apgar's request, and upon his promise of indemnity, still the plaintiff was entitled to recover in this action. The evidence was not offered to show an independent contract of guaranty against loss, but simply the character in which Hiller became a party to the note. This, as has been shown, may be proved by parol. Nor was the evidence offered to prove a promise by Apgar to pay the debt of a third person, and which must therefore be in writing. It was designed to show an original, equitable obligation on the part of Apgar to refund the money, growing out of the circumstances under which Hiller became a party to the instrument, and consequently liable to pay the debt."

It will be observed that, in this reasoning, the court dealt with two legal rules that had been suggested as obstacles to the plaintiff's recovery. The one was the common-law rule that rejects parol evidence of an antecedent or contemporaneous understanding that tends to modify the effect of a written instrument. The effect of this rule was excluded on the ground that the memorandum appearing upon

the face of the note did not clearly show the relation of the one surety to the other. The other obstacle suggested was the statutory rule found in that section of the statute of frauds (now in Gen. St. p. 1603, § 5, par. 2) which declares that no action shall be brought to charge the defendant upon any special promise to answer for the debt, default, or miscarriage of another person unless the agreement shall be in writing, etc. This the court disposed of upon the ground that the parol evidence was not offered to prove Apgar's promise to pay the debt of a third person, but to show his original equitable obligation to indemnify Hiler.

Before coming to *Hartley v. Sandford*, 66 N. J. Law, 627, 50 Atl. 454 (which deals only with the statute of frauds), it will be well to consider whether either the common-law rule or the negotiable instruments act (P. L. 1902, p. 583) excludes the parol evidence upon which alone was rested the proof of the agreement for whose breach recovery was sought in the present case. The note in question was made by Walter D. Wilson to the order of the bank, and was indorsed by the parties to this suit prior to its delivery to the bank. As the law stood in this state before the enactment referred to, their signatures would per se have created no implied or commercial contract whatever, their liability to the payee would have depended upon extrinsic evidence to show the intent with which they became parties, and parol evidence would have been competent for the purpose of showing such intent. *Chaddock v. Vanness*, 35 N. J. Law, 517, 10 Am. Rep. 256. Had the payee afterwards indorsed the note, and had it come to the hands of a bona fide holder before maturity, the irregular indorsers might have been subjected to the liability of second indorsers. *Crozer v. Chambers*, 20 N. J. Law, 256. But, as between the original parties, the question whether any contract was made, and, if so, what was the character of that contract, was to be determined by the intention of the parties as ascertained by parol evidence of the circumstances under which the indorsement was made; evidence of this sort not being objectionable on account of a tendency to vary a written contract, when no contract would arise except for such evidence. *Chaddock v. Vanness*, 35 N. J. Law, 523, 10 Am. Rep. 256. Even with respect to negotiable paper regular in form, our decision recognized the admissibility of parol evidence as between the immediate parties for the purpose of showing that a note or indorsement was made for accommodation, or made without consideration, or upon a consideration that was conditional and was not performed. *Gilbert v. Duncan*, 29 N. J. Law, 133; *Id.* 521; *Chaddock v. Vanness*, 35 N. J. Law, 520, 10 Am. Rep. 256. But, as a general rule with respect to paper regular in form, our decisions did not, even as between the parties, admit of the introduction of parol evidence to vary the commer-

cial contract that was held to arise from the terms of the instrument; for instance, as between successive accommodation indorsers. *Johnson v. Ramsey*, 43 N. J. Law, 279, 39 Am. Rep. 590; *Middleton v. Griffith*, 57 N. J. Law, 442, 448, 31 Atl. 405, 51 Am. St. Rep. 617; *Kling v. Kehoe*, 58 N. J. Law, 529, 33 Atl. 946; *Foley v. Emerald Brewing Co.*, 61 N. J. Law, 428, 431, 39 Atl. 650. In other jurisdictions the rule adopted in this state with respect to excluding parol evidence of the intent of the parties to a negotiable instrument regular on its face, where such evidence would tend to vary the contract that the law merchant implies from the form of the instrument, was not uniformly adhered to, it being held in many states that in actions between the parties parol evidence was admissible to show that they had agreed otherwise than as would appear from the face of the note. 1 Dan. Neg. Inst. (6th Ed.) § 717, and cases cited; 2 Rand. Com. Paper, §§ 740, 741, 778, 779, and cases cited; *Crawf. Ann. Neg. Inst. Law* (2d Ed.) § 118.

In this state of the law our new negotiable instruments act was passed. P. L. 1902, p. 583. Prior to its enactment a similar act, or one substantially similar, had been adopted in 16 American states, and had been enacted by Congress as the law of the District of Columbia. *Crawf. Ann. Neg. Inst. Law*, preface to second edition. We must attribute to our Legislature an intent to render the law of this state respecting negotiable instruments conformable to the law in these other states. And at the same time it is obvious that the act was intended to do away with some of the distinctions established or recognized by our adjudicated cases respecting the form and mode in which a contract of indorsement might be entered into, and the effect of making such an indorsement, whether as between the parties or with respect to subsequent holders of negotiable paper. By section 63 of that act (P. L. 1902, p. 594) "a person placing his signature upon an instrument otherwise than as maker, drawer or acceptor, is deemed to be an indorser unless he clearly indicates by appropriate words his intention to be bound in some other capacity." This, of course, abrogates so much of *Chaddock v. Vanness*, 35 N. J. Law, 517, 10 Am. Rep. 256, as held that an irregular indorsement of itself imported no implied or commercial contract whatever. Section 64 is as follows: "Where a person not otherwise a party to an instrument, places thereon his signature in blank before delivery, he is liable as indorser in accordance with the following rules: I. If the instrument is payable to the order of a third person, he is liable to the payee and to all subsequent parties. II. If the instrument is payable to the order of the maker or drawer, or is payable to bearer, he is liable to all parties subsequent to the maker or drawer. III. If he signs for the accommodation of the payee, he is liable to all parties subsequent to the

payee." It will be observed that this section deals with the rights of the payee and subsequent parties, and has not the effect of defining the rights and liabilities of several irregular indorsers as between themselves. These are set forth in section 68, which reads as follows: "As respects one another, indorsers are liable *prima facie* in the order in which they indorse; but evidence is admissible to show that as between or among themselves they have agreed otherwise," etc. This does not, by express mention, sanction parol evidence; neither does it expressly exclude any kind of evidence, whether written or verbal. Is parol evidence excluded by implication? If the legislative design was to admit only written evidence for the purpose indicated, it would have been unnecessary to say anything upon the subject, for by the common-law rules of evidence other writings explanatory of the real agreement would, of course, have been admissible. When we recall that a previous section had brought irregular and regular indorsers into a single category in the absence of an expressed intention to the contrary, that the first clause of section 68 renders the mere act of indorsement only *prima facie* evidence of the contract as between successive indorsers, and that by previous decisions parol evidence as between irregular indorsers was for all purposes admissible, and as between regular indorsers was for some purposes admissible and for other purposes not, it is easy to arrive at the conclusion that the section was intended to admit parol evidence in all cases between indorsers for the purposes of showing what was the agreement amongst themselves. This view brings our state into accord with the rule already laid down in some other jurisdictions as the common-law rule. At the same time it does not destroy the value of the instrument as a commercial instrument, for it is not against those who subsequently take the instrument in the course of commerce that the explanatory evidence is admitted. When we remember that the rules of the law merchant in this regard were established especially for the protection of subsequent holders of the instrument, and that the liability of indorser arises not from any words expressed upon the paper but from implications that originated in the necessities of trade and commerce, it is reasonable to attribute to the Legislature an intent to leave the paper open to explanation by parol as between the indorsers themselves. This is the effect that was given to section 68 of the act in the recent decision of this court in the case of *Morgan v. Thompson*, 72 N. J. Law, 244, 62 Atl. 410. In our opinion, therefore, the act admits of the introduction of parol evidence to show the actual agreement made between several indorsers, notwithstanding it contradicts the

prima facie inference appearing from their successive indorsements.

To come now to the question of the statute of frauds in *Hartley v. Sandford*, 66 N. J. Law, 627, 50 Atl. 454, the case of *Apgar v. Hiller*, 24 N. J. Law, 812, was not overruled, but distinguished. Recovery was denied upon a verbal promise made by the defendant to indemnify the plaintiff if he would become surety for the son of the promisor. The promisor did not become a party to the instrument upon which the plaintiff became surety; neither was there any consideration of benefit to the promisor to support his undertaking. In both these respects the case before us is different. The defendant Hendee became a party to the note in question. And we think his agreement to indemnify the plaintiff was founded upon a consideration of substantial benefit to Hendee. The consideration arose as follows: Both plaintiff and Hendee were accommodation indorsers for the maker of the note. To secure its payment the maker delivered a bill of sale to Hendee for personal property of substantial value. There was evidence tending to show that its value was at least equivalent to the amount of the note; but whether the security was or was not ample to satisfy the amount of the note in our view makes no material difference. If plaintiff and Hendee were to remain successively liable as indorsers upon the note, Hendee would hold the personal property delivered to him as mortgagee subject to an accountability both to the maker and to the plaintiff. If by agreement between the parties the plaintiff, instead of looking to the personal property alone for his security, accepted the promise of Hendee to pay the note at maturity if the maker did not, this agreement practically relieved Hendee from any liability to account to the plaintiff for the proceeds of the personal property, provided he carried out his agreement to pay the note in exoneration of the plaintiff. The effect of this was to fix the amount of Hendee's responsibility to the plaintiff in the premises, and leave him at liberty to deal with the property by disposing of it at private sale or otherwise, provided he had the consent of the maker of the note, and provided he indemnified plaintiff from liability. The status thus resulting from Hendee's agreement to indemnify the plaintiff was in a legal sense, and doubtless in a practical sense, substantially beneficial to Hendee, and furnishes an adequate consideration to support his undertaking upon which the action was based. And so, as respects the statute of frauds, the present case is governed by *Apgar v. Hiller*, and not by *Hartley v. Sandford*.

It follows that the action of the trial judge in nonsuiting the plaintiff was erroneous. The judgment should be reversed, and a *venire de novo* awarded.

(69 N. J. Eq. 337)

WRIGHT v. STONE HARBOR IMP. CO.
(Court of Errors and Appeals of New Jersey.
Feb. 2, 1906.)

MORTGAGES—AMOUNT DUE—TENDER.

The amount due on foreclosure of a mortgage was ascertained from the admission of a former owner of the equity of redemption contained in a declaration of no set-off. The proofs did not sustain an alleged tender.

(Syllabus by the Court.)

Appeal from Court of Chancery.

Action by one Wright against the Stone Harbor Improvement Company. Decree for complainant, and defendant appeals. Affirmed.

The following is the opinion of Grey, V. C., in the court below:

"The testimony submitted on the part of the complainant indicates that the mortgage, which is sought to be foreclosed, in this case was a purchase-money mortgage, that it still remains a subsisting mortgage, and that it passed by a number of assignments from one holder to another until it came into the hands of the present holder. There is a declaration of no set-off from one of the previous owners of the equity of redemption which states the amount which at the time of that declaration was due on the mortgage. The complainant accepts that admission of the party who then held the equity of redemptions as an ascertaining of the amount due, and claims that admitted amount as the principal sum due, with interest from that date. There is no proof on the part of the defendant that he has paid anything. There is some testimony on the part of the defendant that a tender was made, but the testimony on the point failed to prove that the amount tendered was the full amount due and also to show the other requisites of a competent tender. It has not been shown that the amount due was reduced by payments or that it was voluntarily dismissed or remitted by the holder of the mortgage. The defendant starts out with a showing that the alleged tender was made. When the witness who undertook to prove the tender, was asked whether it was a tender of the amount due on the mortgage, he said it was not, but that it was an amount which was due on an agreement between Mr. Walter Brooks and Mr. Alonzo Wright, which agreement, he said, was in writing; and this writing was not produced. Whether that agreement had any relation to this mortgage, whether it was made between parties who had a right to bind the mortgagor and mortgagee, does not appear. I see no reason why the complainant should not have a decree in accordance with the proofs, and I will advise such a decree. The complainant's proofs fix the amount. I will advise a decree for that sum."

Edward Ambler Armstrong, for appellants.
J. Willard Morgan, Charles V. D. Joline, and French & Richards, for respondent.

PER CURIAM. The decree appealed from is affirmed, for the reasons stated in the opinion filed in the Court of Chancery by Vice Chancellor Grey.

The CHIEF JUSTICE, DIXON, GARRISON, GARRETSON, PITNEY, SWAYZE, REED, BOGERT, VREDENBURGH, GRAY, VROOM, GREEN, and DILL, JJ., concur.

(69 N. J. Eq. 641)

HOWELL v. WESTBROOK.

(Chancery Court of New Jersey. July 21, 1905.)

1. WILLS—CONSTRUCTION.

Testator bequeathed to his wife the interest arising from 46 shares of bank stock, and empowered his executors to pay the said interest to her "as the same shall be declared by said bank." *Held*, that the wife was entitled only to dividends declared, not to dividends earned.

2. SAME—"REPRESENTATIVES."

Testator devised and bequeathed as follows: "I do give and devise unto all my brothers and sisters and their representatives, after the decease of my wife, the house and lot left in trust to her and also the bank stock left in trust to her, to be equally divided, share and share alike." The sisters died leaving issue. *Held*, that the word "representatives" was substitutionary, and meant, having reference to the context, "next of kin under the statute of distributions."

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, § 1107.]

(Syllabus by the Court.)

Bill by one Howell against one Westbrook to construe a will. Decree rendered.

John L. Swayze, for complainant. Allen R. Shay, Vreeland, King, Wilson & Vreeland, and Theodore Simonsen, for defendant.

STEVENS, V. C. Two questions arising under the will of Henry Dildine, who died in 1874, have been propounded to me.

First. Testator bequeathed (inter alia) to his wife the interest arising from 46 shares of the capital stock of the Merchants' National Bank of Newton, and empowered his executors "to pay the said interest to my wife Lydia as the same shall be declared by said bank." The widow died in February, 1900. It appears to me that what the testator intended was that the wife should have such dividends as were declared. It is said in Thompson on Corporations, § 2219, that the enhanced price for which stocks may sell by reason of dividends earned, but not declared, enures, under the modern rule, to the benefit of the remainderman. How far, if at all, this rule is modified by what has been decided in *Van Doren v. Olden*, 19 N. J. Eq. 176, 97 Am. Dec. 650, *Ashurst v. Field*, 26 N. J. Eq. 1, *Van Blarcom v. Dager*, 31 N. J. Eq. 783, and *Lang v. Lang*, 57 N. J. Eq. 325, 41 Atl. 705, I need not consider, for, as I understand the language of the will in question, the gift to the wife is expressly limited to dividends declared. Everything else goes to the remaindermen.

Second. Testator devised and bequeathed as follows: "I do give and devise unto all my brothers and sisters and their representatives, after the decease of my wife, the house and lot left in trust to her, and also the bank stock left in trust to her, to be equally divided, share and share alike." The sisters, three in number, all died in testator's lifetime, leaving issue, and the question is: who takes under the words "or their representatives"? I have so recently considered this question in *Howell v. Gifford*, 64 N. J. Eq. 180, 53 Atl. 1074, that I shall not attempt to repeat here what I said there. Among the cases cited in the opinion is *King v. Cleaveland*, 4 De G. & J. 477, which seems to be on all fours with the case at bar. I think the word "representatives" is substitutionary, and means, having reference to the context, "next of kin under the statute of distributions."

(70 N. J. Eq. 797)

CITY OF ELIZABETH v. CENTRAL R. CO. et al.

(Court of Errors and Appeals of New Jersey. March 25, 1907.)

JUDGMENT—ISSUES—RES JUDICATA.

A judgment by the Supreme Court that under the riparian acts the grant by the state to a railroad company operated to terminate the existence of a street over lands included in the grant below high-water mark, while unreversed was conclusive of such question as between the parties.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, §§ 1248-1252.]

Appeal from Court of Chancery.

Information by the Attorney General, on relation of the city of Elizabeth, and a bill in equity by such city against the Central Railroad Company of New Jersey and others, to test the validity of a grant of tide lands. From a decree dismissing the bill and information (59 Atl. 348), complainants appeal. **Affirmed.**

Frank Bergen, for appellants. R. V. Lindabury, for respondents.

PER CURIAM. Our examination of this case leads us to the conclusion that the decree appealed from should be affirmed. We concur in the opinion of the learned Vice Chancellor before whom the cause was heard in the court below, except so far as it intimates a dissent from the view expressed by the Supreme Court in the case of *Elizabeth v. Central R. R. Co.*, 53 N. J. Law, 491, 22 Atl. 47, that under the riparian acts the grant of the state to the Central Railroad Company (which was the subject-matter of the controversy in that case as well as in present one) operated to terminate the existence of Elizabeth avenue, over the lands included in the grant, below high-water mark, as is pointed out by the learned Vice Chancellor in his opinion, so far as the issues involved in the present information and bill are concerned. The determination of the Supreme Court,

while unreversed, must be accepted as settling that question so far as the present litigation is concerned, and any expression of opinion upon it, by this court in this proceeding would be merely obiter.

(74 N. J. L. 633)

STATE v. FEISS.

(Court of Errors and Appeals of New Jersey. March 4, 1907.)

1. RECEIVING STOLEN GOODS—VALUE—EVIDENCE.

Upon the trial of an indictment for receiving stolen goods, the owner of the goods may testify as to their value.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Receiving Stolen Goods, § 15.]

2. SAME—INSTRUCTIONS.

A charge of the court in such case that the jury has a right to infer from the circumstances surrounding the purchase of the goods as to whether or not the defendant must have known that the goods were stolen is not open to the construction that the court thereby instructed the jury that the only two elements of the crime charged were "that the goods were stolen" and that "the defendant must know that they were stolen," although in that connection the court omitted to instruct the jury that they must also find that the defendant bought or received the goods; the court having expressly directed the jury in another part of the charge that, if the defendant was not there that day (i. e., at the time and place where and when the goods were alleged to have been received by him) he could not have bought the goods and it was their duty to acquit him.

State v. Goldman, 47 Atl. 641, 65 N. J. Law, 394 distinguished.

(Syllabus by the Court.)

Error to Supreme Court.

Emil Feiss was convicted of receiving stolen goods, and brings error. **Affirmed.**

Gustave A. Hensicker, for plaintiff in error. Eugene Emley, Prosecutor of Pleas, for the State.

GARRETSON, J. The plaintiff in error was convicted in the Passaic quarter sessions upon an indictment charging him with having received certain goods and chattels, to wit, one diamond ring of the value of \$25, and one diamond stick pin of the value of \$5, in all of the value of \$30, knowing said goods and chattels to have been stolen, and the Supreme Court affirmed the conviction. The entire record has been returned under the certificate of the judge and causes of reversal have been served pursuant to section 137, p. 1147 of the criminal procedure act.

The first cause for reversal specified is permitting the alleged thief to answer the question, "What kind of a store is it?" The witness, having testified to taking the articles specified from the owner and selling them to the defendant at a store at Main street near Broadway, was asked, "What kind of a store is it?" to which answer was given, "It looks like a hockshop." We are not able to discover, nor have we been pointed by the defendant's counsel to, any particular in which this question was illegal.

The next cause for reversal is because the court permitted the owner of the goods stolen to testify to their value. It is the universal practice to permit the owner of goods stolen to testify as to their value upon the trial of the thief, and we know of no reason why the owner should not be permitted to testify as to the value upon the trial of the receiver. Besides, if this evidence is inadmissible, it could not be said to be injurious because it is criminal to receive or buy, knowing it to have been stolen, "any valuable thing whatsoever," without any reference as to how much it is worth.

The fourth cause for reversal relates to the refusal of the court to direct a verdict of acquittal at the close of the state's case. An examination of the evidence returned with this writ satisfies us that it was sufficient to justify and require its submission to the jury. *State v. Jagers*, 71 N. J. Law, 281, 58 Atl. 1014, 108 Am. St. Rep. 746.

The fifth, sixth, and seventh causes of reversal are directed to the charge. The defendant specifies as erroneous instruction the following: "As has already been intimated, upon the motion made by the counsel of the defendant to dismiss this indictment, the jury had a right to infer from the circumstances surrounding the transaction as to whether or not the defendant must have known that the goods were stolen. Now, you have heard her story. Perhaps you will be able to recall all the circumstances besides those that I mentioned from which you can make the inference that the defendant, being an intelligent business man and accustomed to deal in this kind of business, would be able to conclude from appearances, from what took place, whether or not he was justified in the purchase of those articles, and whether or not he should make an investigation where the circumstances were suspicious." This part of the charge dealt only with the circumstances surrounding the purchase of the goods, and instructed the jury as to what bearing they might have upon the knowledge of the defendant as to whether or not the goods were stolen. The counsel of plaintiff in error, in pointing out the defects in the charge, says that the court started out with the erroneous proposition that the only two essential elements of the crime charged were "that the goods were stolen," and that "the defendant must know that they were stolen, and omitted to instruct the jury that they must also find that the defendant bought or received the goods." This is a misapprehension of the effect of the charge as a whole. At its close the court instructed the jury as follows: "If you conclude that these goods were stolen and were bought by the defendant, knowing them to have been stolen, or that the circumstances were such that he must have inferred that they were stolen, why, he is guilty of the crime charged. However, if he was not there that day, he could not have bought the

goods, or, if you conclude that he did buy the goods and did not know that they were stolen, then it is your duty to acquit him." It is also urged that there is error in that part of the charge in which the judge said to the jury: "In other words, were the circumstances surrounding this transaction, conceding the state's case, in the first place, to be true, were the circumstances surrounding this transaction and the purchase of these two articles of jewelry such that the defendant must have known that they were stolen?" If this is an instruction, then the jury was told that the defendant must have known from the circumstances surrounding this transaction and the purchase of these two articles of jewelry that they were stolen. He must have had knowledge, not suspicions. *State v. Goldman*, 65 N. J. Law, 394, 47 Atl. 641, holds that "the proof must be that the defendant had knowledge, not that he had suspicions."

The defendant refers to the *Goldman Case* in support of the alleged error in the charge as above. But the instruction in the *Goldman Case* was entirely different from the instruction in this case. In that case the court charged "that which a man ought to have suspected in the position of the defendant he should have suspected, and he must be regarded as having suspected in order to put himself upon his guard and upon inquiry. The proof in any case is inferential." This quotation from the *Goldman Case* can have no application to the part of the charge excepted to in this case.

Another specification of cause for reversal is the following from the charge: "Now, gentlemen of the jury, I may fail to recall exactly and accurately just what was said while the testimony was being given; but, as I recall the testimony, this young woman was asked by the counsel for the defendant whether, when she was selling these things — Was not she asked by him, or did she not say to him, that her husband had pneumonia, and that she was poor? It may be that I do not recollect that testimony accurately, but it looks very much as if I did recollect it accurately when I say that question was asked of her at the time she was selling these goods, for what was the reason of asking those questions, or that kind of a question, at any other time? Didn't you say, perhaps, as a reason for wanting to dispose of these articles, that you wanted the money, that your husband was sick with pneumonia, and that you were poor? Well, the asking of a question does not necessarily bind the defendant, gentlemen of the jury, but in dealing with that part of the case you have a right to consider that element in it." In the course of the trial the witness who was the alleged thief, and who testified that she had sold the goods to the defendant, testified on cross-examination as follows: "Q. Did you tell him [the defendant] anything about your husband? A. I told him

It was my engagement ring, and said he was sick with pneumonia. Q. Did you tell him that you wanted to dispose of these things because you needed the money? A. Yes, sir. Because your husband was sick? A. Yes, sir. Q. Did you tell him you were suffering for want of food? A. No, sir. Q. Did you tell him your husband was suffering from pneumonia, and you needed the money? A. Yes, sir." The defendant by his testimony claimed that he did not buy the articles from this witness, and could not have done so at the time she alleges, because he was then in New York. It was entirely proper for the court to state this testimony to the jury, and to direct their attention to the inferences that might be drawn from it. One very obvious inference would bear upon the truth of the defendant's alibi. The question would naturally arise: How could this conversation between the witness and the defendant take place when the defendant was at the time in New York? We find no error in this part of the charge.

Another specification of cause for reversal was in the part of the charge of the court referring to the evidence of an alibi. Exception was taken to this at the time of the trial, but the court, upon its attention being called to it, withdrew that part of the charge from the consideration of the jury, and expressly directed them to disregard it.

The judgment brought up by this writ of error must therefore be affirmed.

(72 N. J. Eq. 473)

HAGGERTY v. BADKIN.

(Court of Chancery of New Jersey. March 8, 1907.)

1. BANKRUPTCY—DISCHARGE—TRUST FUNDS—PARTNERSHIP.

Pursuant to the formation of a contemplated partnership between defendant and intestate, the latter paid to defendant \$500 for the benefit of the firm. Almost immediately thereafter intestate died, and pending his sickness defendant deposited such funds in a bank in his own name, and after intestate's death converted the money to his personal use. Held, that intestate's death dissolved the partnership, after which defendant became a trustee of such fund for the benefit of intestate's estate, holding the same in a fiduciary capacity within Bankr. Act July 1, 1898, § 17, subd. 4, c. 541, 30 Stat. 551 [U. S. Comp. St. 1901, p. 3428], exempting from a discharge debts created by misappropriation while the bankrupt is acting in a fiduciary capacity.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Bankruptcy, §§ 793-802.]

2. EQUITY — DECREE—ENFORCEMENT—ATTACHMENT AGAINST PERSON.

Where a surviving partner wrongfully misappropriated funds which he held in trust for the estate of his deceased partner, the latter's administrator, in a proceeding in equity to compel the enforcement of a decree for the payment of the money, was entitled to process against defendant's body, which would be executed in the absence of proof that defendant was unable to obey the order.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Equity, § 1056.]

Proceeding by Austin L. Haggerty, as administrator, against John H. Badkin, to compel defendant to pay the amount of a decree on pain of being punished for contempt. Granted.

James Steen and William D. Tyndall, for complainant. A. C. Hart, for defendant.

PITNEY, V. O. This is a proceeding to compel the defendant to pay to the complainant the amount of a decree recovered by the latter against the former in this cause on the 5th day of January, 1905, for upwards of \$500, besides costs.

The motion is resisted on two grounds. The first and principal ground is a discharge in bankruptcy granted a year later by the District Court of the United States for the District of New Jersey, which purports to discharge defendant from all debts and claims which existed on the 10th day of May, 1905, "excepting such debts as are by law excepted from the operation of a discharge in bankruptcy." The complainant replies to this defense that the debt for which the decree was granted is within that exception, and he relies on the fourth subdivision of section 17 of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 551 [U. S. Comp. St. 1901, p. 3428]), where are enumerated the several exceptions, the fourth of which is: "Such debts as were created by his fraud, embezzlement, misappropriation or defalcation while acting as an officer or in any fiduciary capacity." The complainant contends that the debt herein arose by a misappropriation to his own use of money which had been confided to him by complainant's intestate in a fiduciary capacity. To sustain this contention, resort is had to the original bill in the cause, the answer thereto and the proofs, and facts appearing at the trial and the findings of the court thereon.

The bill charges that the intestate, in his lifetime, about the 20th of May, 1902, being in negotiations with the defendant in reference to a proposed partnership between them, deposited with the defendant the sum of \$500 as and for his share of the partnership capital. The bill further shows that immediately after such deposit complainant's intestate was taken violently ill and died of the illness on May 23th, and alleges that the actual formation of the partnership was interrupted by such illness, and was never consummated. The answer of the defendant denies these allegations, and sets up that there were in fact negotiations between the parties as to the formation of such partnership, but that the plan for such partnership did not include the use of any capital; that the defendant was employed as a salesman for a furniture house, and complainant's intestate desired to join him in the business of selling furniture; and that, in order to carry out that plan, it was necessary for defendant to abandon his present business connection, which was valu-

able, and that intestate paid him the \$500 as a personal compensation to him for giving up his then present lucrative job. The cause came on for hearing before me as Vice Chancellor, and I found the issue in favor of the complainant, and, as a matter of fact, that the \$500 was paid to the defendant as a contribution to partnership assets and funds. I have since read over the stenographer's minutes of the evidence and my oral reasons for the decree, and am entirely satisfied with the result above stated. It appeared at the hearing that the complainant's intestate at the date of the transaction, May, 1902, was 24 years old and single, and resided with his mother in Hackensack, N. J., and worked as a clerk on a small salary for his uncle, a New York business man. The defendant was a married man about 14 years older than intestate, and lived with his wife in Hackensack. He was a salesman on a salary of \$30 per week for a New York furniture house. Neither of the parties had any capital, nor were either engaged in any business of any sort for themselves. The defendant kept no bank account, but brought his weekly wage home to his wife every Saturday night, and handed it to her after the fashion of an ordinary mechanic. In this state of affairs, about the 1st of May, 1902, the parties entered into negotiations to enter into the business of selling furniture as partners, and it was supposed that they would need a little capital in the business, presumably to pay traveling expenses and the like, which under the arrangement between defendant and his employers were paid by his employers in addition to his weekly wage. For the purpose of supplying this capital, it was arranged that complainant's intestate should contribute to the business \$500 and the defendant contribute his knowledge and familiarity of the business to stand as an equivalent for the contribution in cash by the intestate. Complainant's intestate borrowed that sum from his uncle in a check dated May 17, 1902, drawn by his uncle to his order. On the evening of May 19th (as near as the date can be determined) deceased took the check to the house of the defendant in Hackensack, and there indorsed it over specially to him as his contribution to the capital. Either at the moment of the indorsement or immediately after, deceased was taken violently ill with malignant diphtheria. Defendant took the check to New York, and opened an account in his own name in a bank, and deposited the check to his own credit. The date of the entry in the book is May 20th. He called to see the deceased the same evening, and found him very ill. They had some conversation on business matters, heard in part by the deceased's mother, who heard the deceased say to the defendant, "Let that remain for a few days." It appeared that no written contract had as yet been entered into between them, but typewritten sheets embodying a contract, with corrections, were found in the posses-

sion of the deceased. He died on the 26th of May. Defendant called at once upon the uncle who had advanced the money, and the uncle recited to him the terms of the contract, as hereinbefore stated, and he admitted it to be correct. He speedily used the \$500 for his personal use. The evidence satisfied me that the terms of the contract of partnership were substantially agreed upon, but that the intestate desired to have them reduced to writing. Under these circumstances, the question is whether the debt is excepted from the effect of the discharge in bankruptcy, and that question depends on whether it was received in the first place or afterwards detained by the defendant in a "fiduciary capacity." That it was so received or detained I think there can be no doubt, if we give to these words their ordinary meaning.

Money is received or detained by one from another in a fiduciary capacity when, in the mind of the person handing the money to the other, as such mind is known to that other, it does not become the absolute money and property of that other, to do with as he chooses as his own money, but is received by him for a particular purpose in which a person or persons other than the person receiving it is or are interested. If two persons are in partnership, and one is acting as cashier or financial manager and the other pays money to his partner to be used in partnership business, the money so paid is received in a fiduciary capacity. The receiver holds it in trust for the partnership and for the benefit of the partners in proportion to their several interests, and neither partner has the right to appropriate one dollar of it to his individual use without the consent, express or implied, of the other party. Each partner, for all the purposes within the scope of the partnership, becomes the agent of each other partner and of the partnership entity, and when a present partnership is dissolved by death of one of the partners the survivor at once becomes a trustee for the representatives of the deceased. Now, it seems to me this sort of fiduciary capacity is clearly within the language of the act. The words "fiduciary capacity" do not in my judgment refer to a technical trust such as forms the ordinary basis of treatises on that subject.

Mr. Hill, in his introduction to his work on Trustees (page 1), defines a "trustee" as, in the widest meaning of the term, "a person in whom some estate, interest, or power in or affecting property of any description is vested for the benefit of another." And he says that that definition also extends to bailees, factors, and agents whose duties in their fiduciary character are recognized and enforced at common law. And Mr. Willis, in his treatise, published in Lord Eldon's time (page 1), gives the same definition. To the same effect is Mr. Perry in his book (section 1). The original bankrupt law of 1841 (Act Aug. 19, 1841, c. 9, 5 Stat. 440) provided in its first section that "all persons whatsoever residing etc.

owing debts which shall not have been created in consequence of a defalcation as a public officer or as executor, administrator, guardian or trustee, or while acting in any other fiduciary capacity," might apply to be discharged in bankruptcy. The fourth section provided that no person who, after the passage of this act, should apply trust funds to his own use, should be discharged. Under that legislation the Supreme Court of the United States, in *Chapman v. Forsyth*, 2 How. (U. S.) 202, 11 L. Ed. 236, held that a balance due from a mercantile factor to his principal arising out of the ordinary dealings between factor and principal is not a fiduciary debt in the meaning of that act. Justice McLean, in delivering the opinion of the court, held that the cases enumerated in the first section, namely, defalcation by public officer, executor, administrator, guardian, and trustee, were special trusts, the "other fiduciary capacity" mentioned must mean the same class of trusts, and says "the act speaks of technical trusts, and not those which the law implies from the contract." He then refers to the fourth section of the act, which provided that the discharging certificate, when duly granted, shall in all courts of justice be deemed a full and complete discharge of all debts, contracts, and other engagements of said bankrupt as are provable under the act, and may be pleaded as a complete bar. And the court further held that the creditor entitled to the exception must appear and show in the bankrupt court that he was entitled to the exception, and that the court for that reason had no jurisdiction as to his claim. Notwithstanding this decision, the Supreme Court of New York four years later in *White v. Platt* (1848) 5 Denio, 269, under the same act, held that a debt was not barred by an act of bankruptcy which arose under the following circumstances: Defendants were indebted to plaintiff in a sum certain. They transferred to him certain promissory notes as collateral to secure the indebtedness. Before the maturity of these notes the plaintiff returned them to the defendants to collect them on plaintiff's account as his agent. Defendants collected the notes, and did not account to plaintiff therefor. The court held that they received them in such a fiduciary capacity that they were not discharged by a discharge in bankruptcy. This case has never been doubted, but was cited with approval by Judge Strong speaking for the Supreme Court of the United States in *Clark v. Iselin*, 21 Wall. 360, 368, 22 L. Ed. 568. Here a transaction in all respects similar to that involved in *White v. Platt* is thus characterized in the headnote: "When a person borrowing money of another pledges with that other a large number of bills receivable as collateral security for the loan (many of them overdue), the pledgee may properly hand them back to the debtor pledging them, for the purpose of being collected, or to be replaced by others. All money so collected is money collected by the debtor in a fidu-

ciary capacity for the pledgee." I stop here to say that the distinction between the New York case and the one in 2 How. (U. S.) 202, 11 L. Ed. 236, is one which runs through all the cases, and is noticed by the judges, namely, that a factor who sells goods for a principal naturally and in the ordinary course of business mingles the proceeds of the sales with his own money and the amount at once becomes a simple debt, and that the principal or consignor of the goods is presumed to have notice of the ordinary course of business. In fact, it is a pure mercantile transaction, resulting in an implied contract, and the natural remedy is by action of assumpsit at common law. In the case in New York and others I shall have occasion to cite there could be no such usual course of business, and it was the duty of the debtor defendants, as soon as one of the collateral notes intrusted to them for collection was paid, to transmit the proceeds instantaneously to their creditor.

Act March 2, 1867, c. 176, 14 Stat. 533, varied in its language from that of 1841. It provided not in the first section, as in that act, but in the thirty-third section, that "no debt created by the fraud, or embezzlement of the bankrupt or his defalcation as a public officer or while acting in any fiduciary character" shall be discharged under the act. The contrast between this section of the act and the corresponding section of the prior act is manifest. By dropping out the word "other" found in the first section of the old act the Legislature divorced the words "fiduciary capacity" from the list of specific trust positions enumerated in the older act. Moreover, its position in the statute is significant. And this was the view taken by many federal and state courts when that act first came under judicial consideration. Judge Blatchford, then district judge, so held in *Ex parte Seymour*, 6 Int. Rev. Rec. 60, 1 Ben. 348, Fed. Cas. No. 12,684, and his view was approved by Justice Nelson of the Supreme Court of the United States in *Re Kimbal*, 6 Blatchf. 292, Fed. Cas. No. 7,769, and by many other judges. As late as 1882 Judge Pardee followed these judges in *Fulton v. Hammond* (C. C.) 11 Fed. 291. In that case Hammond had received from the clerk and master in the chancery court of Lincoln county, Tenn., a sealed bill made to him in his official capacity for a large sum of money for collection, signing therefor a receipt (containing a copy of the note) in these words: "I receive said note to collect without suit, if practicable. If not I am to employ counsel and collect by suit if necessary." In a suit by the successor in office of the original payee to recover the amount collected by Hammond, the latter pleaded a discharge in bankruptcy. Judge Pardee declined to allow the plea, referring to *White v. Platt*, supra, and the cases decided by Judge Blatchford and Justice Nelson above cited, and held that the distinction is clear between the case of a commission merchant or cotton factor selling

goods in the ordinary course of business and a man employed to collect money. He shows distinctly and clearly that the case of *Chapman v. Forsyth*, *supra*, does not apply to the act of 1867. So far as I can find, *Fulton v. Hammond* has never been questioned.

But, notwithstanding the line of cases of which *In re Kimbal* is one, a somewhat different construction was finally put upon the act of 1867, and a different line of decisions was adopted which culminated in *Hennequin v. Clews*, 111 U. S. 676, 4 Sup. Ct. 576, 28 L. Ed. 565. *Hennequin* was a French merchant doing business under a letter of credit on London issued by *Clews & Co.*, New York bankers. *Hennequin's* practice was to draw upon the strength of his letter of credit on *Clews & Co.* on time, and before the draft matured to put *Clews & Co.* in money to meet it. The transaction amounted to an acceptance in advance by *Clews & Co.* of *Hennequin's* bills of exchange, but no debt arose from *Hennequin* to *Clews & Co.* until the latter was obliged to pay the draft. In point of fact, no debt ever did arise, because *Hennequin* always provided funds in advance. But, in order to secure *Clews & Co.* according to mercantile custom, *Hennequin* deposited with *Clews & Co.* certain collateral securities in the shape of negotiable bonds. In that state of things *Clews*, being pressed for money, pledged or disposed of the collateral deposited with him, and then failed, and got a discharge in bankruptcy. The Court of Appeals of New York (*Hennequin v. Clews*, 77 N. Y. 427, 33 Am. Rep. 641) indirectly, and the Supreme Court of the United States (*Hennequin v. Clews*, 111 U. S. 676, 4 Sup. Ct. 576, 28 L. Ed. 565) directly, held that his discharge in bankruptcy released that particular debt. Justice Bradley, speaking for the latter court, held that the question was covered by the previous case of *Neal v. Clark*, 95 U. S. 704, 24 L. Ed. 586. In dealing with the question, however, the learned justice, at page 680, gives a long list of cases in which the federal and state courts had taken a contrary view, including therein the cases decided by Judge Blatchford and Justice Nelson, *supra*, and a case in Missouri and several others, citing only two cases in accord with the decision which the court was pronouncing. But at page 682 et seq. he shows that the English authorities dealing with nearly or quite similar language were decidedly the other way. He does not cite the case of *Fulton v. Hammond*, *supra*, decided by Judge Pardee. The case of *Neal v. Clark*, *supra*, referred to by Justice Bradley in *Hennequin v. Clews*, was this: The executor of an estate sold some of its assets to *Neal* at somewhat of a sacrifice. The executor was then a man of large property and undoubted solvency. *Neal* made no inquiry as to the condition of the estate, and the executor gave him as a reason for selling the securities that the estate was in debt to him for moneys advanced. Ten years after *Neal* purchased the

bonds and seven years after the executor had become insolvent and left the state, after having previously given a new bond as executor, *Clark* and *Holland*, as sureties on that bond, brought an equity suit against *Neal* and others and charged the executor with a devastavit in selling the bonds to *Neal*, and that *Neal*, in view of the circumstances under which he received the bonds, became a participant in that devastavit. *Neal* had been discharged in bankruptcy in the meantime and pleaded his discharge in the suit. The Virginia court held him liable on the devastavit, and refused him the benefit of his discharge in bankruptcy, which discharge contained the same exception as that found in the one dealt with here. He was held liable in the Virginia courts on the ground that he had been guilty of fraud or embezzlement under the act of 1867. The force of the words "acting in a fiduciary capacity" were not at all involved. The Supreme Court of the United States held him entitled to the benefit of the discharge on the distinct ground that the debt was not "created by the fraud or embezzlement" of the bankrupt. With great respect I am unable to see how that decision can be said to directly support the decision in *Hennequin v. Clews*, except to discharge *Clews* from the charge of fraud or embezzlement. *Hennequin v. Clews* was followed by *Palmer v. Hussey* (1886) 119 U. S. 96, 7 Sup. Ct. 158, 30 L. Ed. 362. There the plaintiff had loaned to *Hussey* a large quantity of United States bonds under a written contract by which *Hussey* agreed to hold the bonds subject to the plaintiff's order, collect and pay him the coupons free of charge, and "allow him 2 per cent. per annum interest on the par value of the bonds." The acceptance of that contract by the plaintiff from *Hussey* amounted to an implied permission to *Hussey* to make use of the bonds in his business, presumably by borrowing money on them; for how otherwise was he able to pay interest for their use? And, if he was permitted to use them by borrowing money on them, they were, of course, at the ordinary risk of mercantile transactions. The case cannot be distinguished from any ordinary loan of money.

Another case was *Noble v. Hammond* (1888) 129 U. S. 65, 9 Sup. Ct. 235, 32 L. Ed. 621. There *Hammond* had a claim against a railroad company, and, for his own convenience, drew an order on the company in favor of *Noble*, who was engaged in business, for the amount, and handed it to him for the purpose of collection. *Noble* asked *Hammond* what he was to do with the money when collected, and was told by *Hammond* to keep the money until called for. That was *Hammond's* account of it. *Noble's* account was that he was to keep and use the money until called for. In any point of view it was plain that *Noble* expected *Hammond* to keep the money as an ordinary deposit as a bank would keep

It. Hammond was a business man using considerable sums of money, in perfectly good standing, and having no reason to suppose that he was liable to financial trouble, and, while in that condition, collected \$1,000 from the railroad and mixed it with his own funds. Shortly afterwards, through an unanticipated business loss, he was compelled to go through bankruptcy. It was found as a fact that there was no evidence tending to show actual fraud or any fraudulent intent in defendant's mingling the money with his own. The Supreme Court held that he was discharged by those proceedings. There it was plain that the transaction amounted to a loan by Hammond to Noble. A still later case is *Upshur v. Briscoe* (1890) 138 U. S. 365, 11 Sup. Ct. 313, 34 L. Ed. 931. In that case one Andrews made a present to his daughter Annie of \$10,000, and placed the money in the hands of Briscoe, accompanied with a written contract which amounted to a special settlement of the money upon his daughter and her heirs, and at the same time to an absolute covenant on the part of Briscoe sooner or later to pay the whole sum of money, with interest. Briscoe thereby became an absolute debtor and at liberty to treat the money as his own. It was not contemplated or provided for that he should hold the money as trustee and invest it for the benefit of the cestui que trust. The transaction amounted to an absolute obligation on Briscoe's part. Under those circumstances the court held that the discharge in bankruptcy barred a claim against him personally, but the court enforced it against an estate which he had transferred to his wife fraudulently in anticipation of bankruptcy. This was on its face a "technical trust," and hence was within some of the definitions given by the judges in construing the language here in question. They said the words "fiduciary capacity" referred to a "technical trust." But the court in *Upshur v. Briscoe* did not rely on the form of the affair, but on the actual substance, and distinctly relied on the fact that an absolute debt by Briscoe was created by the instrument.

We come now to the act of 1898. The language of that portion of the act here in question is variant from the act of 1867 above cited, and is as follows: "Except such as were created by his fraud, embezzlement, misappropriation or defalcation while acting as an officer or in any fiduciary capacity." The act of 1867 speaks of a debt created by the fraud or embezzlement of the bankrupt, or by his defalcation as a public officer, or while acting in any fiduciary capacity. Here the word "misappropriation" is added. The meaning of that word as given in the dictionaries is "wrong appropriation" (Webster), and, according to the *Encyclopedic Dictionary*, "to appropriate wrongly or wrongfully; to turn or put to a wrong purpose; the act of misappropriating or turning to a wrong purpose." I can well perceive that, as used in this statute, the misappropriation

must have been consciously done. The party must have known and felt at the time that he was misappropriating the money. The only case in the Supreme Court of the United States to which my attention has been called construing this part of the act of 1898 is *Crawford v. Burke* (1904) 195 U. S. 176, 25 Sup. Ct. 9, 49 L. Ed. 147. That was a suit much like *Hennequin v. Clewa*. The bankrupt was a broker, who, as a part of his business, bought, held, and carried stocks on a margin for his clients, and in the ordinary course of his business bought stocks and carried for Burke. The transactions between them were the ordinary gambling transactions in stocks carried on a margin. While so doing, the bankrupt sold out his principal's stock without his knowledge. Pending a suit in trover to recover damages for converting the stocks so sold, the broker obtained his discharge in bankruptcy, and pleaded it *puls darrein continuance*. It was held by the Supreme Court of Illinois that the discharge was no bar. On error to the Supreme Court of the United States, that court held that the fiduciary capacity did not exist. The distinction between that case and the present is clear.

It remains to consider some cases in our own state. Among them are *Gibson v. Gorham*, 44 N. J. Law. 325. There the question arose as to the effect of a discharge in bankruptcy under the act of 1867 upon a judgment recovered in *assumpsit*. The debt arose out of two payments by the plaintiff in the judgment to the defendant in the judgment of the advance money or deposit on a purchase of lands which the defendant had for sale as an agent. The money was paid to him in the ordinary course of business. The sale in one instance was never completed on account of some supposed defect in the title, but the deposit was held by the agent for a long time in hopes that the title would be completed. In the other case the advance payment was withheld under a claim of commissions. Both sales fell through. It was held that neither of the sums was received in a fiduciary capacity, but were paid in the ordinary course of business in which the parties were engaged, and it was only by reason of what was claimed to be the defect in the title in the one case and a misunderstanding as to price in the other that the plaintiff was entitled to recover at all. Another case is *Smith & Wallace Company v. Lambert*, 69 N. J. Law, 487, 55 Atl. 88. That case was on demurrer to a replication to a plea of discharge in bankruptcy, which set up simply that the cause of action was excepted from the operation of a discharge in bankruptcy because it was created by fraud. It was held that the replication was bad. The question here involved was not there involved or discussed. The latest case is *Reeves v. McCracken*, 69 N. J. Eq. 208, 60 Atl. 332. The bill in that case was filed for an account of

moneys received by McCracken to the use of the complainant in the sale of lands conveyed by the complainant to the defendant in trust for complainant. The fact was that it had been so conveyed by complainant to defendant in fraud of complainant's creditors, and that no written declaration of trust had been made. It was held that the money could not be held to have been received in a fiduciary capacity, because there could be no trust in the case, first, because no trust was declared in writing; and, second, because the fact that the conveyance as between the parties was valid and binding, and the complainant could never have recovered back the land from the defendant on the ground of a lack of consideration for the conveyance, but was absolutely bound by it because made to defraud creditors. The learned Vice Chancellor does, indeed, cite and comment upon many of the cases I have already cited, and relies upon them to show that only a technical trust, so called, is within the meaning of the words "fiduciary capacity" as used in the seventeenth section of the bankrupt act. But with great respect I do not think that that question was involved in the case before him, and, further, I am of the opinion that the case is clearly distinguishable from the present.

The complainant herein appeared before the judge in bankruptcy, and objected to the discharge of the defendant on the ground of fraud in the creation of the debt, and the learned judge was unable to find any fraud in the case as presented to him, which was simply the pleadings in the suit in equity which resulted in the decree. I do not find from his opinion that he discussed the question of fiduciary capacity. The question whether the claim is excepted from the discharge is one for the forum where it is pleaded to determine, and hence is entirely within the jurisdiction of this court, as held in *Marshall Paper Co. v. Train*, 102 Fed. 872, 43 C. C. A. 38.

I have already referred to the reasoning by which the courts have held that the ordinary relation between factor and principal was not fiduciary within the meaning of that word here involved. It is that those transactions are mercantile transactions in which the principal must have known that his factor would, in the ordinary course of business, mingle the money received from the sale of his goods with his own, and that the ordinary relation of debtor and creditor arose out of those transactions, and that it was not the duty of the factor to earmark or segregate the proceeds of the sale of his principal's goods and remit at once. In fact, the ordinary course of business in such cases renders such restrictive dealing impracticable. The principal often obtains from the factor money in advance upon his goods, and the goods are not sold ordinarily in a lump; nor is the payment received in a single lump. The principal relies upon the personal re-

sponsibility of his factor. The courts held that it was and is contrary to public policy, as manifested in the bankrupt law, to except such a large class of unfortunate creditors from its benefits. This consideration covers the case in 2 How. (U. S.) 202, 11 L. Ed. 236, cited hereinbefore, and all cases of that character. The same consideration applies in a less striking degree to the case of *Hennequin v. Clews*. There, as we all know, Mr. Clews, like all bankers engaged in the business of issuing letters of credit, had numerous letters of credit outstanding in various parts of this country and Europe. He could not at any moment know how many drafts had been drawn against him upon which he was liable. He could only know the extent of his possible liability at any moment. He did know that his failure to meet one of those drafts would create great disturbance in mercantile circles, and he was justified by mercantile customs in going to extreme lengths in saving himself from a default in accepting and paying any such draft, and that it was to the interest of the holders of his letters of credit, especially of those who had drawn against him, that his insolvency should be averted. Among those who may have drawn upon him was *Hennequin*. Under these circumstances it is by no means a stretch to say that mercantile usage justified him in devoting all these collaterals which he held as security from the holders of his letters of credit to protect himself and his customers, if practicable, from the consequences of failure to protect the drafts drawn by the holders of the letters. The situation brings him without the policy of the law.

Coming now to the case in hand, I find the present case not within the principle upon which those cases were founded, nor within the facts involved in those cases. It had nothing of a mercantile character. The defendant was not engaged in any business which required the use of money. He had no bank account, and opened one in his own individual name with the very money handed to him by complainant's intestate, and immediately after the intestate's death drew it out of bank for his personal use. I think the case is clearly within the case of *White v. Platt*, *supra*, and is within the definition of the words "fiduciary capacity" found in the headnote to *Clark v. Iselin*, *supra*, and it is also within the case of *Fulton v. Hammond*, decided by Judge Pardee in the federal court and cited above. It is also within the ruling of the Supreme Court of South Dakota in *Shipley v. Platts* (1903) 97 N. W. 1, 17 S. D. 357. There the plaintiff, the proprietor of a laundry, employed the defendant as a distributor and collector of laundry material and to collect from the patrons of the laundry their current dues and return the same to the plaintiff, less the defendant's commissions. In an action to recover the moneys so collected and not paid over, defendant set up his discharge in bankruptcy, and the court,

relying mainly on *White v. Platt*, *In re Kimbal*, *Fulton v. Hammond*, and other cases in the same line, held the discharge no bar. It is true the court did not refer to the cases I have reviewed decided by the Supreme Court of the United States. As applicable to the whole position here, I refer to the case of *Burdick v. Garrick*, decided in the Vice Chancellor's Court by Vice Chancellor Stuart, and affirmed on appeal by Lord Chancellor Hatherly and Sir G. M. Giffard, Lord Justices. L. R. 5 Ch. App. 233 (1870). There the contest was over a sum of money held by an agent acting under a power of attorney to sell lands with power to invest the proceeds for the benefit of the principal, in the agent's own or any one's else name. The agent never did invest the money, but deposited it in a bank to the credit of a firm of which he was a member, and it was held that the agent could not set up the statute of limitations, and that the bill in equity was a proper remedy. The judges distinguished *Foley v. Hill*, 2 H. of L. 35, where it was held that the relation between an ordinary depositor in a bank was not that of trustee and cestui que trust, but of debtor and creditor. That case has the same characteristic as that of *White v. Platt*, *Fulton v. Hammond*, and *Shipley v. Platts*, above cited, namely, that the money or property was placed in the hands of the defendant for a specific purpose which made him a trustee and his situation that of a fiduciary. But, whatever may have been the character in which the defendant herein received the money in the first instance, there can be no doubt as to the character in which he held it at and after the death of the intestate. That death dissolved the partnership at once, and the defendant's legal title to the money became absolute; but he held that legal title strictly in trust for the complainant's intestate. No business had ever been done under the partnership, so that he had no title on a settlement of the partnership affairs to any part of it. Feeling the force of this, he set up in his answer to this action an absolute title in the whole sum under what he alleged to be the contract between the parties, namely, that he was to have that money, not as a contribution to the partnership funds, but as compensation to himself personally for giving up his present position as salesman. I found that issue against him expressly, and I found impliedly that, as the partnership business had been arrested and the partnership dissolved by the death of intestate before anything had been done under it, the complainant was entitled to the whole fund.

I have said that on the death of the intestate the partnership was at once dissolved, and the absolute legal title to the money became vested in the defendant, and that he held it in trust for the partnership, which in this case amounted to holding it in trust for the complainant's intestate. It was on this ground that the action was brought and

maintained in this court. That this is the true statement of the relations between the parties cannot be doubted. In *Lewin on Trusts* (8th Ed., reprint by Flint, 1888) p. 377, this relation of partners to each other is distinctly recognized, and, while it has been held that that relation does not go so far as to prevent the application of the statute of limitations, it seems quite clear that the relation between the personal representatives of the deceased partner and the surviving partner is quite distinct from that between a principal and his factor or agent in the ordinary mercantile relation out of which an action of assumpsit at law will arise, and the universal rule is that resort must be had to a court of equity. It is true that the doctrine that the surviving partner holds the property of the partnership in trust for the personal representatives of the deceased partner has been repudiated and the contrary held in cases where the rights of third parties or the statute of limitations was involved. The leading case on that subject is *Knox v. Gye* (1872) 5 Eng. & Ir. Ap. Cases, 656. There the sole question was the operation of the statute of limitations. Lord Westbury uses the following language: "Another source of error in this matter is the looseness with which the word 'trustee' is frequently used. The surviving partner is often called a 'trustee,' but the term is used inaccurately. He is not a trustee, either expressly or by implication. On the death of a partner the law confers on his representatives certain rights as against the surviving partner, and imposes upon the latter correspondent obligations. The surviving partner may be called, so far as these obligations extend, a trustee for the deceased partner; but, when these obligations have been fulfilled, or are discharged, or terminate by law, the supposed trust is at an end." Against this mere dictum Lord Hatherly, at page 678, vigorously protests. The other law lords, Lord Chelmsford and Lord Colonsay, agreed that the statute of limitation applied, without discussing the questions of the fiduciary relations between the parties or relying on it. All agreed that the bill in chancery was the proper remedy. Lord Westbury did, indeed, hint that the old action at law for an account would lie. Mr. Clement Bates, in his treatise on the Law of Partnership (volume 2, §§ 718, 719), reviews the language in *Knox v. Gye* with ability, and cites cases in support of his criticism. Whatever may be the proper language to apply to and describe the relation existing between the complainant's intestate and the defendant, it is quite clear that the obligations arising out of the circumstances under which the defendant became indebted to the complainant's intestate were not in the ordinary course of mercantile business, and did not give rise to the right to sue and recover in an ordinary action at law, because it was within the province of the defendant to set up and prove that the fund had become in-

volved and depleted by legitimate use in the partnership venture to which it was contributed as capital before that partnership was dissolved by death; hence the complainant's proper remedy was a bill in this court for an accounting, precisely as if such a state of facts as I have indicated had existed.

Now, if we go back and review the opinions in the cases I have cited, we will find that this distinction in the proper remedies is adverted to, and in a measure relied upon, in determining whether the debt is or not barred by the discharge. It is hardly necessary to advance arguments to show that, the trust relation being established, the use of the fund for his individual benefit was a misappropriation within the meaning of that word in the act. For these reasons I am of the opinion that the defendant's debt, manifested by the decree, is not discharged by the decree of the bankrupt court.

The next defense set up by the defendant is his inability to pay. For this he relies upon his *ex parte* affidavit read at the hearing, in which he says he has a wife and one child, and receives \$30 per week, or \$1,560 per year, salary, and therefore he cannot pay anything. The same excuse was set up in answer to proceedings similar to these instituted after decree and before bankruptcy proceedings were taken. Then, as now, the defendant relied upon his *ex parte* affidavit. Of course, the complainant is entitled to have the defendant subjected to examination. In the former case the proceedings were dropped or suspended on a verbal undertaking, at my suggestion, that the defendant should pay \$5 per week, which he did for two weeks and then took bankruptcy proceedings. In the present case I think it will be no hardship on the defendant to contract his living expenses to the extent of \$5 per week. This is a mere suggestion to save expense and need not be accepted by either party, but each may fall back on the regular practice of an oral examination. The case is clearly one justifying the extraordinary process of the court. The obligation which is the foundation of this suit arose as soon as the intestate died. It was then the duty of the defendant to preserve the fund so that he could account for and pay it over to the personal representatives of the deceased when appointed and duly accredited. The equitable wrong committed by the defendant was the misappropriation of that fund by treating it as his own and applying it to his personal use.

If the complainant's right had been a legal one, enforceable in a court of law, it would have warranted process against the body. As, however, his right was an equitable one, and enforceable in this court, he is entitled to the corresponding remedy of this court, subject, however, to this exception: That while in a court of law the process against the body would be issued without regard to the defendant's personal ability to pay, and he be

remitted to his remedy by insolvent proceedings, in this court he will not be deprived of his liberty if it appears in advance that he is unable to respond and obey the order of the court. This view is entirely in accord with that of the Court of Errors and Appeals in *Grand Lodge Knights of Pythias v. Jansen et al.*, 62 N. J. Eq. 737, 48 Atl. 526. The foundation of the decree in that case, as shown by the opinion in the original cause (56 N. J. Eq. 63, 38 Atl. 341), was, briefly, as follows: Jansen and others were members of Germania Lodge No. 50 of the Knights of Pythias, and became dissatisfied with some of the conduct of the Grand Lodge, and, being aware that any failure to obey and observe the laws of the Grand Lodge would result in a forfeiture to the Grand Lodge of all the funds of the inferior lodge, amounting to hundreds of dollars, deliberately set to work and, in defiance of an interlocutory order of this court, distributed the money among themselves. The result was that later on a final remedial decree was made against all of them who actively engaged in the scheme, and they were directed to pay the money to the Grand Lodge. Failing so to do, proceedings in attachment were taken against them on two grounds: First, for punitive purposes, in disobeying the interim restraining order of the court; second, remedial to the Grand Lodge for not paying over the money in obedience to the final decree. The real basis of the final decree was the wrong appropriation of the money in their hands after they had been enjoined by this court. On those contempt proceedings Jansen and others were adjudged guilty of contempt, and committed to the custody of the sheriff. An appeal was taken from that order. The matter was argued both above and below by able counsel. Neither in the court below, nor on appeal, was the point taken that proceedings against the body were not proper or lawful, but the order below was reversed on the single ground that it appeared by the affidavits already in the case that the defendants were unable to pay the money, and therefore the imprisonment should not be imposed.

(72 N. J. Eq. 492)

STANDARD OIL CO. v. BUCHI et ux.

(Court of Chancery of New Jersey. April 17, 1907.)

1. EASEMENTS—EXTENT OF RIGHT—REVOCA-TION.

A deed whereby, for a cash consideration named and the payment of damages to be ascertained by disinterested persons on oath, one grants the right to lay pipes for the transportation of petroleum, together with all the rights and privileges necessary to the enjoyment of the grant and the removal of the pipes, the pipes to be laid within 10 feet of the line of the grantor's property, does not convey a mere easement in gross nor a license which may be revoked at the will of the grantor, and it is not revoked by its assignment to a third person.

2. SAME.

Under a grant of right to lay pipes in land to convey petroleum, the exercise of the right by the laying of a single pipe and later of a second pipe does not define the extent of the easement so as to prevent the laying of a third pipe.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Easements, §§ 97, 120.]

3. SAME—EFFECT OF LAPSE OF TIME.

Under a grant of right to lay pipes in land to convey petroleum, the mere lapse of time does not affect the right of the grantee to lay additional pipes.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Easements, §§ 97, 120.]

Action by the Standard Oil Company against Robert Buchl and wife. Heard on order to show cause why injunction should not issue. Injunction granted.

Gilbert Collins, for complainant. J. Emil Walscheid, for defendants.

PITNEY, Advisory Master. The object of the bill is to obtain judicial restraint preventing the defendant from interfering by strong hand and serious threats of violence with the complainant's work in laying across the lands of the defendant in Bergen county a line of pipe for the transportation of oil. At and just before the filing of the bill the complainant had placed on the premises of the defendant a number of joints of pipe, and had leaded them together, ready to be buried beneath the earth, and its workmen were about to excavate a trench for that purpose, when they were driven from the premises by threats of the defendant's daughter to shoot them, accompanied with the actual presentation of a pistol.

The complainant claims the right in question by virtue of a deed dated the 30th day of October, 1882, and duly recorded on the 6th day of December, 1882, in the clerk's office of Bergen county, where the lands lie, between James H. Kingsland, predecessor in title of the defendant and then the owner of the lands in question, and one John B. Barbour, under whom the complainant claims. That deed, or so much of it as is necessary for present purposes, is as follows: "Witnesseth: That for and in consideration of five dollars in hand paid, the receipt of which is hereby acknowledged and the further sum of twenty dollars to be paid before any pipe is laid, the party of the first part, his heirs and assigns, hereby grants to the party of the second part, his heirs and assigns, the right of way to lay pipes for the transportation of petroleum; and operate the same on, over and through his lands in said County of Bergen, in said State of New Jersey, described in a certain deed dated Sept. 13th 1881, and recorded in the County Clerk's office of Bergen County, in book Z-10 page 542 of deeds, together with all the rights and privileges incident and necessary to the enjoyment of this grant, and the removal of said pipes. In further considera-

tion of said grant and demise, the party of the second part hereby agrees to bury the said pipes a sufficient depth, so as not to interfere with the cultivation of the soil, at least three feet, and to pay any and all damages which may arise from the laying, maintaining or operating of said pipe lines, said damages if not mutually agreed upon, to be ascertained and determined by three disinterested persons on oath, one thereof to be appointed by the party of the first part, his heirs and assigns, one by the party of the second part, his heirs and assigns, and the third by the two so appointed as aforesaid, and the award of such three persons shall be final and conclusive. It is understood and agreed between the parties hereto that said pipe lines are to be laid within ten feet of the southerly lines of the above described property, excepting where there are angles in said property lines at which points such deflections shall be made therefrom as the surveyor of the party of the second part may decide to be necessary. Witness our hands and seals the day and year first above written. [Signed] Jas. H. Kingsland. [Seal.] J. B. Barbour. [Seal.]" The bill alleges, and in this respect is supported by the affidavits, or at least is not disputed on this motion, that the grantee, Barbour, was a mere agent or trustee for procuring the right of way (and land for pumping stations) for a continuous underground series of pipes conducting petroleum from Pennsylvania and other oil-bearing regions to tide water. That in 1880 he purchased certain land in Bergen county from a Mrs. Zabriskie, and an adjoining tract from one Knowles, for the purpose of a pumping station, which he immediately conveyed to the Standard Oil Company, and that the deed above mentioned from Kingsland was also taken by said Barbour as a part of the right of way for a great pipe line system for conducting oil from the oil regions to tide water, and shortly afterwards was assigned and conveyed to the complainant and a continuous line of oil-bearing pipe was laid over it, including the Kingsland strip, and pumping stations erected and the pipe line put in use for the purpose of conveying oil, and has been in use ever since; that later on, in 1894, a second pipe line was laid alongside the first along the entire length of the Kingsland property and put in immediate use, and that the object of the present proposed interference with the soil of the defendant is to lay a third pipe line over the whole right of way close beside the first. The justification set up by the defendant amounts to a demurrer to the bill, and the argument in its support may be briefly stated as follows: That the grant contained in the Kingsland deed amounted to no more than the grant of an easement without the naming of any dominant tenement, and therefor amounted to no more than an easement in gross, which was not assignable,

and hence amounted to a mere license, and was determinable at the will of the licensor; that the license was in law immediately abandoned by the assignment thereof, and that it was also formally determined by a notice of revocation given by the defendant Buchl to the complainant, dated March 5, 1907, and annexed to the bill of complaint.

The first inquiry naturally is: what is the true character of the grant in question? Is it properly classified either as a mere easement or as a mere revocable license? It is to be observed, in the first place, that it is an instrument under seal, and expresses to be for a valuable consideration presently paid, with the provision for the ascertainment of a further consideration in a mode, the reasonableness of which seems to me to be quite apparent and which has not been attacked in the argument. In the next place, it is not a mere promise to do something in the future, nor is it a mere permission, but it is a grant in present, and it is not a mere privilege given to the grantee which can be considered as merely personal to him, such as a privilege to wander over ground with or without the privilege of hunting or fishing, but it is made to the grantee, his heirs and assigns. Then it is not the mere privilege to walk or pass over land without the right to disturb the soil, as is a right of way, but it is a "right to lay down pipes for the transportation of petroleum and to operate the same over" the lands, "together with all the right and privileges incident and necessary to the enjoyment of the grant and the removal of the pipes." This grants rights in the soil in perpetuo. Now just here the defendant attempts to meet this aspect of the case by setting up that he does not propose to dispute or disturb what has already been done under the so-called license, or to interfere with the complainant in the enjoyment of its works already on his land, but he claims the right to prevent any further exercise of the rights mentioned in the grant. Nor does he contend that the right to lay the third line of pipes is not included in the terms of the grant. Nor does he contend that there is anything inequitable in the complainant's standing before the court. On the contrary, he puts himself on the bold, bare ground that, because there was no dominant tenement mentioned in the grant to which what would have been an easement was appurtenant or appendant, the easement so called became one in gross and not assignable, and by its attempted assignment ceased to exist in law, or at least degenerated into a mere license revocable so far as not acted upon. Now, is it possible to treat the document in question as having no greater force than that? The doctrine contended for, if logically applied, leads to this result: If Mr. Barbour had paid Mr. Kingsland \$1,000 in cash for this grant, and had the next day assigned it to the complainant, it would

have been possible for Kingsland to have immediately destroyed the value in the law of his grant by a formal revocation of it, and the complainant would have had no relief in equity by showing that Barbour was acting merely as its agent; for it is not contended by the defendant that the Standard Oil Company has not the capacity in law of holding the title to and operating a pipe line such as that described and in actual use. And it is to be observed that the question is not whether in the then present condition of the law the Standard Oil Company had the right to acquire by condemnation proceedings the lands and rights of way for its pipe line and pumping stations from the western oil fields to tide water, but the question is whether, having first purchased the lands and rights of way through agents, by means of divers conveyances which did not disclose, so far as relates to mere rights of way, any termini or dominant tenement, it could have been prevented by any one of the grantors from proceeding to lay its pipe across the grantor's land, or, rather, whether, having acquired title in that manner, by grants which provided in effect the right to add to its pipe line from time to time, and having acted upon those grants so obtained, and having built a great trunk line and being in possession and use thereof, it may be prevented from adding thereto on the ground here taken. The question is a serious one, and has received my careful consideration, aided by elaborate arguments by counsel. It is serious because it is quite notorious that it has been a common practice in starting great enterprises of this character to acquire necessary rights in the manner here adopted.

Now, to return again to the grant itself. In addition to the characteristics already noticed, it is to be remarked that the object of the grant is mentioned, namely, the transportation of petroleum. Now, it was then common knowledge that petroleum was produced mainly, if not entirely, in western Pennsylvania and regions to the west of that locality, hundreds of miles from the locus in quo, and that its principal place of preparation by refinement for market and distribution was in or near the city of New York. Now it seems to me that, under these conditions, the grantor and his assigns are chargeable with notice, from the very language of the grant, that this line of pipes was to extend from the various sources of the crude petroleum to tide water, and that, from the very nature of the case, it was not a mere easement which granted to a dominant tenement a right or privilege in a servient tenement. And I think, further, that the grantor could not have supposed that the grantee, Barbour, expected himself personally to exercise the right granted, but that it would be transferred to some corporation for exercise in connection with many other like grants; the whole creating a long

through route from the oil regions to tide water. Now, with these preliminary remarks, is it possible to conceive that the idea of an easement requiring a dominant tenement could have been in the minds of the parties, and, further, is it possible that the grant could be construed to be one involving a dominant tenement to which it was appurtenant? The idea underlying the ordinary easement is that it is at the expense of one tenement, called the "servient" tenement, and for the benefit especially of another tenement, called the "dominant" tenement. Clearly the right granted by the deed in this case was not of that character, and hence it must be construed by rules not applicable to those of ordinary easements. There was in this case, and could in the nature of things be, no dominant tenement. Nor is it, in its essential nature a license, nor can it be reduced in its nature in that respect. It by its terms granted a permanent right to lay the pipe, to maintain the same, and to remove the same. It gave an interest in the land quite as positive and as permanent as that in which a deed is given granting the right to lay a line of water pipes or to erect a line of telephone poles across the grantor's land, where the circumstances indicate that the work done thereunder was to be permanent. From these considerations, based on general and familiar principles, I come to the conclusion that the defendant's position is untenable, especially when urged in a court of equity.

Let us now consider some of the authorities cited by the learned counsel for the defendant.

Among the first of those is the famous case of *Ackroyd v. Smith*, 10 C. B. (1 Scott) 164. That was the case of the conveyance of a piece of land with a right of way over other lands of the grantor to the land conveyed, with the addition of the words "for all purposes," and it was held that an assignee or grantee of the land so conveyed could not justify under the grant unless he showed that the act done under it would be justifiable without the words "for all purposes." That was in effect holding that a right of way in gross was not assignable. It was a case of pure easement of way which gave no interest in the soil itself. It is proper to remark here that the doctrine so established has been confined generally to cases of pure easements. See *Goodrich v. Burbank*, 12 Allen (Mass.) 459, 90 Am. Dec. 161, and see, per Earl, J., in *Mayor, etc., of New York v. Law*, 125 N. Y. 380, 392, 26 N. E. 471, 473, where he says: "It is quite true that easements must generally be appurtenant to some land or estate, and that there must be a dominant estate to which the easement appertains and a servient estate upon which it is imposed. But that is not true of all easements. There may be easements in gross which are not appurtenant to any land, and which the owner may enjoy, although

he does not own or possess a dominant estate or any land whatever. Here the intention was to create an interest in this wharf by this grant which the grantee could enjoy himself or convey to any other persons."

The next case cited by counsel is *East Jersey Iron Company v. Wright*, 32 N. J. Eq. 248. That was the case of a license or privilege under seal given by the owner of certain lands to one Rude whereby the owner agreed with Rude, his executors, administrators, and assigns, that he and they should have the exclusive right and privilege of raising and removing ore from certain lands belonging to the owner, with the privilege of entering upon them for the purpose of raising and removing ore and erecting buildings, etc. Rude, as the only consideration, agreed to pay the owner 25 cents per ton for all ore removed. This paper was executed in 1857, and all that was done under it was to dig a hole deep enough to show the existence of the vein of ore. It was then abandoned by Rude and his assigns. The original owner who gave the instrument passed the title to his son, who made a new grant or license to a new party, who entered and worked the mine. It was held by Vice Chancellor Van Fleet that it was a mere license and not a grant, and that it was not a lease, citing numerous well-considered authorities. Moreover, and this is the principal ground of his decision, he held that the instrument plainly showed that the licensee was bound to enter within a reasonable time and prosecute the work so that the owner would receive the consideration; that he could not stand by, like a dog in a manger, and do nothing, and thereby disappoint the owner of the land in what was his reasonable expectation, namely, to receive the royalty of 25 cents per ton of ore as provided for in the instrument, and that his conduct in that respect amounted to an abandonment of his rights, whatever they were, under the instrument.

The next case cited by counsel is *Eckert v. Peters*, 55 N. J. Eq. 379, 38 Atl. 491. In that case, one Green, being the owner of a sea front tract of land of considerable extent lying on the easterly side of Ocean avenue in Monmouth county, and reaching from that avenue to the sea, and another separate tract on the west side of Ocean avenue, granted the tract on the west side, which was capable of being divided into several tracts, to a grantee, "together with the free use and full rights of sufficient land on my sea front for bathing purposes, with the right to erect thereon bath houses and use the same free of charge undisturbed at any time." It was held that, while that grant gave the right to future owners of the lands on the west side a right of way from the avenue over the land on the east side to the sea, yet that so much of the grant as gave the right to erect bath-houses and use the same free of charge was revoked by the death of the grantor and subsequent conveyance. The learned Vice Chan-

cellor held that a strip 40 feet wide which had been set apart as a right of way to the shore was ample for that purpose. He then comments upon the vagueness and uncertainty of the language referring to bathhouses and their use, the nonlimitation in number, and the failure to locate their place on the large tract fronting the sea, and then holds that the right to place and use the bathhouses was, under the authorities, a mere license, and sustains his judgment by abundant authority and sound reasoning. The case has no application here, where the location of the pipes and their object are clearly defined and the permanent estate in the soil is given by clear and proper language. The difference between an oil-bearing pipe laid in the ground and a portable bathhouse is quite manifest.

Another case relied upon by counsel is *Mitchell v. D'Olier*, 68 N. J. Law, 375, 53 Atl. 467, 59 L. R. A. 949. The only effect of that decision is to hold that a conveyance of land bordering on a small lake, together with a right of boating on the lake for pleasure and amusement, and to fish therein for pleasure, and to cut ice therefrom for their own private domestic use, was, under the circumstances, a clear appurtenant to the land granted, although no words so expressly declaring were found in the deed, and that these rights passed without being mentioned as an appurtenant to the land so conveyed in a subsequent conveyance to a third party. The court does, indeed, express its opinion that a private easement, accompanied with a profit à prendre, could not be held in gross, thus expressing a preference for the English rule rather than the rule held by some of the American states. Such expression was simply for the purpose of showing that the grant of the rights in the lake passed as an appurtenant to the land conveyed without any express declaration to that effect, and did not pass to the grantee as a personal right or in gross. At the same time the right of certain entities to hold the rights properly exercised by them without any dominant tenement is clearly recognized on page 380 of 68 N. J. Law, page 469 of 53 Atl. (59 L. R. A. 949). The court also points out that, according to the old English doctrine, a profit à prendre may be held in gross, and shows an error in that respect in the language used in the opinion in *Cobb v. Davenport*, 32 N. J. Law, 369.

Another case cited by the defendant is *Wilkins v. Irvine*, 33 Ohio St. 138. That was a writ of error in an action at law to recover a balance due for the purchase money of a tract of land agreed to be sold and conveyed by Irvine, the plaintiff, to Wilkins, the defendant below. The defense set up by Wilkins by answer and cross-petition in equity was that the land contracted to be conveyed was subject to an easement or incumbrance arising out of a grant in writing, but unsealed, and not recorded, given by certain previous owners of the land to the Cleveland Rolling Mill Company of a right to lay down

across the land and permanently maintain a water pipe from the Cuyahoga river to the rolling mills works for the purpose of carrying water to the works, and that the grant had been executed and the pipe laid, and the defendant prayed a rescission of the contract. The answer to this defense was that the defendant, Wilkins, had no knowledge or notice of either the existence of the pipe or of the grant, and therefore was able to hold the property free and clear of the easement. The defendant, by his counsel in argument, urged that he (Wilkins) should not be compelled to assist Irvine in practicing a fraud upon the Rolling Mill Company. On the other hand, it was urged by counsel for Irvine that under the peculiar statutes of Ohio the license in that case, not being under seal and recorded, created no incumbrance, and the extreme ground was taken that although the former owners of the land had in the grant used this plain language, "We hereby grant to said company the right to come upon said lands and so lay said pipes at a depth of not less than two feet and there permanently to maintain the same, with like privilege at any time for repairs, relaying or removing," yet that, although fully executed, for want of a seal it was a mere license and revocable. The court held that under the statute, which it cites at length an unsealed unacknowledged paper like the one in question could create no incumbrance. It further held, under another section of the statute, that, if unrecorded, it must be deemed fraudulent as against any subsequent bona fide purchaser without notice. The court intimated no opinion on the question of an executed or nonexecuted license being revocable, but put their decision distinctly on the ground that the defendant had no right in equity to a rescission because he was a bona fide purchaser without notice. The decision was by a majority of three against two of a court of five judges. The result of the decision is simply to hold that a bona fide purchaser without notice of an incumbrance cannot set up that incumbrance in any court as a defense to a suit for purchase money.

The defendant also cites the famous case of *Wood v. Leadbitter* (1844) 13 M. & W. 845. This is the famous race course ticket case, in which the plaintiff, after having purchased a ticket, issued by the stewards of the Doncaster races, was ejected from the grounds, and the ticket was held to be a mere revocable license. The opinion of Baron Alderson is a carefully prepared and luminous exposition of the law on the subject, so much so that it is quoted in extenso by Mr. Gale in the fourth edition (London, 1868) of his treatise on Easements, where will also be found many cases decided in England on the subject after *Wood v. Leadbitter*. It is cited by the defendant here to sustain the proposition that the fact that the license here in question is created by deed does not alter the situation. But an examination of the opinion

in question shows that its character for revocability depends upon the construction of the instrument itself, and the whole of what the learned Baron says on pages 844 and 845 is most instructive, and by no means supports the contention of the defendant's counsel. *Wood v. Manley*, 11 Ad. & El. 34, another case cited by defendant, not only has no bearing on the present question, but is against his general proposition. The headnote is this: "Goods which were upon plaintiff's land were sold to the defendant. By the conditions of the sale, to which plaintiff was a party, the buyer was to be allowed to enter and take the goods. Held, that after the sale plaintiff could not countermand the license." Another case cited by defendant's counsel is *Berry v. Potter*, 52 N. J. Eq. 664, 29 Atl. 323. There a father sold to his daughter and her husband that they might pick out among several tracts of land a certain tract as their share in his property and take present possession of it, and that he would make his will, giving it to his daughter. The daughter and husband took possession, and the father afterwards became insane, and a guardian was appointed, who demanded possession of the premises. In the meantime the daughter and her husband had taken possession and worked certain clay banks. Vice Chancellor Bird held that it was a mere parol license and could not be set up in defense to the demand of the guardian for possession of the premises. There was there no written grant, and the case has no application here.

Finally, the defendant makes the point that the complainant, having once exercised its right of laying a single pipe and again later a second pipe all before the title became vested in the defendant, cannot now enlarge the burden of the easement by now adding a third pipe, and he relies upon the very recent decision of Vice Chancellor Bergen in *Sked v. Pennington Spring Water Company*, 65 Atl. 713, and he relies also upon the well-known cases of *Johnson v. Jaqui* and *Jaqui v. Johnson*, both in the Court of Errors and Appeals and reported in 27 N. J. Eq. at pages 552 and 526, respectively. The case of *Sked v. Pennington, etc., Company* was this: Sked conveyed to the company the right to build a reservoir, not exceeding a half acre in extent, at what is called the "middle" spring, and to convey the water away, but not designating by metes and bounds or in any other manner the precise shape or location of said reservoir. The defendant entered and constructed the reservoir and abducted water, but did not include in the boundaries of the reservoir quite a half acre of land. Ten years later, having occasion to increase its supply, it entered on the premises and commenced to sink what is known as a "driven well" outside the limits of the reservoir, but so near it that, by a new line of circumference which should include the original reservoir and the locus of the driven well, no more than one half an acre would be included; and

the learned Vice Chancellor enjoined such work. He did this upon the principle that having once located their half acre the defendant could not go outside of such location. The distinction between that case and this is manifest. Here the limits of the original grant is clearly defined as being within ten feet of the southern boundary of the land. That the mere lapse of times does not affect the complainant's right was held in the case of *Wheeler v. Wilder*, 61 N. H. 2. That a grant may be made in advance to individuals in favor of a corporation afterwards to be organized seems to have been held in *Salem Capital Flour Mills Company v. Stayton Water Ditch & Canal Company* (C. C.) 33 Fed. 146. The case is very lengthy, but the part from which I draw my inference is found on page 153. I have examined a large number of cases bearing upon this question, and agree with what Vice Chancellor Van Fleet said in *East Jersey Iron Company v. Wright*, 32 N. J. Eq. 248, 254, viz., that the adjudications upon this subject cannot be reconciled, and, "If an attempt should be made to arrange them in harmonious groups, I think some of them would be found to be so eccentric in their application to legal principles, as well as in their logical deductions, as to be impossible of classification." Mr. Gale, in the edition of his work on Easements previously cited, at page 20 et seq., attempts a list of those recognized up to the date of that edition. Among them I find none like the present. I think the present grant is something more than an easement, although undoubtedly it includes easements, and I think that it is a great deal more than a license, in that it gives an irrevocable interest in the land and creates, by apt words, an estate, is expressed to be upon a consideration, and is sealed by the seal of the grantor. I can find no authority in any of the treatises or in any of the adjudged cases for holding that it is revocable.

As in my judgment the right of the complainant is entirely clear and not subject to revocation, I think it is entitled to relief by way of immediate injunction. But I think that such relief must be upon conditions contained in the grant, which requires that the complainant enter into bonds to the defendant, to be approved by a special master, to pay such damages as may be ascertained in the manner expressed in the deed above recited.

(66 N. J. Eq. 604)

URICH v. WATTS.

(Court of Chancery of New Jersey. June 27, 1905.)

REFORMATION OF INSTRUMENTS—MISTAKE IN DEED.

The complainant purchased lands of the defendant, and, after discovery of an alleged mistake in the description, made an oral agreement with the defendant to purchase the additional land claimed to have been intended to

have been included in the original purchase, and soon after the complainant began building a porch thereon on the faith of this agreement, which porch was completed without the defendant's objection. *Held*, that this subsequent oral agreement cannot be repudiated after a year's possession under it in order to obtain specific performance of the alleged original parol agreement of purchase by having the deed corrected to include the land in question.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Reformation of Instruments, § 82.]

(Syllabus by the Court.)

Bill by one Ulrich against one Watts. Dismissed.

Frank Voigt and Frank E. Bradner, for complainant. Charles R. Snyder and Edmund Wilson, for defendant.

EMERY, V. C. On the evidence in this case I am satisfied that the complainant, after the discovery of the alleged mistake in the description contained in her deed, made an agreement with the defendant, Watts, for the right to purchase the additional land now claimed to have been intended to be included in the original purchase. This agreement for purchase was made on her behalf by her son, soon after the commencement of complainant's building, and the completion and continuance of complainant's porch on the disputed land, to which the grantor still held the title, was permitted by the grantor on the faith of this agreement or option of purchase within a year. I conclude, therefore, that this agreement, followed by possession for more than a year, cannot now be repudiated in order to obtain a specific performance of the alleged parol agreement of purchase made prior to the execution of the deed and alleged to have included the land in question as part of the original purchase. The enforcement of this contract is sought by the bill and the correction of the deed for the purpose of enforcing it, and, even if the alleged agreement was satisfactorily proved, the complainant, in view of her subsequent agreement, is not now equitably entitled to a specific performance of it. The bill must therefore be dismissed upon this ground, without considering the further questions raised. These were (1) the insufficiency of the parol proof to establish the alleged contract under the statute of frauds. The possession relied on to take the case out of the statute is, as I find, fairly referable to the subsequent agreement with the grantor, and not to the alleged original agreement. (2) The merger and termination of all prior contracts by the deed finally accepted in the form which all parties agreed upon. This subsequent agreement to purchase the disputed strip of land was set up in the answers, but complainant made no application to amend her bill in order to obtain relief under this agreement, if made. On the contrary, she denied making or authorizing her son to make the subsequent agreement, and at the hearing declined to apply for relief on the subsequent contract.

The bill stands, therefore, purely as a bill to enforce the alleged prior parol agreement, and must be dismissed.

(74 N. J. L. 476)

RIVERSIDE TP. v. PENNSYLVANIA R. CO.
(Court of Errors and Appeals of New Jersey.
March 18, 1907.)

1. HIGHWAYS — ENCROACHMENTS — REMOVAL — REMEDY — EJECTMENT.

An action of ejectment will lie by a municipality against a person unlawfully encroaching upon a public highway under its control.

2. DEDICATION — HIGHWAYS.

If the evidence is conflicting, whether the animus dedicandi is established is for the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Dedication, § 83.]

3. HIGHWAYS — ESTABLISHMENT — ADVERSE USER.

Mere adverse user of the locus in quo, acquiesced in for 20 years, will conclusively show an abandonment to the public.

Quære, will such acquiescence for a less period of years do so?

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Highways, § 8.]

(Syllabus by the Court.)

Error to Supreme Court.

Action by the township of Riverside against the Pennsylvania Railroad Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Gaskill & Gaskill, for plaintiff in error. George M. Bacon and Clarence T. Atkinson, for defendant in error.

FORT, J. The Camden & Amboy Railroad Company, of which the plaintiff in error is the lessee, is the owner of the fee of a strip of land lying north of the railway station and right of way of the said company at Riverside in this state, which it has owned since 1833. The strip of land was allowed to be unfenced and as a common for many years. On the north side of this strip of land there is a road or street known as "Lafayette avenue," which upon the brief of the plaintiff in error, is conceded to be a public road or highway by dedication. In 1901 the Camden & Trenton Traction Railway Company laid its tracks in said Lafayette avenue and close to the northerly line of the strip of land of the railway company aforesaid. Thereupon the railway company fenced in its strip of land or common in accordance with the lines in its deed of conveyance of April 27, 1833. The authorities of the township of Riverside, the defendant in error, then began this suit in ejectment to recover possession of an easement in the land so fenced. The land described in the declaration covers the whole strip or common, and the plea defends as to the whole and every part thereof. The verdict is for a part of the land mentioned in the declaration only, being a small wedge-shaped strip, on the northwest corner and the north side of the land.

It is first objected that a verdict for a

part only of the land sued for in ejectment cannot be recovered; that the verdict must be for all or for none. The complete answer to this is that by our statute the verdict may be for a part only of the land described in the declaration. Gen. St. p. 1288, § 41.

It is also urged upon the brief that ejectment will not lie to recover the enjoyment of a public easement in a highway. No authority is cited to sustain this contention. There is an abundance of authority the other way. In such a case the right to the fee and the right to the easement in the same land are rights independent of each other. Each party may protect himself by appropriate actions, one to maintain possession of the fee and the other to protect himself in the enjoyment of his easement. Newell on Ejectment, p. 81, § 20; Morgan v. Moore, 3 Gray (Mass.) 319 (322); Hancock v. Wentworth, 5 Metc. (Mass.) 450; Price v. Plainfield, 40 N. J. Law, 608. This court has determined that it is the right of a municipality to maintain ejectment against a person unlawfully encroaching upon a public highway. Ocean Grove v. Berthall, 63 N. J. Law, 312, 43 Atl. 887; Asbury Park v. Hawxhurst, 67 N. J. Law, 582, 52 Atl. 694. The brief on this point states the contention of the plaintiff in error, as follows: "An action of ejectment may be maintained to recover possession of dedicated lands, but there is no decision which goes so far as to say that in an action of ejectment proof may be introduced of such adverse user as will disclose an animus dedicandi, and that there is a possession or user thereby." It is difficult to comprehend the force or meaning of the last clause of this quotation; but, eliminating that, and considering so much of it as is comprehensible, it seems a strange proposition. It concedes that an animus dedicandi may exist, and that, if shown, it will establish a right in the public to the possession of the easement which it has thus acquired. Yet, it is asserted, that when the existence of the easement is denied, and the public, by ejectment, seeks to recover possession, that evidence legally admissible to establish a dedication or user or both, and hence the easement, is inadmissible. It would be difficult to prove any case on that theory of the admissibility of evidence.

The other assignments relied upon on the brief were the refusal of the court to consult or to direct a verdict for the defendant. We are unable to see how on the proof the court could have done either. There was evidence for the jury showing an adverse user by the public of the part of the land described in the verdict for upwards of 40 years. It also appeared by the proof that the public authorities had worked and repaired the locus in quo mentioned in the verdict, and treated it as a public highway, since 1865, and that during all that period it was used generally by the public as a public highway, to the knowledge of the plaintiff in error, and its predecessors

in possession, and successors in title. What will constitute a dedication to the public use by acquiescence is stated by Mr. Justice Van Syckel, in Wood v. Hurd, 34 N. J. Law, 87, as follows: "The right of the public accrues by such acquiescence as carries with it the intention of the owner to subject his fee to the public use; and mere acquiescence for 20 years, unaccompanied by any act which repels the presumption of such intention, is conclusive evidence of abandonment to the public. It must be a use by the public of the neighborhood, and not a use confined to one or two individuals." Wood v. Hurd, 34 N. J. Law, 87. The law is correctly stated in this quotation, except that we do not accede to the suggestion, if it be there made, that acquiescence in a user by the public is of necessity required to cover a period of 20 years to give the public an easement. That question is not decided, as it is not necessary to pass upon it in this case, for the reason that the trial judge charged that 20 years' adverse user was necessary, and the jury have found that such a user existed. There is quite a diversity of opinion in the reported cases on the question of the length of time that acquiescence or adverse user is necessary to establish a dedication. 13 Cyc. p. 488, 4, "User," A, and p. 482, D.

There is no error in the record, and the judgment of the Supreme Court is affirmed.

(69 N. J. Eq. 779)

ROGERS v. ROGERS.

(Court of Errors and Appeals of New Jersey.
March 5, 1906.)

For former opinion, see 63 Atl. 1119.

SWAYZE, J. I concur in the result reached in this cause, but not in the findings of fact expressed in the opinion. Without expressing any opinion upon the sufficiency of the proof of adultery, I think the evidence justified the conclusions of the Vice Chancellor that, if the defendant was guilty, the petitioner had condoned the offense.

I am authorized to say that Justice GARRISON concurs in this view.

(105 Md. 365)

DARCEY et al. v. BAYNE et al.

(Court of Appeals of Maryland. April 6, 1907.)

1. APPEAL—DECISIONS REVIEWABLE—FINALITY OF DETERMINATION—ORDER OVERRULING GENERAL DEMURRER.

An order overruling a general demurrer to a bill of complaint is a final decree or order, within the meaning of the law allowing appeals from any final decree or order in the nature of a decree.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, §§ 466, 683.]

2. TENANCY IN COMMON—MUTUAL RIGHTS—PURCHASE OF OUTSTANDING TITLE—CONTRIBUTION.

A tenant cannot share in the benefits of an outstanding title purchased by a cotenant, with-

out contributing or tendering his proportionate share of the purchase price.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Tenancy in Common, § 59.]

Appeal from Circuit Court, Prince George's County, in Equity; Geo. C. Merrick, Judge.

Action by Mary Ellen Bayne and another against William A. Darcey and others. From an order overruling a demurrer to the bill of complaint, defendants appeal. Reversed and remanded.

Argued before BRISCOE, BOYD, PEARCE, SCHMUCKER, BURKE, and ROGERS, JJ.

T. Van Clagett, for appellants. Clarence M. Roberts, for appellees.

ROGERS, J. This case comes before us for review upon an appeal from an order of the circuit court for Prince George's county overruling a demurrer which had been interposed to the bill of complaint filed in the case; and we are asked to dismiss the appeal, because an order overruling a demurrer is not in the nature of a final decree or order, and that, therefore, no appeal lies.

This question has been repeatedly, and we think definitely, settled by the decisions of this court. In the case of Chappell v. Funk, 57 Md. 472, Judge Miller, delivering the opinion of this court, says: "By the law regulating appeals from courts of equity (Code, art. 5, § 20), an appeal is allowed 'from any final decree or order in the nature of a final decree,' and it is well settled that an order of the latter character to admit of an appeal must be one which finally settles some disputed right or interest of the parties." *Dillon v. Insurance Co.*, 44 Md. 395. A demurrer to the entire bill does finally settle (so far as the court passing it can do so) a disputed right of the parties. It is true that demurrers are no favorites of courts of equity, nor are they often resorted to, but it is the undoubted privilege of a defendant in an equity suit to demur to the bill. By so doing he challenges and denies either the jurisdiction of the court, or that the bill on its face states any case which the defendant can be lawfully required to answer, or otherwise notice or defend. He says in fact to the complainant, you have no right to bring me into a court of equity upon this case. If the demurrer be sustained, the complainant is out of court; and it is conceded he can then appeal, for by such action the right to proceed with his case is finally settled against him, and in favor of the defendant. So if the demurrer be overruled, the court by its order to that effect determines and settles in favor of the complainant and against the defendant the disputed right of the former to proceed in equity upon the case made on the bill, and it seems to us, not only convenient, but most important, for both parties that such a question should be finally settled in limine, and by an appeal if necessary, before the costs and expenses of a long litigation have been

incurred. An order settling either way a right so important as this does not, in our judgment, fall within the class of mere interlocutory orders which can only be reviewed upon appeal from the final decree in the cause. Nor do we fear or anticipate that by allowing appeals from such orders the privilege will be abused to the prejudice of suitors or the delay of justice. It has not been so in the past, although the appeal has been entertained and acted on by the appellate court, in every case where one has been taken from such an order. And even if we now were inclined to put a different construction upon the statute, and deny the right of appeal in such cases, we should find ourselves embarrassed if not precluded from so doing by the strong and numerous precedents in favor of the right. *Alexander's Ch. Pr.* 188; *Wolf v. Wolf*, 2 Har. & G. (Md.) 382, 18 Am. Dec. 313; *Wilson v. Wilson*, 23 Md. 162; *Kunkle v. Markell*, 26 Md. 390; *Bank v. Fowler*, 42 Md. 393; *Trego v. Skinner*, 42 Md. 426. The motion to dismiss must therefore be overruled.

We now come to the second point in the case, viz.: The sufficiency of the averments in the complainants' bill. The bill recites the proceedings whereby the appellant Wm. A. Darcey became the tenant in common, together with the appellees, of the property in question, and the mortgage from Edward E. Darcey and his second wife to Eliza J. Andrews (which mortgage was placed on the property before the title of the said Edward E. Darcey thereto had been in any way assailed) alleges that the mortgagee acquired a title which could not be successfully attacked; that interest on said mortgage was paid by the appellee Mary Ellen Bayne and that she obtained a tax deed to said property; that the mortgage was foreclosed, and the property sold and was conveyed to Wm. A. Darcey; and that because he was cotenant at the time of said sale each of his cotenants is by law entitled and bound to contribute his or her proportionate share of the purchase price with interest, and that upon payment of same each of them should be declared to own an undivided one-third interest in said property. The complainants in their bill neither allege that they had tendered to Wm. A. Darcey their proportion of the purchase money, nor offered to do so, but pray a sale of the property as if this were an ordinary suit for partition. To this bill the defendants filed a general demurrer. The exact language of the section of the bill of complaint (section 5) is as follows: "The mortgage having been an encumbrance upon the land, it became the duty of the four heirs at law of the said Mary A. Darcey to redeem the same as between themselves by equal payments. And the complainants aver that they are entitled to have the deed from Phil. H. Tuck, attorney to Wm. A. Darcey, declared to be a constructive trust for the use of those who now by law are entitled and

bound by law to contribute his or her proportionate share of the purchase money with interest, and that upon payment of same to be decreed to own a one-third interest in said property." In this averment it is apparent that the appellees here invoke the doctrine that one cotenant cannot purchase an outstanding title or incumbrance affecting the common estate for his exclusive benefit and assert such right against the other cotenants, but such purchase will inure to the benefit of them all; the purchaser being bound to accept contribution from a cotenant, if he elects within a reasonable time from the purchase to share in same and to pay his proportionate share of the purchase price. But this bill nowhere alleges contribution of or offer to contribute the appellees' share of the purchase price, and in the event of any heir failing to contribute his or her share they pray a sale. Now the doctrine of contribution here invoked rests upon the principle that where parties stand *aequali jure*, equality of burthen becomes equity (4 Kent's Com. 370), and in a note the same learned author says one tenant in common before partition cannot purchase in an outstanding title or incumbrance on the joint estate for his exclusive benefit and use it against his cotenants. The purchase inures in equity to their common benefit, and the purchaser is entitled to contribution. The principle rests upon the privity of the parties and the fidelity and good faith which the connection implies. But all the authorities agree that this is a privilege or option, and not an obligation, and one which must be exercised within a reasonable time by a cotenant, otherwise he decreed to have repudiated the transaction and abandoned its benefits. In their bill the appellees base their claim, not upon the privilege accompanied with an offer, but solely upon the legal right asserted at any time, and not with a tender to contribute. Freeman on Co-Tenancy and Partition (2d Ed.) pp. 154, 156; *Turner v. Sawyer*, 150 U. S. 573, 14 Sup. Ct. 192, 37 L. Ed. 1189; *McPheeters v. Wright*, 124 Ind. 560, 24 N. E. 734, 9 L. R. A. 176; *Venable v. Beauchamp*, 3 Dana (Ky.) 321, 28 Am. Dec. 74; *Rothwell v. Dewees*, 2 Black (U. S.) 613, 17 L. Ed. 309. A quotation from the decision in *Van Horne v. Fonda*, 5 Johns. Ch. (N. Y.) 408, which elaborates this principle, will give at length the reasons upon which this principle is founded. In some cases, says Littleton (section 307), a release to one joint tenant shall aid the joint tenant to whom it was not made as well as him to whom it was made. I will not say, however, that one tenant in common may not, in any case, purchase in an outstanding title for his exclusive benefit. But when two devisees are in possession under an imperfect title derived from their common ancestor there would seem, naturally and equitably, to arise an obligation between them resulting from joint claim and community of interests that one of them should

not affect the claim to the prejudice of the other. It is like an expense laid out upon a common subject by one of the owners, in which case all are entitled to the common benefit on bearing a due proportion of the expense. It is not consistent with good faith, nor with the duty which the contention of the parties, as claimants of a common subject, created, that one of them should be able without the consent of the other to buy in an outstanding title and appropriate the whole subject to himself, and thus undermine and oust his companion. It would be repugnant to a sense of refined and accurate justice. It would be immoral because it would be against the reciprocal obligation to do nothing to the prejudice of each other's equal claim, which the relationship of the parties, as joint devisees, created. Community of interests produces a community of duty, and there is no real difference, on the ground of policy and justice, whether one cotenant buys up an outstanding incumbrance or an adverse title to dislodge and expel his cotenant. It cannot be tolerated when applied to a common subject in which the parties had equal concern, and which created a mutual obligation to deal candidly and benevolently with each other, and to cause no harm to their joint interest. I have no doubt, therefore, that in a case like the present, and assuming what the evidence warrants us to assume, that the deed was taken by the defendant for trust purposes, that the purchase ought in equity to inure for the common benefit, subject to an equal contribution to the expense.

It follows from what we have said that the order overruling the demurrer will be reversed, and the cause remanded, with the right to the appellees to amend their bill, if they so desire, in accordance with this opinion.

Order reversed and the cause remanded, with costs to the appellants.

(106 Md. 1)

OREM FRUIT & PRODUCE CO. OF BAL-
TIMORE CITY v. NORTHERN CENT.
RY. CO. et al.

(Court of Appeals of Maryland. April 4, 1907.)

1. TRIAL—INSTRUCTIONS—PROVINCE OF COURT AND JURY—ASSUMPTIONS AS TO FACTS.

In an action for loss of a shipment of tomatoes, where the plaintiff's evidence showed a contract to re-ice the refrigerator car at certain points, and the arrival of the tomatoes at their destination in a heated condition, so that they were sold at a loss, and the defendants' testimony showed that the car was inspected at the points named in the contract for re-icing, but that the persons making the inspections did not re-ice it because it did not appear to be necessary, and that the contents of the car were not inspected, an instruction that the defendants performed every duty they owed to the plaintiff, and that the verdict must be for the defendants, was erroneous, as usurping functions of the jury and assuming the truth of the evidence for defendants.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 420.]

2. CARRIERS—TRANSPORTATION OF GOODS—INJURIES TO SHIPMENT—CARE REQUIRED OF CARRIER.

The rule of a railroad company not to re-ice refrigerator cars unless they could get 600 pounds of ice in the ice tanks, unknown to a shipper, and not embraced in his contract, does not relieve the company from the duty imposed by the contract of re-icing the refrigerator at specified points in the journey.

3. SAME—ACTIONS—EVIDENCE.

On proof that a carrier received goods in good condition, the burden rests on defendant to show delivery in the same condition to the next carrier or to the consignee; such proof being within its power.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, § 578.]

Appeal from Baltimore City Court; Dan'l Giraud Wright, Judge.

Action by the Orem Fruit & Produce Company of Baltimore city against the Northern Central Railway Company and another. From a judgment in favor of defendants, plaintiff appeals. Reversed, and new trial granted.

Argued before BRISCOE, BOYD, PEARCE, SCHMUCKER, BURKE, and ROGERS, JJ.

George E. Robinson and O. Parker Baker, for appellant. Shirley Carter, for appellee.

BRISCOE, J. This is a suit brought by the Orem Fruit & Produce Company of Baltimore city, a corporation, organized under the laws of Maryland, against the Northern Central Railway Company and the Pennsylvania Railroad Company, to recover damages for an alleged breach of contract in failing to safely carry, in a refrigerator car, 479 crates of tomatoes from Baltimore city to Montreal, Canada. The declaration, in substance, states that on the 19th of July, 1904, the defendants were common carriers of goods for hire from Baltimore city to divers places in the United States and Canada; that on this date the plaintiff delivered to them, as such carriers, 479 crates of tomatoes, of the aggregate value of \$958, to be carried in a refrigerator car from Baltimore to Montreal, Canada, and there to be delivered to J. R. Clogg & Co., the defendants at the same time agreeing to re-ice the refrigerator car in which the tomatoes were shipped at Wilkesbarre, Pennsylvania, and Oneonta, New York, but the defendants did not do so. It further states that the defendants wholly neglected their duty in this respect, and by the neglect to safely carry and re-ice the car according to the contract the tomatoes were wholly lost or destroyed, and the plaintiff sustained loss and damage to the extent of \$1,000. The case was tried in the Baltimore city court, and from a judgment in favor of the defendants, the plaintiff has appealed.

There are six bills of exceptions in the record. Five of them relate to the rulings of the court below upon the admissibility of evidence, and the sixth to its ruling upon the prayers. As the action of the court in rejecting the plaintiff's prayer and in granting

the defendants' prayer, which withdrew the case from the consideration of the jury, present the important questions in the case, it will be considered at once.

The undisputed facts of the case briefly stated are these: The plaintiff had been a large shipper of fruit and produce from Baltimore city, their place of business, to Montreal, Canada, in refrigerator cars belonging to the appellees. On the 19th of July, 1904, the appellant delivered to the appellees, as common carriers, in the city of Baltimore, 479 crates of tomatoes to be carried, in one of their refrigerator cars, from Baltimore city to the place of destination, Montreal, Canada. The route of the car was over several systems of railroads, to wit, from Baltimore to Sunbury, Pa., over the Northern Central Railway; from Sunbury to Wilkesbarre over the Sunbury Division of the Philadelphia & Erie Railroad, operated by the Pennsylvania Railroad Company; from Wilkesbarre by the Delaware & Hudson Company to Rouse's Point, N. Y.; and by the Grand Trunk Railroad from the last-named point to Montreal, Canada, the point of destination. The tomatoes were received by the Northern Central Railroad Company at Baltimore in good condition, and were placed in a car for transportation under the terms of a bill of lading, set out in the record. The car was inspected and properly iced in Baltimore before leaving that city at 5:40 p. m. on July 19, 1904. It arrived in Montreal on the 22d of July, 1904, in a "heated condition, the ice tanks empty, and the tomatoes dead ripe." The sum realized from the sale of the tomatoes amounted to \$37.59, whereas, if they had not been injured and damaged, the plaintiff should have received from \$800 to \$900. According to the terms of the contract between the plaintiff and defendant stated in the bill of lading, the car was to be re-iced at two points, viz., at Wilkesbarre, Pa., on the line of the appellees, a distance of about 2½ miles from Baltimore, and at Oneonta, N. Y., on the line of the Delaware & Hudson Railroad, a connecting carrier, 167 miles from Wilkesbarre; the distance from Oneonta to Montreal being about 215 miles, making the entire route of the car 600 miles. It further appears that one of the defendants' lines ended at Sunbury, Pa., and the other at Wilkesbarre, Pa., but they had a through billing arrangement with the Delaware & Hudson Railroad. The re-icing of cars is noted on the card waybill which goes with the car and is delivered to the connecting carrier. The card shows the initials, the car number, its destination, routing, and the consignee.

It is admitted that the car was not re-iced at either Wilkesbarre, Pa., or Oneonta, N. Y., according to the terms of the bill of lading. The car inspector for the Pennsylvania Railroad Company testified that he inspected the car at Wilkesbarre, and made the entry in his record, "No ice required"; that he lifted the

lids on top of the refrigerator car, and saw that the ice was about four inches from the top; that it was the rule of the company that, if they could not get 600 pounds of ice in the ice tank, they considered the car full, and they do not put any more ice in it; that he did not re-ice the car; that he lifted the lid of the ice tank, and found the ice within four inches from the top, and concluded that no ice was required. The witness Burroughs, assistant yardmaster of the Delaware & Hudson Railroad, testified that he inspected the car at Oneonta, N. Y., on July 20, 1904, and found the ice had melted about a foot from the top, and he did not deem it necessary to re-ice it. There was evidence to show that the refrigerator car was delivered by the Pennsylvania Railroad Company at Wilkesbarre and was received by the Delaware & Hudson Railroad Company in good order. The car was inspected, but not its contents. There was evidence also to the effect that the temperature in Baltimore July 19, 1904, was 97 degrees, lowest 77 degrees; at Wilkesbarre, on July 20th, 83 degrees, lowest 68 degrees; at Oneonta on July 21st highest 84 degrees, lowest 55 degrees; at Montreal July 22d highest 72 degrees, lowest 56 degrees.

The foregoing statement is condensed from the evidence, as presented in the record, and it will be seen upon this state of facts the court below granted the defendants' prayer, which withdrew the case from the jury. The prayer is as follows: "The defendants' pray the court to instruct the jury that since, by the uncontradicted evidence in this case, it is shown that the defendants performed every duty they and each of them owed to the plaintiff in the transportation of the tomatoes mentioned in the evidence while on their respective lines, and duly delivered the said tomatoes and the car containing them to the next succeeding carrier at the end of their lines, respectively, to wit, at Sunbury, Pa., and Wilkesbarre, Pa., that the verdict of the jury must be for the defendants." This prayer is open to several objections, and under the facts of the case should have been rejected. It wholly usurped the functions of the jury, and told them that by the uncontradicted evidence the defendants had performed every duty they and each of them owed to the plaintiff in the transportation of the tomatoes, and had duly delivered them and the car containing them to the connecting carrier. It also assumed the truth of the evidence offered on the part of the appellee, and excluded from the consideration of the jury the whole evidence produced by the plaintiff. In the case of *Calvert Bank v. Katz*, 102 Md. 61, 61 Atl. 411, it is said it is manifest error for the court to assume the existence of facts, and take away from the jury the finding of the same. The prayer granted at the instance of the appellee in this case has been condemned by a number of decisions of this court. *Corbett*

v. Wolford, 84 Md. 426, 35 Atl. 1088; *Boyd v. McCann*, 10 Md. 118; *Jones v. Jones*, 45 Md. 154; *Bank v. B. & O. R. R. Co.* 99 Md. 661, 59 Atl. 134. It will be seen that the instruction absolutely ignored the plaintiff's theory of the case, and the contract to re-ice the car at the points designated.

According to the undisputed evidence, the appellees had neglected to re-ice the car at Wilkesbarre, Pa., or at Oneonta, N. Y., according to the express terms of the bill of lading, and had therefore failed to perform their part of the contract. The rule relied upon by the appellees, to relieve them from the performance of their duty, "that the company did not re-ice unless they could get 600 pounds of ice in the ice tanks," can have no application to this case, because this rule was not embraced in the contract between the appellant and appellees, and there is no evidence that the plaintiff had knowledge of the existence of such rule. *Railroad Co. v. Miller*, 16 Neb. 661, 21 N. W. 451. The case of *Western Md. R. R. Co. v. Landis*, 90 Md. 749, 976, 1124, relied upon by the appellees, is entirely unlike this. In *Landis Case* the evidence showed that the cattle were not injured at the time the cars were delivered by the Western Maryland Railroad Company to the Cumberland Valley Railroad, the connecting carrier. In this case there is no evidence that the tomatoes, the contents of the car, were inspected at Wilkesbarre. The witness testified that the car was in good order when delivered, but its contents were not inspected. In *Meredith v. Railroad Co.*, 137 N. C. 479, 50 S. E. 1, it is held, on proof that a carrier received goods in good condition, the burden of proof rests upon such carrier to show delivery in the same condition to the next carrier or to the consignee; such proof being within its power. *Myrick v. Railroad Co.*, 107 U. S. 107, 1 Sup. Ct. 425, 27 L. Ed. 325; *U. S. v. Denver R. R. Co.*, 191 U. S. 84, 24 Sup. Ct. 33, 48 L. Ed. 106; *Hoffman v. Cumberland R. R. Co.*, 85 Md. 391, 37 Atl. 214. There was no error in the rejection of the plaintiff's prayer. It did not correctly recite the facts necessary to be found by the jury, under the evidence in the case, and was properly refused.

Nor was there error in the ruling of the court in refusing to admit the testimony sought to be introduced in the first exception. The evidence was not material or relevant to the issue in the case. We do not understand that this exception is pressed in this court. It is not relied upon on the appellants' brief. The second exception is not properly before the court, and need not be considered here.

The questions raised on the third, fourth, and fifth exceptions may be considered together, and can be disposed of without discussing them seriatim. The ground of the objection to the questions embraced in these exceptions is that the questions were leading, and the witnesses were not shown to have

had the requisite knowledge of facts upon which to base an opinion. We concur in the action of the court, as set out in these exceptions, and can see no error in the rulings thereon. The questions were manifestly leading, and no proper foundation had been laid for the introduction in evidence of the opinions of the witnesses sought by the questions to be elicited from them.

For the error in granting the defendants' prayer, the judgment must be reversed, and a new trial awarded.

Judgment reversed, and a new trial awarded, with costs to the appellant.

(105 Md. 424)

BALTIMORE COUNTY WATER & ELECTRIC CO. v. DUBREUIL et al.

SAME v. GORDON.

(Court of Appeals of Maryland. April 3, 1907.)

1. HIGHWAYS—USE—PUBLIC PURPOSES—WATER AND GAS MAINS—ADDITIONAL SERVITUDE—USE OF STREETS—WATER PIPES.

Although the fee of streets in cities and towns is in the abutting owners, it is subject to the paramount right of the public for all proper street uses which include the laying of gas and water pipes; but the only right the public acquires in ordinary country highways is the easement of passage and its incidents, and the laying of gas and water pipes therein is an additional servitude.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Highways, § 298.]

2. MUNICIPAL CORPORATIONS—USE OF STREETS—NATURE OF STREET—WATER MAINS—ABUTTING OWNERS—WHAT CONSTITUTES RURAL HIGHWAY.

A company proposed to lay water mains along a road where for over a mile there were only 15 houses; the object being not to furnish the houses thereon with water, but to use that road for over a mile to connect with pipes at other points. *Held*, that the laying of pipes therein was an additional servitude, since the road was not so improved as would justify the application of the rule which governs streets in cities and towns, though it was within the corporate limits.

Appeal from Circuit Court, Baltimore County, in Equity; Frank I. Duncan, Judge.

Bills by Carrie V. Dubreuil and another against the Baltimore County Water & Electric Company and by Douglas H. Gordon against the same. From a judgment for plaintiffs, defendant appeals. Affirmed.

Argued before BRISCOE, BOYD, PEARCE, SCHMUCKER, BURKE, and ROGERS, JJ.

Wm. S. Bryan, Jr., for appellant. Osborne I. Yellott, for appellees.

BOYD, J. Two bills in equity were filed against the Baltimore County Water & Electric Company—one by Mr. and Mrs. George A. Dubreuil, and the other by Mr. Douglas H. Gordon—in each of which an injunction was prayed for to prevent the company from digging a trench or laying its water mains along that portion of Lake avenue which lies within the bounds of the properties owned by the respective plaintiffs. It is

admitted that the lines of the deeds of Mrs. Dubreuil and Mr. Gordon extend to the center of Lake avenue, embracing the southerly side thereof, and that the defendant company was digging a trench along that side of the avenue, within those lines, for the purpose of laying one of its water mains. A preliminary injunction was issued in each case, and, after the defendant answered, testimony was taken, which by agreement was used in both cases. After hearing, the injunction was made perpetual in each case. A mandatory injunction was also granted requiring the defendant to remove such mains as were already laid on the properties of the respective plaintiffs, and to refill the trenches; each bill containing a prayer for such mandatory injunction. The cases being similar, they were argued together in this court, and will be disposed of in one opinion.

The company had obtained permission from the highways commission of Baltimore county to lay the mains in the bed of Lake avenue from Falls Road to Bellona avenue, which included the part of Lake avenue on which these properties fronted, but it had not acquired, by purchase or condemnation, the interests of the plaintiffs in the bed of that avenue. The principal question, therefore, is whether water mains laid in the bed of Lake avenue, in which the plaintiffs owned the fee at the points involved, constitute an additional servitude. In the recent cases between this company and the county commissioners of Baltimore county et al., the question before us was whether or not the water company could lay its mains and pipes in the highways of Baltimore county without first obtaining the consent of the local authorities, and we held it could not beyond certain territories therein referred to in which they had that power. In discussing the meaning of the expression "to extend its operations," used in an amendment to its charter, by way of illustrating the necessity for obtaining from the state some such power as that expression conferred, we stated a proposition of law, the correctness of which we do not understand to be questioned, but it is not conclusive of these cases. We there said that it could not be pretended that Act 1900, p. 49, c. 52, which was the one relied on by the company, gave it power to use private property without the consent of the owners, "and it would seem to be equally clear that neither the Legislature nor the county commissioners could authorize this or any other water company to use county roads, if the fee belonged to the abutting owners, without their consent." We then referred to some authorities which pointed out the distinction between the right to use streets in cities and towns for laying gas and water pipes, and that to lay them in what we there spoke of as "county highways," but the word "country" would have more accurately expressed our meaning,

as we did not intend to say that a different rule from that applicable to streets in cities and towns was applied to other highways simply because they were owned or controlled by the county authorities, instead of by those of some incorporated city or town. The law is well settled that, although the fee of streets in cities and towns is in the abutting owners, it is subject to the paramount right of the public for all proper street uses, which include gas and water pipes, sewers, etc. Lights, water, and drainage are so essential to the comfort, health, protection and convenience of the people of a city or town that the original owner is conclusively presumed to have known, and to have consented, that such uses could be made of a street laid out over land formerly owned by him, however it be acquired by the municipality, and those claiming under him have no more rights in the streets than he had; or, as a late book on municipal corporations expresses it: "Ordinarily the use of streets for such a purpose [supplying water] does not impose any additional burden or servitude, and the adjoining owners, therefore, are not entitled to compensation for such use; it being one of the common and anticipated purposes to which they may be put." 2 Abbott on Mun. Cor. 1165.

But the great weight of authority is to the effect that there is a distinction between the use of streets in cities and towns for gas and water pipes and the use of country or rural highways. See 14 Am. & Eng. Ency. of Law, 921, 30 Ib. 438, 15 Cyc. 671, Ib. 683, 2 Abbott on Mun. Cor. 1166, and Thornton on Oil and Gas, § 506, where many cases will be found in the notes. In Mackenzie's Case, 74 Md. 47, 21 Atl. 690, 28 Am. St. Rep. 219, the distinction is recognized and reasons given for it. In that case it was said of "an ordinary road or highway in the country" that "all the public acquires is the easement of passage and its incidents," and that is in substance the doctrine announced by most courts. The appellant, however, contends that if it be conceded that laying gas or water pipes along a strictly country road for the purpose of conveying gas or water from one distant point to another, and not for the benefit or convenience of the abutting owners, is an additional servitude, still the nature of the locality and the character of the surroundings of Lake avenue are such as authorize the court to apply the rule applicable to streets in cities and towns, and not that which is applied to "country" or "rural" highways, as those terms are used by the courts. The solicitors for the appellant say in their brief: "There is no magic about a charter. The question is what are the needs and requirements of the class of property holders whose homes abut upon the highway." We are not inclined to take issue with them as to the effect of a charter or altogether as to the other statement. We can see no reason why the mere fact that a place is or is

not incorporated should require the application of the one rule, to the exclusion of the other. It is not a question of incorporation vel non, but, when highways are dedicated to or in any way acquired by the public, the real question as to what uses can be made of them must depend largely upon circumstances. It would not be reasonable to hold that the streets of an incorporated town can be used for water and gas pipes and similar uses without compensating the owners of the fee, while those of a town of the same general character, size, etc., but not incorporated, cannot be.

The real question to be determined in such cases is whether the proposed use of a highway is such as can reasonably be said to be within "the scope of the original easement." After quoting at length from *Western Union Tel. Co. v. Rich*, 19 Kan. 517, 27 Am. Rep. 159, the court, in *American Tel. & Tel. Co. v. Pearce*, 71 Md. 543, 18 Atl. 913, 7 L. R. A. 200, accepted the doctrine of the Kansas case, and said: "It recognizes the right of the landowner to compensation for every additional burden cast upon the land outside the scope of the original easement, and that whether a given structure creates an additional servitude is a question of fact, depending on the circumstances of each case, to be determined by the tribunal having jurisdiction to try the same, and before which it is tried." The tribunal whose duty it is to determine the question is not to be governed alone by the mode of user first adopted, or by the conditions existing at the time the highway is acquired by the public. For example, if the easement when acquired be over land which is in the open country, but is so situated that it will probably be built upon, like a street of a city or town, and is afterwards so built upon, it would be wholly unreasonable to hold that the public must again compensate the owner of the fee before it can make such use of the highway as its then condition requires and justifies, provided, of course, they be within the scope of the original easement. Indeed, we have many instances in this state of such changed conditions, where the highway when acquired by the public was in the open country, but subsequently became a street of a town. It could not be successfully contended that water and gas pipes could not be laid in such street without additional compensation to the owner of the fee merely because the land was originally taken for a rural highway. Reference to some of our decisions will show the view this court has taken as to what is an additional servitude, either on city streets or country highways.

In *Peddicord's Case*, 34 Md. 463, it was determined that the use and occupation of the bed of a turnpike for the purposes of a passenger railway was not a new and distinct servitude, entitling an abutting owner to a new compensation for such use of the

land. It is true that the railway company was acting under a contract with the turnpike company, which had secured the easement by legislative authority, through purchase or condemnation, but, if it had not been an authorized use of the road, the turnpike company could not have granted it to the railroad company, to the detriment of Peddicord. That road was in the country. Then, in *Hiss v. Railway Co.*, 52 Md. 242, 36 Am. Rep. 371, we held that the Legislature had the power to authorize the railway company to construct and use a horse car railway on Decker street, or Maryland avenue, in Baltimore county. In commenting on the distinction made by Judge Cooley between streets taken or dedicated for city or town purposes, and county highways, the court said that, without determining whether that distinction was supported by authority, it "cannot and ought not to apply in this case; for, although the way is not technically within the city limits, its location, in such near proximity thereto, as an entering way into the city and exit therefrom, and, in fact, as an extension of one of the city streets, it must and ought to be regarded as subject to the same burdens in the way of use which would legitimately fall on the street, of which it is, at the place in question, only an extension. * * * Under such circumstances it must be supposed the dedicator intended it to be liable to all the uses of city streets, one of which it was so absolutely certain that, in the growth of the town, it would become." In that case the fee of the bed of the street was in the complainants, who were refused an injunction, although the street was in Baltimore county and not in the city. In *Hodges v. Railway Co.*, 58 Md. 603, an order refusing an injunction to lot owners on Park avenue, in the city of Baltimore, was affirmed, and it was held that the use of a street for a horse railway was not an additional servitude, for which adjoining lot owners could recover compensation. It is there said that "the easement thereby acquired was the right to use the streets of a city, not only according to the then existing modes of travel and transportation, but all such other modes as may arise in the ordinary course of improvement, and that a horse railway is but one of the legitimate contingencies within the objects and purposes for which the street was dedicated to the public, and which, we must therefore presume, was within the contemplation of the parties at the time damages were assessed to abutting owners." Then in *Koch v. Railway Co.*, 75 Md. 222, 23 Atl. 463, 15 L. R. A. 377, we extended that doctrine to electric railway companies in the streets of Baltimore, on the ground that electricity was but a new and improved motive power for propelling street cars, and in no manner inconsistent with the uses and purposes for which streets were opened and ded-

icated as ways for public travel. Again in *Green v. Railway Co.*, 78 Md. 294, 23 Atl. 626, 44 Am. St. Rep. 288, we so held as to an electric railway on the turnpike which was before the court in *Peddicord's Case*. We quoted from the latter case that: "It may be said to have been within the legal contemplation of all that it [the road] was to be used for all purposes by which the object of its creation, on a public highway, could be promoted." In *Lonaconing Ry. Co. v. Con. Coal Co.*, 95 Md. 630, 53 Atl. 420, the previous cases were reviewed, and it was distinctly determined that the owner of the fee of a country road was not entitled to an injunction against an electric railway company, because it was not an additional servitude. It will be observed that we have not distinguished between the streets of cities or towns and country highways in determining whether there was an additional servitude by reason of their use for horse or electric railways, but we have been governed by the fact that such uses of both streets and rural highways were only new modes of travel and transportation, and the right originally acquired to use them was not simply for the then existing modes, but for all such as might arise in the ordinary course of improvement. It could, therefore, be presumed that such improved modes of travel and transportation were within the contemplation of the parties at the time the damages were assessed to abutting owners. In *Am. Tel. & Tel. Co. v. Pearce*, 71 Md. 535, 18 Atl. 910, 7 L. R. A. 200, it was held that if a telephone or telegraph line be constructed over the right of way of a railroad company, for its use and benefit in the operation of its road and to facilitate its business, the landowners cannot complain, because such use of the land is within the scope of the original easement, for which they have received compensation; but, if the line be not constructed for such purpose, it is a new easement, and puts a new and additional burden upon the land, for which the owners are entitled to compensation. The evidence showed that the line involved in that case was being built by the appellant as a link in the chain of its communication, at long distances, by telegraph and telephone, and not for the railroad company, and it was therefore clearly a new easement. When the railroad company condemned its rights of way, it could not have entered the minds of the parties that the owners were being compensated for such a use of the land as was then attempted. Indeed, it might as well be claimed that a telegraph or telephone company could condemn a right of way, and give authority to a railroad company to use it for its tracks, without further compensation to the owners, as to hold that the railroad company could condemn it and give authority to the telephone or telegraph company to use it for its purposes, and not for those of the

railroad company. It was a case of one public service corporation condemning and paying for land to be used for its own purposes, and then undertaking to give another public service corporation, engaged in an entirely different business, the right to use the land for its business. In *Mackenzie's Case*, supra, while the court pointed out the distinction between the two classes of highways, which we approve of and adopt in this case, the suit was concerning a pole on Charles street in the city of Baltimore, and hence was not decided on the ground that it was on a country highway. Inasmuch as it is shown (74 Md. 51, 21 Atl. 690, 28 Am. St. Rep. 219) that the plaintiff was not the owner of the reversion in the bed of Charles street, the question of such an owner's rights was not necessarily involved in the case. So in *Phipps' Case*, 66 Md. 319, 7 Atl. 556, the record did not show who were the owners of the fee, but it was decided on the ground that the railroad company had acquired from the former owners, and paid for, the land in controversy, although the statement there made that the use of a highway for a steam railroad is an additional servitude is in accord with the authorities. It is because such use cannot be reasonably said to have been contemplated by the parties, but is a new and different use, and, moreover, such a railroad to some extent excludes the public at large.

In *Mackenzie's Case*, after speaking of an ordinary road or highway in the country, the court said: "But with respect to streets in populous places the public convenience requires more than the mere right to way over and upon them"—and there are other cases using similar expressions. There is nothing in our decisions that indicates that laying gas or water pipes under what was originally a mere rural highway, after it becomes built upon and populous, like an ordinary street in a town, can be said to be "outside the scope of the original easement," any more than building a horse or electric railway would be. In point of fact, the abutting owners are not as much interfered with by laying water and gas pipes under the surface of the highway as they are by the construction of an electric railway, which requires the erection of poles, wires, etc., over the surface, if an overhead trolley is used, or, if an underground trolley be used, requires the surface to be disturbed. Indeed, in either case there is a disturbance of the soil below the surface of the highway.

But, applying these principles to the facts of this case, what must the result be? The proof shows that the appellant proposes to run its mains northerly on the Falls Road to Lake avenue, then eastwardly on Lake avenue to Bellona avenue, and then branching off into two pipes, one northerly, to Gittings avenue, and with that avenue eastwardly to connect with the water main on York Road, which now supplies water to Govanstown,

Towson, Waverly, and vicinity, and the other going southerly on Bellona avenue to the York Road. The pipe going northerly on the Falls Road is to be connected with one coming from the present system of the company at Catonsville. The properties of the plaintiffs are on Lake avenue, between Charles Street avenue and Roland avenue. Near the corner of Lake avenue and Falls Road there are quite a number of houses, most of them on Falls Road, but 10 or 12 on Lake avenue. It is over a mile from those houses, along Lake avenue, to Charles Street avenue, and there are only seven houses in that distance, including those of Mrs. Dubreuil and Mr. Gordon, on the south side and eight on the north side. There are very few between Charles Street avenue and Bellona avenue, a distance of about a quarter of a mile. The pictures in evidence of Lake avenue and of the properties fronting on it between Bellona avenue and Falls Road, as well as the other testimony, shows that it is simply a country road, doubtless kept in better condition than many other roads owing to the class of houses on the properties fronting on it, but for over a mile there are only 15 houses on the two sides of Lake avenue, some of which set back a considerable distance. It can scarcely be claimed under the evidence that the object of laying the mains on Lake avenue was to furnish the houses thereon with water, but it was undoubtedly to use that avenue, for more than a mile, to connect with the pipes at other points, although, of course, the company might be willing to give those living along there the use of water, if sufficient compensation be made for the connection and supply. The testimony fails to show any demand from those persons.

There is therefore not sufficient evidence to justify us in holding that Lake avenue, for this distance of over a mile, is so situated or improved that it can properly be treated, for the purposes of the question before us, as a street, and not as a country road. The properties were spoken of by one of the witnesses as "gentlemen's country residences, undeveloped property." They vary in size from 10 to 40 or 50 acres, and most of them are improved by handsome residences which are some distance back from the avenue and have their own water supply. It is true that there are a number of small towns, villages, and developments within half a mile or less of this avenue, but, with the exception of the houses near the corner of Falls Road, there are very few fronting on it. The property on it has not yet reached that stage of development that can fairly be said to change it from a country highway to such a street or avenue as would justify us in applying to it the rule applicable to streets in cities and towns.

The appellant has a franchise from the Legislature to use the public highways of this locality for laying its mains and pipes, but that cannot give it the right to take prop-

erty owned by these plaintiffs, without their consent, unless by condemnation. The right of eminent domain is conferred upon it, and in such a location and under such conditions as are shown in these cases it must resort to that, if it deem it desirable to use Lake avenue for its mains. There are places on the plat filed, such for example as that near the corner of Falls Road and Lake avenue, where houses have been erected in such numbers and in such proximity to each other as would justify the application of the rule which governs streets in cities and towns; but we think it would be carrying that doctrine beyond what the authorities authorize to apply it to Lake avenue, along the properties of these plaintiffs, in its present condition.

The decree in each case will therefore be affirmed.

Decree in each case (Nos. 65, 66, office docket) affirmed, the appellant to pay the costs.

(106 Md. 50)

REESE v. STARNER et al.

(Court of Appeals of Maryland. April 4, 1907.)

1. BASTARDS—RIGHT OF MOTHER TO INHERIT.

Under the express provision of Act 1868, p. 355, c. 199 (Code Pub. Gen. Laws, art. 46, § 30), the mother of an illegitimate child dying without descendants or brothers or sisters or their descendants may inherit both realty and personalty from him; the fact that the act was codified under the title "Inheritances," instead of under article 46, subtitled "Distribution," and employs the word "inherit," not excluding her right to take the personalty.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Bastards, §§ 257-262.]

2. SAME.

Act 1868, p. 355, c. 199 (Code Pub. Gen. Laws 1888 and 1904, art. 46, § 30), enables the mother of an illegitimate child to inherit from him when he dies leaving no children, brothers or sisters, or their descendants. Act 1798, c. 101, subc. 11 (Code Pub. Gen. Laws 1904, art. 93, § 119), provides that if intestate leaves a surviving husband or widow, and no child, parent, etc., the surviving spouse shall take the whole estate. *Held*, that these acts must be construed together, enabling an illegitimate child's widow and mother to share equally in the distribution of the estate where he dies leaving no descendants; the mother being not excluded as a "parent" within the act of 1798, on the ground that, when it was passed, the mother of an illegitimate child could not take property, the Code of 1888 embracing both acts having been adopted as a substitute for all other public general laws of the state.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Bastards, §§ 257-262.]

Appeal from Orphans' Court of Baltimore City.

Bertha I. Reese appeals from an order of the orphans' court of Baltimore city distributing one-half of the personal estate of her deceased husband, Robert E. Reese, to T. L. Starnier. Affirmed.

Argued before BRISCOE, BOYD, PEARCE, SCHMUCKER, BURKE, and ROGERS, JJ.

Richard Bernard, for appellant. Benj. F. Crouse, for appellees.

BRISCOE, J. The questions on this appeal arise upon the distribution of the personal estate of Robert E. Reese, of Baltimore city. The facts are undisputed, and are submitted upon an agreed statement of facts. The orphans' court of Baltimore city held that one-half of the estate should be distributed to his widow, the appellant, and the remaining one-half to his mother, Tabitha L. Starnier, one of the appellees. The widow has appealed.

The decedent died August, 1905, intestate, leaving a personal estate approximating \$7,000, and letters of administration were duly granted to his widow and Alfred D. Bernard, of Baltimore city. By the agreed statement of facts, it appears that the intestate was the illegitimate child of Tabitha L. Starnier, the appellee; that the mother of the deceased married after his birth a man by the name of Babylon, by whom she had seven children, now living; that the deceased left no child, children, or descendants, and that the appellant was married to the deceased, and is his widow; that there are no other children or descendants of the appellee. It will be thus seen that the claimants of the property in controversy are his widow, the appellant, who claims the whole of the estate, and his mother, the appellee, who asserts a claim to one-half thereof. The question presented is a narrow one, and we have had no difficulty in reaching a conclusion in regard to it.

Code Pub. Gen. Laws, art. 46, § 30, provides where an illegitimate child or children shall die leaving no descendants or brothers or sisters, or the descendants of such brothers and sisters, then and in that case the mother of such illegitimate child or children, if living, shall inherit both real and personal estate from such illegitimate child or children; and, if the mother be dead, then and in that case the heirs at law of the mother shall inherit the real and personal estate of such illegitimate child or children in like manner as if such illegitimate child or children had been born in lawful wedlock. Whatever then may have been the law of this state prior to the passage of Act 1868, p. 355, c. 199, codified as article 46, § 30, of the Code of Public General Laws of 1888, and the same section and article of Code 1904, it must be clear that since this act the mother of an illegitimate child, dying without descendants, or brothers or sisters or the descendants of such brothers and sisters, can inherit both real and personal estate from such illegitimate child. The language of the act heretofore set out is plain and explicit, and can admit of no dispute. The difficulty suggested by the appellant, that because Act 1868, p. 355, c. 199, was codified in the Code of Public General Laws of 1888, and the present Code Pub. Gen. Laws 1904, under article 46, title, "Inheritances," instead of under article 93 of the Code of Public General Laws, subtitled "Distribution," and employs the word "inherit," the act does not apply to personal property, is entirely without force. The com-

plete answer to the contention here made is the language of the statute itself—"shall inherit both real and personal estate from such illegitimate child."

The next objection is that the mother of an illegitimate child is not a "parent" within the meaning of the statute, who can take as against the widow, and section 119, art. 93, of the Code Pub. Gen. Laws, is relied upon to sustain this contention. This section provides that if the intestate leave a surviving husband or widow, and no child, parent, grandchild, brother or sister, or the child of a brother or sister of the intestate, the surviving husband or widow, as the case may be, shall be entitled to the whole. The reason urged in support of this proposition is based upon the statement that at the time of the passage of Act 1798, c. 101, subc. 11, now section 119 of article 93 of the Code Pub. Gen. Laws 1904, the mother of an illegitimate child could not take or inherit property, and that the word "parent," in this section, does not mean or include mother. This objection we do not think is tenable, in the light of the recent legislation in this state upon this subject.

In the case of *Miller et al. v. Stewart et al.*, 8 Gill, 129, decided in 1849, Judge Frick carefully reviews the status of an illegitimate child at common law, and the statutes in force in this state at that date. Subsequently, Act 1868, p. 355, c. 199, was passed, and in 1888 this act was codified as article 46, § 30, of the Code of Public General Laws of the state. In *Hawbecker et al. v. Hawbecker et al.*, 43 Md. 520, decided in 1876, this court, after reviewing the previous legislation bearing upon the subject, said: "And now by Act 1868, p. 355, c. 199, it is provided that the mother and her heirs at law shall inherit from her illegitimate children, in case they shall die leaving no descendants or brothers or sisters or the descendants of such brothers and sisters." The case of *Estep v. Mackey*, 52 Md. 599, decided in 1879, also sustains this construction of the act. But, independent of this, the Code of 1888 was adopted in lieu of and as a substitute for all public general laws of the state in force at that date. It therefore became the law of the state and superseded all other legislation. *State v. Popp*, 45 Md. 433; *McCracken v. State*, 71 Md. 150, 17 Atl. 932; *Trustees of College v. McKinstry*, 75 Md. 188, 23 Atl. 471. Act 1868, p. 355, c. 199, is now codified as section 30, art. 46, Code Pub. Gen. Laws 1904, and Act 1798, c. 101, subc. 11, is codified as section 119, art. 93, Code Pub. Gen. Laws 1904. These sections of the Code must be read and construed together, and the legislative intent is thus made clear and beyond dispute.

This conclusion disposes of the other objections raised on the record, and, for the reasons assigned, we are of the opinion that the orphans' court of Baltimore city was entirely right in holding that the estate of the

intestate should be divided equally between the widow (appellant) and the mother (appellee).

Order affirmed, with costs.

(105 Md. 345)

NORTHERN CENT. RY. CO. v. UNITED RYS. & ELECTRIC CO.

(Court of Appeals of Maryland. April 3, 1907.)

1. STREET RAILROADS—DUTY TO PAVE STREETS—BRIDGES.

A railroad company entering a city and crossing a street at grade, an ordinance was passed providing that the grade of the street be raised so as to enable the railroad company to construct its railroad tracks under the street, and the change of grade, made in pursuance of the ordinance, was accomplished by the construction of a bridge. By a previous ordinance of the city a street railway company was granted the right to lay double tracks upon this street on the condition that the owners thereof should keep the portion of the street covered by its tracks and two feet on either side thereof in repair. With respect to a second street of the city, another street railway company was by ordinance authorized to construct double tracks upon the same, on the same condition as to repair as that imposed in the first grant of authority. A bridge connecting portions of that street and forming the only means of passage from one portion to another had at that time been constructed by the city. Neither the charters of these two street railway companies nor the ordinances of the city made any reference to bridges as distinguished from streets, and under the respective grants of authority to use such streets the two street railway companies laid their tracks upon these two bridges. *Held*, that the two bridges were parts, respectively, of the two streets, within the meaning of the word "streets" as used in the ordinances imposing on the owners of the street railways, as a condition of their right to use the streets, the duty to repair the same.

2. SUBROGATION—BENEFIT OF ORIGINAL OBLIGATION.

Where street railway companies were under obligation to the city to keep in repair the portion of two bridges occupied by their tracks and two feet on either side, and thereafter a railroad company became liable to the city to maintain and make all needed repairs on both bridges by virtue of ordinances granting certain privileges, the obligation of the street railway companies was not thereby discharged, and the railroad company, having made all such needed repairs, was entitled to recover from the street railway company succeeding to the rights and obligations of the original companies that portion of the cost of repairing the bridges for which the street railway company would have been liable had the bridges been repaired by the city.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Subrogation, § 49.]

Appeal from Superior Court of Baltimore City; Ch. E. Phelps, Judge.

Action by the Northern Central Railway Company against the United Railways & Electric Company. From a judgment for defendant, plaintiff appeals. Reversed, and new trial awarded.

Argued before BRISCOE, BOYD, PEARCE, SCHMUCKER, BURKE, and ROGERS, JJ.

Shirley Carter and John J. Donaldson, for appellant. Flieder C. Slingluff, for appellee.

PEARCE, J. This action was brought by the Northern Central Railway Company to recover from the United Railways & Electric Company of Baltimore the sum of \$2,000.00, claimed to be due and owing as its proportion of the cost of repairs to two bridges known as the "Charles Street Bridge" and "Maryland Avenue Bridge," which respectively, form a continuation of Charles street and of Maryland avenue, two of the public streets of Baltimore City, running parallel to each other. Both of these bridges cross the valley below, in which flows the stream known as "Jones Falls," and on the banks of which beneath said bridges are located the tracks of the Northern Central Railway. To avoid the repetition of long names, we shall in this opinion refer to the Northern Central Railway Company as the "railroad company," to the United Railways & Electric Company as the "railway company," and to the mayor and city council of Baltimore as "the city." The declaration, as filed, contained six counts; the first four being the common counts for money payable by defendant to plaintiff, and the fifth and sixth counts being special counts, which we shall request the reporter to have transcribed in connection with this opinion. The defendant pleaded the general issue, never promised as alleged, and demurred to the fifth and sixth counts, and the demurrer to each of these counts was sustained with leave to amend. The plaintiff declined to amend these counts, but by leave of the court amended the declaration by striking out the four common counts, whereupon judgment was entered on the demurrer for defendant, and plaintiff appealed. Before the ruling on the the demurrer an agreement was filed that all ordinances of the city in any way relating to the subject-matter of the suit should be considered as a part of the declaration in the case as fully as if the same had been set out at length therein. It will be seen by reference to the fifth count of the declaration that it is there sought to recover upon the strength of the obligation alleged to be imposed, by the condition in the grant of the city, upon the defendant as successor to the rights and obligations of the Baltimore City Passenger Railway Company, and of the Baltimore Traction Company, the cost of repairs between the tracks on these two bridges, and two feet upon either side thereof, upon the legal theory that these bridges are parts of the respective streets; and it will appear by reference to the sixth count that it proceeds upon the defendant's theory that these bridges are not parts of these streets respectively, and upon the further legal theory that, if they are not parts of said streets, then they are the private property of the plaintiff, and that the defendant cannot occupy or use that property without making compensation for the increased cost imposed upon the plaintiff as owner, by such use and occupation.

Three questions were raised at the argu-

ment: (1) Are these bridges parts, respectively, of Charles street and Maryland avenue, within the meaning of the ordinances of the city relating to the laying of street railways thereon? (2) If so, is the plaintiff entitled to maintain this action upon the obligation alleged to be imposed by the condition in the said ordinances upon the defendant as successor to the rights and obligations of the original grantees? (3) If these bridges are not parts of these streets, respectively, and therefore not within the scope of the supposed obligation, can the plaintiff recover in this suit the increased expense to which it is put by the use of its property by the defendant?

In order to a proper understanding of the legal effect of the averments of the declaration, it will be necessary to state the substance of some of the city ordinances which it was argued should be considered as set out in the declaration, and also something of the physical situation at the location of these bridges before the passage of any of these ordinances. Previous to the year 1868 the railroad company, after entering what were then the northern limits of the city, went upon the west side of Jones Falls, down and across certain streets to its station on Calvert street, in Baltimore City. About the year 1868 its tracks under proper legal authority, after entering the northern limits of the city, were changed to the northerly or eastern side of Jones Falls, and, in going to Calvert Station, crossed Charles and Eager streets at grade; Maryland avenue, North and Calvert streets not being opened as streets at that time beyond Jones Falls. In the year 1868 the property owners on Charles and Eager streets petitioned the city to raise the grade of Charles and Eager streets in order to cross the railroad above grade. This resulted in the passage of Ordinance No. 77 of 1868. The first section of this ordinance provided "that the grade of Charles street, between Hoffman and Lanvale streets, and of Eager street, between North and Buren streets shall be raised by the mayor and city commissioner so as to enable the said Railroad Co. to construct its railway tracks under said streets." It must be noted here that Charles and Eager streets were then both graded and paved, and were in use as streets, and it was therefore provided by section 2 of that ordinance "that all expenses incurred in making said change of grade shall be paid by the Northern Central Railway Co." This necessarily included the cost of maintenance of said bridges by which alone this change of grade was accomplished. It seems to be entirely just and equitable that the railroad company should bear the cost and expense of taking up the pavements already laid, and cutting through them in changing the route of the railroad for its convenience in the accommodation of the public. From this ordinance of 1868 it will thus be seen that the railroad company was obligated to the city to keep in repair the whole bridge

forming the northerly extension of Charles street. By Ordinance No. 44 of the year 1859, the Baltimore City Passenger Railway Company was granted the right "to lay double tracks upon Charles street from the northern limits of the city to Read street, thence along Read street to Calvert street," etc. But, as a condition of said grant, section 11 of said ordinance provided "that the owners and proprietors of said railways shall keep the streets covered by said tracks, and extending two feet on the outer limits of either side of said tracks, in thorough repair, at their own expense, and shall free the same from snow and other obstructions, in doing which they shall not cause to be obstructed the other portions of the street on either side of the railway tracks authorized by this ordinance to be constructed, and for non-compliance the mayor and city council may impose such reasonable fines not exceeding twenty dollars per square, to be collected as other city fines are now collected." So much for the bridge over Charles street, and we now come to the bridge over Maryland avenue.

Maryland avenue was not opened as a public street across the valley of Jones Falls until some time after 1877. In the meantime, in March, 1877, the case of the Northern Central Railway Co. v. Baltimore, 46 Md. 425, was decided, in which it was held that the city must pay for the bridges necessary to carry North and Calvert streets across the valley of Jones Falls, when those streets were opened across said valley, and, as the result of that decision, the bridges now continuing said streets were constructed. Subsequently Maryland avenue was opened across said valley, and the city accordingly built the bridge necessary for that purpose, and paid both the cost of its construction and maintenance up to the year 1882. Then Ordinance No. 40 of 1882 was passed, as a supplement to Ordinance No. 150 of 1880 (which related to the Baltimore Union Passenger Railway Company), and by said Ordinance No. 40 of 1882 the Baltimore Union Passenger Railway Company, to all whose rights and obligations the railway company in this case has succeeded, was granted the right "to lay down and construct double tracks upon Biddle street, from the intersection of said Railway Co.'s tracks upon Park avenue to Maryland avenue, and like double tracks upon Maryland avenue from Biddle street to the northern limits of the city," the latter authority embracing that part of Maryland avenue supplied by the said bridge, and said ordinance further provided "that said tracks should be constructed, used and operated under the terms and conditions mentioned in ordinance No. 150 of 1880." The terms and conditions mentioned in that ordinance are stated therein in the exact language of Ordinance No. 44 of 1859, which, so far as it relates to the repair of said tracks, has been transcribed in full in

the preceding part of this statement of the facts. When Maryland avenue was opened and the bridge carrying it across the valley was constructed by the city, the railroad company had but two or three tracks crossing the line of the street under said bridge. The street, when graded so as to conform to said bridge, was carried on a fill or bank both to the north and south end of the bridge, obstructing the railroad company's property beneath these fills, and preventing the laying of additional continuous tracks on the property of the railroad company. Finding it necessary, however, to have these additional tracks, the city and the railroad company entered into an arrangement for the removal of both said fills or banks and the extension of the bridge both north and south. This was for the convenience of the railroad company, and the city granted it the right to make those changes in Ordinance No. 132 of 1890, entitled "An ordinance to authorize the Northern Central Railway Company to move the north abutment of the bridge which carries Maryland avenue over its tracks, and also to extend said bridge southward to the bridge over Jones Falls"; and this ordinance provided "that all the work authorized by this ordinance shall be done under the supervision and to the satisfaction of the city commissioner, and at the sole cost and charge of said Railway Co.," and "that the bridge over the tracks of the Railway Co. as well that now existing, as the extension thereof hereby authorized, shall always be maintained at the sole cost of the Northern Central Railway Co." It thus appears that the railroad company is under legal obligation to the city to maintain both said bridges in repair, by virtue of the ordinances granting it, for its own convenience, rights, and privileges in the streets extended by means of said bridges, and that the railway company is under legal obligation to the city to keep in repair that portion of the beds of Charles street and Maryland avenue occupied by their tracks, and two feet on either side thereof, by virtue of the condition in the ordinances granting them authority to lay said tracks in the beds of said streets; and, if said bridges are parts of said streets, it also appears that this liability of the railway company to the city applies as well to said bridges as to any other parts of said streets. Upon that hypothesis, therefore, both the railroad company and the railway company are liable to the city for the repair of said bridges, the former to the extent of all the necessary repair, and the latter to the limited extent provided in the grant of authority to lay its said tracks.

The demurrer admits the averments of the declaration in both counts; that the defendant recognized its liability ever since the passage of said ordinances, down to the month of March, 1903, and "provided for the repairs needed to the flooring of said bridges between the tracks, and extending two feet

on the out limits on either side of said track, either by furnishing the material and labor therefor, or by paying the plaintiff for the work and materials by it furnished for the same," but that since March, 1903, the defendant has refused further to recognize any liability in the premises, and has refused to pay for its proportion of the repairs then made by the plaintiff as set forth. The first question for determination is whether these bridges are streets, or parts of streets, within the meaning of the word "streets," as that word is used in the ordinances imposing the obligation upon the owners and proprietors of the railways in question to keep in repair "the streets covered by said tracks, and two feet on the out limit of either side of said tracks." It is not necessary to maintain that a bridge connecting portions of a city street, and forming the only means of passage from one portion to another, is for all purposes, and under all circumstances, a part of said street. Our inquiry here is whether these bridges for the purpose of this case are parts of these particular streets. It will be observed at the outset of this inquiry that, under a grant from the city to the railway company of the right to lay its tracks in the streets of the city, the railway company has laid its tracks on these bridges connecting portions of said streets, and that neither the city nor the railroad company has ever denied or questioned their right to do so under that grant. The grant would have been of no practical value to the grantee if it had been obliged to terminate its tracks at each end of these bridges, and the railway would have been of no practical value to the traveling public as a means of conveyance nor to the city as a source of revenue for the Park tax imposed upon the street railways. To exclude, therefore, the right to use these bridges, would be to nullify the practical advantages to the public and to both of the direct parties to the contract. But, if the right so to use the bridges is a part of the contract, then it must be subject to the condition upon which the right is granted. In *North Baltimore Passenger Railway Co. v. North Avenue Railway Co.*, 75 Md. 243, 23 Atl. 469, Judge Alvey has said: "Where a contract with a municipality is susceptible of two meanings, one restricting, the other extending, powers of the other party, that is to be adopted which works least harm to the municipality. In other words, where is a want of plainly expressed intention, the construction should be beneficial to the public." And that language was used in construing a grant made by the city to a street railway company for the use of its streets. In the case before us every beneficial interest of the municipality requires the words "streets" to include these "bridges," and the beneficial interest of the railway company demands the same construction. If we now place ourselves in the situation of the parties to this grant, as we

have a right to do, and should do, in order to avail ourselves of the light of the surrounding circumstances, and the conduct of the parties at the time, it will be seen that the parties themselves have left no doubt of their construction of the grant. We have examined the charter of the Baltimore City Passenger Company (Acts 1862, c. 71) and the charter of the Baltimore Union Passenger Company (Acts 1882, c. 47), and neither of these corporations were by their charters granted any authority to construct or build bridges or to lay their tracks upon any bridges or in any streets in Baltimore City, except as granted by said city. Their only right, either under their charters or the ordinances passed in their behalf, is to lay their tracks in streets designated as such, and they have no authority from any source to lay their tracks on bridges as distinguished from streets in Baltimore City. The city itself has been delegated by the state no power to build bridges as distinguished from streets, and it has always built such under its general powers to open and extend streets, and has done this through its street commissioners or officers charged with that duty. The North Street and Calvert Street Bridges were so constructed, and in *Northern Central Railway Co. v. Mayor & City Council*, 46 Md. 445, where the proceedings in reference thereto were under review, the court, after considering the difficulties of crossing the railroad tracks either at grade, which would be dangerous to the public, or by fills which would destroy parts of the tracks of the railroad company, said: "The only mode in which the proposed streets can cross the tracks, without great injury both to the appellant and the appellee, is by viaducts or raised ways of some description." Since neither the charters of these companies nor the ordinances of the city made any reference to bridges as distinguished from streets, and as said companies laid their tracks upon said bridges without other authority, and the city assented thereto, and as said companies ever since down to 1903 and 1904, complied with the condition annexed to the grant of the use of the streets, by keeping in repair the same proportion of trackage upon these bridges as upon these streets, it would be idle to deny that they regarded these bridges as parts of said streets, and that their present attitude is a departure from that which they have maintained for many years.

In *North Baltimore Passenger Railway Co. v. Baltimore*, 75 Md. 247, 23 Atl. 470, the appellant had been granted by an ordinance the right to "lay its tracks on, and use North avenue from McMechen to Charles street," which included North Avenue Bridge, and under that grant had laid its tracks on North Avenue Bridge. It then sought to restrain the city from giving another railway company the right to lay its tracks on North Avenue Bridge, and the court held that it was

only "so much of the street as may be actually occupied that can be claimed to be exclusive of other tracks, and other parts of the street may be granted to competing lines." Here, then, is a plain implication that a grant to use the street is a grant to use a bridge forming the only connection between parts of that street. But that case does not stop with that implication. It states in explicit language that "the bridge known as 'North Avenue Bridge' over Jones Falls is the property of Baltimore City, erected and maintained for public use, and forms a part of North avenue, one of the highways of the city." The fact that North Avenue Bridge was the property of Baltimore City is not material to the question in hand. The city had wisely relieved itself of the burden of maintaining Charles Street and Maryland Avenue Bridges when it granted the railroad company privileges for its own convenience under said bridges, but they were none the less highways of the city, as North Avenue Bridge was declared to be, and the city could no more forbid public travel across these bridges than it could across North Avenue Bridge, merely because it had imposed upon the railroad company and upon the railway company, as a condition of the right of the latter to lay its tracks thereon, the obligation to repair these bridges so as to keep them in safe condition as public highways. An emphatic and significant instance in connection with Charles Street Bridge and with Eager Street Bridge is found in the language of Ordinance No. 77 of 1868, which provided "that the grade of Charles street between Hoffman and Lanvale, and the grade of Eager street between North and Buren streets, be raised and changed under the direction of the mayor and city commissioner so as to enable the Northern Central Railway, to construct its railway tracks under said streets." This ordinance is not so suggestive of deliberation and design in describing the tracks as laid under the streets, as it is of common sense and natural adherence to language appropriate to the work the city was specifically authorized to undertake, viz., the opening and extending of streets whether at, above, or below grade.

The weight of authority in well-considered cases sustains the view expressed in *North Baltimore Passenger Railway Co. v. Baltimore*, 75 Md. 247, 23 Atl. 470. In *Chicago v. Powers*, 42 Ill. 169, 89 Am. Dec. 418, plaintiff's intestate stepped off one end of an unlighted draw bridge spanning a stream which crossed the line of a city street, and was drowned. The defense was that, though the city had power to lay a tax to light its streets, that power did not include the lighting of bridges. But the court rejected this defense, and said: "It seems to us to be obvious that a bridge over a stream crossing a street is a part of the street. It is as much so as the cover placed over a drain, or a sewer crossing a street. Persons travel over

it as they do over other portions of the street. It is, and must be, a part of the street." In *McDonald v. Ashland*, 78 Wis. 251, 47 N. W. 434, a bridge built by a private citizen with lumber furnished by the city and forming part of a platted street used by pedestrians was held to be a public way; and in *Birmingham v. Rochester City Railway Co.*, 137 N. Y. 13, 32 N. E. 995, 18 L. R. A. 764, a bridge over a canal intersecting a highway was held to be part of the highway; the court saying: "In substance and effect, it is nothing more than a continuation of the city street." We have been referred to but one case claimed to sustain the contention of the appellee, viz., *Cedar Rapids v. Railway Co.*, 108 Iowa, 406, 79 N. W. 125. In that case the city granted the right to lay its tracks on "the streets, avenues, and bridges of the city," but in terms imposed the duty of repairs only as to paved streets. That case comes within the rule of "*Expressio unius, exclusio alterius*," but, in so far as it may on other grounds sustain the contention of the appellee, we cannot accept it as satisfactory authority.

We now come to the second question in the case—whether there is such a privity of contract between the parties to this suit as entitles the plaintiff to any recovery. The contention of the plaintiff, in the language of its brief, is "that, where two persons are legally liable to a third person for the same thing *ex contractu*, if one of said two persons performs the whole obligation to said third person, the other of said two persons is liable to the one who has so performed in direct proportion as he is liable to said third person." The right of the railway company to maintain its tracks upon these two bridges under the ordinances of 1859 and 1890 was vested, and its liability to the city to keep in repair the space occupied by its tracks and two feet on either side thereof, was fixed, when under the ordinances of 1868 and 1890, respectively, the railroad company became liable to the city for the construction and maintenance of the bridges then erected. The trackage rights of the railway company on these bridges as parts of the streets was not thereby divested, nor was its liability to the city for repair of its tracks thereon thereby released or extinguished. It continued unimpaired, though the city could thereafter, at its pleasure, call upon the railroad company to make all the needed repairs, or upon the railway company for the limited repairs for which it is liable, and upon the railroad company for all other needful repairs, and, upon performance by the railroad company of the primary and continuing duty of the railway company to make its limited repairs, the contract of the railway company with the city ought to enure to the benefit of the railroad company, and, if the legal proposition of the plaintiff stated above is sustained by satisfactory authority, it does so enure. Two cases from the Supreme Court of Massachu-

setts are so strongly in point as to justify extended reference to them. The first of these cases is the *City of Lowell v. Proprietors of Locks and Canals*, 104 Mass. 18. The canal owners constructed a canal across a public highway in the city of Lowell, and built a bridge to restore the severed highway. A street railway had a grant for its tracks on this highway, upon condition that it should keep in repair the space between its rails and 18 inches on either side, both on streets and bridges; and its tracks were accordingly laid on this bridge when it was opened for use. In the course of time repairs became necessary within the limits of the railway company's liability, and the city called upon the canal company to make such repairs. The canal company refused to make them on the ground that they could only be demanded of the railway company. The city sued the canal owners, and the court held that, as the owners had built the bridge to carry their canal across the highway, they were liable to the city in the first instance for its maintenance, and for all necessary repairs. The canal owners then brought suit against the railway company both for the amount recovered from it by the city and also for some subsequent repairs made by it within the railway company's limits, and a recovery was allowed. *Proprietors of Locks and Canals v. Lowell Horse Railroad Corporation*, 109 Mass. 221. The court said "that a street railway corporation, whose charter requires it to repair such portions of all bridges in a city as are occupied by its tracks, is bound to repair such a portion of a bridge which the owners of a canal have built over the canal, and which as against the city he is bound to repair; and, if on his refusal the city makes such repairs and recovers judgment against him for the expense thereof, he can recover from the corporation the amount of the damages recovered by the city against him. * * * The duty thus imposed upon the defendant of repairing a part of a bridge, the whole of which, as between them and the city, the plaintiffs were obliged to maintain, was an obligation to do that which would be a benefit to the plaintiffs, assumed by the railway company in the acceptance of their charter, and the plaintiffs, having been obliged to meet that liability to the city, through the neglect of the defendant are entitled to recover the amount paid in discharge of it. *Carnegie v. Morrison*, 2 Metc. (Mass.) 381; *Brewer v. Dyer*, 7 Cush. 337." In *Carnegie v. Morrison*, Chief Justice Shaw said: "The law operating upon the act of the parties creates the duty, establishes the privity, and implies the promise and obligation on which the action is founded. The same instrument may constitute a contract between the original parties, and also between one or both of them, and others who may subsequently assent thereto, and become interested in its execution." A case more closely analogous in the relation of

all the parties can scarcely be found, and the Massachusetts decisions are everywhere regarded as high authority. In *Small v. Schaefer*, 24 Md. 158, the Court of Appeals of this state adopts the view expressed by Chief Justice Shaw in *Carnegie v. Morrison*, supra, and quotes with approval the following passages from the opinion in that case: "When one person, for a valuable consideration, engages with another by simple contract to do some act for the benefit of a third, the latter, who would enjoy the benefit of the act, may maintain an action for the breach of such engagement." This is not the Massachusetts law alone. In *Hendrick v. Lindsay*, 98 U. S. 149, 23 L. Ed. 855, the Supreme Court of the United States said, "The right of a third party to maintain assumpsit on a promise not under seal to a third party for his benefit, although much controverted, is now the prevailing rule in this country"; and cites the same author cited in *Small v. Schaefer*, 24 Md. 143; 1 *Parsons on Contracts* (6th Ed.) 467.

It is not necessary, as contended by the appellee, that the contract must have been entered into at the time for the benefit of some particular third person. "If the person for whose benefit a contract is made has either a legal or equitable interest in the performance of the contract, he need not necessarily be privy to the consideration." 9 Cyc. 381. The rule is thus stated in 7 *Enc. of Law* (2d Ed.) 107: "To have this effect, the contract must have been entered into for his benefit, or at least such benefit must be the direct result of performance and within the contemplation of the parties."

The following cases from the New York Court of Appeals illustrate the judicial view generally: In *Coster v. Albany*, 43 N. Y. 399, a statute authorized as a public improvement a bridge connecting a pier with the adjoining land, the removal of which made it necessary in order to reach plaintiff's store to go over another more distant bridge. The statute provided that all damages caused to property should be paid by the city. The court said: "The result of the passage of the law and the assent of the city to its provisions was to put the city in the place of the state as to damages. Here is the promise, the consideration, and the promisee definitely brought out. The ultimate beneficiary is uncertain. The third person need not be privy to the consideration, nor need he be specially named." The city was held liable for direct, but not for remote damages. In *Little v. Banks*, 85 N. Y. 258, it was held that "contractors with the state who assume for a consideration received from the sovereign power, by covenant, express or implied, to do certain things, are liable in case of neglect to perform such covenant to a private action at the suit of the party injured by such neglect, and such contract inures to the benefit of the individual who is interested in its performance." These cases and the rea-

soning upon which they are founded are satisfactory to us as controlling the present case, and we are therefore of opinion that there was error in sustaining the demurrer to the fifth count of the declaration.

The sixth count of the declaration proceeds upon the theory of the defendant that these bridges are not parts of streets, but maintains that the defendant is nevertheless liable for the increased cost of repairs caused by the construction, maintenance, and operation of the defendant's tracks on said bridges; they being upon the theory of that count the exclusive property of the plaintiff which the defendant cannot use without just compensation for such use. Having determined that said bridges are parts of said streets within the meaning of the ordinances which impose upon the defendant the liability to repair, and fix the measure of recovery to which the plaintiff is entitled, there was no error in sustaining the demurrer to the sixth count in the declaration.

For the error in sustaining the demurrer to the fifth count, the judgment must be reversed.

Judgment reversed, with costs to the appellant above and below, and new trial awarded.

(105 Md. 507)

UNION TRUST CO. OF MARYLAND et al.
v. THOMAS et al.

(Court of Appeals of Maryland. April 2, 1907.
On Rehearing, May 1, 1907.)

1. CORPORATIONS — MORTGAGES — CONSTRUCTION—DEFAULT—TAXES.

Default by a corporation in paying taxes on its capital stock was a default within a provision of the corporation's mortgage that, if it should suffer any lawful tax or charges to fall in arrear, whereby the security might become impaired, the mortgagee might foreclose, etc., and hence the mortgagee was entitled to a decree of sale under the terms of the mortgage.

2. SAME.

The payment of a corporation's taxes on its capital stock, after a consummated default, under the provision of a mortgage that nonpayment should entitle the mortgagee to foreclosure, did not obliterate the default or divest any right to sell founded thereon.

On Rehearing.

3. SAME—REQUEST OF BONDHOLDERS FOR SALE—SUFFICIENCY.

A corporate mortgage provided that, on the mortgagor's default by suffering any lien to be obtained whereby the security might become impaired, or on default of any of the covenants or stipulations therein, upon request of one-fourth of the mortgage bondholders in amount, the mortgagee might take possession and manage the property through receivers or sell it. *Held*, that there was a sufficient request by the bondholders to exercise the power of sale, where one-fourth of them in amount by written request instructed the trustee to declare the principal sum due, and to proceed to a sale of the mortgaged property, referring in general terms to certain defaults, and specifically mentioning as one of the grounds of the request the insolvency of the mortgagor, which was admitted.

4. SAME — RIGHT TO FORECLOSE — EFFECT OF MORTGAGOR'S INSOLVENCY.

Though a corporation's mortgage provided that the principal sum should not become due before the date fixed for its payment, except for specified defaults, the adjudicated insolvency of the corporation operated to mature the mortgage bonds at the option of the holders, where otherwise the bondholders would have been precluded from recovering any portion of the deficiency that might arise on a sale of the mortgaged property.

Appeal from Circuit Court of Baltimore City: Alfred S. Niles, Judge.

Suit by the Union Trust Company of Maryland, trustee, and another, against Douglas H. Thomas and others. Plaintiffs appeal from the decree. Reversed and remanded. Motion for reargument overruled.

Argued before BRISCOE, BOYD, PEARCE, SCHMUCKER, BURKE, and ROGERS, JJ.

Fielder C. Slingluff, T. Wallis Blakistone, and Joseph C. France, for appellants. George Dobbin Penniman, for Perin estate. Arthur George Brown, for Wells Bros. Co. Bernard Carter, for committee of second mortgage bondholders. John P. Poe, for unsecured creditors.

PEARCE, J. It will be necessary to a proper understanding of this case that the facts be stated in somewhat full detail before considering the law applicable to the facts. The Belvidere Building Company of Baltimore City is a corporation formed under the general incorporation law of the state of Maryland April 10, 1901. The certificate of incorporation states that it was formed "for the purpose of buying, selling, mortgaging, leasing, improving, disposing of, or otherwise dealing in lands in this state, and also for the purpose of carrying on in the city of Baltimore the industrial business of conducting a hotel in all its branches, the aforesaid purpose being, in the judgment of those forming said corporation, of advantage to the general interests of said corporation," and the aggregate capital stock of the corporation was fixed at \$500,000, divided into 5,000 shares of the par value of \$100 each. Under its corporate powers, and in pursuance of proper authority from its directors and stockholders, it was determined to issue its first mortgage bonds to the amount of \$850,000 in order to pay for the erection, equipment, and furnishing of a hotel building upon a lot of land at the southeast corner of Charles and Chase streets, in Baltimore City, owned by it, and also its second mortgage bonds to the amount of \$500,000, for the erection, equipment, and furnishing of said hotel building; and, accordingly, on June 20, 1902, said corporation executed to the appellant the Union Trust Company of Maryland, trustee, its mortgage upon the parcel of ground at the corner of Charles and Chase streets on which the Belvidere Hotel was then in the course of erection, together with all the improvements and machinery thereon when and as erected,

and all the rights, privileges, and franchises connected with said hotel in any manner, to secure the said first mortgage bonds mentioned to the amount of \$850,000, said bonds being for \$1,000 each, payable on January 1, 1923, with interest in the meantime semiannually at the rate of 5 per cent., payable on the 1st days of January and July in each year. And on June 16, 1908, said corporation executed to the said Union Trust Company, trustee, its mortgage upon the same property described in the said prior mortgage, and also upon all the furniture, equipment, machinery, and supplies that should be placed in said hotel, to secure said second mortgage bonds to the amount of \$500,000; said bonds for \$1,000 each payable October 1, 1918, with interest in the meantime payable semiannually at the rate of 5 per cent. on the 1st days of April and October in each year. It also executed a third mortgage on May 27, 1904, to the Fidelity & Deposit Company of Maryland, as trustee, to secure its bonds for \$150,000, held by Wells Bros. Company, for work done by them on said hotel building. The whole amount of bonds secured by these three mortgages were issued concurrently with the execution of said mortgages. It does not appear in the record by whom all of these bonds are now held, nor is it material that this should appear; but the record does disclose the fact that the Union Trust Company of Maryland holds in its own right \$620,000 of the first-mortgage bonds, and that Ella K. Perin, as life tenant under the will of Nelson Perin, now deceased, holds \$134,000 of the first-mortgage bonds. It also appears that, of the second-mortgage bonds, Ella K. Perin holds \$120,000; the Merchants National Bank of Baltimore, \$30,000; Hambleton & Co. \$10,000; Citizens' National Bank of Baltimore, \$10,000; United States Fidelity & Guaranty Co., \$20,000; W. P. Harvey, \$30,000; Parker & Thomas, \$14,000; and the Sherwood Distilling Company, \$8,000. And that, of the third-mortgage bonds, \$68,000 are yet held by Wells Bros. Company, and that there are unsecured creditors whose claims amount to a large sum of money. The bondholders above named have all been made parties to the proceedings at some stage, and McDowell & Co., holding an unsecured claim of \$3,133.34, have also come in by petition, acting in their own behalf and in behalf of other unsecured creditors.

On February 10, 1906, the Union Trust Company of Maryland, trustee, filed its bill in the circuit court of Baltimore, reciting the first mortgage above mentioned, so far as necessary to the case, and especially alleging that, in the second article of said first mortgage, the said mortgagor covenanted that on January 1, 1906, and annually thereafter, and so long as any of said bonds remained outstanding and unpaid, it would pay to the plaintiff the sum of \$12,500 for the purpose of constituting a sinking fund for the pay-

ment of said bonds at maturity. That, by article 13 of said mortgage, the said mortgagor further covenanted to pay promptly all taxes and assessments lawfully assessed against the property mentioned in said mortgage, so long as any of said bonds should be outstanding. That, by article fourth of said mortgage, it was provided that if the mortgagor, its successors or assigns, should at any time, after demand made, neglect or omit, for any period exceeding nine months, to pay semiannual interest on said bonds, or to pay the principal sum of each bond for any period after the maturity thereof, "or shall suffer or allow any lawful tax or charges to fall in arrear, or any lien to be obtained on the said property, whereby the security of this mortgage may be impaired, or shall refuse or fail to keep or perform any of the covenants or stipulations contained herein," then, in either of such events, in case the same continue for nine months, the plaintiff might, upon the written request of one-fourth the amount of bonds thereby secured, enter upon and take possession of the mortgaged premises, and apply the net revenue and income therefrom as stipulated in said mortgage; or after, or without entering as aforesaid, upon the written request as aforesaid, might proceed to sell and dispose of said mortgaged real estate, corporate rights, and franchises. That it was further provided by said article 4 that in case of any default in any matter or thing to be done or performed by the mortgagor, according to the requirements of said bonds or of said mortgage, the plaintiff should be authorized to apply to any court of competent jurisdiction in the state of Maryland for the appointment of a receiver or receivers of the mortgaged property and franchises, and that the court should forthwith appoint such receiver or receivers, and, if named or designated as such by the plaintiff, that such appointment should be made by the court as a matter of strict right to the trustee and to the bondholders, and without reference to the solvency or insolvency of the mortgagor. The bill then alleged that the defendant had made default: (1) in failing to pay on January 1, 1906, to the trustee, the sum of \$12,500, or any part thereof, for said sinking fund; (2) in failing and omitting to pay "the properly levied and assessed state and city taxes upon the property, real and personal, conveyed by said mortgage deed of trust for the years 1905 and 1906, as covenanted in article 13, which taxes are in arrears under section 40 of the City Charter, and are liens upon said property prior to the aforesaid deed of mortgage, and the security conveyed thereby is impaired by the failure to pay said taxes." The bill then further averred that the failure to pay promptly the taxes for the year 1905 had continued for a period of more than nine months, and the contingency had arisen under which the plaintiff was authorized to enter upon and

take possession of said mortgaged property, or to exercise the power of sale before mentioned, or to apply for and have appointed a receiver or receivers as aforesaid; that the plaintiff deemed it necessary and expedient to exercise its rights and obligations under said mortgage, and to take possession of the mortgaged property for the purpose of sale; that it was the plaintiff's intention to sell the same as soon as it could be advantageously done; and that it deemed it necessary that a receiver or receivers should be appointed to continue the business of the defendant until the further order of the court. The prayer of the bill was: First, that the court would assume control of all the trusts reposed in the plaintiff, and direct the proceedings as to the sale of said property; second, that a receiver or receivers should be appointed; third, that an injunction should issue restraining the defendant's officers or servants from interfering with the receivers; and, fourth, for general relief.

On the same day the defendant answered, admitting all the matters and facts stated in the bill, consenting to the appointment of receivers, and recommending Edgar G. Miller, Jr., as a receiver on behalf of the defendant and its stockholders representing the \$508,300 of capital stock of the corporation. On the same day an order or decree was passed: (1) Assuming jurisdiction of all the trusts confided to, and the powers to be exercised by, the trustee under said mortgage; (2) authorizing the trustee to sell the property mentioned in the proceedings, under the direction of the court, and subject to its ratification; (3) appointing George Blakistone and Edgar G. Miller, Jr., nominated by the Union Trust Company, as receivers to take charge of the property until sold; (4) granting the injunction as prayed.

A second bill was filed by the plaintiff, as trustee under the second mortgage, on February 14, 1906, for the sale of the hotel property, its furniture, and furnishings; the allegations being similar to those in the first bill. A similar answer was filed thereto on the same day, and a similar order was passed directing, in addition to a sale of the hotel, a sale of the furniture and furnishings which were only embraced in the second mortgage. These two cases were consolidated, and on March 19, 1906, Laurence Perin, a stockholder of the defendant corporation, holding 100 shares of its capital stock of the par value of \$100 each, filed a bill in the circuit court of Baltimore City, under article 23, § 264, of the Code of Public General Laws of Maryland of 1888, and section 264a (Laws 1902, p. 303, c. 198), being the insolvent law for corporations, alleging that the defendant had outstanding a number of promissory notes for debts incurred in furnishing the hotel, that a few days before that time a judgment had been entered against the defendant for \$10,000 in favor of Olin Bryan for personal injuries sustained in an accident in the hotel

elevator, and that the defendant also owed about \$24,000, for overdue state and city taxes, none of which the defendant was able to pay, and that the defendant was then insolvent. The bill recited the filing of the two previous bills, and prayed for a decree adjudging the defendant to be insolvent, and to have surrendered its corporate rights and franchises, and that it be dissolved and its assets be distributed among those entitled according to their respective rights and priorities, and that receivers be appointed to take charge of the assets of the defendant. An answer was filed the same day by the defendant, admitting all the allegations of this bill, consenting to the appointment of receivers, and suggesting Messrs. George Blakistone and Edgar G. Miller, Jr., as such receivers.

On March 21st, upon petition of Laurence Perin, the consolidated causes of the Union Trust Company against the Belvidere Building Company were consolidated with the last-mentioned cause of Laurence Perin against the same defendant, and the same receivers appointed in the two causes above mentioned were appointed receivers in the three consolidated causes, with all the rights and powers conferred by their previous appointments, and in addition thereto all the other powers which can be conferred upon receivers appointed under article 23 relating to the dissolution of insolvent corporations, with a proviso, however, that that order should not be deemed in any manner to affect the rights and privileges of the Union Trust Company of Maryland under the mortgages referred to in the two causes of said Union Trust Company against the Belvidere Building Company, or under the decrees passed in said causes. On March 27, 1906, the Belvidere Building Company filed a petition for leave to file amended answers to the two bills of the Union Trust Company, alleging that there had been no default by the defendant under said mortgages, and that the defendant had been inadvertently led into making an erroneous admission of default, and praying that so much of said answers as consented to a sale should for that reason be stricken out, and subsequently Wells Bros. Company and Ella K. Perin, before mentioned, also intervened by petition and asked that said orders of sale be stricken out. The ground upon which these petitions were filed is set out in the petition of the Belvidere Building Company at much length; the substance being that the averments of these two bills that the failure to pay the taxes for the year 1905 had continued more than nine months when the bill was filed on February 10, 1906, was not true, since the nine months would begin to run from July 1, 1905, at which time, under section 40 of the City Charter, taxes on real estate and chattels real are in arrear, and that therefore the nine months had not expired on February 10, 1906, and although the said section of the City Charter also provided that taxes on personal property should be in

arrears on May 1, 1906, of the year in which they were levied, so that if the defendant were taxed on any personal property, and such taxes for 1905 had been in arrears on February 10, 1906, they would then have been in arrears for nine months, yet the defendant was not taxed with any personal property, because, under the law of Maryland, corporations having a capital stock on which taxes are assessed are not taxable on their personal property, the tax on which is represented by the tax on their stock. The petition admitted that the taxes assessed on the defendant's capital stock were in arrears for more than nine months when these bills were filed, but contended that those taxes are not the taxes contemplated by the terms of the mortgage, which provides that, if the defendant "shall suffer any taxes or charges to fall in arrear or any lien to be obtained on the said property whereby the security of this mortgage may be impaired," then a sale may be made. Amended answers were accordingly filed denying any default. The Union Trust Company answered the petition of the defendant repeating the averment of default contained in the original bills, namely, that there was a default in the nonpayment of taxes agreed to be paid under said mortgage for a period of more than nine months, and that this default was twice admitted by the answers filed to the two original bills, at separate and distinct dates, and that, said decrees having been enrolled, the defendant is bound thereby. The Union Trust Company, further answering, said that there is a conceded default in the payment of the taxes on the real estate, but that the defendant contends that this default has not existed for nine months, as stipulated by the mortgage, but that this right has been waived by the defendant's answer, and it is now too late to avail of that ground.

This petition of the defendant and the answer of the plaintiff were heard, and on April 27, 1906, the court revoked and rescinded so much of the decrees of February 10 and 14, 1906, passed in the two causes of the Union Trust Company against the Belvidere Building Company, and consolidated with the case of Laurence Perin against the same defendant, as provided for a sale by the Union Trust Company, trustee, of the property described in said mortgages, respectively, and also modified the order of March 21, 1906, so far as related to the rights of said Union Trust Company under said mortgages and decrees so as to conform in all respects with this order, and its effect upon said orders or decrees of February 10 and 14, 1906. So the matter stood until October 31, 1906, the receivers in the meantime conducting the hotel, when one of the receivers, Mr. Miller, filed a petition, asking the court to determine whether a sale should be made, and, if so, how, when, and by whom. Thereupon the Union Trust Company filed its petition on November 9, 1906, referring to the previous proceedings, re-

peating the allegations of a default made and continuing for nine months, and stating the failure of a proposed plan of reorganization of the defendant's finances, and the consequent urgent necessity of a sale; stating also that the holders of one-fourth in amount of the first mortgage bonds have in writing directed the trustee to declare the whole principal sum of said bonds to be due and payable, and that said trustee had so declared; and prayed for an order authorizing the trustee to sell under the powers contained in said mortgage, at such time and on such terms as the court should prescribe. This petition was resisted by the defendant and the other intervening parties, and on December 6, 1906, the Union Trust Company amended the last-mentioned petition so far as the prayer for relief was concerned, so as to ask specifically for a dissolution of the defendant corporation, and also, in event that the court should determine the sale should not be made by the trustee under the mortgage, but by the receivers in the consolidated causes, that then such sale should be made free and clear of the first mortgage held by the plaintiff as trustee, so that the Union Trust Company could be paid from the proceeds of sale the amount due it under said mortgage, and in event of deficiency be put in position to prove its claim for such deficiency in the insolvent court. The whole matter then came up for hearing, and the court then passed the following decree from which this appeal is taken: (1) That the Belvidere Building Company is, and was at the time of the filing of the bill of complaint by the Union Trust Company, insolvent, and has lost its corporate rights and privileges. (2) Declaring the Belvidere Building Company to be dissolved. (3) Ordering a sale of all the property, real and personal, of the Belvidere Building Company, to be made by the receivers, subject to the liens and terms of the two mortgages held by the Union Trust Company as trustee, and prescribing the manner and terms of sale. Among these terms of sale is a provision that a sale to the highest bidder would not be ratified, unless, before final ratification, satisfactory evidence should be produced to the court that the purchaser would, within 30 days after ratification, supply \$35,000, as a working capital for the operation of the hotel, and that, within six months after ratification, the purchaser would expend in the necessary repairs of the hotel such amount as should be by the court ascertained and determined, at least 10 days before the day of sale, to be reasonably sufficient for that purpose.

It is obvious, from the foregoing statement of facts, that this is simply a contest between the first-mortgage bondholders, on the one hand, and the second-mortgage bondholders and the unsecured creditors, on the other hand, as to whether the sale shall be made clear of, or subject to, the lien and terms of

the first mortgage held by the Union Trust Company as trustee for itself and other holders of the first-mortgage bonds, since the Belvidere Building Company admits its insolvency, and the Union Trust Company is willing to waive its alleged right to sell under the first mortgage, if the receivers should be directed to sell free and clear of its mortgage, so that a complete settlement of all the affairs of the Belvidere Building Company should be made as a result of the sale. In so saying, we are not unmindful of the fact that Mrs. Ella K. Perin, who is the holder of \$134,000 of the first-mortgage bonds, is resisting a sale thereunder; but she is also the holder of \$120,000 of the second-mortgage bonds, and her mixed and nearly balanced interests naturally range her with those who oppose a sale under the first mortgage. Under the decree made, she will at least have a chance of continuing the investment represented by both series of bonds, with the assurance of continued protection in event of future defaults by those who may be in charge of the conduct of the hotel, and her second mortgage bonds would increase in value in proportion as future compliance may be made with the provision for sinking fund payments on the first-mortgage bonds. But with the wishes or mere interests of the respective parties we are not permitted to be concerned. It is the rights of the parties alone which we are authorized and required to determine. The primary question, therefore, and one which is fundamental in this case, is whether there had been any such default at the time of filing the first bill by the Union Trust Company, trustee, as gave a right to sell under said first mortgage, for, if there was such right, it cannot be denied by any decree of a court whose jurisdiction was invoked, not to destroy, but to direct and regulate, the exercise of the power of sale created by the terms of the mortgage, and which might have been exercised without resort to the court for authority to make such sale, and which sale would have been brought within the jurisdiction of the court upon the filing of the bond required as preliminary to the exercise of the power of sale, only for the purpose (if the power was found to exist) of proper control over the making of the sale authorized by the mortgage, and the distribution of the proceeds of sale.

In our opinion the question above stated is concluded by the Casualty Insurance Company's Case, 82 Md. 535, 34 Atl. 778. We have seen, from the reference heretofore made to the first mortgage, that article 4 provides that, if the Belvidere Building Company should "suffer any lawful tax or charges to fall in arrear, or any lien to be obtained on the said property whereby the security of this mortgage may be impaired," and if this condition should continue for the period of nine months, then, with or without entering into possession, the Union Trust Company

was authorized, upon the written request of the holders of at least one-fourth in amount of said bonds, to proceed to sell all said real estate, corporate rights, and franchises at public sale, and to apply the proceeds, "after deducting therefrom proper allowances for all the expenses thereof including attorney and counsel fees, and all other expenses, additions or liabilities which may have been paid or incurred by it for taxes or assessments on the said property, or the appurtenances, or other property thereto belonging or any part thereof, and the payment to the trustee or any bondholder, of any advances made under the provisions of article seventeen of this indenture, as well as reasonable compensation for its own services, to apply the residue of the proceeds of sale to the payment of the whole amount of the unpaid principal of said bonds then outstanding, and of the whole amount of the interest at that time accrued and unpaid, pro rata, without preference or priority, and ratably to the aggregate amount of such unpaid principal and accrued and unpaid interest."

We have also seen that in the petition of the Belvidere Building Company of March 27, 1906, for leave to amend its answer to the bill in which the default charged thereon in the nonpayment for more than nine months of the state and county for 1905 on its real and personal estate, there is an express admission by the Belvidere Building Company that the taxes for 1905 upon its capital stock were in arrear for more than nine months when the bill was filed, but the petition denied that these were the taxes contemplated by the language of article 4 above quoted, because the petition alleged: "It is obvious that these taxes cannot impair the security of the mortgage, for the reason that such taxes are not a lien upon the real estate of the defendant, being primarily assessed to the stockholders, although the duty of paying them is imposed upon the corporation." It is quite clear, however, that the stipulation of article 4 which we are now considering has a wider scope and operation than the covenant of article 13, which requires prompt payment "of all taxes and assessments lawfully assessed against the property herein mentioned"; that property being the lot of ground with the hotel erected thereon, and all the improvements, machinery, and appurtenances belonging thereto. That covenant would be performed by prompt payment of taxes upon the real property described in the mortgage. The stipulation of article 4 must necessarily, and in accordance with its more general language, have been designed to provide for any other charge or lien, however created, and however operating, so as to impair the security of said mortgage, and any lien which would have priority over said mortgage must operate to impair its security. All taxes in any manner chargeable upon any specific property take precedence over

all other liens, and tax sales divest the title of the owner of the fee and transfer the lien of all incumbrances from the property to the fund created by the tax sales. It is therefore to just such a charge or lien as that claimed for the tax upon the capital stock in this case, if it be a lien, that the stipulation of article 4 must apply. Another obvious illustration of such a lien would be that created by an assessment for benefits imposed under any scheme for improvements of the streets, such as paving or sewerage.

In the Casualty Insurance Company's Case, 82 Md. 535, 34 Atl. 778, that company having been adjudged to be insolvent, receivers were appointed to take charge of its assets, and had in their hands funds arising therefrom, some of which were special and some general funds. The mayor and city council of Baltimore filed a claim for taxes, and this court, speaking through Chief Judge McSherry, said two questions were presented: "First, whether the tax levied by the municipality for the year 1893 upon the shares of the stock of the company held by residents and nonresidents is a debt due and payable by the company, or only collectible from the shareholders; and, secondly, if the tax be a debt due and payable by the company, is it a prior lien over the claims of all other creditors? These taxes cannot, of course, be considered a debt due by the company, unless they are made so by statute, because the shares of stock are the property of the shareholder, and under the Code must be valued to him. But the Code further provides that the shares of stock of corporations owned by residents or nonresidents of the state shall be valued at their actual cash value, but the tax assessed on such stock shall be levied and collected from the corporation, and may be charged to the account of such nonresident stockholders, and shall be a lien on the shares held by them, respectively." Code Pub. Gen. Laws 1888, art. 81, § 138, as to nonresidents, and section 141, as to residents. The statute thus makes explicit provision for a certain and prompt method of collecting the taxes due upon shares of stock, whether held by residents or nonresidents, by imposing upon the corporation the obligation and the duty to pay the tax itself. In the case of shareholders not residing in this state, it is the only mode in which the state can reach their shares for taxation. *Nat. Bank v. Kentucky*, 9 Wall. 353, 19 L. Ed. 701. And when this court came to deal with the same question (*American Coal Co. v. Co. Com'rs Al. County*, 59 Md. 197) we held that, the statute having created the duty and obligation to pay when the shares are assessed to the individual owners, that duty and obligation on the part of the corporation may be enforced by a proper action at law. If these taxes are a debt due by the corporation, they are a debt due by it and to be paid by it, regardless of any dividends or profits

payable by the corporation to the shareholder and out of which it might be reimbursed. *New Orleans v. Houston*, 119 U. S. 265, 7 Sup. Ct. 198, 30 L. Ed. 411. Though this is conceded to be so whilst the corporation is a going concern, the contention is that, when the company becomes insolvent, and its property has passed into the hands of receivers, such taxes cannot be held to be a debt of the corporation for the payment of which its assets are liable. In reply to this, it may be observed that the tax is, by the express terms of the statute, charged to and made payable by the corporation. If this be so, and if the tax was due at the time of the insolvency, then obviously the insolvency could in no manner affect the right of the city to demand payment out of the company's assets. * * * These taxes were due when the company's assets passed into the hands of the receivers, and, being then due, the act of 1892 directs that they shall be paid and satisfied by the officer or person selling under judicial process the property, real or personal, upon which such taxes are payable. As these taxes were due and payable when the company became insolvent, they are, in our opinion, a prior lien upon the assets in the hands of the receivers, and must be paid out of the general fund, and if that should be insufficient, the balance must be paid out of the special fund."

We are not able to discriminate that case from the present. It will be observed that the point of time when the taxes in the Casualty Insurance Company Case were determined to be a prior lien upon the assets of the company was when the insolvent company's assets passed into the hands of the receivers, and in this case that occurred on February 10, 1906. The demand of one-fourth in amount of the bondholders that the sale should be made was duly made November 24, 1906. It is true that the tax upon the capital stock of the company was paid October 10, 1906, by whom does not appear; but this payment after a consummated default, by whomsoever made, or upon whatever authority, cannot obliterate the default, or divest any right to sell founded thereon. We are therefore of the opinion that this default, followed by the proper demand of one-fourth in amount of the bondholders, entitled the Union Trust Company, as trustee, to a decree of sale under its mortgage, and that there was error in refusing such decree, and in directing a sale by the receivers subject to said mortgage.

Other interesting questions, involving the effect of the dissolution and insolvency of the Belvidere Building Company upon the maturing of the mortgage bonds, under the peculiar terms and stipulations of the mortgage in reference thereto, and as to the effect upon intending purchasers, of the somewhat unusual provisions of the decree requiring the furnishing of a working capital of \$35,000 and a stipulated sum for repairs, by the person

reported as purchaser, as a condition of ratification of the sale, were argued with great ability; but, in view of the conclusion we have reached, it will not be necessary to consider those questions.

Decree reversed, and cause remanded that a decree may be passed in conformity with this opinion; the costs above and below to be paid out of the proceeds of sale..

On Motion for Rehearing.

Since filing the opinion in this case, the appellees have made a motion for reargument, and in the brief filed in support of their motion they contend that we reached the wrong conclusion as to the existence of any such default by the Belvidere Building Company as gave the appellant the right to a decree for sale under its mortgage. The authorities relied on are *Hull v. Southern Development Co.*, 89 Md. 8, 42 Atl. 943, and *Baltimore v. Chester Steamboat Co.*, 103 Md. 400, 63 Atl. 810. It is contended upon these cases that until suit had been brought for recovery from the Belvidere Building Company of the taxes of 1904 and 1905, and judgment obtained therefor, such taxes were not liens upon the property of the hotel company. *Hull v. Southern Development Co.*, 89 Md. 8, 42 Atl. 943 was an appeal by a tax collector from an order setting aside a sale of a corporation's real estate by such collector for taxes upon shares of stock assessed to the owners of such shares; the collector having attempted to sell under a distraint. That case did not decide whether or when such taxes became liens upon the property of the corporation, nor when they became due and in arrear. It only decided, in the case of a going concern, that upon failure to pay such taxes the property owned by the corporation cannot be distrained by the collector and sold by him, and that the only method by which the collector could enforce payment was by obtaining judgment and issuing execution thereon; but it did not decide when such taxes become liens on the property of the corporation, nor did the case of *Baltimore v. Chester Steamboat Co.*, 103 Md. 400, 63 Atl. 810, so decide. But section 47 of article 81 of the Code provides that: "All state, county, or municipal taxes shall be liens on the real estate of the party indebted from the time the same are levied." The *Casualty Insurance Company's Case*, 82 Md. 564, 34 Atl. 778, decided that the taxes assessed and levied upon the shares of capital stock of a corporation are "a debt due by the corporation, and to be paid by it regardless of any dividends or profits payable by the corporation to the shareholder, and out of which it might be reimbursed." The taxes upon these shares of stock were therefore debts due by the hotel company, and the hotel company was "the party indebted" for payment of such taxes, and by section 156 of article 81 such corporation is given "a lien on the shares of stock therein held by such stockholders respectively until paid," just as the state,

county, or municipality is given a lien on the real estate of the corporation charged with the payment of such taxes.

Under sections 150 and 159 of article 81, the state tax commissioner is required annually, by the 15th day of May in each year, to assess the shares of stock of all incorporated institutions, as of the 1st day of January next preceding, and to levy the state taxes prescribed by law upon the same; and in *Baltimore v. Chester River Steamboat Co.*, 103 Md. 408, 63 Atl. 810, it was held that county and municipal taxes were within the reason of the law, and the reason applies to these with the more force, since they are the larger and more burdensome part of taxation under our system. In this case the taxes for 1904 were levied at least as of May 15, 1904, and those of 1905 as of May 15, 1905, and were made liens on the real estate of the hotel company from the respective dates of their levy, though not due and in arrear for the purposes of collection until January 1, 1905, and January 1, 1906, respectively. The bill was filed in this case February 10, 1906. There were therefore two clear defaults, separate and distinct under article 4 of the mortgage, in suffering or allowing any lawful tax or charge to fall in arrear, or any lien to be obtained on the property of the corporation whereby the security of said mortgage might be impaired, and in allowing said lien to continue for the period of nine months. The court did not say, in the *Casualty Company's Case*, that the taxes only became a lien on the property of the company at the date when it became insolvent, and the writer of the opinion in this case is responsible for the inaccurate and misleading language which erroneously referred to the date of insolvency as the date of the creation of the lien. What the court actually did say in the *Casualty Insurance Company's Case* was this: "As these taxes were due and payable when the company became insolvent, they are, in our opinion, prior liens upon the assets in the hands of the receivers." The court said this was so, because, as it had just before said, "these taxes being then overdue, Acts 1892, p. 722, c. 518, directs that they shall be paid and satisfied by the officer or person selling under judicial process the property, real or personal, upon which such taxes are payable." It was sufficient in that case to determine that the taxes were an existing lien at that date, without determining for how long previously they had been a lien; but the only logical reason why these were liens was because they constituted a pre-existing lien upon the property from the date of levy, which lien Acts 1892, p. 722, c. 518, transferred to the proceeds of sale.

In the brief on the motion for reargument, it was also contended there was no sufficient request of the bondholders upon the trustee to exercise the power of sale. Article 4 of the mortgage provides two modes of procedure in event of default by suffering any

lien to be obtained whereby the security of the mortgage might be impaired, or in default of any of the covenants or stipulations therein: (1) Upon request of one-fourth of the bondholders in amount, to enter upon and take possession of the mortgaged property and to conduct and manage it through servants or receivers applying the income to expense of management, then to interest on bonds, and then to principal as the bonds should mature. (2) Or, with or without entering into possession, upon like request from bondholders, to proceed to sell and dispose of all the real estate, corporate rights, and franchises and to convey the same to the purchaser or purchasers free from all and every trust thereby created. The trustee entered upon the filing of the bill of February 10, 1906, and has ever since continued to conduct and manage the affairs of the company, through its receivers appointed under that decree and the subsequent orders in the consolidated cases. On November 9, 1906, the Union Trust Company, the holders of more than one-fourth in amount of said bonds, by its written request instructed the trustee, because of the happening of certain defaults and contingencies, to declare the whole principal sum of said bonds to be due, and to proceed to sell the mortgaged property, and the trustee on the same day made the required declaration, and filed a petition for an order to sell, and on December 6th filed an amended petition, asking that the hotel company be dissolved, and on December 20th these petitions were dismissed by the decree for sale, from which decree the Union Trust Company and the Union Trust Company, trustee, both appealed.

The appellees contend that the request to exercise the power of sale should have set out as the ground the default in nonpayment of taxes on the capital stock; but we have seen that article 4 allowed this request to be based upon the nonperformance of any covenant or stipulation of the mortgage, and the request made not only referred in general terms to certain defaults, but specifically mentioned, as one of the grounds of said request, the insolvency of the company and the consequent forfeiture of its rights and franchises, this insolvency having been admitted by the company in its answer to the petition of Laurence Perin, and the receivers previously appointed having been reappointed by the order passed on said petition, March 21, 1906, with all the powers of receivers appointed under the law relating to the dissolution of insolvent corporations.

The appellees contend that the only grounds upon which the principal of the bonds can be declared matured are set out in articles 7, 13, and 16; those in article 7 being the event of sale by judicial proceedings or the entry of a decree for sale under the mortgage, that in article 13 being the failure to keep in force the insurance therein provided

for, and that in article 16 being the failure to complete the hotel building with reasonable diligence. But their argument overlooks, as we have already shown, the fact that article 4 provides that, upon default in any of the conditions and stipulations of the mortgage, upon written request of one-fourth of the bondholders in amount, the trustee might proceed to sell and convey the mortgaged property, corporate rights, and franchises, free from every trust thereby created. The mortgage must be construed, like other deeds, most strongly against the grantors, and effect must be given to both the modes above provided for making a sale free from all trusts under said mortgage, and upon reconsideration we are of opinion that there was a sufficient request for the exercise of the power of sale. But, apart from this view of the case, we are all clearly of the opinion, notwithstanding the language of article 7, that "in no other case and for no other purpose, except as provided in this article and in articles 13 and 16 hereof, shall the principal sum of any of said bonds become due and payable before the date fixed in said bonds for the payment thereof"; that the adjudicated insolvency of the hotel company operated to mature the bonds in question at the option of the holders thereof, and to entitle the Union Trust Company, which has exercised that option, to decree for a sale under its mortgage. This we think, must be so *ex necessitate rei*, because, if it be not so, the mortgagee would be precluded without its consent from proving its claim as a creditor against the assets in the hands of the receivers. If a sale is made under a decree upon its mortgage, and that results, as it may in a deficiency of proceeds of sale to pay their mortgage debt, they can participate in the distribution of the general assets in the receiver's hands, and thus be put upon an equality with the other creditors of the insolvent hotel company in accordance with the fixed policy of our insolvent laws; but, if they are refused a decree for the sale of their collateral security, the hotel building and lot, and a sale is decreed subject to their mortgage, the general assets will be distributed amongst other creditors, and, should a default be made hereafter, at any period while these bonds are unpaid, and a deficiency occur upon any subsequent sale made under their mortgage, these bondholders will be remediless. This would be a most inequitable exercise of the powers of an equity court. These mortgage bonds have 16 years yet to run. The mortgage debt is a large one, even in these days of magnificent enterprises and bold ventures. The business for which alone the mortgaged building was designed and is adapted is in itself a precarious and uncertain one, largely dependent upon the skill and tact of the manager of the business. The hotel company is no longer in existence, and all personal, or rather

corporate, obligation for the payment of these bonds is destroyed and lost. The mutuality of the contract between the mortgagor and the mortgagee is destroyed.

In England the courts have, in a number of cases, held that insolvency matures the outstanding obligations of a corporation. In *Hodson v. Tea Co.*, 14 Ch. Div. 862, the court said: "It appears to me that, when a company comes to be wound up, the arrangement for the continuance of a loan for a certain time necessarily comes to an end; the money becomes immediately payable and the security immediately enforceable." And to like effect are *In re Panama New Zealand Co.*, 5 L. R. Ch. Ap. 10, and *Hubbuck v. Helmes*, 56 L. J. Ch. 539, and, in this country, *Harding v. Mill River Woolen Mfg. Co.*, 34 Conn. 458, and *People v. Globe Mutual Life Ins. Co.*, 91 N. Y. 179. In the last-named case, the court said: "What had happened was a dissolution of the contract by the sovereign power of the state, rendering performance on either side impossible, and this result was within the contemplation of the parties, and must be deemed an unexpressed condition of their agreement." In *Jones on Mortgages* (6th Ed.) vol. 2, p. 1175, it is said: "The nature of the security may be such that an event not contemplated, or provided for by the parties, may give this right [the right to foreclose upon an event other than the lapse of time], as where the mortgage secures the fulfillment of an executory agreement which is to run for a fixed period, and the insolvency of the mortgagor puts it out of his power to fulfill the agreement; and therefore this works a breach of it, and gives the mortgagee the right to foreclose immediately." Without discussing the cases in detail, but after careful consideration of the criticism by the appellees of the English cases cited and of the case from 34 Conn., as applicable to this case, we are of opinion, for the reasons stated, that the adjudication of the insolvency of the hotel company, under the circumstances of this case, matured the mortgage bonds held by the Union Trust Company, and that it is entitled to a decree for sale under the first mortgage. It is neither necessary nor desirable for us to hold broadly, and as a general rule, that the mere insolvency of a mortgage corporation ipso facto matures the mortgage debt, or authorizes the mortgagee at his election to treat it as mature. It is sufficient for our case to hold that the fact that the mortgagor hotel company was judicially declared to be insolvent, in a proceeding properly instituted for its dissolution and the liquidation of its affairs, authorized the mortgagee to proceed at once to exhaust its security by a sale of the mortgaged property, in order to determine the basis upon which it could participate in the liquidation.

The motion for reargument is overruled.

(105 Md. 478)

STATE v. CUMBERLAND & P. R. CO.

(Court of Appeals of Maryland. April 3, 1907.)

1. CORPORATIONS—FORFEITURE OF CHARTER—PLEADING—ANSWER—DEMURRER.

Though Code Pub. Gen. Laws, art. 23, § 367 et seq., prescribing the procedure for the forfeiture of the charter of a corporation, does not in terms authorize the filing of demurrers to an answer to the petition, such a procedure is proper.

2. STATUTES—SUBJECTS—TITLE—SUFFICIENCY.

Acts 1906, p. 413, c. 257, entitled "An act to amend chapter 469 of the Acts of 1849, entitled, 'An act to incorporate the Cumberland and Pennsylvania Railroad Company,' and to amend the charter of said company so as to prohibit it from allowing its tracks to connect with, or its tracks, right of way or other property, to be used by the Baltimore and Ohio Railroad Company or any other railroad company which is operated, owned or controlled by, or whose railroad property is leased to the said Baltimore and Ohio Railroad Company, except under certain conditions," and providing that, on the railroad continuing to do the acts prohibited, the state's attorney for Allegany county shall file a petition in the circuit court for the forfeiture of the charter and franchises of the company, and directing the court, on the ascertainment of the fact of the commission of the prohibited acts, to decree the forfeiture of its charter, is violative of Const. art. 3, § 29, providing that every law shall have but one subject, which shall be expressed in its title.

3. COMMERCE—POWER TO REGULATE—RESTRICTIONS ON STATES.

Acts 1906, p. 413, c. 257, amending the charter of the Cumberland & Pennsylvania Railroad Company so as to prohibit it from allowing its tracks to connect with the tracks of the Baltimore & Ohio Railroad Company, which passes through other states, unless the latter shall arrange its freight charges on coal delivered to it from the former, that the combined freight charges of the two companies shall not exceed the lowest freight charges on coal shipped to the same destination over the line of the Baltimore & Ohio Railroad Company from any point in Pennsylvania or West Virginia, which is as far or further distant from the destination as the point in Allegany county, where the coal is delivered to the Cumberland & Pennsylvania Railroad Company, is invalid as an attempt to regulate interstate commerce.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Commerce, §§ 7, 8, 54-70.]

4. APPEAL AND ERROR—DECISIONS REVIEWABLE—NATURE OF SUBJECT-MATTER—FORFEITURE OF CORPORATE CHARTER.

Under Acts 1906, p. 413, c. 257, amending the charter of the Cumberland & Pennsylvania Railroad Company, and providing that the mode of proceeding for a forfeiture of its charter for violation of its provisions shall be the same as is now provided by the General Laws of the state in such cases, and providing that, after the decree of forfeiture has been passed, such proceedings shall be had as are now provided under the General Laws of the state in such cases, and Code Pub. Gen. Laws, art. 23, § 374, providing that either party may appeal from any judgment or determination of the court had on petitions for forfeiture of corporate charters, an appeal may be taken from an order dismissing a petition for the forfeiture of the charter of the Cumberland & Pennsylvania Railroad Company under the act of 1906.

Appeal from Circuit Court, Allegany County; A. Hunter Boyd and Robert B. Henderson, Judges.

Petition by the state against the Cumberland & Pennsylvania Railroad Company. From an order dismissing the petition, the state appeals. Affirmed.

Argued before BRISCOE, PEARCE, SCHMUCKER, BURKE, and ROGERS, JJ.

William C. Devecmon and William S. Bryan, Jr., Atty. Gen., for the State. Robert H. Gordon, Ferdinand Williams, and Edgar H. Gans, for appellee.

SCHMUCKER, J. This is an appeal from an order of the circuit court for Allegany county, dismissing a petition filed on behalf of the state of Maryland against the Cumberland & Pennsylvania Railroad Company. The petition was filed under chapter 257, p. 413, of the Acts of 1906, for the purpose of procuring a decree of forfeiture of the charter of the railroad company for its refusal to comply with the provisions of that act. To this petition the railroad company filed an answer, containing 22 paragraphs, to all of which the state demurred, except the fourteenth and twentieth, to which it replied. At the hearing of the demurrers, the court, mounting up to the first error in the pleadings, held the original petition to be bad, and, the state refusing to amend, the order was passed dismissing the petition, and the state appealed.

The petition avers that the railroad company was incorporated by the state by the special act (chapter 469 of the Acts of 1849) which reserved to the Legislature the right to alter, amend, or annul at its pleasure the charter thereby granted, for the main purpose of constructing a railroad into the coal fields of Allegany county to promote their development. That by Acts 1906, p. 413, c. 257, the charter of the railroad company was amended, by adding thereto the following provision: "The Cumberland and Pennsylvania Railroad Company shall not, after the 31st day of May next, permit its tracks to connect with the tracks of the Baltimore and Ohio Railroad Company, and shall not permit its tracks, right of way or other property to be used by the said Baltimore and Ohio Railroad Company, or by any other railroad company leased, operated, owned or controlled by the said Baltimore and Ohio Railroad Company, unless the said Baltimore and Ohio Railroad Company shall on or before said date so arrange its freight charges upon coal delivered to it from the Cumberland and Pennsylvania Railroad Company for shipment over its lines, that the joint and combined freight charges of the said two railroad companies shall not exceed the lowest total freight charges upon coal shipped to the same destination over the line of the Baltimore and Ohio Railroad Company, or over the line of any railroad company leased, operated, owned or controlled by the said Baltimore and Ohio Railroad Company from any point in the state of Pennsylvania, or West Virginia,

which is as far or further distant from such destination as or than the point in Allegany county, at which such coal is delivered to the Cumberland and Pennsylvania Railroad Company; the intention of this provision being to provide that shippers of coal from Allegany county, in the state of Maryland, shall not be required to pay greater freight charges than shippers of coal from the states of Pennsylvania and West Virginia are required to pay upon their coal hauled equally far or further." That the said act of 1906 also made it the duty of the state's attorney for Allegany county, on and after June the 1st of that year, to cause inquiry to be made whether the Cumberland & Pennsylvania Railroad Company was then permitting its tracks to connect with, or its right of way to be used by, the Baltimore & Ohio Railroad Company, or any other railroad company, leased, operated, owned, or controlled by it, in violation of the terms of said act, and required him, if he had reason to believe on or after said date that the Cumberland & Pennsylvania Railroad Company was not complying with the terms and provisions of the act, to institute proceedings in the circuit court for Allegany county to ascertain whether the said railroad company had been guilty of such misuse or abuse of its corporate powers and franchises as would by law authorize and make proper the forfeiture of its charter, corporate powers, and franchises; "the mode of procedure to be the same as is now provided by the General Laws of this state in such cases." That it was further provided by the same act that if, at the trial of any such proceeding instituted by the state's attorney under its provisions, it should be judicially determined that the Cumberland & Pennsylvania Railroad Company was permitting its tracks to connect with those of the Baltimore & Ohio Railroad Company, or of any railroad company leased, operated, owned, or controlled by it, in violation of the provisions of the act, then it should be the duty of the court to decree the forfeiture of the charter of the Cumberland & Pennsylvania Railroad Company, "and that thereafter such proceedings shall be had as are now provided under the General Laws of this state in such cases." The petition then charges that the state's attorney has since June 1, 1906, caused inquiry to be made whether the Cumberland & Pennsylvania Railroad Company is permitting its tracks to connect with, and its right of way and other property to be used by, the Baltimore & Ohio Railroad Company, or any other company leased, operated, owned, or controlled by it, and that he has reason to believe that the Cumberland & Pennsylvania Railroad Company has been, and is now, permitting its tracks to be so connected and its right of way and other property to be so used, in violation of the provisions of the act, and that it has never complied therewith, although the time limited by the act for its

compliance with the provisions thereof has long since expired, and that by reason thereof it is liable to a forfeiture of its charter and franchises. A certified copy of Acts 1906, p. 413, c. 257, is filed with the petition as an exhibit, and an inspection of the copy shows that the provisions of the act have been stated with substantial accuracy in the petition.

It is unnecessary, for the purposes of this opinion, to state fully the contents of the answer of the railroad company to this petition for the forfeiture of its charter. Its salient features are the admission that the company has failed to comply with the requirements of Acts 1906, p. 413, c. 257, and the assertion that the act is invalid because of its alleged unconstitutionality. It is insisted in the answer that the act is in conflict with the provision of article 3, § 29, of the state Constitution, which requires that every law "shall embrace but one subject and that shall be described in its title"; and that it is also invalid, under clause 3 of section 8 of article 1 of the Constitution of the United States, because it attempts, in effect, to regulate interstate commerce. The state was, in our opinion, entitled to respond as it did by way of demurrer to the several defenses set up by the answer. The General Laws of this state, prescribing the method of procedure for the forfeiture of the charter of a corporation (article 23, § 367 et seq.), do not in terms authorize the filing of demurrers to an answer to the petition, but that course was pursued with the acquiescence of this court in the cases of *State v. Consolidation Coal Co.*, 46 Md. 1, *State v. Easton Social Club*, 73 Md. 100, 20 Atl. 783, and *Fraternal Alliance v. State*, 77 Md. 557, 28 Atl. 1040, and it may now be regarded as a correct mode of pleading. The demurrers, to the answer having thus been properly filed, it becomes our duty to inspect the whole proceeding and mount up to the first fault in pleading. The question of the constitutionality of Acts 1906, p. 413, c. 257, on which the state's petition relies, is thus brought before us for determination.

We will first consider whether the statute under consideration is obnoxious to section 29 of article 23 of the Constitution of Maryland. Few, if any, other provisions of the fundamental law of our state have been before us for construction as frequently as this one. We have always given it a broad and liberal construction, and have generally been able to uphold the validity of the statutes alleged to conflict with its provisions, and thus effectuate the legislative intent. It has, accordingly, been often said by this court that the true meaning of this section of the Constitution is that, "if the several sections of the law refer to and are germane to the same subject-matter, which is described in its title, it is considered as embracing but a single subject and as satisfying the Constitution in this respect," and that, "while

the title must indicate the subject of the act, it need not give an abstract of its contents, nor mention the means by which the general purpose is to be accomplished." *Mayor, etc., v. Reitz*, 50 Md. 574; *Drennen v. Bank*, 80 Md. 316, 80 Atl. 655. Yet, as was recently said by us in *Kafka v. Wilkinson*, 99 Md. 241, 57 Atl. 617, and *State v. Savings Bank*, 103 Md. 200, 63 Atl. 481, in construing this constitutional provision, the courts "have not hesitated to strike down legislative acts that were clear infractions of its purpose and object. These have been declared to be two-fold; the first is to prevent the combination in one act of several distinct and incongruous subjects, and the second is that the Legislature and the people of the state may be fairly advised of the real nature of impending legislation." Or, as was said in *Stiefel v. Md. Inst. for the Blind*, 61 Md. 148: "Publicity and a knowledge of the true effect and operation of every bill brought before the Legislature are the great safeguards against ill considered and improper legislation. The provision in question is one among many others designed to promote those objects." And in *Luman v. Hitchens*, 90 Md. 23, 44 Atl. 1052, 46 L. R. A. 393, we said: "Though the title need not contain an abstract of the bill, nor give in detail the provisions of the act, it must not be misleading by apparently limiting the enactment to a much narrower scope than the body of the act is made to compass; nor must there be cloaked in the enactment any foreign, discordant, or irrelevant matter not disclosed in the title."

When tested by the principles thus announced, how does the act now before us stand? Its title is as follows: "An act to amend chapter 469 of the Acts of 1849 entitled 'An act to incorporate the Cumberland and Pennsylvania Railroad Company,' and to amend the charter of said company so as to prohibit it from allowing its tracks to connect with, or its tracks, right of way or other property, to be used by the Baltimore and Ohio Railroad Company, or by any other railroad company which is operated, owned or controlled by, or whose railroad property is leased to, the said Baltimore and Ohio Railroad Company, except upon certain conditions." The contents of the first section of the act, if otherwise unobjectionable, would be fairly germane to the title, as they provide that, after a specified date, the railroad company shall not, except upon certain conditions therein specified, permit its tracks to connect with or its right of way or other property to be used by the Baltimore & Ohio Railroad Company or any other railroad company leased, controlled, or operated by it. The second section provides that, upon the railroad company continuing to do the acts prohibited by the first section the state's attorney for Allegany county shall file a petition in the circuit court for the forfeiture of the charter and franchises of the company, "the mode

of procedure to be the same as is now provided by the General Laws of this state in such cases"; and the third section affirmatively directs the court, upon the ascertainment of the fact of the commission of the prohibited acts by the railroad company, to decree the forfeiture of its charter. These last two sections do not in any sense provide for an amendment to the charter of the railroad company, but they in effect operate to make, quoad the proceedings authorized by them, radical changes in or departures from the mode of proceeding prescribed by the General Laws of this state relating to the forfeiture of charters of corporations. These general laws are found in article 23, § 367 et seq., of the Code of Public General Laws and they require the authority of the Governor of the state to be given to the state's attorney to institute proceedings for the forfeiture of the charter of a corporation, and, if in such proceedings the legal cause of forfeiture be shown to exist, the court is authorized, if it shall be of the opinion that the public interests require it, to decree the forfeiture of the charter. By sections 2 and 8 of the act now under consideration, not only is the protection of the Governor's discretion as to the advisability of instituting the proceeding withdrawn, but, upon proof of the existence of the situation described in the statute, the court is shorn of the judicial authority and function conferred on it by the General Laws of the state (section 370, art. 23, Code Pub. Gen. Laws) to determine whether the public interests require a forfeiture, and it is imperatively directed to decree the forfeiture of the charter of the corporation against which the proceeding was instituted. Of these radical and important provisions of the act, its title contains no mention or intimation. That defect in the title in our opinion rendered at least the second and third sections, under which these proceedings were instituted, invalid, because obnoxious to the provision under consideration of the Constitution of Maryland, and afforded the court below proper ground for dismissing the petition.

We will next consider whether Acts 1906, p. 413, c. 257, may be fairly considered as an attempted regulation of interstate commerce, and for that reason invalid. We do not deem it important to here review the successive steps of judicial construction by which the courts have arrived at the interpretation now given to clause 3 of section 8 of article 1 of the federal Constitution, by which the power to regulate interstate commerce was conferred upon Congress. It is sufficient to say that it is now firmly settled by the decisions of the Supreme Court of the United States that, while a state may regulate without federal interference such commerce as begins and ends within its own limits and is not connected with a continuous transportation through or into other states, it is powerless to fix and enforce rates or

charges, even as between points in its own territory, for that commerce which crosses state lines under a continuous transportation. *Wabash, St. L. & Pac. R. R. Co. v. Illinois*, 118 U. S. 557, 7 Sup. Ct. 4, 30 L. Ed. 244; *Hanley v. Kansas City & Southern R. R. Co.*, 187 U. S. 617, 23 Sup. Ct. 214, 47 L. Ed. 333; *C. & C. Bridge Co. v. Kentucky*, 154 U. S. 204, 14 Sup. Ct. 1087, 38 L. Ed. 962; *N. & W. R. R. Co. v. Pennsylvania*, 136 U. S. 120, 10 Sup. Ct. 958, 34 L. Ed. 394; *St. Clair County v. Interstate Transfer Co.*, 192 U. S. 454, 24 Sup. Ct. 300, 48 L. Ed. 518; *Central R. R. of Georgia v. Murphey*, 196 U. S. 202, 25 Sup. Ct. 218, 49 L. Ed. 444. It follows, as a matter of course, that, if a state has no power to regulate charges for interstate commerce by direct legislation, it can neither authorize nor require corporations under its jurisdiction to do so. In *Wabash, St. L. & Pac. R. R. Co. v. Illinois*, supra, it was held that a state had no power to pass laws intended to regulate interstate commerce, even in the absence of legislation by Congress upon the subject; but that is not material to the present case, as it is a well-known fact that Congress, by the enactment of the several laws known as "Interstate Commerce Acts," has undertaken to provide for the regulation of charges for interstate commerce.

Acts 1906, p. 413, c. 257, now under consideration, does in our opinion attempt to regulate charges for interstate commerce, and is for that reason also invalid. It is apparent from the recitals contained in its preamble that the alleged abuse which it was intended to correct was the rate of charges in force at the date of its passage for the transportation of coal over the Cumberland & Pennsylvania and Baltimore & Ohio Railroads from points in Allegany county to tidewater points. It sought to correct the abuse by requiring the Cumberland & Pennsylvania Railroad Company to procure, by a rearrangement of the joint freight rates of the two railroad companies, such charges to be no greater than those made by them for the transportation of coal shipped over their lines to the same tidewater from equally distant points in Pennsylvania and West Virginia. No testimony was taken in the case showing the precise course and location of the railroads mentioned in the act, but a map used by both sides in the argument before us showed the location of the Cumberland & Pennsylvania Railroad tracks and their points of connection with other railroads; and the course through the states of Maryland and West Virginia, followed by the Baltimore & Ohio Railroad, from Allegany county to tidewater, has been so long established and is so well known to the residents of this state that it may be treated as a "geographical feature of the country," and its location held to be a matter of common knowledge and regarded as having been familiar to the Legislature that passed the act. It would not be possible to carry coal from Allegany county

to tidewater points over these railroads, without passing for considerable distances through other states than Maryland. Such transportation of coal, therefore, from Allegany county, as well as from Pennsylvania and West Virginia, to tidewater, would constitute interstate commerce, and it would be beyond the power of this state to regulate or prescribe a rate of charges therefor. Tidewater points are not mentioned in the body of the act as the destination of the shipments of coal therein referred to, but the plain declarations contained in its preamble of the alleged abuse to be corrected by its passage and the condition imposed by its first section, that the "joint and combined freight charges of the said two railroads" shall not exceed the limit therein mentioned, make apparent the result sought to be accomplished by its enactment.

The appellant's counsel concede that a state cannot pass a statute which amounts to a regulation of interstate commerce, or prescribe rules for conducting it; but they rely upon the proposition, frequently announced by the federal courts, and recognized and relied on by us in *Stevens v. State*, 89 Md. 669, 43 Atl. 929, that a state law is not rendered invalid because it incidentally or remotely affects interstate commerce or its instruments. They also insist that, as the state reserved to itself the power to alter or repeal at its pleasure the charter of the appellee, it could exact any condition it saw fit as the price of allowing that charter to continue in force, and had therefore the right to say to the appellee by Acts 1906, p. 413, c. 257, that its charter would be forfeited unless it and its confederate and ally would carry coal to a common destination on as favorable terms from Allegany county as from points in Pennsylvania and West Virginia equally distant with it from that destination; or, in other words, that the state might in that manner indirectly limit, which is to regulate, the rates for interstate transportation of coal from Allegany county, although it was confessedly powerless to do so by direct legislative enactment. To that contention we cannot yield our assent. The great majority of federal cases relied on by the appellant in this connection prove upon examination to have upheld laws passed by the several states in exercise of the police power for the protection of the persons and animals within their borders from the introduction of contagious diseases or dangerous or fraudulent commodities, or for preventing the desecration of the Sabbath or injuring public morals, and to have had only an incidental relation to interstate commerce. The case of *B. & O. Railroad Co. v. Maryland*, 21 Wall. (U. S.) 456, 22 L. Ed. 678, which held valid the stipulation contained in the charter of that railroad company, requiring it to pay to the state one-fifth of its gross receipts from the passenger traffic on its Wash-

ington Branch, comes nearer than any other case relied on by the appellant to the one now before us; but in that case, which was admitted by the court to be a close one, the inability of the state to pass any act amounting to a regulation of interstate commerce was asserted by the Supreme Court, and the railroad company was held liable to the state for the sum in controversy, upon the ground that it constituted, not a tax or restriction on the travel or commerce, but a bonus, exacted for the grant of a franchise, to which the railroad company had agreed by accepting the terms of the charter. An accurate statement of the law relating to this subject is found in *McLean v. Denver & Rio Grande R. R. Co.*, 203 U. S. 50, 27 Sup. Ct. 3, 51 L. Ed. —, where it is said by the Supreme Court: "It will only be necessary to refer to a few of the many cases decided in this court holding valid enactments of Legislatures having for their object the protection, welfare, and safety of the people, although such laws may have an effect upon interstate commerce. *M. K. & T. Railroad Co. v. Haber*, 169 U. S. 613, 635, 18 Sup. Ct. 488, 42 L. Ed. 878; *Chicago, Milwaukee, etc., Railroad Co. v. Solan*, 169 U. S. 133, 18 Sup. Ct. 289, 42 L. Ed. 688; *Pennsylvania Railroad Co. v. Hughes*, 191 U. S. 477, 24 Sup. Ct. 132, 48 L. Ed. 208. The principle decided in these cases is that a state or territory has the right to legislate for the safety and welfare of its people, and that right is not taken from it because of the exclusive right of Congress to regulate interstate commerce, except in cases where the attempted exercise of authority by the Legislature is in conflict with an act of Congress, or is an attempt to regulate interstate commerce." We have already said that we regard the passage of the act whose validity is called in question in the present case as a plain attempt to regulate a traffic which is essentially interstate commerce, although the regulation is sought to be indirectly accomplished by an effort to amend the charter of the appellee. We must not be understood, in holding the act to be invalid because unconstitutional in the respects mentioned in this opinion, as passing upon or determining the merits of other defenses to the petition which may be relied on in the answer.

The appellee moved to dismiss the appeal because Acts 1906, p. 413, c. 257, did not provide for an appeal from the action of the lower court on the petition which it authorized to be filed for vacating the appellee's charter. We think the act does provide for such an appeal. Section 1 provides, generally, that mode of proceeding shall be the same as is now provided by the General Laws of the state in such cases, and section 2 specifically provides that, after the decree has been passed, such proceedings shall be had as are now provided under the General Laws of this state in such cases. Now, if we turn

to article 23, § 367 et seq., Code Pub. Gen. Laws, and examine the General Laws of the state regulating the proceedings for the forfeiture of corporate charters, we find it distinctly provided, in section 374, that either party may appeal from any judgment or determination of the court had on petitions filed for forfeiture, under this article, within 30 days from the date of the judgment or determination of the court. The motion to dismiss the appeal must therefore be overruled.

For the reasons mentioned in this opinion, the order appealed from must be affirmed. Order affirmed.

(105 Md. 581)

SHARP v. SHARP.

(Court of Appeals of Maryland. April 4, 1907.)

DIVORCE—GROUNDS—CRUELTY.

In an action for divorce a mensa et thoro, the evidence showed that defendant repeatedly struck plaintiff, threatened to kill her, pointed a loaded pistol and threatened to shoot her, threw her over a chair, while she was in a delicate condition, so that she fell to the floor, threatened to kill her so repeatedly that she believed he would do so, and also kill her child, struck her and her child one night in bed, and repeated the blows in the morning. Plaintiff had often forgiven him, but finally felt that the safety of herself and child required that she should leave him, which she did. *Held*, that the cruelty of treatment warranted a decree.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Divorce, §§ 62-83.]

Appeal from Circuit Court No. 2 of Baltimore City; Pere L. Wickes, Judge.

Action by Emma O. Sharp against John N. Sharp. From an order dismissing the bill, plaintiff appeals. Reversed and remanded.

Argued before BRISCOE, BOYD, PEARCE, SCHMUCKER, and BURKE, JJ.

James P. Gorter, for appellant. S. S. Field, for appellee.

BRISCOE, J. This is a bill in equity filed by the wife, Emma O. Sharp, against her husband, John N. Sharp, to procure a divorce a mensa et thoro, on the ground of alleged cruelty of treatment and excessively vicious conduct. The defendant answered the bill of complaint, and neither admitted or denied its allegations, but asked for full proof thereof. The parties were married on the 29th of January, 1902, in the city of Baltimore, and had two children. They lived together at various places until April 13, 1904, when they separated, and she went to the home of her parents, where she has since resided. The bill was filed on the 14th of April, 1904, and the principal question for our consideration is one of fact; that is: Does the proof disclosed by the record sustain the charge of such cruel treatment or excessively vicious conduct on the part of the husband, within the meaning of section 37, art. 16, Code Pub. Gen. Laws, as to entitle the wife

to a divorce? The case was heard on bill, answer, and proof, in the circuit court No. 2 of Baltimore City, the wife was denied the relief sought, and the bill was dismissed.

We cannot concur in the conclusion reached by the court below. We are of the opinion, after a careful review of the whole testimony, that the conclusion there announced is against the decided weight of the testimony, and the decree of the court below must be reversed.

We will now state the reasons which require us to make this decision. In the case of *Hawkins v. Hawkins*, 85 Md. 104, 3 Atl. 749, this court said, in stating what state of facts will authorize the granting of a divorce a mensa et thoro for cruelty of treatment and excessively vicious conduct: "The rule to be gathered, from all the authorities that furnish safe guides upon this delicate subject, is that the ground of complaint must be grave and weighty, showing to the entire satisfaction of the court the existence of such state of things as render it impossible that the duties of the married life can be discharged. Where the complaint is of cruel treatment, the mere austerity of temper, petulance of manners, rudeness of language, a want of civil attention, even occasional sallies of passion, if they do not threaten bodily harm, do not constitute such cruelty of treatment as to warrant the court in pronouncing a decree of separation; but a series of acts of personal violence, or a menace to the safety of life, limb, or health, or any determined threats of serious bodily hurt, have always been held sufficient ground for a separation by the common law, and that is the law to which we must appeal upon this subject."

In the case now under consideration, the evidence is clear and convincing as to the charge of cruelty of treatment and excessively vicious conduct on the part of the husband on various occasions, to entitle the wife to a decree of separation. The wife testified that at various times her husband struck her, was excessively cruel to her, and that his cruel treatment consisted of repeated blows, threats to kill and shoot her, and other vicious conduct. On one occasion, he struck her in the back with his fist. At another time, he pointed a loaded pistol and threatened to shoot her. He threw her, when in a delicate condition, over a chair, and she fell to the floor. She further testified that he repeatedly threatened to kill her, and his threats became so frequent she believed he would do so, and also kill her child; that he struck her and the child on the night of the 12th of April, and repeatedly struck her when in bed; and that he repeated the blows on the morning of the 13th of April. She also testified that she had often forgiven him for his treatment, but after the night of the 12th of April and the following morning she felt that her safety and that of her child required, she should leave him, and seek protection in the home of her parents. The testimony of the

wife, as above stated, is fully corroborated by other witnesses produced on the part of the appellant, and by the admissions of the husband himself. Mrs. Dora Hugo testified that Mr. Sharp admitted that he had beaten and struck his wife, and this was the cause of her leaving him; that he blamed it on his bad temper. We have also the admissions of the husband, in the presence of the witness John Hugo, and to the father and mother of the wife, that he had repeatedly struck her. "It is all my fault." "It is all my accursed temper. Then I don't know what I am doing." Mr. and Mrs. Laubheimer further testified that the wife was almost a physical and mental wreck when she came to their home, and in this they are corroborated by the testimony of Dr. Charles E. Brack, who was called to render medical aid to Mrs. Sharp, who was then suffering from extreme nervousness, the result of ill treatment by her husband. But, apart from this, we have the letters of the husband to the wife, dated the 13th and 23d of April, 1904, after she had left him, wherein he asks forgiveness and practically admits the cruel way in which he had treated her. These letters, in connection with the other evidence in the case, fully establishes the charge of cruelty of treatment alleged in the wife's bill.

The principles and rules of law upon which this and similar cases must rest are fully stated by this court in *Hawkins v. Hawkins*, supra, and in *Barrere v. Barrere*, 4 Johns. Ch. (N. Y.) 189. Mr. Nelson, in his work on *Divorce and Separation* (293), says: "It is not necessary to wait until an injury has been inflicted, for the law will, in a proper case, interfere to prevent an injury which will probably be inflicted. The court interferes not so much to punish an offense already committed, as to relieve the party from an apprehended danger. Assuredly, says Lord Stowell, the court is not to wait until the hurt is actually done. If a husband threatens to shoot his wife, and shows a disposition to do so, the court will interfere, without waiting until he has shot her or attempted to do so. Nor is it necessary to wait until the defendant has attempted to execute his threats, since that would be folly in most

cases. Where from evidence of hatred, malice, high temper, violent conduct, habits of intoxication, and lack of self-control, the court apprehends that injury to the plaintiff's health will follow, then it will interfere. Where violence has been inflicted and threats are made, the court should not hesitate to interfere, as the past, when considered with the attitude of the defendant, makes it clear that the violence will be repeated."

Applying and adopting the principles of law announced in the adjudicated cases and text-writers to the facts of this case, there can be but one conclusion for us to reach; and that is that the wife is entitled to a decree for separation. We have examined with some care the very able and carefully prepared brief submitted by the learned counsel for the appellee and the authorities there cited; but we are unable to agree that they apply to the facts of this case. While we agree that the conduct of the wife is not entirely free from censure, yet it was not such as to call for or justify such inhuman and cruel treatment as the evidence in the case shows was repeatedly inflicted by him. In this case, as in *Hawkins v. Hawkins*, supra, "the charge of cruelty of treatment is fully made out, and that entitles the plaintiff to a decree for a separation." It will be seen, however, that by section 37 of article 16 of the Code it is provided that, in all cases where divorce a mensa et thoro is decreed, it may be revoked at any time thereafter by the court granting the same, upon the joint application of the parties to be discharged from the operation of the decree.

For the reasons we have given, we are of the opinion that the court below was in error in dismissing the plaintiff's bill, so the decree of the 28th of September, 1906, will be reversed, and the cause remanded, to the end that a decree may be passed in accordance with the foregoing opinion; the wife's property rights, alimony, and the care, education and custody of the children to be subject to the future order of circuit court No. 2 of Baltimore City.

Decree reversed, and cause remanded, with costs in this court and the court below.

(6 Pen. 238)

REMINGTON MACH. CO. v. WILMINGTON CANDY CO.

(Supreme Court of Delaware. May 6, 1907.)

1. EVIDENCE—HEARSAY—MEMORANDUM.

In an action for breach of warranty of a machine for the manufacture of ice, slips showing the amount of ice used in the business were offered in evidence. They were made by plaintiff's bookkeeper, in one instance on information from plaintiff's ice cream man, and in the other on information from plaintiff's soda man, verified by the ice cream man. The bookkeeper and the ice cream man each testified that the entries were correct at the time they were made. *Held*, that the slips were admissible as auxiliary to the testimony of the witness who made them, supported by the testimony of the witness upon whose information the ice entries thereon had been made, above defendant's objection that they were hearsay.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 1445.]

2. SAME—DOCUMENTARY EVIDENCE—PRIVATE MEMORANDA AND STATEMENTS.

Entries made on slips of paper by the bookkeeper, on information furnished him by the ice cream man and the soda man, as to the amount of ice used, were entries made in the usual course of business by a person who had no purpose to misstate what had occurred, and were admissible in evidence, where verified and adopted by the person who made them.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 1445.]

3. SALES—WARRANTY—BREACH—ACTION—EVIDENCE—ADMISSIBILITY.

In an action for breach of warranty of a machine for the manufacture of ice, the issue was one concerning the capacity of the machine. Slips were admitted in evidence to show the amount of ice bought, so that the amount of ice actually made by the machine could be shown by the difference between the ice consumed and the ice bought. *Held*, that the slips, connected with the testimony promised to be introduced, tended to show the amount of ice made by the machine, and hence were conditionally relevant and admissible.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales, § 1273.]

4. TRIAL—OBJECTIONS TO EVIDENCE—WITHDRAWAL FROM JURY.

Where evidence introduced was only conditionally relevant in connection with other evidence which plaintiff promised to introduce, and the failure of plaintiff to make good its promise rendered the evidence irrelevant and inadmissible, the court did not err in failing to withdraw it from the jury, where defendant made no application therefor.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 239.]

5. SAME—OBJECTIONS—TIME TO OBJECT.

In an action for breach of warranty of a machine, an objection that it was not operated in accordance with defendant's instructions during the period covered by plaintiff's evidence of the incapacity of the machine, made after the evidence was admitted, was too late.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 185.]

Error to Superior Court, New Castle County.

Action by the Wilmington Candy Company against the Remington Machine Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Argued before NICHOLSON, Ch., and SPRUANCE and BOYCE, JJ.

J. Harvey Whiteman and Victor B. Woolley, for plaintiff in error. John F. Neary and John W. Brady, for defendant in error.

BOYCE, J. This was an action of assumpsit, brought by the Wilmington Candy Company against the Remington Machine Company upon an alleged breach of the warranty contained in a contract between the parties for the manufacture, erection, and installment of a refrigerating and icemaking machine and plant. The warranty was in the following words, to wit: "We guaranty this plant to be first-class in every respect; that it will be capable of doing an amount of work equal to the melting of six tons of ice per day of 24 hours, when operated in accordance with our instructions; and that, while running 12 hours per day, it will be capable of making one ton of ice in the tank supplied, and cooling the rooms, while in operation, to the temperature required." The plaintiff prevailed in the court below, and the defendant, taking bills of exceptions, has filed in this court an assignment of five errors. The first charges that the court improperly admitted, on behalf of the plaintiff, certain documents, called "time slips," and designated as "Plaintiff's Exhibit No. 4." The second, being directed against the admission of other time slips, designated as "Plaintiff's Exhibit No. 5," is otherwise the same as the first. The third charges that the said Plaintiff's Exhibit No. 4 was erroneously admitted, "for the purpose of proving the incapacity of the plant to make ice in the quantity warranted." The fourth, being directed against the admission of the said Plaintiff's Exhibit No. 5, is otherwise the same as the third. The fifth charges that the said Plaintiff's Exhibits Nos. 4 and 5 were erroneously admitted, "showing the quantity of ice consumed by the plaintiff below in its business, which said ice was proved to have been obtained from two sources, namely, ice made by the ice plant and ice bought from ice dealers, for the purpose of proving the incapacity of the plant to make ice in the quantity warranted."

The issue raised by the pleadings was one of fact, affecting the question of the capacity of the said machine and plant to conform to the warranty contained in the contract under which the defendant had installed it for the plaintiff. At the trial the plaintiff introduced evidence for the purpose of showing (1) that the said machine and plant had not met the requirements of the said warranty, and (2) that it could not meet them, because of defects in its construction and design. It was under the first branch of the plaintiff's testimony that the said time slips were admitted in evidence. Before seeking to introduce them, it appears that counsel for plaintiff had shown that a daily record of the amount of ice made by the machine had been kept in the usual course of its business, that the person whose duty it

was to keep such record had not at that time been located, and that the record so kept had been mislaid or lost; and it was attempted to prove by means of certain other regular entries made by the plaintiff's employés, in the usual course of their employment, the amount of ice made daily by the said machine, from and after June 29, 1903—the plant having been started on May 12 preceding—(1) by showing the daily amount of ice used by the plaintiff in its business; (2) by showing that all the ice so used was not made by the machine, but had been derived from two sources, namely, ice made by the machine and ice bought from dealers; and (3) by showing the amount of ice bought daily. The purpose of this method of proof was to show that the amount of ice actually made daily by the machine was the difference between the amount of ice consumed and the amount of ice bought daily. It was in this connection that the said time slips were offered and admitted in evidence. While it appears at another stage of the case that there were some expressions of uncertainty respecting the purpose for which the slips were admitted, it is manifest that the purpose for which they were offered was well understood, and that they were admitted for the purpose of showing the amount of ice consumed by the plaintiff.

The circumstances under which the ice entries on the said time slips were made by the person who made them, the objections urged against their admissibility, and the object of their admission may now be stated. Smith, the ice cream maker for the plaintiff, testified, in substance, that he received daily all the ice made by the machine from the ice tank down the chute to his department; that he marked on a slip of paper, kept on a nail for that purpose, each cake of ice made as it came to him; that he marked on the same slip the amount of ice bought, as it was delivered to him; that he was not only required to do this, but was also required to keep a daily slip, called a "time slip," showing the amount of goods made by him each day; that Mr. Griffenberg, the bookkeeper, in the usual course of getting the day's reports, would come every evening and take the time slip and ask for the amount of ice he had used that day, which he would report to Griffenberg, and that the latter would mark it down on the time slip in his presence; that all the entries on the time slips, except those relating to the ice, were made by him, and that Griffenberg, in his presence and upon his information, made the ice entries on the time slips. Both Smith and Griffenberg testified as to the manner in which the slips were kept respecting the ice entries, and each testified that they were correct. Griffenberg was on the stand when the slips known as "Exhibit No. 4" were first offered in evidence. Counsel for the defendant objected, and, so far as the record discloses, for the following rea-

sons: "The man who has testified as to receiving this ice is Smith, that he kept his account of the original amount, so many hundred pounds per day, and recited what he and this witness would do when they met. We contend that those slips are nothing more than memoranda for the refreshment of the memory of this witness upon a matter which is clearly hearsay testimony. Smith is the only man that knows, between these two men, as to the amount of ice that came down the chute. Smith told this gentleman, and this gentleman can only testify as to what Smith told him. Therefore his testimony is hearsay, and is not relevant, especially in view of the fact that we have had the testimony of Mr. Smith himself directly upon the point." The offer was rejected, and Smith was recalled and re-examined at length as to the mode of keeping the account of all the ice which came to his department, whether made by the machine or bought, and the manner of accounting for the same to Griffenberg; and, in answer to the question, "Do you say that the figures on each one of those slips represent the correct amount of ice consumed?" he replied, "Yes, sir." Griffenberg, being recalled, was asked, among other things, "Are those entries, as made by you, accurate with respect to the reports given you by Mr. Smith as to the ice?" and he replied, "Yes, sir." The offer was renewed, and counsel for the defendant again objected, and, so far as the record discloses, for the reason "that the slips were hearsay evidence, contending that the ability of the defendant to cross-examine with respect to the slips was curtailed by reason of the fact that the witness now upon the stand knows nothing about the slips, except what he heard from Smith, who, being off the stand, cannot now be cross-examined by the defendant." The slips were admitted in evidence "for the purpose of showing the quantity of ice."

The slips, designated as "Plaintiff's Exhibit No. 5," were taken up for the purpose of showing the amount of ice used and charged to the "soda man," who was not produced as a witness. Smith and Griffenberg were examined. The general result of their examination shows that Griffenberg, to obtain daily reports from the soda man, as he did from Smith, went to the former for the slips which he was required to keep, and obtained from him information concerning the ice used by him, and then went to Smith to ascertain whether the information thus obtained was correct. The entries on these slips were brought under the inspection of Smith. If the latter found any errors, Griffenberg made correction in the entries from information given him by Smith. Upon this testimony the said slips were offered in evidence, and it is said in the record that they were objected to "as hearsay; the contention being that the slips were made up in this case from the hearsay evidence of two men, Smith and an unknown man, the soda man." The offer

was rejected. Further testimony respecting the mode of keeping the slips having been introduced, the offer to admit them in evidence was renewed. Objection was made on the ground as before stated—as hearsay evidence; it being contended that the witness had said he made up these slips from two sources, from Smith and the soda man, and the soda man is not here to be cross-examined. It being suggested that Smith was the man charged with the keeping of the account of the ice received and ice used in the plant, the slips were admitted in evidence on the same footing as those first admitted. On further cross-examination of Griffenberg, it was shown that he did not have any knowledge of the accuracy of the entries upon the slips respecting the ice used, except such as he had obtained from Smith and the soda man.

Counsel for the plaintiff then sought to show the amount of ice bought each day, during the period covered by the said slips, by offering in evidence successively (1) the bills rendered to the plaintiff for ice bought; (2) the receipts, showing payments for ice bought; and (3) the plaintiff's book-entries of the ice bought. But each, in turn, was objected to and excluded. It was at this stage of the case that the expressions respecting the purpose of the admission of the said slips, to which we have alluded, were made. The amount of ice which the machine could make, under the conditions required by the warranty, was a pertinent fact to the issue, because such a fact would tend to throw light upon the capacity of the machine. It was to show the amount of ice made by the machine—by an indirect method, it is true—that the slips were offered in evidence. Primarily, they were offered for the purpose of showing the amount of ice used by the plaintiff, not, however, as an independent, unassociated fact, but in connection with another fact, promised to be shown, at the time the offer was made, namely, the amount of ice bought during the period covered by the slips; it being claimed that, with both of these facts established, the amount of ice actually made by the machine could be easily ascertained, it being the difference between the amount of ice used and that bought. But the plaintiff failed to show the amount of ice bought, and necessarily failed to show the capacity of the machine by the method of proof it had pursued. It therefore became necessary to proceed in a different method, which it did, but with which we are not concerned; the errors assigned in this case being confined to and directed against the admission of the said time slips under the circumstances substantially as stated.

Counsel for the defendant contended that the said exhibits were not admissible for two reasons. We can, perhaps, at this point better consider and dispose of the second of these, before taking up the several branches contained in the first. The second reason is: "If it be granted for the purposes of the ar-

gument that the matter and thing recorded upon the time slips was a proper subject-matter of evidence, then it was not competent to prove the same by the time slips themselves, but only by the person who was the original source of such information, and the time slips could be legally used for no other purpose than to refresh the memory of the witness." Assuming, for the present, that the said time slips, so far as they related to the ice used by the defendant, were relevant and material, were they themselves admissible in evidence as auxiliary to the testimony of the witness who made them, supported by the testimony of the witness upon whose information the ice entries thereon had been made, or should they have been used only to refresh the memory of the witness? The question presented, affecting, as it does, the admissibility of entries made in the regular course of business or employment, is, in a measure at least, of first impression in this court. And, because of the conflict and want of harmony among the decisions, we have experienced considerable embarrassment in arriving at a conclusion based upon some sound principle. We have for this purpose examined into the origin and expansion of the principle of the hearsay exception applicable to this question as thoroughly, and stated our review as briefly, as we well could, in view of the citations it has been deemed essential to incorporate. In pursuing this course, we have necessarily gone outside of the question immediately before us, in order to show the origin and development of the principle which should control our judgment in determining the question under consideration.

In the argument our attention was directed to some of the rules respecting the admissibility of parties' books of account. Such books have been and are received in evidence under the decisions of courts or by express legislative enactments. In this state the subject is regulated by a statute too familiar to require further notice. The principle recognized and adopted for the admission of such books, in the absence of a statute, like that applied to questions similar to the one before us, had its origin, it is true, among the hearsay exceptions; and in that sense the two were related—were analogous—but were never identical. We must, therefore, look beyond the shop-book rule for the solution of the question now presented. We find it generally held, in this country and in England, that entries made in the regular course of a person's business or employment are admissible in evidence on proof of the handwriting of the entrant after his death. This principle was recognized and adopted early in this country. The two leading cases are *Welsh v. Barrett*, 15 Mass. 380, and *Nicholls v. Webb*, 8 Wheat. (U. S.) 326, 5 L. Ed. 628. *Parker, C. J.*, in the first of these cases, said: "The principle seems to be founded in good sense and public convenience. What a man has said when not under oath may not in

general be given in evidence when he is dead, because his words may be misconstrued and miscollected, as well as because it cannot be known that he was under any strong motive to declare the truth. But what a man has actually done and committed to writing, when under obligation to do the act, it being in the course of the business he has undertaken and he being dead, there seems to be no danger in submitting to the jury." In the other case Justice Story said: "We think it a safe principle that memorandums made by a person in the ordinary course of his business of acts or matters which his duty in such business requires him to do for others, in case of his death, are admissible evidence of the acts and matters so done." Subsequently, in the leading case of *Doe v. Turford*, 3 Barn. & Adol. 898, Justice Taunton said: "A minute in writing, made at the time when the fact it records took place, by a person since deceased, in the ordinary course of his business, corroborated by other circumstances which render it probable that the fact occurred, is admissible in evidence."

This principle of the hearsay exception was early recognized by our own courts. In the case of *Bank of Wil. and Brandywine v. Bradun*, cited in 1 Har. 14, the register of a deceased notary, which contained a copy of the note sued upon, on which was entered, "10th of October 1818, noted, protested, and returned to bank," after the proof of his handwriting and death, was, against objection, admitted in evidence. And in the case of *Bank of Wil. and Brand. v. Cooper's Administrator*, 1 Har. 16, the record of the notary was admitted in evidence of all the facts it furnished "as to the time, manner, etc., of notice," by reason of his death. This rule prevails generally, but the American decisions are inharmonious upon the question of the expansion of the principle beyond the requirement of the death of the entrant. Many of the courts have, however, expanded it so as to include within it cases of insanity, incompetency, and unavailability of the entrant. In *North Bank v. Abbott*, 13 Pick. (Mass.) 471, 25 Am. Dec. 334, Shaw, C. J., said: "It was satisfactorily proved, not merely that the witness was out of the jurisdiction of the court, but that it had become impossible to procure his testimony. We cannot distinguish this, in principle, from the case of death or alienation of mind. The ground is the impossibility of obtaining the testimony, and the cause of such impossibility seems immaterial." Mr. Wigmore says: "The general principle should recognize practical inconvenience as an excuse, subject to the judge's discretion to require the entrant's production for cross-examination when the nature of the dispute renders it desirable." 2 Wig. on Ev. § 1521.

Thus far the exceptions are based upon the principle of necessity, considered in connection with the circumstances under which such entries were made, which obviously fur-

nish some guaranty of their validity and trustworthiness. In some of the American jurisdictions a further expansion of this principle has been recognized; and we find that some of the better-considered cases, following the development of the principle in logical sequence, have extended it by admitting such entries during the life of the entrant, when verified and adopted by him, though he does not have a present recollection of the facts contained therein. In other jurisdictions such entries are not admissible in evidence during the life of the entrant, and can only be used, even when they fail to refresh the memory, as a pretext, we may say, for that purpose. No difficulty is presented by the cases when the entries produce an actual, present recollection of the facts therein stated. In such case the witness is required to testify from his recollection, revived, it may be, by such entries, and the record of the entries is in no sense evidence. The cases are out of harmony at the point where such entries, being presented to the witness, fail to stimulate an actual, present recollection of the matters once recollected and recorded by him, but which present to his mind a record simply of a past recollection. The principle of the admission of this latter class of entries during the life of the entrant has been frequently recognized. In *Shove v. Wiley*, 18 Pick. (Mass.) 558, was involved the question of the admissibility of an entry made by a clerk in a book kept at the bank for that purpose. The clerk on cross-examination stated that he had no particular recollection of the transaction, independently of the entry he found in the book, but that from his habit of transacting business, etc., he had no doubt the notices were left. Shaw, C. J., said: "It is very obvious to remark that, if such evidence is not sufficient, it would be extremely difficult to prove such acts done. * * * It is very clear that this is such a book as would of itself be evidence of the fact, if the witness were dead. * * * The book offered * * * would become admissible, according to the cases cited, on proof of the handwriting of the clerk, in case of his death, insanity, or other incapacity to testify; and we think it not less so when authenticated by himself."

The case of *Redden v. Spruance*, 4 Har. 265, was cited and commented upon by counsel for both plaintiff and defendant. At the trial of this case a question as to the admissibility of the contents of a letter, detailing a conversation which the writer had had with one of the defendants, was raised; it appearing that the writer as a witness was unable to swear to any of the facts from memory, though he was willing to swear to the truth of the letter from confidence in his own veracity. The question was reserved, and it was subsequently heard before the chancellor and all the judges. Harrington, J., in announcing the unanimous opinion of the court, said: "The general rule of

evidence is not questioned that the witness must swear to facts within his own knowledge, though his memory may be refreshed, and his knowledge verified, by reference to written memorandum. Further than this the memorandum or writing cannot be used, except in cases where it was made in the usual course of business as evidence of the fact to be proved, as in book entries, notes of presentment, protest, etc. * * * So, where the question was whether a bill of exchange had passed through a banker's hands, his clerk was allowed to prove his own writing on it, though he did not recollect it; also, with regard to inventories and schedules, precise dates, particular words, and other matters which the memory would not be likely to retain, a greater liberty of reference has been allowed, where the notes were made at or about the time of the transaction, and where the witness remembers that at the time they were made he knew them to be correct and true. This seems to be carrying the principle of substituting memorandums for the sworn recollection of witnesses far enough. It has been done from the apparent necessity of cases occurring so often as to form classes."

In the case of *Hatfield v. Perry*, 4 Har. 463, the proof was by depositions upon interrogatories. The proof of the presentment and protest of the notes sued upon was objected to. "The proof was: (1) The notes, with the notary's certificate of presentment, demand, refusal, and protest; (2) the deposition of S. Badger, notary, stating that the notes were presented at the place of payment by Edward Barton, his clerk; (3) the deposition of Edward Barton, stating: 'I have no doubt that I presented the notes at Western Bank of Philadelphia for payment when they severally became due. By referring to the book of protests belonging to Samuel Badger, Esq., to whom I was then clerk, I find that I have returned that the said notes were not paid on my demand, and that payment was refused at the bank by its officers. The signature signed to each of the certificates marked "U" and "D" is in the handwriting of Samuel Badger, and the seal is his seal as a notary public. The certificates contain the answer made by the officers of the bank when the said notes were severally presented for payment by me.'" It was said by the court: "The certificates of presentment, demand, and refusal would not in themselves be evidence of these facts; but the notary and his clerk have been examined on commission, and the clerk's deposition so refers to and incorporates these certificates as to make it necessary to refer to them as a part of his answers. The clerk's reference to the notarial book must be admitted also, from necessity, as a memorandum made at the time for the purpose of evidence by a person and on a subject which make the admission of such evidence neces-

sary, as the memory of a notary in full business could not retain recollection of such matters. Entries made in books in the course of official duty or in the course of professional employment are admissible in evidence in regard to those matters, which it was the duty or the business of the party to do. Therefore entries made in the ordinary course of business in the books of the notary public are admissible to prove a demand of payment from the maker and notice to the indorser of a promissory note. (Cases cited.) If the notary is living and competent to testify, it is deemed necessary to produce him; but, if he is called as a witness to the fact, the entry of it is not thereby excluded. It is still an independent and original circumstance, to be weighed with others, whether it goes to corroborate or to impeach the testimony of the witness who made it."

In some jurisdictions, where the principle of the admission of this class of entries has been recognized during the life of the entrant, it is first required that it be shown that the entrant is unable to distinctly recollect the fact or transaction with the aid of the entries; and the principle is not applicable when the entrant has a distinct recollection of the essential facts to which the entries relate. Whenever the principle is applied, the better opinion seems to be to regard the admission of such entries in evidence as auxiliary to and as essentially the oath of the witness. In those jurisdictions where such entries can only be used during the life of the entrant to refresh his memory, whether they do in fact or not, both Mr. Greenleaf and Mr. Chase (the latter in his edition of *Stephens on Evidence*) divide the cases into three classes. In the case of *Davis v. Field*, 56 Vt. 426, it is said: "There seem to be two classes of cases on this subject: (1) Where the witness, by referring to the memorandum, has his memory quickened and refreshed thereby, so that he is enabled to swear to actual recollection; (2) where the witness, after referring to the memorandum, undertakes to swear to the fact, yet not because he remembers it, but because of his confidence in the correctness of his memorandum. In both cases the oath of the witness is the primary, substantive evidence relied upon; in the former the oath being grounded on actual recollection, and in the latter on the faith reposed in the verity of the memorandum." As we have already indicated, much of the confusion has arisen in cases of the latter character. The court in *Redden v. Spruance*, *supra*, while it did not have before it the question of the admissibility of regular entries made in the course of employment, such as we have in this case, did, however, recite with apparent approval the result reached in the American note to *Price v. Lord Torrington*, in *Smith's Leading Cases*, which is "that entries made

in the regular and usual course of business are admissible in evidence, after the death of the person who made them, on proof of his handwriting, and during his life, if authenticated by himself"; to which is added, in recognition of a further distinction made in some jurisdictions between regular and occasional or isolated entries: "Other entries may be used to refresh the memory, but are not admissible in evidence." In *Hatfield v. Perry*, supra, the clerk of the notary, in giving his testimony, referred to the book of protest and gave in evidence his entries found there, apparently read them, adopted them as the embodiment of his testimony, and did not use them as a pretext to refresh his memory. The court held that the entries were admissible, and said: "If the notary is living and competent to testify, it is deemed necessary to produce him; but, if he is called as a witness to the fact, the entry of it is not thereby excluded. It is still an independent and original circumstance, to be weighed with others." We think that the extension of the exception to such regular entries, in the lifetime of the entrant, if verified and adopted by him, is sustained by principle and the weight of authority.

The witness Griffenberg had no personal knowledge of the accuracy of the entries respecting the ice recorded on the slips by him. He made them in one instance on information from Smith, and in the other on information from the soda man, verified by Smith. The combined testimony of Smith and Griffenberg was sufficient for the admission of both of the said Exhibits Nos. 4 and 5, as auxiliary to and complementary of their testimony, if they were relevant and material. It does not appear whether Smith had a present recollection of the quantities of ice used by him and the soda man as entered upon the said exhibits, respectively, either with or without their aid. There were a great many of the daily entries, covering a period of several months, and it would have been quite impossible to retain them in memory. If the witnesses each knew they were correct at the time they were made, and they, or either of them, had been permitted to use them to assist the memory, and had given testimony of the quantities stated on the slips, either from memory or by reading them, it is difficult to see why the slips themselves, verified and adopted, as they were by the witnesses, were not as trustworthy, and as harmless to the defendant as the testimony of the witness would have been. In the case of *State v. Brady*, 100 Iowa, 191, 69 N. W. 290, 36 L. R. A. 693, 62 Am. St. Rep. 560, it was said: "The old common-law rule seemed to be that such memoranda were not admissible; that they could be read by the witness after proper foundation had been laid, even though the witness had no recollection of the matters, after having read them. The modern doctrine, at least in this country, seems to be

that such documents are admissible in evidence, and that the court will not go through the useless ceremony of having the witness read a document relating to a fact of which he had no present recollection, except that he knew it was correct when made." *Hammersley, J.*, in considering this subject, said, in the case of *Curtis v. Bradley*, 65 Conn. 99, 81 Atl. 591, 28 L. R. A. 143, 48 Am. St. Rep. 177: "It seems to us to be pressing the use of a legal fiction too far for a court to permit the statement made by such paper to be read in evidence, while holding that the law forbids the admission as evidence of the paper which is the original and only proof of the statement admitted. * * *

When, in the application of the rule, a document like the one in question was presented to a witness and absolutely failed to refresh his memory, its exclusion as a means of refreshing his memory became imperative; but the evidence of the document was so clearly essential to a fair and just trial that its use in some form seemed absolutely imperative." *Owens v. State*, 67 Md. 307, 10 Atl. 210, 302, presents a case where the witness testified independently of the entries made by him and introduced in evidence in connection with his testimony. The court said: "It has been urged in argument that the entry or memorandum can only be used where the witness has no present, independent recollection of the transaction referred to." The same contention was made in this case. "But its admissibility depends upon no such distinction. If the witness swears that he made the entry or memorandum in accordance with the truth of the matter, as he knew it to exist at the time of the occurrence, whether he retains a present recollection of the facts or not, the entry or memorandum is admissible; for, though he may have a present recollection (of doubtful or varying degree of certainty, it may be) independently of the memorandum, the paper is admissible as a means of verification or confirmation of what he states from memory." *Insurance Cos. v. Weide*, 14 Wall. (U. S.) 380, 20 L. Ed. 894; *Donovan v. Boston, etc., R. R. Co.*, 158 Mass. 450, 33 N. E. 583; *Diament v. Colloty*, 66 N. J. Law, 295, 49 Atl. 445, 808; *Callihan v. Washington Water Power Co.*, 27 Wash. 154, 67 Pac. 697, 56 L. R. A. 772, 91 Am. St. Rep. 829; *Firemen's Insurance Co. v. Seaboard Air Line Railway Co.*, 138 N. C. 42, 50 S. E. 452; *Mayor, etc., N. Y. v. Second Ave. R. R. Co.*, 102 N. Y. 572, 7 N. E. 905, 55 Am. Rep. 839.

It was contended in the first instance that said exhibits were not admissible in evidence because the matter and thing recorded upon the time slips is not a proper subject-matter of evidence, for four reasons, namely: (1) It is incompetent. (2) The entries were made by the party in its own interest, and not in a matter between it and the defendant. (3) It is *res inter alios acta*. (4) It is hearsay. We will consider these several objections in the reverse order: (4) If the entries were

relevant and material, they were admissible under an exception to the hearsay principle, such as we have already indicated. (2 and 3) These will be disposed of together. Such entries, made in the usual course of business by a person who has no interest to misstate what had occurred, are admissible in evidence, after the death of the person who made them, on proof of his handwriting, and during his life, if verified and adopted by him, as auxiliary to his testimony, as exceptions to the rules excluding acts, declarations, etc., of third persons. (1) Lastly, were the time slips competent? The issue in this case was one concerning the capacity of the machine to conform to the warranty when operated in accordance with defendant's instructions. The slips were offered and admitted in evidence for the purpose of showing the amount of ice consumed by the plaintiff in its business—the same having been derived from two sources, namely, ice made by the machine and ice bought—under the promise made at the time of the offer that the plaintiff would show the amount of ice bought, so that the amount of ice actually made by the machine could be shown by the difference between the ice consumed and the ice bought. The slips, offered in this way, were not, strictly speaking, matters pertinent to the issue—the capacity of the machine; but, under the promise made to show the amount of ice bought, they did tend to show the amount of ice made by the machine. An irrelevant fact, standing alone, may be conditionally relevant in connection with other facts necessary to its admissibility; and in such case counsel may very properly offer to introduce such irrelevant fact for a specific purpose, coupled with a statement of the other facts necessary to show its relevancy. "It constantly happens," says Mr. Wigmore, "that an evidential fact is relevant, not with direct reference to an allegation in the pleadings, but only through its connection with other subordinate facts. Without them it is irrelevant, and therefore inadmissible. * * * The possibility that the other facts may not be made good is a necessary risk to be taken, and, in case of a failure to make them good, the subsequent striking out of the evidence offered is regarded as an adequate remedy." 3 Wig. on Ev. § 1871.

Counsel for the plaintiff, it appears, failed to make good their promise to show the amount of ice bought. The slips, therefore, were, independent of such proof, irrelevant and inadmissible. They might have been stricken from the evidence. That was not done. Was it error on the part of the court not to have withdrawn them from the jury? We think not. In such event, if opposing counsel does not make application to the court to strike out the provisional evidence, upon failure to prove other facts necessary to its materiality and admissibility, the court may very reasonably conclude that such evidence is regarded at least as harmless, if not favor-

able. In the case of *Stone v. State*, 118 Ga. 705, 45 S. E. 630, 98 Am. St. Rep. 145, it was said: "Where incompetent evidence is admitted on the statement that it will be subsequently connected and made admissible, it is the right of the objecting counsel to renew his motion at a later stage of the trial; and, if the connection has not been made, it will then be the duty of the court to exclude the testimony, with proper instructions to the jury not to be influenced thereby. But it cannot be expected that in a long and tedious trial the court should bear these matters in mind, and of his own motion exclude what has been thus provisionally admitted. It is for counsel interested to remind him of the circumstances, and have it ruled out, if he so desires."

Objection that the machine was not operated in accordance with the defendant's instructions during the period covered by the slips does not appear to have been made at the time the slips were offered and admitted in evidence; and such objection comes too late here. The Supreme Court of the United States has held that "the objection, 'incompetent,' 'immaterial,' and 'irrelevant,'" is not specific enough. *New York, etc., Equipment Co. v. Blair*, 51 U. S. App. 86, 79 Fed. 896, 25 C. C. A. 216; *Noonan v. Mining Co.*, 121 U. S. 393, 7 Sup. Ct. 911, 30 L. Ed. 1061; *Sigafus v. Porter*, 84 Fed. 430, 28 C. C. A. 443. The weight of authority is to the effect that counsel should state specifically his ground of objection to the admission of testimony to the trial court.

We find no reversible error in the record of the proceedings of the trial court, and the judgment below is therefore affirmed.

(6 Pen. 316)

LEWIS v. PAWNEE BILL'S WILD WEST CO.

(Supreme Court of Delaware. May 6, 1907.)

LIMITATION OF ACTIONS—COMPUTATION OF TIME—ABSENCE OF DEFENDANT—PERSONAL INJURIES.

Rev. Code 1852, amended in 1893, c. 123, § 14, provides that if, after a cause of action shall have accrued against any person, he shall depart from and reside out of the state, the time of his absence until he shall have returned into the state so that he may be served with process shall not be taken as any part of the time limited for the commencement of the action. Act May 28, 1897 (20 Del. Laws, p. 712, c. 594) § 1, provides that no action for a recovery of damages upon a claim for alleged personal injuries shall be brought after one year from the date upon which the injuries were sustained. Held that the act of 1897 (20 Del. Laws, p. 712, c. 594) was not subject to the exception contained in Rev. Code 1852, amended in 1893, c. 123, § 14, and that a cause of action for personal injuries was barred where the action was not brought until after one year from the date on which the injuries were sustained, though defendant, immediately upon the accrual of the cause of action, removed from the state and until the commencement of the action was absent therefrom.

Error to Superior Court, New Castle County.

Action by Mary E. Lewis against Pawnee Bill's Wild West Company. From a judgment for defendant (61 Atl. 888), plaintiff brings error. Affirmed.

Argued before NICHOLSON, Ch., and SPRUANCE and GRUBB, JJ.

Robert H. Richards and John B. Hutton, for plaintiff in error. William S. Hilles and Frank H. Davis, for defendant in error.

SPRUANCE, J. This action was brought for the recovery of damages for personal injuries sustained by the plaintiff on May 5, 1902, alleged to have been occasioned by the negligence of the defendant company. The action was begun by a writ of foreign attachment issued May 31, 1904, pursuant to the provisions of the act of March 12, 1901 (22 Del. Laws, p. 496, c. 207), which authorized the issuing of writs of foreign attachment in actions *ex delicto*. Under said writ certain personal property of the defendant was attached. Subsequently, the defendant having entered security, the attachment was dissolved and the defendant was admitted to defend the action, which thereafter proceeded as if it had been commenced by summons. The plaintiff's declaration, containing five counts, alleged in substance that the defendant, a corporation of the state of New Jersey, gave an exhibition in the town of Dover, in this state, on May 5, 1902, which the plaintiff attended, and that she was then and there injured by the falling of certain seats which had been negligently erected by the defendant for the use and occupation of the persons attending said exhibition. The fourth and fifth pleas of the defendant are to the effect that the plaintiff's cause of action did not accrue within one year next before the commencement of her suit. The plaintiff's replications to said pleas alleged, in substance, that the defendant was a corporation foreign to this state, and as such had not filed any certificate in the proper office or offices designating the name and residence of some person or agent within this state upon whom service of process might be made, and had never filed in the office of the Secretary of State a certified copy of its charter and the name or names of its authorized agent or agents in this state; that the defendant, on the day when said cause of action accrued, was the owner of certain personal property within this state; that immediately thereafter it removed all its personal property without this state, and thereafter owned no property within this state until May 31, 1904, when it brought into this state certain of its personal property, which was then seized under said writ of foreign attachment; that the plaintiff's action was brought within one year after the time when the defendant first owned within this state any property after the accruing of said cause of action. To these replications the defendant entered a general demurrer. The court below sustained the said demurrer, and (the

plaintiff having declined to take a judgment of respondeat ouster) final judgment was entered in favor of the defendant.

The only question material for our consideration is whether the said action was or was not barred by the statute of limitations applicable thereto. The defendant relies upon the act, entitled "An act in relation to pleading and practice," passed May 28, 1897 (20 Del. Laws, p. 712, c. 594) as a complete bar to this action. The said act is as follows:

"Section 1. That from and after the passage of this act no action for the recovery of damages upon a claim for alleged personal injuries shall be brought after the expiration of one year from the date upon which it is claimed that such alleged injuries were sustained.

"Sec. 2. That this act shall be deemed and taken to be a public act."

Chapter 123 of the Revised Code of 1852, amended in 1893, under the title of "Limitations of Personal Actions," excepts certain cases from the operation of the limitations prescribed in said chapter, among which are the following:

"Sec. 14. If at the time when a cause of action accrues against any person, he shall be out of the state, the action may be commenced, within the time herein limited therefor, after such person shall come into the state in such manner that, by reasonable diligence, he may be served with process; and if after a cause of action shall have accrued against any person, he shall depart from and reside out of the state, the time of his absence until he shall have returned into the state in manner aforesaid shall not be taken as any part of the time limited for the commencement of the action."

It is contended by the plaintiff: (a) That the said act of 1897 should be construed in connection with said chapter 123 of the Code, and that the exceptions contained in the latter should be held to be applicable to the former act; (b) that chapter 123 of the Code and said act of 1897 are "parts of one homogeneous system, or scheme, or body of laws upon the subject of limitations of actions," and that the exceptions and savings in said chapter, in the absence of express provisions to the contrary, are applicable to all limitations of actions under the laws of this state, and that they are therefore applicable to the said act of 1897; (c) that in passing said act of 1897 the Legislature had in mind only the shortening of the period of limitation in case of actions for personal injuries, and not the exemption of actions of this character from the operation of the exemptions specified in said chapter 123 of the Code, the general act relating to limitations of personal actions; (d) that this case is within the last clause of said section 14 of said chapter 123, *viz.*, that "if after a cause of action shall have accrued against any person, he shall depart from and reside out of the state, the

time of his absence until he shall have returned into the state in manner aforesaid, shall not be taken as any part of the time limited for the commencement of the action." The said act of 1897 contains no saving clause whatever, and no reference to any saving clause in any other statute. It does not purport to be an amendment or supplement to said chapter 123, or to any other statute. Upon its face it has no relation to said chapter, or to any other statute. It is a special statute limiting the bringing of actions for causes therein designated to one year after the cause of action accrued.

We are asked, in construing said act, to read into it and make a part of it certain exceptions contained in another statute. The language of said act is plain and needs no construction to ascertain its meaning. The law on this subject is well stated in *Chauncey v. Dyke*, 119 Fed. 18, 55 O. C. A. 579: "Construction and interpretation have no place or office where the terms of a statute are clear and certain and its meaning is plain. When its language is unambiguous and its meaning evident, it must be held to mean what it plainly expresses, and no room is left for construction. In such a case argument from the reason, spirit, or purpose of the legislation, from the mischief it was intended to remedy, from history or analogy, for the purpose of searching out and justifying the interpolation into the statute of new terms, and for the accomplishment of purposes which the lawmaking power did not express, are worse than futile. They serve only to raise doubt and uncertainty where none ought to exist, to confuse and mislead the judgment, and to pervert the statute." It is clearly within the power of the Legislature to fix the period within which actions shall be brought, without any exceptions whatever. Whether there are exceptions in favor of certain classes of persons, or against certain other classes, depends wholly on the will of the Legislature as expressed in the statute itself, or in some other statute of which it is a part.

In support of the contention that the exceptions in a general statute of limitations should be applied to a special statute of limitations not containing such exceptions, a number of cases in other states have been cited; but the weight of authority and sound reason lead us to a different conclusion. In *Warfield v. Fox*, 53 Pa. 382, the question was whether an act of limitations as to a certain class of cases, which contained certain exceptions, should have read into it other exceptions contained in a prior general statute of limitations. It was held that "a saving from the operation of statutes for disabilities must be expressed, or it does not exist," and that the exceptions in the general statute should not be applied to said special act. *Peterson v. Ferry Co.*, 190 Pa. 364, 42 Atl. 955, was an action to recover for injuries occasioned by the negligence of the

defendant's employés. The defendant relied on a statute of limitations which made no exceptions in favor of persons under disabilities. Held, that infants and all others are barred by the provisions of such statutes, and that the saving relied on must be expressed or it does not exist. This case was cited and approved in *Spees v. Boggs*, 204 Pa. 504, 54 Atl. 348. In *Morgan v. Des Moines*, 60 Fed. 208, 8 C. C. A. 569, the court say: "The contention of the plaintiff in error is that the provision of the general statute of limitations of the state (section 2535, Code Iowa 1873), which declares that minors shall have one year after the termination of their disability within which to commence an action, should be imported, by construction, into the statute which we have copied. To do so would be judicial legislation. * * * The act of February 17, 1888, is not an amendment of any previous act on the subject to which it relates. It is new and independent legislation, and complete in itself. It establishes the rule for the class of cases to which it relates. The power of the Legislature to enact the statute is not questioned. It would be entirely competent for the Legislature to enact a general statute of limitations putting minors and adults on the same footing as to all causes of action, and such would be the legal effect of a statute which contained no saving clause exempting infants from its operation." In *McIver v. Ragan*, 2 Wheat. (U. S.) 25, 4 L. Ed. 175, it was held that it is not competent for the court to engraft exceptions upon a statute of limitations upon the ground that they are within the same equity as those provided by the Legislature. In *Vance v. Vance*, 108 U. S. 514, 2 Sup. Ct. 854, 27 L. Ed. 808, the court say: "The exemptions from the operation of statutes of limitation usually accorded to infants and married women do not rest upon any general doctrine of the law that they cannot be subjected to their action, but in every instance upon express language in those statutes giving them time after majority, or after cessation of coverture, to assert their rights." In *Amy v. Watertown*, 130 U. S. 320, 9 Sup. Ct. 537, 32 L. Ed. 953, it was held that the general rule respecting statutes of limitation is that the language of the act must prevail, and that no reason based on apparent inconvenience or hardship will justify a departure from it, and that inability to serve process upon a defendant, caused by his designed elusion of it, is no excuse for not commencing an action within the prescribed period. The court say: "Inability to serve process on a defendant has never been deemed an excuse for not commencing an action within the prescribed period. The statute of James made no exception to its own operation in case where the defendant departed out of the realm and could not be served with process. Hence the courts held that absence from the realm did not prevent the statute from

running. * * * Mere effort on the part of the defendant to evade service surely cannot be a valid answer to the statutory bar. The plaintiff must sue out his process and take those steps which the law provides for commencing an action and keeping it alive."

In the present case the plaintiff might have commenced her action by foreign attachment within one year from the time her cause of action accrued, and kept it alive by alias and pluries writs until the defendant brought its property within reach of process, which it did in about two years after the injuries complained of. The law upon this subject is well summarized in 19 Am. & Eng. Ency. 212, as follows: "The exceptions usually made in statutes of limitation in favor of infants, married women, and other persons under disability do not rest upon any doctrine of law that such persons cannot be subjected to the operation of statutes of limitation, nor upon any theory of an inherent equity in their favor, but are based in every instance upon the express provisions of these statutes giving to such persons time within which to assert their rights after a removal of their disabilities. The rule is therefore well settled that, unless there is an express provision in the statute in favor of persons under disability, it runs against them as against all others. As to all other exceptions to the general operation of the statute, the rule is the same. The courts cannot create exceptions in favor of any class of persons, or cases, or in favor of particular cases, when the statute itself makes none, and no hardship which might result from an adherence to this rule can justify a court in departing from it and reading into the statute some qualification which the Legislature did not provide."

While speculations as to the reasons governing the Legislature are often misleading, it may be assumed that among the reasons for reducing the period of limitation in actions for personal injuries was that in actions of this character, the evidence being usually wholly oral, is liable to be lost by the death or absence of witnesses, failure of memory, and other causes. It is not unreasonable to suppose that similar reasons may have influenced the Legislature to purposely omit the savings or exceptions provided in the general statute of limitations. Where the Legislature has made no exception to the positive terms of a statute, the presumption is that it intended to make none, and it is not the province of the court to do so. *Madden v. Lancaster County*, 65 Fed. 188, 12 C. C. A. 566. In our opinion the said act of 1897 is not subject to the exceptions contained in the general statute of limitations (chapter 123 of the Code), and that the defendant's demurrer was properly sustained.

It is not necessary for us to express any opinion as to the contention of the defendant that the allegations of the plaintiff's replica-

tions are not sufficient to bring this case within the said exceptions.

The judgment of the court below is affirmed.

(102 Me. 217)

BOEHM et al. v. ALLEN.

(Supreme Judicial Court of Maine. Dec. 12, 1906.)

COMMERCE—POWER TO REGULATE—RESTRICTIONS ON STATES.

The plaintiffs, who were wholesale liquor dealers in the city and state of New York, and likewise were citizens of that state, brought an action of assumpsit upon an account annexed to recover the purchase price for intoxicating liquors bought by the defendant, a citizen of the state of Maine, with an intent to sell the same in the state of Maine in violation of law. The defendant interposed the statute (Rev. St. c. 29, § 64) in defense to the action.

While the defendant bought the liquors for the purpose and with the intent of reselling the same in the state of Maine in violation of the statutes of Maine, yet there is no evidence showing that the plaintiffs participated in this illegal design, or did any act in its furtherance or even had knowledge of the intent upon the part of the defendant to sell the liquors in violation of law. Therefore the sole question presented with reference to the plaintiff's right to maintain the action, in view of Rev. St. c. 29, § 64, is whether or not that statute is in violation of the commerce clause of the federal Constitution.

Held, that this is precisely the same question decided by this court in *Corbin v. Houlehan*, 61 Atl. 131, 70 L. R. A. 568, 100 Me. 246, and for the reasons stated in the opinion in that case it is again decided that Rev. St. c. 29, § 64, is valid and is not in conflict with the federal Constitution.

Corbin v. Houlehan, 61 Atl. 131, 70 L. R. A. 568, 100 Me. 246, affirmed.

(Official.)

Exceptions from Supreme Judicial Court, Cumberland County.

Action by Samuel C. Boehm and others against Calvin W. Allen. Findings for defendant, and plaintiffs except. Exceptions overruled.

Assumpsit on account annexed to recover the purchase price for intoxicating liquors sold by the plaintiffs to the defendant, in the state of New York, with intent, upon the part of the defendant, to sell such liquors in Maine in violation of law. The plaintiffs were citizens of the city and state of New York at the time of the sale, while the defendant was a citizen of Maine.

The action was commenced in the superior court, Cumberland county. Writ dated February 4, 1904. Plea, the general issue, with the following brief statement: "That no recovery can be had by plaintiffs in the courts of the state of Maine because, he says, the items of the said plaintiffs' account against him were solicited or sold within the state of Maine, contrary to Revised Statutes of Maine, c. 29, § 30, as amended, and section 56 of said chapter, and other sections and chapters of laws of Maine applying to sale of intoxicating liquors. Digitized by Google

"Also that said contract was for goods intended for illegal sale within state of Maine, and no recovery can be had under said chapter 29, § 56."

The matter was heard before the justice of the superior court on an agreed statement of facts, without the intervention of a jury, subject to exceptions in matters of law. The justice found for the defendant. During the hearing certain rulings were requested by the plaintiffs which were refused, and thereupon the plaintiffs took exceptions.

The pith of the case appears in the opinion.

Argued before WISWELL, C. J., and EMERY, SAVAGE, POWERS, PEABODY, and SPEAR, JJ.

Barrett Potter, for plaintiffs. Clarence E. Sawyer, for defendant.

WISWELL, C. J. The plaintiffs are wholesale liquors dealers in, and citizens of, the city and state of New York. The defendant is a citizen of this state. The action is one of assumpsit, upon an account annexed to the writ, to recover the purchase price for liquors bought by the defendant of the plaintiffs in the state of New York, with intent upon the part of the defendant to sell them in this state in violation of law. The action was commenced in the superior court for Cumberland county, where the defense interposed the statute, as follows: "No action shall be maintained upon any claim or demand, promissory note or other security contracted or given for intoxicating liquors sold in violation of this chapter, or for any such liquors purchased out of the state with intention to sell the same or any part thereof in violation thereof; but this section shall not extend to negotiable paper in the hands of a holder for a valuable consideration and without notice of the illegality of the contract." Rev. St. c. 29, § 64.

The plaintiffs' answer is that this statute is invalid because in conflict with the commerce clause of the federal Constitution, that it is an attempt upon the part of the State Legislature to regulate commerce between the states, and is a direct interference with such commerce. The court below ruled that the statute was valid and that the action could not be maintained. The case comes here upon various exceptions by the plaintiffs, none of which need be considered except that in relation to the validity of this statute.

The question presented is precisely the one recently decided by this court in *Corbin v. Houlehan*, 100 Me. 246, 61 Atl. 131, 70 L. R. A. 568. The only distinction between the cases is this: The opinion in *Corbin v. Houlehan* contains this statement of facts: "These liquors were bought by the defendant [the word 'plaintiffs' in the printed report should be 'defendant'] for the purpose and with the intention of selling them in this state in violation of the laws of the state, and they

were subsequently so sold by him, and the plaintiffs, when they accepted the order and thereby completed the contract, not only knew that they were intended for illegal sale, as practically admitted by one of the plaintiffs in his testimony, but also materially aided the defendant in his attempt, apparently successful, to prevent their seizure, by marking the goods, in accordance with the direction of the purchaser contained in the order, in the name of a person other than the purchaser, which name was adopted by him for this purpose, and it was known by the plaintiffs' agent that the name in which the liquors were to be shipped was fictitious and adopted by the defendant for the purpose of avoiding their seizure." Later in that opinion it is said: "So far, we have considered only the fundamental proposition that independently of any statute upon the subject forbidding resort to our courts, and upon common-law principles, the courts of a state will not enforce a contract made in another state, and valid where made, provided the purpose of both parties to the contract was to violate the laws of the state of the forum, and if the vendor did some act in furtherance of such purpose. In accordance with this principle, it might well be held in this case that the plaintiffs would not be entitled to a remedy in our courts, since they not only knew of the illegal design of the purchaser, but furthered that design by having the liquors marked in the name of a fictitious consignee to aid the purchaser in the evasion of our laws."

In this case the defendant bought the liquors in question for the purpose and with the intent of reselling them in this state, in violation of the statutes of the state. But there is no evidence in the case showing that the vendors, the plaintiffs, participated in this illegal design, or did any act in its furtherance, or even had knowledge of the intent upon the part of the purchaser to sell the liquors in violation of law. So that the sole question in this case, with reference to the plaintiffs' right to maintain this action, in view of our statute above quoted, is whether or not that statute is in violation of the commerce clause of the federal Constitution.

That was precisely the question decided by this court in *Corbin v. Houlehan*. Although the court in its opinion said that the case might be decided upon another principle—that is, that the plaintiffs not only knew of the illegal design of the purchaser, but also furthered him in that design—the court in fact decided the case upon the ground that the statute relied upon was not in conflict with the federal Constitution, that for that reason the statute was valid, and the action could not be maintained. In that case the court said: "But the question presented here by the plaintiffs' exceptions is as to the constitutionality of the statute in question,

which does not make a participation by the vendor in the purchasers' illegal purpose, or even his knowledge of the purchasers' illegal purpose, necessary to prevent his resorting to our courts."

After a careful consideration of the exhaustive and able discussion of the question by the counsel for the plaintiffs, we adhere to the conclusion reached in the case referred to, and again decide, for the reasons stated in the opinion of the court in that case, that the statute above quoted, and relied upon by the defense, is valid, and is not in conflict with the federal Constitution. For a full statement of the reasons upon which this conclusion is based, we adopt as a part of this opinion the opinion of the court in the case of *Corbin v. Houlehan*, 100 Me. 246, 61 Atl. 131, 70 L. R. A. 568.

We appreciate that the final and authoritative determination of this question is for the Supreme Court of the United States, and that, very likely, the purpose of the counsel in again presenting the question to this court is that it may be carried to that court. A different conclusion may be reached by that tribunal when the question is presented to it, but we are not aware of any utterances of that court up to the present time which have the effect of changing the conclusion reached by us in the previous case.

Exceptions overruled.

(102 Me. 229)

STATE v. WALLACE.

(Supreme Judicial Court of Maine. Dec. 13, 1906.)

1. STATUTES—CONSTRUCTION—PENAL STATUTES.

A statutory offense cannot be created by inference or implication, nor can the effect of a penal statute be extended beyond the plain meaning of the language used. It is a recognized rule that a penal statute is to be construed strictly in favor of a respondent.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, § 322.]

2. FISH—CLAMS—POWER TO PROTECT—STATUTORY PROVISIONS.

Section 1, p. 175, c. 161, Pub. Laws 1905, amendatory of section 34 of chapter 41 of the Revised Statutes, reads, in part, as follows: "Towns at their annual meetings may fix the times in which clams may be taken within their limits, and the prices for which its municipal officers shall grant licenses or permits therefor, and the number to be granted; and when not so regulated by vote the municipal officers may fix the times and prices for which permits shall be granted, and the number to be granted. No person shall take clams within the limits of any towns having so regulated the taking of clams, without first obtaining a written license or permit from the municipal officers of such towns, unless the clams are for the consumption of himself and family, or for the consumption or use of inhabitants of the town or any person temporarily resident therein. Whoever takes clams contrary to the provisions of this section, shall for each offense, be fined not more than ten dollars, or imprisoned not more than thirty days." This amendatory act was approved and took effect March 24, 1905. The annual town meeting of the town of Cushing for 1905 was held March 13th, 11 days before this amendatory

act took effect. At this meeting the town took no action, in relation to clams, under the provisions of the aforesaid section 34 of chapter 41, Rev. St., which had not then been amended. April 15, 1905, the municipal officers of Cushing voted to issue not to exceed 150 licenses to residents of the town of Cushing to take clams, and also voted not to issue licenses for that purpose to nonresidents. The defendant was a resident of the town of Friendship, and was arrested for taking clams within the limits of Cushing on October 26, 1905. The clams taken by the defendant were not for the consumption of himself and family, or for the consumption or use of the inhabitants of Cushing or any person temporarily resident therein.

Held (1) that Rev. St. c. 41, § 34, as amended by the statute of 1905 (Pub. Laws 1905, p. 175, c. 161), is materially different from Rev. St. c. 41, § 34, as it stood before the amendment; (2) that the nonaction of the town at its annual meeting, March 13, 1905, in relation to clams, was equivalent to an affirmative action in favor of the free taking of clams in Cushing during the ensuing year; (3) that the omission on the part of the town to act was not made in contemplation of any power then in the municipal officers to act; (4) that the municipal officers of Cushing had no authority to act under the statute of 1905 at the time they assumed to act; (5) that such municipal officers will have no authority to act until after an annual meeting of the town to be held subsequently to March 24, 1905, at which no vote is taken to regulate the taking of clams under the terms of the statute of 1905.

(Official.)

Argued Statement from Supreme Judicial Court, Knox County.

Action by the state against Ulysses T. Wallace. Complaint dismissed.

Complaint for taking clams within the limits of the town of Cushing, Knox county, contrary to the regulations of the municipal officers of Cushing assuming to act under Pub. Laws 1905, p. 175, c. 161. The matter came on for hearing at the January term, 1906, of the Supreme Judicial Court, Knox county, at which time an agreed statement of facts was filed and the case was sent to the law court, for that court to render such judgment as the law and evidence required. The case does not show how the matter reached the Supreme Judicial Court, but probably on appeal from the court or magistrate issuing the warrant.

The case appears in the opinion.

Argued before WHITEHOUSE, SAVAGE, POWERS, PEABODY, and SPEAR, JJ.

Phillip Howard, Co. Atty., for the State. Rodney I. Thompson, for defendant.

PEABODY, J. This was a complaint for taking clams within the limits of the town of Cushing, contrary to the regulations of the municipal officers assuming to act under Pub. Laws 1905, p. 175, c. 161. The case comes before this court on an agreed statement of facts.

The act of the Legislature is as follows: "Towns at their annual meetings may fix the times in which clams may be taken within their limits, and the prices for which its municipal officers shall grant licenses or permits therefor, and the number to be granted; and

when not so regulated by vote the municipal officers may fix the times and prices for which permits shall be granted, and the number to be granted. No person shall take clams within the limits of any towns having so regulated the taking of clams, without first obtaining a written license or permit from the municipal officers of such town, unless the clams are for the consumption of himself and family, or for the consumption or use of inhabitants of the town or any person temporarily resident therein. Whoever takes clams contrary to the provisions of this section, shall for each offense be fined not more than ten dollars, or imprisoned not more than thirty days."

This act was approved on the 24th day of March, 1905, and took effect on approval. The annual town meeting was held March 13, 1905. On April 15, 1905, the municipal officers of Cushing voted to issue not to exceed 150 licenses to residents of the town of Cushing, and also voted not to issue licenses to nonresidents of the town. The defendant was a resident of the town of Friendship. The complaint alleged that the defendant took clams within the limits of the town of Cushing on the 26th day of October, 1905, and it was further alleged and admitted that the clams were not dug for the consumption of defendant and family, or for the consumption of inhabitants of Cushing, or any person temporarily resident therein.

The two contentions of the defendant are, first, that the action of the municipal officers could be of no force because their right to act depended wholly upon whether the town had taken or omitted to take action, and that the town could not take action under a statute which was not enacted until after the date of the meeting; second, that the statute and the regulation of the municipal officers by discriminating in favor of citizens of the town denied to other citizens of the state the equal protection of the law.

It is unnecessary to consider the questions raised by the second defense, as a true construction of the statute indicates that the action of the municipal officers was without authority. It is a recognized rule that a penal statute is to be construed strictly in favor of the rights of a respondent. "A statutory offense cannot be created by inference or implication, nor can the effect of a penal statute be extended beyond the plain meaning of the language used." *State v. Bunker*, 98 Me. 887, 57 Atl. 95.

Another reason for a strict construction of the present act is that it relates to the delegation of a power which is primarily vested in the Legislature, that of controlling the subject of seashore fisheries. Such statutes are as a general rule strictly construed. 26 Am. & Eng. Enc. of Law (2d Ed.) 665; 20 Am. & Eng. Enc. of Law (2d Ed.) 1140.

It is clear from the language of the act of 1905, if it stood alone, that the municipal officers had no authority to act until after an

annual meeting of the town at which no action had been taken. At the annual meeting of the town which was held 11 days prior to the enactment of this law action might have been taken under the similar provisions of the statute then existing (Rev. St. c. 41, § 34), but under that statute, if the town did not act, no authority was otherwise delegated, and no action could be taken until the following year. In other terms the statute was materially different from the one substituted for and repealing it in 1905. The nonaction of the town at this annual meeting was equivalent to an affirmative action in favor of the free taking of clams in the town of Cushing during the ensuing year. The omission to act was not made in contemplation of any power then in the municipal officers to regulate the taking of clams. A strict construction of the language of the new act, as well as a reasonable interpretation of the words, does not indicate a legislative intent to delegate to the municipal officers authority to reverse the will of the inhabitants of the town, but only an intention to give the municipal officers power to act after the town had exercised its option, with the knowledge that on failure to act the subject would devolve upon the municipal officers. It follows, therefore, that they had no authority to act under this statute until after an annual meeting of the town held subsequently to the 24th day of March, 1905, at which no vote was taken to regulate the taking of clams under the terms of this statute. The act of the respondent charged in the complaint violated no law.

Complaint dismissed.

(102 Me. 233)

IRELAND et al. v. WHITE.

(Supreme Judicial Court of Maine. Dec. 12, 1906.)

1. NOTES—VALIDITY—LEGAL INCOMPETENCY—BURDEN OF PROOF.

The law generally presumes mental soundness, and, when legal incompetency is alleged for the purpose of showing that an instrument creating an obligation by its terms is thereby invalid, such legal incompetency must be proved by a preponderance of evidence, and the burden of proving the same rests upon the defendant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 83.]

2. EVIDENCE—OPINIONS—MENTAL CAPACITY—PHYSICIANS.

Skillful and reputable physicians, although not experts upon the subject, may testify to the mental condition of their patients when they have adequate opportunity of observing and judging of their mental qualities. Such condition testified to is a fact observed, which differs from a conclusion as to legal sufficiency or insufficiency of mental capacity to be deduced in each case from facts proved, under correct rules of law.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 2198.]

3. SAME.

In the case at bar the deceased intestate in her lifetime made and delivered a certain promissory note payable after her death, and on which said note suit was brought against her administrator. The defendant contended, among

other things, that his intestate was of unsound mind at the time she executed the note. The presiding justice, against the objection of the plaintiffs, admitted a part of the testimony of two physicians engaged in the general practice of medicine, and who had attended the deceased intestate professionally, in reference to the mental capacity of the deceased intestate. *Held*, that the ruling of the presiding justice admitting this testimony was correct.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 2198.]

4. NOTES—ACTIONS—EVIDENCE—SUFFICIENCY.

The jury specially found that the deceased intestate was of unsound mind at the time she executed the note. *Held*, that the jury did not err in this finding, and that the general verdict for the defendant must be sustained.

(Official.)

Exceptions from Supreme Judicial Court, Androscoggin County.

Action by A. M. Ireland and others against Jordan White, administrator. Verdict for defendant, and plaintiffs move for a new trial and except to rulings of the court. Motion and exceptions overruled.

Assumpsit on a certain promissory note against Jordan White as administrator of the estate of Melinda P. Tarbox, late of Lewiston, deceased intestate. This note was for the sum of \$500 and was given by Mrs. Tarbox on the 29th day of October, 1902, to one Jason Russell, and was payable after her death. After the death of Mrs. Tarbox the payee, Mr. Russell, sold and transferred this note to the plaintiffs.

Tried at the January term, 1906, of the Supreme Judicial Court, Androscoggin county. The defendant's pleadings set up three defenses, viz.: "First, that Mrs. Tarbox did not sign the note; second, that, if she did sign it, she was induced to do so by fraud; and, third, that at the time of said signing, if she did sign it, she was of unsound mind."

The jury was instructed to make special findings, and in accordance therewith found that Mrs. Tarbox did sign the note, that there was no fraud, but that at the time of signing the note she was of unsound mind.

The general verdict, therefore, was for the defendant.

The plaintiffs then filed a general motion for a new trial. The plaintiffs also took exceptions to certain rulings of the presiding justice during the trial admitting certain testimony of certain physicians who had attended Mrs. Tarbox professionally.

The case is fully stated in the opinion.

(Memorandum: One of the justices sitting at the term of the law court at which this case was argued did not sit in this case, being disqualified under the statute by reason of having ruled therein at nisi prius.)

Argued before WHITEHOUSE, POWERS, PEABODY, and SPEAR, JJ.

Edgar M. Briggs, for plaintiffs. McGillicuddy & Morey, for defendant.

PEABODY, J. The plaintiffs bring this action against the administrator of the es-

tate of Melinda P. Tarbox, late of Lewiston, in the county of Androscoggin, deceased intestate, on a promissory note alleged to have been given by the intestate in her lifetime to Jason Russell.

The note is as follows:

"Lewiston, October 29, 1902.

"For value received I promise to pay Jason Russell or order the sum of five hundred dollars payable after my death with interest.

"Melinda P. Tarbox.

Indorsed: "Jason Russell."

Melinda P. Tarbox died in March, 1904, aged about 80 years. After her death Jason Russell sold and transferred the note in suit to the plaintiffs, who seasonably gave notice to the defendant, who had been duly appointed and had qualified as administrator of the promisor's estate.

Three defenses are made under the pleadings: First, that Mrs. Tarbox did not sign the note; second, that, if she did sign it, she was induced to do so by fraud; and, third, that at the time of signing, if she did sign it, she was of unsound mind. The jury were directed to make special findings on each of these points. They found that she did sign the note, that there was no fraud, and that at the time of said signing she was of unsound mind.

The verdict was for the defendant, and the case comes before this court on the plaintiffs' motion for a new trial, and exceptions to the ruling of the presiding justice allowing, against the plaintiffs' objection, part of the testimony of two physicians engaged in the general practice of medicine in reference to the mental capacity of the deceased promisor. Dr. Ward J. Renwick, who resided in Auburn and had been engaged in practice as a physician and surgeon for nearly 10 years, attended Mrs. Tarbox professionally, visiting her on the 1st day of November, 1902, and saw her four times as his patient. In answer to questions, among others asked by the defendant's attorney objected to by the plaintiffs, he gave the following testimony:

"Q. What did you observe as to her mental condition; that is, getting at her mental condition by talking to her and her answers and what she said in response to the questions?

"A. I observe that her mental condition was very much impaired.

"Q. Can you tell, doctor, whether her answers to your questions were wandering or not, whether or not they would meet your questions?

"A. I should say that they wouldn't meet my questions. Very incoherent.

"Q. Was her trouble chiefly in her mind or in her body?

"A. I couldn't answer that question. I should say both.

"Q. Was there anything about her case, as you observed it then, to indicate that her condition was one that came upon her suddenly, the 1st day of November, or whether

it had been a gradual transfer in her mind to reaching that point?

"A. It had been gradual.

"Q. Were the conditions you observed on the 1st day of November, 1902, chronic conditions or acute conditions?

"A. Chronic."

Dr. George W. Curtis, of Lisbon Falls, a physician and surgeon of 21½ years' practice, who was called to attend Mrs. Tarbox the 1st day of December, 1902, and made an examination and diagnosis of her case, testified in answer to questions, among others, asked by the defendant's attorney and objected to by the plaintiffs, as follows:

"Q. Should you say the condition of her mind that you have described was a condition that was acute or was it a chronic condition?

"A. It seemed to me like a senile trouble coming on gradually."

The bill of exceptions relates solely to the ruling of the presiding justice admitting this testimony of the two physicians.

The motion for a new trial applies only to the finding of the jury that the maker of the note was at the time of signing of unsound mind. The other special findings were in favor of the plaintiffs.

There is no complaint that the charge of the presiding justice did not fully present the rules of law by which the mental competency of the promisor of the note in question was to be determined upon the evidence submitted to the jury. The evidence bearing upon this question presented incidents, acts, and conditions contradictory in tendency, but the jury from the whole history of the mental condition of Mrs. Tarbox, shortly before and shortly after she signed the note, decided that she was incompetent. The testimony of the physicians referred to, whether legally admissible or not, constituted a part of the defendant's evidence, which the jury must have found was of greater weight than the opposing evidence offered by the plaintiffs. The law generally presumes mental soundness, and, when legal incompetency is alleged for the purpose of showing that an instrument creating an obligation by its terms is thereby invalid, it must be proved by a preponderance of evidence. This being a substantive defense to the note, the burden of proving it rests upon the defendant. The paper itself, although found by the jury not to be fraudulent, does not appear to be an ordinary commercial transaction. It was given for \$500, while the actual valuable consideration for which it was given was money loaned to her by the payee to the amount of \$100, and was made payable after her death. The explanation as to its amount and terms given by the payee is that she wanted to do something for him and his family; that she wanted them to have something out of her estate. Several witnesses acquainted with her testify to acts and conversations contemporaneous with the date

of the note which they noticed as unusual, and indicating changes in Mrs. Tarbox's personal habits and mental condition. For example, that she was at one time found sitting down close to the track of the electric railroad, near the cemetery, and remained there until the motorman stopped the car and asked her if she was going to Lewiston, to which she replied she guessed so, and was then helped on to the car. When a tenant went to pay her his rent, she did not appear to know who he was. At another time when rent was paid to her she offered a receipt so indefinite that another was made for her to sign, although she had been accustomed to collect her rents and give sufficient receipts; that her manners at table indicated a change; that her replies to questions in regard to her property and business affairs showed forgetfulness and failure to comprehend, making repeated explanations necessary. When acquaintances called who had been accustomed to visit her, she failed to appreciate what was said to her, and that at times she seemed to understand, and then her mind would be right off. The testimony of the doctors stated in the bill of exceptions, and also that not objected to, show that her talk was disconnected and incoherent, and that her condition of mind indicated senile decay. Opposing testimony was offered by the plaintiffs of witnesses, even more numerous, who had transacted ordinary business with Mrs. Tarbox not long previous to the date of the note, shows that she borrowed money to pay taxes to save interest, for which she gave her note and paid it in small amounts, and contracted and paid milk and grocery bills; that about the date of the note a deacon of the Friend's Church, of which Mrs. Tarbox was a member, called upon her, when she remarked that he had not been to see her lately, and said that she would like to hear about the church; that her conversation was connected and responsive to his questions; that a short time previous she made an exhortation in church, and he did not see that she was any different from what she had always been. The pastor of the church, who had known her for 20 years and had visited her frequently, stated that he did not discover any difference in her except that she was more feeble, more tottering, and she was growing old. The pastor's wife saw Mrs. Tarbox in September, 1902, and testified that she was inquiring about the church and seemed very much interested in it; "she always wanted us in the berry time to go down and get berries," meaning in her garden, and said that, "when they were ripe, she should want us to go down just the same"; that she noticed nothing different in her understanding conversation from what it had always been. Dr. A. F. McAllister, who had been a practicing physician between 23 and 24 years, who had lived in Lewiston about 8 years, and who lived opposite the residence of Mrs.

Tarbox, testifies that she called at his house four or six months after her husband's death in 1901. She spoke about being lonesome and missing the care and attention her husband had given her during his life. He noticed nothing in her appearance mentally out of the usual line. Her conversation was connected from anything he noticed, and that her answers were entirely responsive to the questions which he asked. This testimony offered by the plaintiff was consistent with the theory of the mental soundness of Mrs. Tarbox, but there is nothing in its nature so inconsistent with the existence of senile impairment of her mind which the defendant claims was manifested by her acts and conduct observed, on different occasions, by the witnesses called by him, as to show that the verdict of the jury was clearly wrong. It is difficult to determine in all cases where there is decay of the mental faculties in old age whether there is disease of the mind which would render the individual affected incompetent to transact ordinary business, or mere feebleness of the mental faculties which would not prevent the mind from acting normally. No experts have been called to explain the distinction in this case, but attending physicians have testified, not only in the same manner as the other witnesses have testified to acts and conditions observed by them, but have been allowed to state the facts which they observed and discovered by their examinations indicated as to the condition of the patient's mind; and we see no reason to disturb the verdict of the jury as being against the weight of evidence. We now consider the exceptions to the admission of the opinions of the physicians called by the defendant, formed from what they observed as to the mental condition of Mrs. Tarbox. The testimony of Dr. Renwick is distinctly admissible on the authority of *Fayette v. Chesterville*, 77 Me. 28, 52 Am. Rep. 741, and *Hall v. Perry*, 87 Me. 569, 33 Atl. 160, 47 Am. St. Rep. 352, in which it is held that skillful and reputable physicians, although not experts upon the subject, may testify to the mental condition of their patients when they have adequate opportunity of observing and judging of their mental qualities, and that, having had opportunity to observe the manifestation of the mental disease, they may testify as to its nature. The condition testified to is a fact observed, which differs from a conclusion as to legal sufficiency or insufficiency of mental capacity to be deduced in each case from facts proved under correct rules of law.

The testimony of Dr. Curtis must be considered admissible by the same rule. Under the strict procedure applicable to bills of exceptions we are not to infer the existence or nonexistence of facts necessary to support an exception. Prejudicial error must be shown. It does not appear by the bill of

exceptions in this case that the facts and observations upon which Dr. Curtis based his opinion, "It seemed to me like a senile trouble coming on gradually," were limited to a single professional visit. *Fayette v. Chesterville*, supra; *McKown v. Powers*, 86 Me. 291, 29 Atl. 1079; *Toole v. Bearce*, 91 Me. 209, 89 Atl. 558. Our conclusion is that the exceptions cannot be sustained.

Motion overruled.

Exceptions overruled.

(102 Me. 212)

STETSON et al. v. GRANT et al.

(Supreme Judicial Court of Maine. Dec. 12, 1906.)

1. ENTRY, WRIT OF—EVIDENCE—PRESUMPTIONS.

The legal presumption is that by a deed of conveyance of land, duly executed and recorded, the title passed, that the grantor had sufficient title to enable him to convey, and that the seisin and the title correspond with each other.

2. SAME—ISSUES, PROOF AND VARIANCE—MATTERS TO BE PROVED.

The plaintiff in a real action is bound to prove his allegations of seisin within 20 years. To disprove this allegation, the defendant under the general issue may show title in a third party under whom he does not claim. Such evidence is received, not for the purpose of showing a better title in the tenant, but to show no title in the demandant within the 20 years. If seisin within 20 years is shown by the plaintiff, the defendant under the general issue cannot show a subsequent conveyance to a third party under whom he does not claim.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Entry, Writ of, §§ 35, 36.]

3. PUBLIC LANDS—DISPOSAL BY STATE—STATUTORY PROVISION.

Pub. Laws 1830, p. 1262, c. 480, § 2, empowered the land agent to select and designate for public uses 1,000 acres of land to average in quality and situation in each township which is or may be surveyed into small lots for sale or settlement.

Held, that a township which had been surveyed for sale into lots mostly of 670 acres each fell within this description.

4. SAME—RETURN OF LAND AGENT—SUFFICIENCY.

The land agent's return stated that he had selected land of an average value with the rest of the township.

Held, that this showed a substantial compliance with the requirements of the statute.

Held, also, that the land agent was made the judge of the quality and situation of the land, and that his decision made in good faith cannot be reviewed or reversed.

5. TAXATION—PROPERTY LIABLE—PUBLIC LAND.

There never has been in this state any authority in law for taxing the soil of the public lots or reserved lands, while the fee to the same is held in trust by the state.

6. ENTRY, WRIT OF—TITLE OF PLAINTIFF.

In order to recover in a writ of entry, the demandant must prove not only a right of entry at the time of the commencement of his action, but also such an estate in the premises as he has alleged.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Taxation, § 301; vol. 18, Entry, Writ of, § 38.]

(Official.)

Report from Supreme Judicial Court, Franklin County.

Action by Edward Stetson and others against Edward Grant and others. Judgment for defendants.

Real action. Writ dated September 6, 1905. The declaration in the plaintiff's writ is as follows:

"In a plea of land wherein the said plaintiff's demand against the said defendants the possession of a certain lot or parcel of land, situate in township numbered 3, range 4, in Franklin county, and bounded and described as follows, to wit: Commencing on the south line of said township at a point two miles from the southwest corner; thence, northerly, parallel with the west line of said township to Kennebago Lake, so called, thence, in a southeasterly direction, following the shore of said Kennebago Lake, to the south line of said township; thence, westerly, on the south line of said township, to the point begun at. Whereupon the said plaintiffs say that they were lawfully seised of the demanded premises with the appurtenances in their demesne as of fee simple within 20 years last past and ought now to be in the quiet possession thereof, but that the said defendants have since unjustly entered and hold the plaintiffs out."

Plea, the general issue, with brief statement as follows: "That the defendants claim the right to the possession of the land described in the writ at the date of the writ, and also claim to have been in rightful possession thereof for the purpose of occupying the same with sporting camps, and have occupied the same with sporting camps, by virtue of and under the authority vested in them by a certain permit or lease thereof granted by Edgar E. Ring, land agent of the state of Maine, for and in behalf of the state of Maine, to Ed. Grant & Sons, dated October 28, 1904, for the term of one year, to wit, from November 1, 1904, to November 1, 1905, and defendants claim still to be rightfully in possession under a like permit for the succeeding year."

Tried at the February term, 1906, of the Supreme Judicial Court, Franklin county. At the conclusion of the testimony, by agreement of the parties, the case was reported to the law court for decision upon so much of the evidence "as is legally admissible or as to which objection has been waived."

The case fully appears in the opinion.

Argued before WHITEHOUSE, SAVAGE, POWERS, PEABODY, and SPEAR, JJ.

Frank W. Butler and Joseph C. Holman, for plaintiffs. E. E. Richards, H. F. Beedy, and Fremont E. Timberlake, for defendants.

POWERS, J. This is a real action reported to the law court for decision. The writ is dated September 6, 1905, and the demanded premises are a part of lot 33 in township 3, range 4 W. B. K. P., in Franklin county,

according to the survey of Uriah Holt, made in 1835. In 1860 the south half of the township was again surveyed into lots by Jonathan Russ, and the demanded premises are the same as lot 149 of this survey.

The plea is the general issue, with a brief statement that the defendants claim the right to possession of the demanded premises and to have been in rightful possession thereof for the purpose of occupying the same with sporting camps by virtue of and under the authority vested in them by certain permits or leases thereof granted by the land agent of the state of Maine for and in behalf of the state. Plaintiffs derive their title from duly recorded deeds from the state land agent, dated September 1, 1866, of the south half of the township, excepting lots 146, 147, and the south half of lot 135 according to the survey of Russ, and reserving 500 acres for public uses, and by intermediate conveyances. One of the plaintiffs appears to be a grantee in one of these state deeds and the others are heirs or devisees of such grantees, or they are grantees in intermediate conveyances, all of which were duly recorded. This makes a prima facie case for the plaintiffs. The legal presumption is that, by a deed of conveyance of the land duly executed and recorded, the title passed, that the grantor had sufficient seisin to enable him to convey, and that the seisin and the title correspond with each other. *Blethen v. Dwinel*, 84 Me. 133; *Webster v. Calden*, 55 Me. 165.

The demandants, however, declare on their seisin of the demanded premises within 20 years. They are bound to prove the seisin upon which they count, and it is competent for the defendants under the general issue to disprove this allegation of seisin by showing title in a third party, even although the defendants do not claim under him. If seisin within 20 years is shown by the plaintiff in a writ of entry, the tenant cannot show a subsequent conveyance by the plaintiff to a third party under whom the tenant does not claim, for no such issue is raised in the case. He may, however, always show that the plaintiff obtained nothing by his deed. Under the general issue the question is who has the better title. The demandant must recover on the strength of his title, not on the weakness of his adversary's. Possession is better than no title. Evidence to rebut the demandants' seisin within 20 years is received not for the purpose of proving a better title in the tenant, but to show no title in the demandant within that time. *Stanley v. Perley*, 5 Me. 369; *Bussey v. Grant*, 20 Me. 281; *Warren v. Miller*, 88 Me. 108; *Chaplin v. Barker*, 53 Me. 275; *Poor v. Larrabee*, 53 Me. 543; *Rowell v. Mitchell*, 68 Me. 21; *Hewes v. Coombs*, 84 Me. 434, 24 Atl. 896.

For the purpose of disproving the alleged seisin of the plaintiff within 20 years, the defendants claim that the evidence shows that the demanded premises are a part of

the reserved lands in the township which were duly located in 1836, 30 years before the deeds from the state land agent under which the plaintiffs derive title. Certainly, if this contention is borne out by the evidence, the land agent had no authority to sell and convey the public lots, and no title in the demanded premises passed by his deeds.

In 1836 the land agent made the following selection and designation of the public lots in the township:

"Be it known by these presents:

"That I, John Hodgdon, agent of the state of Maine, to superintend the sale and settlement of the public lands by the authority in me vested by the laws of the state, do hereby select and reserve for uses by the law designated in township number three of the fourth range of townships west of Bingham's Kennebec purchase in the county of Oxford, lots numbered twenty-seven and thirty-three according to the survey and return thereof by Uriah Holt in the year 1835, containing one thousand acres, being of average value with the rest of the township.

"Given under my hand this second day of January in the year of our Lord one thousand eight hundred and thirty-six.

"John Hodgdon, Land Agent."

This designation was made under Pub. Laws 1830, p. 1262, c. 480, § 2, in force at that time, which empowered and made it the duty of the land agent "to select and designate one thousand acres of land to average in quality and situation in each township which is or may be surveyed in small lots for sale or settlement to be reserved for such public uses." This selection was duly recorded in the Oxford registry of deeds on February 4, 1836, as provided by the last-named act.

The first objection urged is that at that time the township had not been surveyed into small lots for sale or settlement. In 1835 Uriah Holt was directed by the surveyor general of the state to survey and lot the townships into sections of one mile square, so that no section should contain more than 700 acres, and to divide such sections as were suitable for farming into lots, not exceeding 170 acres. His return and plan showed that he lotted it mostly into sections of 670 acres, although some of the blocks on account of water contained less than that amount of land. Block 33 contained 670 acres and block 27, exclusive of water, 327 acres, so that the two lots selected for public uses together contained exactly 1,000 acres and were both in the south half of the town. The land agent was bound to select and designate the reserved lands in all townships that had or might be surveyed into small lots for sale or settlement. Small lots for settlement might be one thing and small lots for sale another. This distinction was recognized by the Legislature in 1831 by enacting that no townships should be sold until the land suitable for farming

should be surveyed into lots not exceeding 170 acres, and the remaining land into lots not exceeding 700 acres. Laws 1835, p. 296, c. 192, § 5. This state was selling land in large quantities by townships and parts of townships, and we have no doubt that the township had been surveyed into small lots for sale within the meaning of the act which directed and empowered the land agent to select and designate the public lots.

It is insisted, however, that the location is invalid, because the land agent was directed to select "land to average in quality and situation in each township," and the record shows that the land selected was "of an average value with the rest of said township." The force of this objection depends upon whether there is any substantial difference in the significance of the statutory language and that used by the land agent. We are unable to discover any. In speaking of wild land, quality includes, not only the soil, but the kind and amount of the growth upon it, and situation includes proximity to floatable streams and accessibility for operation or settlement upon it. All these elements and none other determine its value. Wild land which averages in quality and situation with other land must average with it in value, and land of average value with other land must be of average quality and situation with it. The terms as used are synonymous. The land agent was not obliged to use the language of the statute in describing his acts. He was obliged to do what the statute authorized him to do, and this the return shows that he did.

Finally, it is said that the plans filed in the case show that the land selected does not average in quality and situation with the rest of the township. This may be true, but we are unable to discover it as applied to the conditions existing 70 years ago, when the selection was made. Even if true, it does not authorize this court to review or reverse the judgment of the land agent. The statute made him the judge of the quality and situation of the land, and by his judgment, honestly exercised, both the state and its grantees must abide.

The township is wild land, and, notwithstanding the demanded premises are a part of the public lots, the demandants contend that they have established a right of entry and seisin therein by the payment of state and county taxes thereon under Rev. St. c. 9, § 65, formerly chapter 162, p. 192, § 1, Pub. Laws 1895. It is there provided that when a person claims under a recorded deed describing wild land taxed by the state, and the records of the State Treasurer show that the grantee, his heirs or assigns, have paid the state and county taxes thereon continuously for 20 years subsequent to recording such deed, such payment shall give said grantee or person claiming as aforesaid, his heirs or assigns, a right of entry and seisin in the whole, or such part in common and undivided of the whole tract as the deed states, or as

the number of acres in the deed is to the number of acres assessed. Admitting the soundness of the plaintiffs' legal proposition, they fail by their evidence to establish the alleged fact upon which it is based. The only evidence of the payment of state and county taxes produced is the certificate of the State Treasurer that he has examined the records of his department "so far as relates to the payment of state and county taxes in township number 3, range 4 W. B. K. P. Franklin county" from 1881 to 1905, both inclusive, and finds that said taxes have been paid in full continuously by the plaintiffs and their predecessors in title. There is nothing here to show that state and county taxes were either assessed or paid on the public lots in said township. There never was any authority in law for assessing any such taxes, and the presumption is that none were assessed. Since April 23, 1897, the timber and grass upon such lots have been taxed; but the soil, the fee to which the state itself holds in trust for the beneficiaries, has never been subject to taxation. There is nothing in the certificate of the State Treasurer to indicate that any such extraordinary and unauthorized taxes were imposed upon the public lots in this township. It simply shows that whatever state and county taxes were imposed in the township have been paid by the demandants and their grantors.

The evidence shows that the demandants have a right to cut and carry away the timber and grass upon the public lots. Undoubtedly they have a right of entry for this purpose. This, however, is not sufficient to enable them to maintain this writ of entry. They have alleged in their writ that within 20 years last past they were seised in fee simple of the premises. This they have failed to prove. Proof of both the right of entry at the time of the commencement of the action and of such an estate in the premises as they have alleged is necessary before they can recover, although the defendants show no title in themselves. *Rev. St. c. 106, § 8; Rawson v. Taylor, 57 Me. 343; Hamilton v. Wentworth, 58 Me. 101.*

The plaintiffs having failed to show any title to the demanded premises, it is unnecessary to determine what, if any, authority the land agent may have to lease the public lots for the purpose of erecting and maintaining sporting camps upon them.

Judgment for the defendants.

(74 N. H. 215)

LITTLE v. COLMAN et al.

(Supreme Court of New Hampshire. Hillsborough. April 2, 1907.)

1. WILLS — CONSTRUCTION — LIFE ESTATES — TRUST.

A testatrix gave to each of her two daughters "the use" of certain real property during life. *Held*, that each daughter took a life es-

tate in the real property itself, and there was no trust created.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, §§ 1393-1397, 1575-1578.]

2. SAME.

Testatrix gave to her daughters and the survivor of them during life "the income from all the rest" of her real and personal estate, consisting of two lots of land having buildings upon them. *Held*, that the intention was to create a life tenancy in the property itself, and not a trust, inasmuch as no trustee was named, and no circumstances disclosed tending to show why the testatrix should prefer a trust to a life tenancy.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, §§ 1393-1397, 1575-1578.]

Transferred from Superior Court, Hillsborough County; Peaslee, Judge.

Bill in equity by Cyrus H. Little, trustee, against Emily F. Colman and others, for directions in respect to the execution of a will. Bill taken pro confesso and transferred without a ruling from the superior court. Case discharged.

This was a friendly suit, brought for the purpose of settling the question of the necessity of further service by the trustee, and the defendants did not appear by counsel. The material allegations of the bill are as follows: Mary Dyson died testate in 1898, her will being duly proved and allowed. In 1905 the plaintiff was appointed trustee by the probate court to hold certain property and estate described in the will. Besides certain provisions in favor of the husband of the testatrix during life, the will contained the following: "II. I give and bequeath, upon the death of [my] husband, the use of my farm in Vassalborough, * * * during the term of her natural life, to my daughter, Emily F. Colman, of Vassalborough, Maine. III. I give and bequeath, upon the death of my husband, the use of my house and lot where I reside and which is the family homestead, during the term of her natural life, to my daughter, Lottie B. Ring, of Manchester aforesaid. * * * V. I give and bequeath to my daughters aforesaid, and to the survivor of them, the income from all the rest of my real estate and personal property in equal shares during the terms of their natural lives. VI. I give, bequeath, and devise to the children now living, or who may be hereafter born to my daughter, Lottie B. Ring, all the rest, residue, and remainder of my estate of every kind." The husband of the testatrix died in 1899. The estate consists of the farm in Vassalborough and the family homestead in Manchester mentioned in the second and third clauses of the will, and of two lots of land with buildings upon them in Manchester. The plaintiff, as trustee, has taken possession of the real estate last mentioned, collected the rents, paid the expenses of maintenance, and divided the net income between Emily F. Colman and Lottie B. Ring. He is in doubt concerning his duties and liabilities in the premises, and prays for

advice and direction upon the following questions: (1) Are the provisions of the will sufficient to create a trust in any property of the testatrix? (2) If so, in what portion?

Cyrus H. Little, for the plaintiff.

CHASE, J. The testatrix, by the second and third clauses of the will, gave to one of her daughters during life "the use" of the Vassalborough farm, and to the other daughter during life "the use" of the family homestead. Obviously "the use" intended was to be direct—of the property itself, without the intervention of a trustee or other agency. Each daughter took a life estate of the real estate of which she was to have the use, and the plaintiff, as trustee, has no duty to perform in respect to such real estate.

By the fifth clause of the will the testatrix gave to her daughters and the survivor of them during life "the income from all the rest" of her real and personal estate. "The rest" consists of two lots of land in Manchester having buildings upon them. The income from these lots is the gain or profits which comes in or arises from the use of them, either directly by the owner in person, or indirectly by tenants. The use of the term "income," in the connection in which it appears in this clause, would be proper if the intention was that the property should be held in trust by a third person, and the gain or profit arising from its use was to be paid over to the legatees. But, if such were the intention, it would seem as if the idea would be expressly stated and a trustee would be nominated to hold the property. "Income" is also used when the intention is that the legatee or grantee of it shall have the possession and control of the property from which it arises, without the intervention of a trustee. In *Walker v. Hill*, 73 N. H. 254, 60 Atl. 1017, the provision in the will considered was "I do also give to my said wife the income of the remainder of my estate during her natural life"; and it was held that the provision did not create a trust in respect to the property from which the income would arise, but gave the wife a life estate in the property. One reason for the holding was the absence of any mention in the will of a trust estate or a trustee. See, also, *McClure v. Melendy*, 44 N. H. 469; *Wood v. Griffin*, 46 N. H. 230, 234; *Merrill v. Baptist Union*, 73 N. H. 414, 62 Atl. 647, 3 L. R. A. (N. S.) 148, 111 Am. St. Rep. 632. This case very closely resembles *Walker v. Hill*. The will contains nothing, aside from the employment of the word "income" instead of "use," having a tendency to prove an intention to create a trust. This change from the term used in the preceding clauses may have arisen from the understanding of the testatrix that the legatees would not be likely to use the property in person, as they would that mentioned in the preceding clauses. No circumstances are disclosed in the case having

a tendency to show why the testatrix should prefer a trust to a life tenancy. A life tenancy would as effectively secure to the daughters the income of the property as would a trust. If they could not manage it themselves, they could employ an agent to manage it for them. The remainderman would also be as fully protected in the one way as in the other. On the whole, it does not seem probable the testatrix intended that the property mentioned in the fifth clause of the will should be held in trust; and the plaintiff is so advised.

Case discharged. All concurred.

(74 N. H. 212)

DAME v. WOOD.

(Supreme Court of New Hampshire. Belknap. April 2, 1907.)

STIPULATIONS—AGREEMENT AS TO FACTS—MISTAKE OF COUNSEL—RIGHT TO RELIEF.

Plaintiff was entitled to relief from a stipulation as to facts where, though he and his counsel knew of certain facts omitted from the agreement, he acted upon advice of counsel, and neither of them knew or ought to have known that those facts were material to recovery.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Stipulations, § 70.]

Exceptions from Superior Court, Belknap County; Stone, Judge.

Action by George F. Dame against Horace H. Wood. From an order relieving plaintiff from an agreement as to facts, defendant brings exceptions. Exceptions overruled. See 62 Atl. 379.

Motion by the plaintiff to be relieved from the agreement on which this case was submitted when it was previously before the court. 73 N. H. 222, 891, 60 Atl. 744, 70 L. R. A. 183. Although both the plaintiff and his counsel knew of the facts which they say show that "the parties understood that the plaintiff's performance of the contract was accepted from day to day as the work progressed," the plaintiff acted by advice of counsel, and neither of them knew or ought to have known that those facts were material to a recovery. Subject to the defendant's exception, the court ordered that the plaintiff be relieved from the agreement.

George B. Cox and Walter S. Peaslee, for plaintiff. Jewett & Plummer, for defendant.

YOUNG, J. It can be found from the fact that a person fails to act because of a mistake of his counsel that he was prevented from acting by accident, mistake, or misfortune (*Grout v. Cole*, 57 N. H. 547; *Bolles v. Dalton*, 59 N. H. 479, 490; *Kelsea v. Manchester*, 64 N. H. 570, 15 Atl. 206; *Harvey v. Northwood*, 65 N. H. 117, 19 Atl. 653; *Cossar v. Truesdale*, 69 N. H. 490, 45 Atl. 252; *Parsons v. Durham*, 70 N. H. 44, 47 Atl. 600; *Gunnison v. Abbott*, 73 N. H. 590, 592, 64 Atl. 23), so there was evidence to sustain the court's finding, which is the only

question of law raised by the defendant's exception.

Exception overruled. All concurred.

(74 N. H. 217)

ROBERTS v. CLAREMONT RY. & LIGHTING CO.

(Supreme Court of New Hampshire. Sullivan. April 2, 1907.)

1. WATER COURSES—RIPARIAN OWNERS—DIVERSION.

The owners of land through which a stream runs may divert it from its channel for any lawful use, provided the water is not unreasonably detained, does not overflow the land of the next upper proprietor, and is returned to its channel above the land of the next lower proprietor in substantially the same condition as when it reached such land originally.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Waters and Water Courses, §§ 67-72.]

2. PARTITION—PROPERTY SUBJECT TO PARTITION—WATERS—RIGHT OF USE—CO-OWNERS.

Where plaintiff and defendant were co-owners of the right to use and divert the water of a stream, they had a legal right to have the water divided and their share assigned in severalty in the same manner as co-tenants of real property, such partition being possible without injury to either party.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 88, Partition, § 39.]

2. SAME—VALUE OF USE—ACCOUNTING.

Where, in an action by a riparian proprietor to enjoin his co-owner of the right to use the water of a stream and to have the extent of defendant's rightful use determined, defendant filed a petition for partition, and the court found that defendant had received a benefit of \$500 a year from its use of plaintiff's share of the water, defendant was bound to account to plaintiff at that rate for such use.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 88, Partition, § 228.]

Transferred from Superior Court, Sullivan County; Wallace, Judge.

Petition for injunction by Alexander Roberts against the Claremont Railway & Lighting Company. Case transferred to Supreme Court on defendant's exceptions. Exceptions sustained, and case discharged.

The case is the same as that reported in 73 N. H. 121, 59 Atl. 619. After the decision in *Claremont Co. v. Putney*, 73 N. H. 431, 62 Atl. 727, the plaintiff filed a motion in the superior court, asking that the defendants be enjoined from drawing water from Sugar river through their canal, and that the amount he is entitled to recover from them because of their use of his share of the water be determined; and the defendants filed a motion in the nature of a petition for partition, alleging that the parties are common owners of the right to use the water of the stream which divides their land, and that the defendants can use their share most advantageously by drawing it through their canal, and praying the court to divide the water in a way that will permit such use by them. After a hearing on the motions, the court found the following facts: The parties have been the common owners of a waterfall on Sugar river since 1902. The defendants own

the land on both sides of the river above the fall, and the plaintiff is the owner of land on both sides below the fall. The interest of each party in the water is that incident to the ownership of the opposite banks of the stream. Prior to August 1, 1903, the defendants built a dam across the river on their land above the fall, by means of which they are enabled to divert all the water ordinarily flowing in the stream through a canal to their power house, and return it to the stream just above the plaintiff's land. When the defendants began to build the dam they supposed their charter authorized them to take the water; but they knew before the dam was used (August 1, 1903) that the plaintiff disputed their right, and they have continued the use since it was decided that they had no such right. The plaintiff had no use for the water, and the only loss he has sustained because of the defendants' action is that incident to their invasion of his legal right. The defendants began to use the water on August 1, 1903, were using it at the time of the hearing, and have received a benefit of \$500 a year from their use of the plaintiff's share. The court denied the defendants' motion, and enjoined them from drawing water from the river through their canal, except for the use of their steam plant, and assessed the plaintiff's damages at \$1. The defendants excepted to the denial of their motion and to the injunction, and the plaintiff to the assessment of damages.

Hermion Holt and Streeter & Hollis, for plaintiff. Frank H. Brown and John M. Mitchell, for defendants.

YOUNG, J. The plaintiff is trying to prevent the defendants from using their share of the water without his consent, even if that may be done without trespassing on his land or interfering in any way with his making a like use of his share of the water, and they are seeking to avoid paying for the benefit they have received from their use of his share. The rule that riparian proprietors have a right "to insist that the stream shall continue to run *utl currere solebat*" (*Tilghson v. Smith*, 32 N. H. 90, 64 Am. Dec. 355), on which the plaintiff seems to rely, is subject to the limitation that the owners of the land through which it runs may divert it from its channel for any lawful use, provided they do not detain the water unreasonably, do not overflow the land of the next upper proprietor, and return it to its channel above the land of the next proprietor in substantially the same condition as when it reached their land. Ang. Wat. §§ 90-95. So, if the plaintiff and the defendants elect to do so, they lawfully may divert the whole of the water from the river, if they return it to its channel above the land of the next lower proprietor. In other words, they are the joint owners of the right to divert the water for power purposes.

The question raised by the defendants' ex-

ception to the dismissal of their motion, therefore, is whether they have a legal right to have the water divided and their share assigned to them in severalty, if that can be done without unreasonably interfering with the plaintiff's rights. It is clear they have such a right if the same rule is to be applied to both improved and unimproved water powers; for it is settled that the court has power to make such orders in respect to the way the several owners shall exercise their rights in the common property as will be for the best interest of each of them, in so far as that can be done without any unreasonable interference with the rights of the others. *Conn. River Lumber Co. v. Company*, 65 N. H. 290, 390, 21 Atl. 1090, 13 L. R. A. 826. Consequently the defendants should be permitted to draw one-half the water from the river above the plaintiff's land, if that would be a reasonable exercise of their right to use the water, and can be done without injury to the plaintiff. *Horne v. Hutchins*, 71 N. H. 128, 51 Atl. 651; *Fowler v. Kent*, 71 N. H. 388, 52 Atl. 554; *State v. Sunapee Dam Co.*, 70 N. H. 458, 50 Atl. 108, 59 L. R. A. 55; *Blanchard v. Baker*, 8 Me. 253, 23 Am. Dec. 504; *Patten Co. v. Company*, 70 Wis. 659, 35 N. W. 737; *Ang. Wat. §§ 98-101*. It is obvious that it can; for, if the defendants are ordered to make a spillway in their dam or to maintain a headgate to their canal which will cause half of the water to return to the river above the plaintiff's land, and he is permitted to attach a dam to the defendants' land or to adopt some other means by which he can exercise his rights as fully and completely as though they were not permitted to divert their share of the water from the stream, he will have no cause for complaint. Consequently there should have been a decree for the defendants, dividing the water upon condition that they permit the plaintiff to attach a dam to their land, or to adopt some other course which will make the use of his right practicable, whenever he desires to do so in order to use his share of the water for any lawful purpose. Although the owners of the land are not, strictly speaking, the owners of the water which flows in a natural channel over it, nor the owner of either bank, the owner of that part of the water which flows over his land, still the owners of the banks are the owners of the right to use the water for any lawful purpose; each owning an undivided half of that right. Consequently their rights and liabilities in respect to the use of the water are those of tenants in respect to common property. In other words, although they are not the common owners of the water, they are of the right to use it. If either uses it, his rights and his liabilities to the other owners will be the same as though they were tenants in common of the water. Since this is so, no reason can be given why a different rule should be applied when one of the owners is asked to account to the other for any benefit he has received from his use of more than

his fair share of the water from that applied in the case of an accounting between the common owners of any other property.

It is settled in this state that when a common owner uses more than his share of the common property—in this case the common right to use the water—he must account to his co-tenants for their equitable share of the benefit he received from his use of their share. *Gage v. Gage*, 66 N. H. 282, 29 Atl. 543, 28 L. R. A. 829. Consequently, no question being raised as to the form of action, there should have been a decree that the plaintiff recover, at the rate of \$500 a year from August 1, 1903, the benefit which it is found the defendants have received from their use of his share of the common property. The defendants' exception to the dismissal of their motion and to the injunction, and the plaintiff's to the assessment of damages, are sustained.

Case discharged. All concurred.

(74 N. H. 111)

TWOMBLY v. LORD.

(Supreme Court of New Hampshire. *Strafford*. April 2, 1907.)

1. APPEAL—TRIAL—FINDINGS—MISTAKE.

Where a finding of fact in a boundary dispute was based on a plain mistake, and no other ground was suggested or appeared on which it could be sustained, it will be vacated.

[Ed. Note.—For cases in point, see *Cent. Dig.* vol. 3, *Appeal and Error*, § 3955.]

2. BOUNDARIES — LOCATION OF LINE — EVIDENCE.

In trespass to determine the location of a boundary line between certain lots, an old plat of the town obtained from a volume of state papers, showing the division of the lots, etc., was admissible, in the absence of objection as to its authenticity.

[Ed. Note.—For cases in point, see *Cent. Dig.* vol. 3, *Boundaries*, §§ 166, 167.]

Exceptions from Superior Court, *Strafford County*; Chamberlin, Judge.

Trespass quare clausum et de bonis by Samuel D. Twombly against William D. Lord. A verdict was rendered in favor of plaintiff, and the case was transferred to the Supreme Court on defendant's exceptions. Sustained.

The controversy was as to the location of the divisional line between the parties. It was agreed that the line began at the obtuse angle of lot 3 in the first division of lots in Middleton, at the intersection of the Hare road, so called, with the main road in Middleton, and thence running southerly by the first check line in the town, which line was the division line between lots 1 and 3. The defendant offered in evidence what purported to be a plan of the town of Middleton in a volume of the State Papers. Because of immaterial printed matter likely to mislead the jury, the plan was excluded, subject to exception.

William S. Pierce and John Kivel, for plaintiff. Forrest L. Marsh and Arthur L. Foote, for defendant.

PARSONS, C. J. The sole ground upon which the plan offered by the defendant was excluded was that it contained "immaterial printed matter likely to mislead the jury." The only suggestion made in support of this finding is that the plan was self-contradictory. It is said that the length of the side line of the town, found by the multiplication of the width of each lot as stated in the printed matter on the plan by the number of lots on the line, is much less than the length of the line as stated on the plan. Hence it is argued it is uncertain whether the width of the lots, which appears to have been a material matter, is the distance stated on the plan or the greater distance obtained by dividing the length of the side line by the number of lots. An examination of the copy found in volume 28, State Papers, which was made a part of the case, shows the suggestion to be unfounded, because the lots on the side line are stated to be of different widths, 10 of the length employed by counsel for the plaintiff in their computation and 10 of greater width. Making the computation according to the width of the lots as stated on the plan, there is no discrepancy between the stated and computed length of the side line, and no contradiction in the evidence as to the width of the lots furnished by the plan.

The finding of fact upon which the evidence was excluded thus appears, upon the only ground urged in its support, to have been a plain mistake. No other ground being suggested or appearing upon which the finding can be sustained, it must be set aside. *Norris v. Clark*, 72 N. H. 442, 57 Atl. 334. The evidence furnished by the plan, no objection being made to the authenticity of the original or of the copy, was competent, and it appears to have been material. Its exclusion was due to a mistake of fact, and was error. This result is reached without considering whether the fact found, if sustainable, would have authorized as matter of law the entire exclusion of the evidence furnished by the plan, or whether the printed matter on the plan was as matter of law immaterial. Nothing appears in the case from which it could be found that the exclusion of material, competent evidence was not prejudicial to the objecting party. The verdict against the party objecting must therefore be set aside.

Exception sustained. All concurred.

(105 Md. 545)

FOUT et al. v. FREDERICK COUNTY COM'RS.

(Court of Appeals of Maryland. April 2, 1907.)

1. STATUTES—SUBJECTS AND TITLES—SUFFICIENCY.

Acts 1904, p. 388, c. 225, entitled "An act for the improvement of the public highways of the state and to provide the means therefor and to require the commission created by an act of the General Assembly of 1896 [page 50] c. 51,

to perform certain additional duties," and providing, in section 2, that whenever the owners of two-thirds of the lands binding on any public road, not less than one mile long, shall present a petition to the county commissioners stating their willingness to pay for the construction or repairs of the road 10 per cent. of the cost thereof, the commissioners shall request the state geological and economic survey for plans and estimates of the cost for the construction and improvement of the road desired, is not violative of Const. art. 3, § 29, providing that every law shall contain but one subject, which shall be expressed in its title.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, §§ 130-132, 176-183.]

2. HIGHWAYS — IMPROVEMENT — STATUTORY PROVISIONS.

Act 1904, p. 388, c. 225, § 2, providing that, on the petition of two-thirds of the owners of the land binding on a public road, the county commissioners shall request the state geological and economic survey for plans and estimates of the costs for the construction and improvement of the roads in the county, is not repugnant to section 15, providing that nothing in the act shall be taken to alter or affect the present method of road construction or repair by several counties at their own expense, or otherwise, as now authorized by law.

Appeal from Circuit Court, Frederick County; Jas. McSherry, John C. Motter, and James B. Henderson, Judges.

Petition by Otho T. Fout and others against the county commissioners of Frederick county. From an order dismissing the petition, petitioners appeal. Reversed and remanded.

Argued before BRISCOE, BOYD, PEARCE, SCHMUCKER, BURKE, and ROGERS, JJ.

Glenn H. Worthington, John J. Donaldson, and John E. R. Wood, for appellants. Reno S. Harp and Hammond Urner, for appellee.

BURKE, J. The appellants on the 22d day of December, 1906, filed a petition in the circuit court for Frederick county, praying that the writ of mandamus be issued against William H. Hogarth, Lewis H. Bow-lus, Lincoln G. Dinterman, H. Milton Kefauver, and Daniel G. Zentz, the county commissioners of that county, commanding them, as such commissioners, to give the notice to the chief engineer of the geological and economic commission and make the request of said commission, as required by section 2 of the act of 1904 of the General Assembly of Maryland (Acts 1904, p. 388, c. 225), for plans and estimate of the cost of the proper performance of the work required, according to said plans and specifications, for the construction and repair of a section of public road described in a petition filed with said county commissioners on the 5th day of November, 1906. It appears, from an examination of the petition, which was filed with the commissioners, and which was also filed as an exhibit in this case, that the appellants were proceeding, under Acts 1904, p. 388, c. 225, § 2, to have a section of public road, located in Frederick county, constructed and repaired under the provisions of that act. It was not denied at the argument that the appellants would be entitled to the writ if,

at the hearing, the facts alleged by them in the petition for the writ were satisfactorily established by the proof, provided section 2 of the statute, to which we have referred, is valid and operative. This could not well be denied, since the act declares it to be the imperative duty of the commissioners to make the request directed by that section of the statute when the requirements thereof have been fully complied with.

All the necessary and essential jurisdictional averments, upon which under the terms of the act the relief prayed for depends, are set out in the petition of December 22, 1906, which show a strict compliance with all the requirements necessary to be observed when action is taken under the second section of the act. An answer was filed by the commissioners of Frederick county to the petition, which contained a traverse of many of the essential facts alleged in the petition; but with these issues of fact we are not concerned. The answer avers: (a) That Acts 1904, c. 225, is unconstitutional and void; (b) that so much of said act as provides for involuntary action by the commissioners for the construction and repair of public roads is unconstitutional and void; (c) that the court was without jurisdiction in the premises. By appropriate pleading the legal questions raised by the answer were presented to the court for its determination, and on the 10th day of January, 1907, the court passed an order dismissing the petition for the writ of mandamus, and from that order this appeal was taken. Two grounds are relied upon by the appellees to sustain the order of the lower court: First, the unconstitutionality of the second section of Acts 1904, c. 225; and, secondly, because, it is contended, the provisions of that section are inoperative, being nullified by later and repugnant provisions of the same act. This repugnancy, it is asserted, is found to exist between the second and fifteenth sections of the act, and is claimed to be of such a character that section 15 must be held to have nullified and rendered inoperative the provisions of section 2. There are certain general considerations which must not be overlooked by the court when it is asked to strike down a legislative act. They have been stated by the courts in a multitude of cases, but nowhere have they been stated with greater clearness and accuracy than by Mr. Cooley, in his work on Constitutional Limitations, in which it is said: "It must be evident to any one that the power to declare a legislative enactment void is one which the judge, conscious of the fallibility of human judgment, will shrink from exercising in any case where he can conscientiously and with due regard to duty and official oath decline the responsibility. The legislative and judicial are co-ordinate departments of the government, of equal dignity. Each is alike supreme in the exercise of its proper functions,

and cannot directly or indirectly, while acting within the limits of its authority, be subjected to the control or supervision of the other, without an unwarrantable assumption by that other, of power which, by the Constitution, is not conferred upon it. The Constitution apportioned the powers of government, but it does not make any one of the three departments subordinate to the other when exercising the trust committed to it. The court may declare legislative enactments unconstitutional and void in some cases, but not because the judicial power is superior in degree or dignity to the legislative. Being required to declare what the law is in the cases which come before them, they must enforce the Constitution as the paramount law, whenever a legislative enactment comes in conflict with it. But the courts sit, not to review or revise the legislative action, but to enforce the legislative will; and it is only where they find that the Legislature has failed to keep within the constitutional limits that they are at liberty to disregard its action; and, in doing so, they only do what every private citizen may do in respect to the mandates of the courts when the judges assume to act and to render judgments or decrees without jurisdiction." Cooley's Con. Lim. (3d Ed.) 175.

The court cannot declare an act of the General Assembly to be unconstitutional, because it is unwise, or inexpedient, or because it displaces or supersedes wiser and better laws regulating the same subject. These matters are committed to the judgment of the lawmaking power, and its action in respect to them is not reviewable by the court. If, therefore, it be true, as contended by the appellees, that the second section of Acts 1904, c. 225, be an unwise provision, and would operate harshly upon the people of Frederick county, this court cannot upon that ground set it aside, but resort must be had for redress to the General Assembly for its repeal or modification. Every presumption favors the validity of the statute. It cannot be stricken down as void, unless it plainly contravenes some provision of the Constitution. A reasonable doubt as to its constitutionality is sufficient to sustain it. The party assailing the act must point out the special provision of the Constitution to which it is obnoxious. The specific objection to the second section of the act under consideration is that it violates section 29 of article 3 of the Constitution. That section provides: "That every law enacted by the General Assembly shall embrace but one subject, and that shall be described in its title." It may be assumed as settled that the purpose of this provision is: "First, to prevent hodge podge, or 'log rolling' legislation; second, to prevent surprise or fraud upon the Legislature by means of provisions in bills of which the titles give no intimation, and which might

therefore be overlooked and carelessly and unintentionally adopted; and, third, to fairly apprise the people, through such publication of legislative proceedings as is usually made, of subjects of legislation that are being considered, in order that they may have opportunity of being heard thereon, by petition or otherwise, if they shall so desire." Cooley's Constitutional Limitations (8d Ed.) 158. The general disposition of the courts has been to give a liberal construction to this provision of the Constitution, rather than to embarrass legislation by a construction whose strictness is unnecessary to render effective the purposes for which it was adopted. It is stated by Judge Cooley that the general purpose of this provision of the Constitution is accomplished when the law has but one general object, which is fairly indicated in its title; and that to require every end and means necessary or convenient for the accomplishment of this general object to be provided for, by a separate act relating to that alone, would be not only unreasonable, but would render legislation impossible. This court has had occasion to pass so frequently upon this provision of the Constitution that its purpose and meaning may be assumed to be well understood and thoroughly well settled. The difficulty in this, as in other cases, is found to exist in the application of the settled rule to the particular case. There must be unity in the subject-matter of the act; but "if the several sections of the law refer to and are germane to the same subject-matter, which is described in its title, it is considered as embracing but a single subject, and as satisfying the requirements of the Constitution in this respect." Mayor, etc., v. Reitz, 50 Md. 579. The title is sufficient if it fairly indicates the subject-matter of the enactment. These rules of construction have been stated and applied by this court in every case in which it has been called upon to consider this section of the Constitution, from the case of Davis v. State (decided in 1854) 7 Md. 151, 61 Am. Dec. 331, in which the question was before the court for the first time, to the case of Mayor, etc., v. Flack et al. (decided October 4, 1906) 64 Atl. 702; and in all of the cases it is held that the title need not contain an abstract of the act, nor mention the means or methods by which it is to be carried into effect, nor will an act of a general nature be declared obnoxious to this clause of the Constitution, unless there be ingrafted upon it some subject of a private, or a local character, or unless two or more dissimilar and discordant subjects be legislated upon in the same law. If foreign, irrelevant, or discordant subjects are introduced, they will be rejected, if other sections of the law can stand without them.

We will now examine Acts 1904, c. 225, to see if in its title, or in any of its provisions, it violates any of these rules of con-

struction by which its constitutionality is to be tested. It is a general public law. Its title is: "An act for the improvement of the public highways of the state, and to provide the means therefor and to require the commission created by an act of the General Assembly of 1896, chapter 51, to perform certain additional duties." The commission created by Acts 1896, p. 50, c. 51, upon which additional duties are imposed, is the state geological and economic survey, which is placed by law under the direction of the Governor, the comptroller, the president of the Johns Hopkins University, and the president of the Maryland Agricultural College. The act we are called upon to consider contains eighteen sections. The first section provides the conditions under which the board of county commissioners of any county in the state may of their own volition petition the commission for plans and estimate of costs for the construction and improvement of roads in their respective counties. This is the voluntary feature of the law, and its validity is not questioned. The second section, which is called the involuntary feature, and which is directly assailed as void, is here transcribed: "Sec. 2. And be it enacted, that whenever the owners of two thirds of the lands binding upon any public road or section of road, not less than one mile long, shall present a petition to the county commissioners of the county where such road, or section of road, may be situated, stating in said petition the desire of said petitioners to have said road, or section thereof, constructed or repaired under the provisions of this act, and stating further the willingness of said petitioners to pay for such construction or repairs, a sum equal to ten per centum of the cost of such construction or repairs; it shall be the duty of said board of county commissioners to make such a request to the commission delegated by this act, as set forth in section one hereof, upon the payment by said petitioners of said ten per centum, or the giving by them of an approved bond to the county commissioners for the payment thereof at any time it may be demanded by said county commissioners upon the filing of a similar petition, and the taking of similar proceedings regarding the extension of any road, which in the opinion of said commission, has been properly improved, a similar request shall be made to the aforesaid commission by the board of county commissioners in the county where such extension lies, even though such proposed extension be less than a mile in length." Section 3 (page 389) provides that if the commission, after the receipt of the notice from the board of county commissioners, as provided in section 1 and section 2 of the act, and after due examination, shall be of opinion that the proposed construction or repair of roads mentioned in such notice would be generally promotive of the objects therein contemplated, and that such

road or proposed road is a right and proper one to be built, and if there shall be sufficient money from the state appropriation to the credit of the county for the necessary outlay, it shall make the plans and specifications for the proposed work, and shall furnish an estimate in detail of the cost of doing the work. Section 4 relates to the character of material of which the road must be constructed or repaired; section 5 (page 390) to the payment by the county of the cost of surveys, mapping, printing, etc., proper to be done in the preparation of the plans and specifications and estimate of cost; section 6 to the advertisement for bids for doing the work, but it is expressly provided that the county commissioners will not be required to advertise for work to be done under the provisions of section 2 of the act to an amount greater than 25 per cent. of the road levy of the county; section 7 to the opening of bids and the awarding of the contract. Sections 8 and 9 (page 391) relate to the approval of the contract by the commission and its supervision over the work. Section 10 relates to the completion of the work and the payment by the comptroller to the county of one-half of the total cost of the work. Section 11 provides that the state shall not be liable for the cost of acquiring land for any roads, nor for damage caused by the construction, or improvement of any road. Section 12 (page 392) provides for the apportionment among the counties of the sum appropriated by the act. Section 13 makes minute provision for the maintenance of the roads constructed under the act. Section 14 makes provision for any county in which the control of the public roads is, or may be vested in any body other than the board of county commissioners. Section 15 (page 393), which is said to be repugnant to section 2, is as follows: "That nothing in this act shall be taken to alter, abridge, or in any way affect the present method of road construction or repair by the several counties, at their own expense or otherwise, as now authorized by law." By section 16 the sum of \$200,000 annually, or so much thereof as might be necessary, is appropriated, out of any money in the treasury not otherwise appropriated, for the purpose of carrying out the provisions of the act. Section 17 declares that the provisions of the act shall be regarded as adding, to such an extent as may be necessary, to enable it to perform the additional duties hereinbefore imposed upon it, to the powers and duties conferred upon said commission by Acts 1898, p. 1073, c. 454. Section 18 provided that the act should go into effect January 1, 1905.

From this examination of the several sections of the act, which have become to be known as the "Shoemaker Road Law," because of the interest taken by Mr. Samuel M. Shoemaker, of Baltimore county, to secure its adoption and retention on the stat-

ute books, it is manifest that the sole purpose or object of the act is the building of good roads in all parts of the state, and, as a means to that end, to permit the state, under carefully provided safeguards designed to secure the best possible results, to contribute annually for that purpose the sum of \$200,000. Most careful and well-considered provisions are made to exclude favoritism, jobbery, and dishonesty, and to insure the application of business principles to the work to be done under the law. The act is exactly what its title declares it to be—an act for the improvement of the public highways in the state. All its provisions relate to, and are inseparably connected with, that subject, and with none other. There is no foreign, irrelevant, or dissimilar subject introduced, and it may well be declared to embrace but one subject. Its title, we think, is sufficiently exact, definite, and comprehensive to cover the subject of the act, and to sufficiently apprise the Legislature and the people of the proposed legislation. Sections 1 and 2 of the act merely prescribe the methods or conditions under which request may be made to the commission for plans and specifications and estimate of the cost. These methods and provisions are not required to be set out in the title of the act. The county commissioners have no just grounds of complaint because the Legislature imposes upon them the duty, under the provisions specified in the act, to make the request for plans, specifications, etc., as directed, since they have no powers or duties except such as may be prescribed by law, and, if the General Assembly, which invested them with authority over the county roads, sees fit to withdraw or modify that authority, or imposes new and additional duties upon them with respect to the public highways, they cannot be heard to complain. It is their duty to obey the mandate of the law. The Legislature did not intend to make the operation of the act dependent solely upon the will of the boards of county commissioners. If through shortsightedness or antipathy to the law on the part of said boards, they will not avail themselves, when they ought to do so, of the co-operation of the state in the improving of the public roads, the act makes provision by which the taxpayers may coerce them to action. It has likewise provided checks and restraints for the protection of the county against unwise, unnecessary, wasteful, or improvident expenditure of public money under the involuntary feature of the law. It by no means follows that the road petitioned for under the compulsory provision of the act must be constructed or repaired. The state commission is charged with the duty of making due examination into the facts, and it must be satisfied that the proposed construction or repair of the roads would be generally promotive of the purposes contemplated by the act, and that the proposed road is a right and proper one under

the circumstances, to be built. The personnel of the tribunal to which the state has committed the decision of these matters would seem to afford a guaranty against apprehended abuses. All proper objections by the county commissioners or others interested would be heard by it, as to the propriety of building, or repairing the roads, and it is safe to assume that it would take no action which would result in injury to the general taxpayers of the county.

We cannot adopt the construction of this act insisted upon by the appellees, which finds an irreconcilable conflict between sections 2 and 15. That construction would frustrate the evident intent of the Legislature as gathered, not only from the purposes of the enactment, but from the plain words employed. This act, as we have said, was passed for the improvement of the public roads of the state at the joint expense of the state and county, and it was not intended to affect the construction and repair of roads by the county commissioners under the general laws upon the subject found in the Code, or under local laws prevailing in the several counties. In order that this might be placed beyond doubt or question, the Legislature embodied in the fifteenth section an express declaration that the act must not be taken to alter, abridge, or in any way affect the present method of road construction or repair by the respective counties, at their own expense, or otherwise, as now authorized by law. This declared purpose of the General Assembly, which would seem to be evident without such declaration, harmonizes all the sections of the act, and preserves in full force and effect the second section, which we have been asked to declare void. For the reasons stated, we decide that section 2 of the Act of 1904 (Acts 1904, p. 388, c. 225) is free from constitutional objection; that there is no conflict or repugnancy between that section and the provisions of the fifteenth section; and that, assuming the allegations of fact contained in the petition for the writ of mandamus to be true, it was the simple, definite, and imperative duty of the respondents to give the notice and make the request provided for in the second section of that act.

It follows that the order of the lower court appealed against must be reversed, and the cause remanded for further proceedings.

Order reversed, and cause remanded, with costs to the appellants.

(105 Md. 530)

CHRISTMAS v. WARFIELD et al.

(Court of Appeals of Maryland. April 3, 1907.)

1. STATUTES—SUBJECTS AND TITLES—SUFFICIENCY.

Acts 1906, p. 1352, c. 804, entitled "An act to repeal and re-enact with amendments section 2 of chapter 426 [page 732] of the Laws of 1904, entitled 'An act to authorize and empower the board of public works of Maryland to collect the insurance upon state tobacco ware-

houses Nos. 1 and 2, and place the same to the credit of the tobacco warehouse fund, and to either re-build a modern warehouse on the present site of tobacco warehouses Nos. 1 and 2, and the property owned by the state adjacent thereto, or to sell said property or lease the same for such sum as they may think right and build a tobacco warehouse in some locality of Baltimore City selected by said board of public works," and providing in section 2 for a state tobacco warehouse building commission composed of the board of public works and others for the rebuilding, enlarging, and equipping of warehouses Nos. 3, 4, and 5, and erecting a warehouse on the site of the houses of warehouse No. 8, is violative of Const. art. 3, § 29, providing that the subject of every law shall be expressed in its title.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, § 136.]

2. STATES—ACTION AGAINST STATE OFFICER—TAXPAYERS.

A resident and taxpayer of the state has such special interest in the subject-matter as to entitle him to maintain a suit to restrain the unauthorized destruction by the state tobacco warehouse building commission of state tobacco warehouses or the unwarranted expenditure by it of the funds of the state.

Appeal from Circuit Court No. 2 of Baltimore City; Pere L. Wickes, Judge.

Action by James M. Christmas against Edwin Warfield and others. From an order sustaining a demurrer to the bill and dismissing the bill, plaintiff appeals. Reversed and remanded.

Argued before BRISCOE, BOYD, PEARCE, SCHMUCKER, BURKE, and ROGERS, JJ.

Isaac Lobe Straus, for appellant. Atty. Gen. Bryan, for appellees.

BURKE, J. The appellant filed a bill of complaint in the circuit court No. 2 of Baltimore City against the appellees, praying that "a preliminary and a perpetual injunction may issue restraining the defendants, and each of them, from acting or assuming in any manner to act as a state tobacco warehouse building commission for any purpose, or in any respect whatsoever, and further restraining and enjoining them, and each of them, from doing any act or thing or taking any steps or proceedings whatsoever to demolish, or cause to be demolished, any of the existing tobacco warehouses of the state of Maryland, and particularly tobacco warehouse No. 4 and section B of tobacco warehouse No. 3; and restraining and enjoining them, and each of them, from entering into any contract upon the part of the state of Maryland, or in any manner involving the funds of said state, or any of them, for the preparation of plans or specifications for a new building to serve as a state tobacco warehouse or for the construction or building of any such warehouse, and particularly of a warehouse consisting of eight stories and with a capacity for the storage and inspection of about 20,000 hogsheads of tobacco upon the site of warehouse No. 4 and section B of warehouse No. 3; and further restraining and enjoining said defendants from expending, disbursing, charging, pledging, or contracting in any manner

whatsoever with reference to said funds of \$267,000, mentioned in said bill of complaint, or any part of the same." The appellees demurred to the entire bill, which demurrer the court sustained, and by its order, passed on the 17th day of January, 1907, the bill of complaint was dismissed, and from that order the appeal in this case was taken.

The bill was filed by the appellant, James M. Christmas, as a property owner, taxpayer, and resident of Prince George's county, Md., on his own behalf and in behalf of all other taxpayers of the state, who might care to come in and avail themselves of the suit. The facts, which are admitted by the demurrer, are that the complainant is a taxpayer as alleged; that prior to the 7th and 8th of February, 1904, the state of Maryland had five tobacco warehouses in Baltimore City, whose capacity for the storage and inspection of tobacco was so much in excess of actual needs for such purposes that one of said warehouses, to wit, No. 2, was leased to the Pennsylvania Railroad Company; that of said five warehouses Nos. 3 and 2 were destroyed by said fire, and that the insurance money accruing as indemnity to the state for the destruction of said two warehouses, and also from the sale of the sites on which said two warehouses were located, together with the sum paid the state by the city of Baltimore for a part of a lot belonging to the state, and taken by the said city for the purpose of widening Light street therein, amounted to the sum of \$267,000, which sum was and is now credited to the state tobacco warehouse fund, and is a part of the public money of the state of Maryland; that the appellees propose to destroy said warehouses, and to build a new warehouse, and in doing so are assuming to act as the state tobacco warehouse building commission, created by Acts 1906, p. 1352, c. 804. The bill charges that the destruction of said warehouses and the erection of a new one, as the defendants propose to do, and which they are about to begin and carry out, would be not only unlawful, but would result in a total loss of said sum of \$267,000 belonging to the state, and would involve the loss of valuable state property, and would embark the state in an enterprise, which would be fraught with undesirable burdens and heavy and constant pecuniary losses to the state, and that the pursuance of the proposed plans as indicated would commit the state to an unwise, discredited, and obsolete policy, which its best interests would require to be abandoned. The bill then sets out in detail facts tending to establish this allegation of waste, extravagance, and unbusiness like policy. The grounds upon which he rests his right to relief are: First, the unconstitutionality of Acts 1906, p. 1352, c. 804, under the authority of which the appellees are assuming to act; secondly, that, assuming said act to be valid, it confers upon the appellees no authority to do the things they are about to do, and hence their pro-

posed plans and acts are ultra vires, and their consummation by the defendants, being unauthorized by law, should be restrained by the court. The act is said to be unconstitutional and void, because, it is asserted, the subject-matter of the act is not described in its title, as required by Const. art. 3, § 29.

If this objection be well taken, the act must be stricken down, and the undertaking of the appellees arrested. In the case of *Fout and Others v. County Commissioners of Frederick County*, 66 Atl. 487, we had an occasion to consider, and state with some particularity, the purpose and operation of that article and section of the Constitution, and we do not deem it necessary to repeat what was there said with respect to that subject. In the case of *Kafka v. Wilkinson*, 99 Md. 238, 57 Atl. 617, the court, speaking through Judge Jones in reference to the frequency with which this section of the Constitution had been considered, said: "It has received a liberal construction, and the courts have been reluctant in any case to give it an operation which would defeat the legislative intent; yet they have not hesitated to strike down legislative acts that were clear infractions of its purpose and object. These have been declared to be two-fold. The first is to prevent the combination in one act of several distinct and incongruous subjects, and the second is that the Legislature and the people of the state may be fairly advised of the real nature of impending legislation. It would seem that if the object of the constitutional provision in question is to be respected, and is to have meaning and effect in controlling legislation, the considerations which have just been mentioned must have a controlling effect in applying it." In the earlier case of *Stiefel v. Maryland Institute for the Instruction of the Blind*, 61 Md. 148, it was said "that publicity and a knowledge of the true effect and operation of every bill brought before the Legislature are the great safeguards against ill considered and improper legislation. The provision is one among many others in the Constitution designed to promote those objects. Bills are sometimes read, especially the first time, by their titles only, and the titles only are spread upon the Journal. It is therefore important that the title to the bill should not be misleading, and at least a general idea of the purport of the law may be gathered from it." To the same effect are all the decisions of this court dealing with the sufficiency of the title, the latest of which are *State v. German Savings Bank*, 103 Md. 196, 63 Atl. 481, and *Mayor, etc., v. Flack et al.*, 104 Md. —, 64 Atl. 702. In the latter case, Chief Judge McSherry mentioned some cases in which statutes have been stricken down because of insufficient titles. "There are several cases," he said, "which illustrate the vice of incorporating in the act something entirely foreign to the subject-matter described in the title. Thus, in *Scharf v. Tasker*, 73 Md. 378, 21 Atl. 58, un-

der an act to provide for the assessment of unclaimed military lots in Allegany and Garrett counties, a section of the act which exempted Garrett county from the obligation of paying fees to the commissioner of the land office, then due for searches previously made, was stricken down. And in *State v. Schultz Company*, 83 Md. 58, 84 Atl. 243, the title had relation to newly incorporated companies, whilst the act included existing companies. In *Luman v. Hitchins Bros.*, 90 Md. 15, 44 Atl. 1051, 46 L. R. A. 393, the title prohibited sales to employés, whilst the act prohibited sales to any one." The Maryland rule upon this subject is in accord with the current of decisions in other states which have incorporated in their organic laws provisions similar to our own. These decisions, with much research and labor and skillful arrangement, have been collected and cited in the carefully prepared brief of the appellant's counsel; but, as most of these cases merely support and illustrate the Maryland doctrine upon the subject, we do not deem it necessary to discuss them.

The act which is assailed in this case (Acts 1903, p. 1352, c. 804) is entitled: "An act to repeal and re-enact with amendments section 2 of chapter 426 of the Laws of 1904, entitled 'An act to authorize and empower the board of public works of Maryland to collect the insurance upon state tobacco warehouses Nos. 1 and 2, and place the same to the credit of the tobacco warehouses fund, and to either re-build a modern warehouse on the present site of tobacco warehouses Nos. 1 and 2, and the property owned by the state adjacent thereto, or to sell said property or lease the same for such sum as they may think right and build a tobacco warehouse in some locality of Baltimore City selected by said board of public works.'" The body of the act embraces six sections. The first section embodies a literal transcript of the title of Acts 1904, p. 732, c. 426, and repeals and re-enacts its second section so as to read as follows: "Sec. 2. And be it further enacted, that the members of the board of public works, together with Henry Lantz, William B. Claggett and Joshua S. Rawlings, Adrian Posey and John H. Drury, shall be and they are hereby constituted the state tobacco warehouse building commission, without compensation, for the purpose of rebuilding, enlarging, and fully equipping warehouses Nos. 3, 4 and 5, and if sufficient amount remain in the tobacco fund for the purchasing a suitable site on the water front in the city of Baltimore, and erecting thereon a tobacco warehouse with a capacity of at least eight thousand (8,000) hogsheads, provided the site shall be west of Market Space and north of Hughes avenue; and in case the said commissioners shall be unable to obtain a suitable site within the said bounds they shall cause to be rebuilt on the site of houses 'A' and 'B' of No. 3 warehouse a modern and fully equipped house for the

inspection and storage of tobacco." Section 3 provides that the governor shall be president of the commission, and contains a provision as to how vacancies therein shall be filled. Section 4 provides that, as soon after the passage of the act as possible, said commission shall organize and select a secretary and proceed to purchase or lease a convenient and suitable site or lot of ground having water front in the city of Baltimore, and shall proceed to procure plans and specifications for said warehouse. It further provides for the advertising for bids, the awarding of the contract, the employment of an architect, and for the proper equipment of the warehouse. Section 5 authorizes the expenditure of the money credited to the tobacco warehouse fund from the insurance money collected from the former warehouses Nos. 1 and 2, and from the sale of the sites of the same, or which may hereafter be credited to said fund from the sale of warehouse No. 3A. The title describes certain duties which it is intended shall be imposed upon the board of public works. The title is restrictive in character, and points out three specific things which the board of public works is authorized to do: (1) To collect the insurance upon warehouses Nos. 1 and 2, and place the same to the credit of the tobacco warehouse fund; (2) to rebuild a modern warehouse on the present site of warehouses Nos. 1 and 2 and the property owned by the state adjacent thereto; or (3) to sell said property, or lease the same, and build a tobacco warehouse on some locality in Baltimore City selected by the board of public works.

The second section of the act, which we have transcribed in full, establishes a governmental agency entirely distinct from the board of public works, called the "State Tobacco Warehouse Building Commission," and which the act declares is established for the following purposes: First, to rebuild, enlarge and equip warehouses Nos. 3, 4 and 5; and, second, to purchase a suitable site on the water front in Baltimore City in the location mentioned in the act, and to erect thereon a tobacco warehouse with a capacity of at least 8,000 hogsheads. And, in case a suitable site cannot be secured in the locality mentioned in the act, the commission is authorized to build, on the sites of warehouses A and B of No. 3 warehouse, a modern and fully equipped house for the storage and inspection of tobacco. It is thus clearly apparent that the things authorized to be done by section 2 of the act, and the agency by which they are directed to be done, are entirely different from the things indicated in the title. It seems to be perfectly plain that the title of this act does not indicate in the slightest degree the nature of the proposed legislation. No one looking at the title would suppose for a moment that it was proposed to create such a commission as that established by the act, and to con-

fer upon it the powers and duties therein expressed. The title is so insufficient and misleading as to be obnoxious to section 29 of article 3 of the Constitution, and therefore the act must be declared void. It follows that the work about to be undertaken by the appellees is without warrant of law. The appellant, who is a resident and taxpayer of the state, has such a special interest in the subject-matter as to entitle him to maintain a suit to restrain the unauthorized destruction by the appellees of valuable state property, or the unwarranted expenditure by them of the funds of the state.

In accordance with the views herein expressed, the order appealed against will be reversed, and the cause remanded.

Order reversed, and cause remanded, with costs.

(105 Md. 633)

DICKERSON v. TRUSTEES OF FRANKLIN STREET PRESBYTERIAN CHURCH.

(Court of Appeals of Maryland. April 3, 1907.)

1. RELIGIOUS SOCIETIES—CONVEYANCES OF LAND.

Under Declaration of Rights, art. 38, providing that every sale of land to every religious denomination without the prior or subsequent sanction of the Legislature shall be void, except any sale of land not exceeding five acres for a church, meetinghouse, or other house of worship or parsonage or for a burying ground, a conveyance to the trustees of a church, and another to its grantor, which was a religious order, not sanctioned by the Legislature and not showing that they were for any of the purposes named in the exception, were void.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Religious Societies, §§ 103-105.]

2. VENDOR AND PURCHASER—TITLE—ADVERSE POSSESSION—EVIDENCE.

Where the trustees of a church went into possession of land under a void conveyance and remained in continuous, notorious, adverse, and uninterrupted possession for over 43 years, they acquired a good merchantable title which a purchaser from them was bound to accept.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Vendor and Purchaser, § 247; vol. 42, Religious Societies, § 100½.]

Appeal from Circuit Court of Baltimore City; Alfred S. Niles, Judge.

Action by the trustees of the Franklin Street Presbyterian Church against Edwin T. Dickerson. From a decree for plaintiffs, defendant appeals. Cause remanded without affirming or reversing the decree to be corrected in accordance with the opinion of the court.

Hyland P. Stewart, for appellant. J. Wilson Leakin, for appellees.

BOYD, J. This is an appeal from a decree requiring the appellant to pay the balance of purchase money due for a property situated at the corner of Falls and Constitution streets, in Baltimore city, purchased by him from the trustees of the Franklin Street Presbyterian Church. The property was conveyed to the church by the Methodist

Sunday School Society of the North Baltimore Station, by a deed dated June 1, 1863, and had been conveyed to that society by Abraham Silver and Charles Farringer by deed dated the 24th of May, 1841. The appellant alleged, and it is not denied, that neither of those grantees obtained the sanction of the Legislature for those conveyances, in accordance with the requirements of what is now article 38 of the Declaration of Rights (article 34, Const. 1776, and article 35, Const. 1851). Neither of the conveyances shows that it was for such purposes as exempted it from the effect of that provision of the Constitution, which has been, with some changes not affecting this case, in all of the Constitutions of this state, and under the decision of *Grove et al. v. Trustees, etc.*, 33 Md. 451, they were void.

But the evidence conclusively shows that since June 1, 1863, the date of its deed, the trustees of the Franklin Street Presbyterian Church, which is a body corporate, has been in continuous, notorious, adverse, and uninterrupted possession of the property, paying regularly the ground rent reserved thereon, and using the building as a Sunday school room until about three years ago, since which time it has paid taxes on it and rented the property out.

Under the recent decision of this court in *Regents of University of Maryland v. Trustees of Calvary M. E. Church South*, to be reported in 104 Md. —, 65 Atl. 398, where previous cases were cited and considered, there can be no doubt that the appellee has a good and merchantable title by adversary possession. It has been in possession of the property for over 43 years, and there is nothing in the record to suggest anything that could in any way affect its title. Without deeming it necessary to repeat what we have said so recently concerning a similar title, involved in the case last cited, we would unhesitatingly affirm the decree of the lower court but for an error in it to which our attention has been called, which is said to have been made by a mistake of the draftsman of the decree which was not noticed by the judge who signed it. It directs the plaintiff, upon payment of the balance of the purchase money, with interest and costs, to convey by a good and sufficient deed, etc., "unto the said defendant and his heirs and assigns in fee simple the land and premises," etc., while in point of fact it is leasehold property, subject to an annual rent of \$35. We will therefore remand the case without affirming or reversing the decree, so that the lower court may correct the decree in that respect, which both parties have expressed their willingness to have done, if we reached the conclusion that the title was valid.

Cause remanded, without affirming or reversing the decree, in order that it be corrected in accordance with the opinion of this court, the appellant to pay the costs.

(105 Md. 490)

WILLIAMS v. UNITED STATES FIDELITY & GUARANTY CO.

(Court of Appeals of Maryland. April 3, 1907.)

1. INSURANCE—GUARANTY INSURANCE—ACTIONS—EVIDENCE—SUFFICIENCY.

In a suit on an employer's guaranty bond, whereby defendant undertook to reimburse an insurance company for which plaintiff was receiver for loss of funds in the possession of an employé by larceny or embezzlement of the employé, evidence examined, and *held* insufficient to show larceny or embezzlement by the employé.

2. APPEAL—REVIEW—HARMLESS ERROR—ADMISSION OF EVIDENCE—DEFECT SUPPLIED.

It was not reversible error to exclude evidence on the ground that it tended to vary the terms of a letter, although the evidence showed that the letter was not intended to constitute a contract, where the evidence has been treated by the Supreme Court as properly in the case and considered by it in arriving at its conclusion to affirm the judgment.

Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4035, 4036.]

3. EXCEPTIONS, BILL OF—TIME OF SIGNING—WAIVER OF OBJECTIONS.

Where appellee's counsel, when the bills of exceptions were presented after the expiration of the term at which the judgment was rendered made changes in them, was present in court when they were signed, participated with appellant's counsel in discussing them before the judge, who allowed further changes and made no objection to the signing, they cannot complain in the Supreme Court that the exceptions were signed too late.

Ed. Note.—For cases in point, see Cent. Dig. vol. 21, Exceptions, Bill of, § 72.]

Appeal from Circuit Court, Baltimore County; Frank I. Duncan, Judge.

Action by G. Harlan Williams, receiver, against the United States Fidelity & Guaranty Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Argued before BRISCOE, BOYD, PEARCE, SCHMUCKER, BURKE, and ROGERS, JJ.

E. Allan Sauerwein, Jr., and Charles W. Heulsler, for appellant. J. Kemp Bartlett and D. G. McIntosh, for appellee.

SCHMUCKER, J. The appellant, G. Harlan Williams, in his capacity of receiver of the Home Fire Insurance Company of Baltimore, sued the appellee in debt on its bond of indemnity given to that company. The suit was instituted in the superior court of Baltimore City, and was removed on affidavit of the plaintiff to the circuit court for Baltimore county, where it was tried. At the trial in the court below the learned judge granted a prayer offered by the defendant at the close of the testimony for the plaintiff, instructing the jury to find for the defendant because the plaintiff had offered no evidence legally sufficient under the pleadings to entitle him to recover. A verdict was rendered in accordance with this instruction, and judgment was entered thereon for the defendant, and the plaintiff appealed.

There are 15 bills of exception in the record, of which the first 14 relate to rulings on

evidence, and the fifteenth to the court's action on the prayer offered at the close of the plaintiff's case. As the prayer, if properly granted, finally disposes of the controversy and a consideration of the propriety of the court's action thereon involves a review of the entire case, we will give that our first attention. The bond declared on by the appellant, as plaintiff below, was an employer's guaranty bond, originally issued to cover the period of one year from August 1, 1902, and extended by agreement executed at Baltimore on July 1, 1903, to cover the ensuing year. By its terms the appellee undertook to reimburse and make good to the insurance company, the employer, to the extent of \$10,000, all loss sustained by it of moneys, etc., "in the possession or custody of the employé [Tuttle], or for the possession or custody of which he is responsible, directly occasioned by larceny or embezzlement on the part of the employé in connection with the duties of his office or position." A subsequent clause of the bond provided that the obligor should not be responsible for loss occasioned by any mere error of judgment or bona fide mistake, adding: "This bond being intended only to cover such dishonest acts of the employé in connection with the position in the service of the employer hereinbefore referred to as amount to larceny or embezzlement." A further clause provided that the obligor should not be liable under the bond for the amount of any balance that may be found due the employer from the employé, and again asserted that it was the true intent and meaning of the bond that the obligor should be responsible thereunder only for moneys, etc., "diverted from the employer through larceny or embezzlement on the part of the employé within the period specified in the bond." The breach alleged in the declaration is that, within the period prescribed in the bond, Tuttle had as agent of the insurance company collected various sums of money on its behalf, of which he had stolen or embezzled the sum of \$7,680. A statement or account verified by the oath of the plaintiff was filed, with the declaration, charging Tuttle with his monthly balances from October, 1903, and crediting him with his commissions and sundry expenditures and debiting him, at its foot, "To net balance due Home Fire Ins. Co. \$7,680.69." The reiterated declarations in the bond restricting the liability of the surety to losses occasioned by the larceny or embezzlement of the employé or by such dishonest acts as amount to larceny or embezzlement are too distinct and positive to be ignored or explained away. The bond should receive at our hands a reasonable construction, so as to give effect to the intention of the parties thereto, and carry out the purpose for which it was executed (Union Ins. Co. v. U. S. Fidelity Co. 99 Md. 423, 58 Atl. 437, 105 Am. St. Rep. 313), but the plain language used by those parties in defining the

limit of the liability of the obligor requires us to hold that there can be no recovery in this case for any acts or conduct of the employé which fall short of larceny or embezzlement. It therefore becomes important for us to determine what are the essential elements of those two offenses. Larceny, at common law, was the felonious taking of the property of another against his will with the intent to convert it to the use of the taker, or, as some authorities hold, the use of the taker or a third person. Embezzlement, which is a statutory offense, consists in the fraudulent appropriation to one's own use of money or goods intrusted to him by another. In larceny the felonious intent must have existed at the time of the taking of the property, whereas, in embezzlement, the fraudulent act consists in the appropriation of the property to the use of the taker or third party, but the felonious or fraudulent intent is of the essence of the offense in each case. *Bouvier's Law Dict.*, under "Larceny" and "Embezzlement"; *Wharton's Crim. Law*, No. 883, etc., and 1009, etc., 15 Cyc. 488. A. & E. Encycl. vol. 10, p. 979 et seq., vol. 18, p. 459.

It was not seriously contended in this case that the acts of Tuttle in failing to pay over to the insurance company an alleged balance of its funds in his hands amounted to larceny at common law, as the funds were paid to him by the company's consent. It was, however, contended that as his office was at Syracuse, in New York, the alleged offense must be regarded as committed in that state, and that it amounted to larceny as defined by the New York statute. A copy of that statute was put in evidence in the case and appears in the record. By it larceny, embezzlement, obtaining property under false pretenses, and felonious breach of trust are included under one definition. It provides that a person who "with the intent to deprive or defraud the true owner of his property or the use thereof or to appropriate the same to the use of the taker or any other person," either takes from the possession of the owner or other person, or fraudulently obtains possession of, or secretes, withholds, or appropriates to his own use or that of any person other than the owner any money or property, or, having it in his possession as agent or trustee, etc., appropriates the same to his own use or that of any person other than the owner or person entitled to the benefit thereof, steals such property and is guilty of larceny. A section of the insurance law of New York was also offered in evidence, which provides that the agent of any insurance company who as such collects or receives any money shall be responsible in a fiduciary or trust capacity to the company therefor. This statutory modification of the definition of "larceny," including "embezzlement," as interpreted by the courts of New York, has not done away with the necessity of proving the felonious or fraudu-

lent intent at the time of taking, or appropriating or withholding the property in order to establish the offense. *People v. Pollock*, 51 Hun (N. Y.) 613, 4 N. Y. Supp. 297; *People v. Laurence*, 137 N. Y. 517, 33 N. E. 547; *Justices of Court of Special Sessions, etc., v. People ex rel. Henderson*, 90 N. Y. 12, 43 Am. Rep. 135; *Loomis v. People*, 67 N. Y. 329, 23 Am. Rep. 123; *People v. Grim*, 3 N. Y. Cr. R. 317. In a number of suits brought on bonds which, like the one now before us, by their terms limited the liability of the surety to losses by larceny or embezzlement or by dishonest acts amounting to those offenses, it has been held that proof of a balance due from the employé to the employer, and a failure to pay the same when demanded, was not sufficient to bind the surety. There must be proof of dishonest acts of the employé within the contemplation of the bond. Fraud and dishonesty are not presumed. They must be proven. *Monongahela Coal Co. v. Fidelity & Deposit Co.*, 94 Fed. 736, 36 C. C. A. 444; *Guarantee Co. v. Mech. Savings Bank*, 100 Fed. 559, 40 C. C. A. 542; *Milwaukee Theater Co. v. Fidelity, etc., Co.*, 66 N. W. 361, 92 Wis. 412; *Reed v. Fidelity, etc., Co.*, 42 Atl. 294, 189 Pa. St. 596.

Let us now consider in the light of these principles the facts of the present case. It appears from the evidence, all of which was for the plaintiff, that late in March or early in April, 1900, an agreement was entered into between the Home Fire Insurance Company of Baltimore, acting by its president, G. Harlan Williams, and his son, Howard T. Williams, who was its secretary, and Robert R. Tuttle, by which Tuttle became the general agent of the company for Pennsylvania and New York, with his headquarters at Syracuse, New York. There is no evidence of a formal written contract between the parties. G. Harlan Williams testified, in reply to the question whether the company had a verbal or written contract with Tuttle, that he thought "the commencement was verbal."

* * * It may have been in correspondence.
 * * * I have not a clear recollection of it.
 * * * I cannot say whether it was by specific contract or just a verbal understanding."

The following letter, purporting to have been addressed by him on April 4, 1900, to Tuttle, was shown to him, and he was asked if the signature to it was his: "We are in receipt of your favor dated 2d inst., in which you ask us to write a letter embodying the arrangement made between the company and yourself as its general agent. As we understand it, you are to give us careful, judicious services, covering that part of New York outside of what is known as the 'Metropolitan' and 'Suburban' districts, in consideration whereof we are to allow you 30 per cent. commission, and in addition 10 per cent. contingent commission upon profits of the company in the territory above referred to. By profits is meant the actual remittances from you to the home office less losses sustained by the

company in your jurisdiction. We believe this covers the agreement between us." [Signed] G. Harlan Williams, Prest." Mr. Williams admitted his signature to the letter to be genuine, but he said at the same time "that letter never meant a written contract," but simply referred to the agreements that arose out of the conversations between the parties. He further said that the company "allowed Tuttle to settle small losses in his territory, up to \$100, and upon approval to deduct the amount from net remittances, to pay agents licenses of \$10, and charge in his account, also to pay fire department taxes. Cancellations would come through Tuttle, and he would charge the company with the amount paid by him to policy holders and deduct that amount from next balance. The company never dealt directly with its policy holders, but always with its agents. That the company required Tuttle to pay unearned premiums to policy holders and permitted him to charge the same to the company"; that Tuttle was to settle monthly, and at first did so, but not latterly; that in 26 instances concerning which letters were shown the witness Tuttle had settled his monthly balances "upon a credit" of from 2 months and 29 days to 4 months and 4 days.

Howard T. Williams, who had been secretary of the company for the 11 years preceding the appointment of the receiver, and who assisted the receiver in the discharge of his duties, testified, when asked to state the substance of the negotiation leading up to making Tuttle the New York agent of the company: "The substance of that negotiation which covered over several meetings was to the effect that he was to be our general agent for the state of New York for the procurement of business. He was to select his agents for the procurement of his business. He was to inspect that business paying the traveling expenses and salaries of his agents. We were to pay him 80 per cent. commission and to pay all agents' licenses, fire department taxes, the state fees for entrance, all adjustment expenses, and the losses, and, if any profit showed over and above that, he was to have 10 per cent. contingent. He was to be responsible for all agents' balances, use due diligence in the collection thereof, and to remit us in 90 days the account current." This witness further said that, in making up such accounts current, Tuttle would take the total amount of premiums written by all his different agents, and then he would deduct from that amount his commissions, any rebates or cancellations he would have, any little bills he may have paid for small fire losses or fire department taxes or things of that kind, and strike a balance which the company would then carry on its books as the amount due it for that month's business, which it would charge him with, and when he remitted that would be the amount of his remittance. On cross-examination this witness reiterated the assertion that under the arrangement with

Tuttle the latter was entitled to retain in his possession his monthly balances for three months before remitting, and stated that G. Harlan Williams, the witness' father, had been mistaken in testifying that it was Tuttle's duty to remit his monthly balances on the first of the ensuing month.

It is apparent from the whole testimony for the plaintiff that in the course of dealing between Tuttle and the company he was currently permitted to retain his monthly balances for three months and sometimes longer before remitting them to the company. There is no evidence he was required or expected to deposit to the credit of the company, or keep separate from his own moneys the premiums received on policies issued by it through him. On the contrary, the evidence shows that he remitted his own checks for the balances due him, and that the officers of the company believed that he kept in bank to his own credit the balances due the company, and made no objection or protest to his doing so.

Tuttle continued to conduct the company's business to its satisfaction in the territory covered by his contract until the losses incurred by the great fire in Baltimore City on February 7-8, 1904, compelled the company to cease operations, and go into the hands of the appellant as receiver. At that time Tuttle had settled with the company up to the previous October 1st, and had rendered to it his current accounts for the four months up to the current month of February. These current monthly accounts charged Tuttle with the premiums for all business done through his office during the month, whether he had collected them or not, and gave him such credits as he was entitled to for the month. The accounts were only tentative, and not final, because, if Tuttle were afterwards compelled by cancellation of policies or other good reasons to return to the policy holders any portion of the premiums with which he was thus charged, he would be credited with the amount so returned on the account for the month in which the return was made. For instance, Howard T. Williams, having testified that on January 14th prior to the fire the monthly accounts theretofore rendered showed a total balance against Tuttle of about \$15,000, was asked whether he had not failed to take into account the possibility that subsequent cancellations of policies might not have wiped out that \$15,000. He replied: "I overlooked the fact that the cancellations could have wiped out the three months' business. That is the reason he was given three months' credit." He was then asked: "Now, the cancellations might have gone even further than that, might they not?" to which he replied: "Might have brought us in debt to him." Upon the happening of the fire the company on February 10, 1904, telegraphed to Tuttle that it declined to assume any further liability or renew any expiring risks, and that he

should govern himself accordingly. Later in the same day it wired him that it would "most likely reinsure in Hartford." On the 13th it wrote him a letter, saying in effect that everything was in confusion; that they were trying to straighten matters out; that they were not broke, and were trying to get the best terms for reinsurance. On the 23d the company wired to Tuttle: "Home cannot protect policy holders." During the days immediately following the fire the company received from Tuttle a number of unpaid telegrams. The banks being closed, and the company's funds locked up in the fire ruins, its officers refused to pay for the telegrams, and therefore their contents are unknown, but the fact that they were sent shows an effort on the part of Tuttle to communicate promptly with the company. As soon as the receiver got well into the saddle, he began to send requests to Tuttle to remit the balance in his hands to the credit of the company, but got no reply from him until March 26th, when he wrote to the receiver as follows: "Replying to your letter asking for a remittance, beg to advise that it has been utterly impossible for us to make any collections since the Baltimore Fire. In fact, every agent has a claim against the Home for more than the amount of their balances, and my claim against the Home will be an exceedingly large one, just the amount I will advise you as soon as I can get in the canceled policies and make an account."

Early in May, 1904, the receiver sent Mr. Thos. E. Bond, an experienced accountant and insurance adjuster, to Syracuse to procure from Tuttle a statement of his accounts with the company. On May 9th Mr. Bond reached Syracuse and went to Tuttle's office to see him about the matter. Tuttle assigned as the reason for not having already sent the accounts that he had been very busy and that there was a large volume of claims for return premiums, some of which were still coming in, and he insisted that, when they had all come in, the balances of the account would be in his favor. He without any objection, at Mr. Bond's request, not only gave him access to his books of account, but permitted him to take such of them as he desired overnight to the hotel at which he was stopping. Tuttle also referred him to the bookkeeper of the agency and she gave him such assistance as he asked for. Mr. Bond found that the ledger and others of the books had not been brought down to date, but he made up a statement of the account, as well as he could, according to which Tuttle was largely in debt to the company. He went with it to the office of Tuttle and showed it to him. Tuttle expressed great surprise, and said Bond had evidently not gotten all of the return premiums, that they could not have been put on the books, and promised to meet Bond that afternoon and take the matter up with him and give his whole time to it. When Bond went to Tuttle's office in the

afternoon, he was informed that the latter had been unexpectedly called to New York City, and would be gone for some days. Mr. Bond then returned to Baltimore. In the latter part of May, or some time in June, Tuttle sent to the receiver a statement showing a balance against himself of \$3,561.19. This was followed at a later day by another statement, claiming an additional credit of \$3,810 for alleged special services and expenses of himself and two special agents and a clerk during the two weeks following the Baltimore fire in visiting subagents in his territory, and otherwise attempting to hold the business together until the company could arrange to reinsure its risks.

The defendant filed a bill of particulars in the shape of an account with its eighth plea, which by way of equitable defense alleged that upon a proper accounting the balance of accounts between the company and Tuttle was in his favor. This bill of particulars charged Tuttle with the same monthly balances, within a few dollars as those charged against him in the account filed with the declaration, but it claimed credits in his favor mainly for return premiums, unpaid agents' balances, and the special services already mentioned, amounting, in the aggregate, to more than the total debits and showing a balance in his favor.

The evidence for the plaintiff, of which we have stated the substance, was not in our opinion legally sufficient to prove dishonest acts on the part of Tuttle amounting to larceny or embezzlement. It is clear that under both the agreement and course of dealing between him and the company he was entitled to "a credit" of three months on his monthly balances. The ascertainment of the monthly balance under their course of dealing did not prove that the amount of the balance has actually come to his hands. It merely made him liable under the contract to pay that sum at the end of three months thereafter, subject, however, to the contingency of its being wiped out in whole or in part by the subsequent return by him to policy holders of unearned premiums. The company by the grant to him of this three months' credit established the relation of debtor and creditor between it and him, and authorized him to apply to his own use during that time so much of the balance charged against him as came to his hands, and relied upon his obligation under their contract to repay to it a like amount at the end of the period for which the credit was given. *Milwaukee Theater Co. v. Fidelity Co.*, 66 N. W. 361, 92 Wis. 412; *McElroy v. People*, 202 Ill. 473, 66 N. E. 1058. If, at the end of the three months, he was unable to pay or simply failed to pay what was due, that fact without proof of some fraudulent disposition of the money *animo furandi* would not have sufficed to convict him of larceny or embezzlement of it. If the company had required him to deposit the money to its cred-

it and draw upon it as its agent and for its use, and thus intrusted him with the mere custody or possession of it, and he had applied it to his own use, the case would have been different. The mere failure to pay a debt without compulsion even by one having the financial ability to pay it is neither larceny nor embezzlement. Tuttle neither concealed nor denied the amount of the "balance" prima facie due by him. He admitted them, and freely gave the company's accountant access to and temporary possession of his books of account for examination, but asserted that his claims against the company exceeded his debits. Nor are the claims made by him, whether excessive in fact or not, of such nature that their assertion affords prima facie evidence of fraud on his part. Such of the claims as are for return premiums, and they constitute the greater part of them, do not suggest fraud, for they were contemplated and provided for by the agreement between the parties, and the failure of the company after the fire made it practically certain that the amount of those claims would be unprecedentedly large in the aggregate. The claim made by Tuttle for special services and expenses incurred in an alleged effort to hold the business together after the fire are unusual in their nature, but the unusual severity of the Baltimore fire and the uncertainty for a time as to its effect upon the continued existence of the company present a situation under which the assertion of claims of that character does not raise a prima facie presumption of dishonesty amounting to larceny or embezzlement. Tuttle was undoubtedly dilatory and perhaps indifferent in sending in his accounts after the fire, and the failure on his part to keep his engagement with Mr. Bond at Syracuse was discreditable to him, but, in view of the fact that he then asserted and still asserts the right to credits for returned premiums and expenses in excess of the balances against him, those circumstances, if they had been found by the jury, would not have been legally sufficient to warrant the finding of a verdict for the plaintiff under the bond sued on in this case. The learned judge below, in our opinion, committed no error in granting the defendant's prayer.

We will not add to this opinion, already long enough, a discussion in detail of the rulings on evidence brought up by the other exceptions. It is sufficient to say that we find no reversible error in them. The evidence referred to in the first and second exceptions, which was excluded because it tended to vary the terms of the letter of April 4, 1900, from G. Harlan Williams to Tuttle, which the court below treated as the written contract between him and the insurance company, should have been admitted, as Mr. Williams himself testified that the letter was not intended to constitute a contract, and the other evidence corroborated him in that respect. We do not, however, regard the court's ac-

tion on these exceptions as presenting reversible error, as we have treated that evidence as properly in the case, and have considered it in arriving at the conclusions to which we have given expression in our opinion.

The motion made by the appellee to dismiss the appeal because the order extending the time for signing the bill of exceptions was not passed until after the expiration of the term cannot prevail. It appears from the affidavits of the counsel for the appellant and the certificate of the trial judge that the counsel for the appellee, when the bills of exception were presented to them after the expiration of the term, examined them and made sundry changes in them, and were present in court when they were signed, and participated with appellant's counsel in discussing them before the judge who allowed further changes to be made in them at the request of the appellee's counsel, and that no protest or objection was then made on behalf of the appellee to the signing of the bills. Under these circumstances, it is too late for the appellee to raise for the first time in this court the objection that the exceptions were signed too late. *Thomas v. Ford*, 63 Md. 346, 52 Am. Rep. 513; *Edelhoff v. Horner-Miller Mfg. Co.*, 86 Md. 605, 39 Atl. 314.

The judgment appealed from must be affirmed.

Judgment affirmed, with costs.

(106 Md. 508)

RASCH v. RASCH.

(Court of Appeals of Maryland. April 4, 1907.)
DIVORCE — EVIDENCE — SUFFICIENCY — ADULTERY.

In an action for divorce, evidence held sufficient to sustain the charge of adultery against defendant.

Appeal from Circuit Court No. 2 of Baltimore City; Pere L. Wickes, Judge.

Bill by Selena Rasch against John Rasch. From a decree overruling defendant's cross-bill, he appeals. Reversed and remanded.

Argued before BRISCOE, BOYD, PEARCE, SCHMUCKER, and BURKE, JJ.

S. Gross Horwitz, for appellant. William P. Constable, for appellee.

BRISCOE, J. On October 22, 1903, the wife (appellee) filed a bill in circuit court No. 2 of Baltimore City against the husband (appellant) for divorce a mensa et thoro, on the ground of desertion and cruel treatment. To this bill an answer was filed by the husband, denying the allegations set out therein, and charging the wife, since her marriage with him, with the crime of adultery. On the 9th of January, 1904, the husband filed a cross-bill against the wife for a divorce a vinculo matrimonii, for adultery with one Michael J. Dellahunty of Baltimore City, between the 1st day of August and the 11th day of October, 1903, and with divers other

men who are unknown to him. The bill also charged illicit carnal intercourse with other men unknown to the plaintiff at the time of the marriage. These allegations were denied by the wife in an answer to the bill. A replication was filed to each bill, and the case was heard on the bills, answers, and proof. Both bills were dismissed by the court below, and from the decree dismissing the cross-bill an appeal has been taken.

There is no appeal from the decree dismissing the original bill. The rules of law applicable to this class of cases cannot admit of dispute, as they have been settled by numerous decisions of this court. They are clearly and fully stated in *Kremelberg v. Kremelberg*, 52 Md. 553, and *Shufeldt v. Shufeldt*, 86 Md. 529, 39 Atl. 416. The proof in the case at bar is quite voluminous, and, as usual in these cases, is somewhat contradictory. It would not aid the conclusion we have reached to review it in detail, or to prolong this opinion by attempting to reconcile the glaring conflicts in the testimony of some of the witnesses. The sole question on the appeal is whether the charge of adultery alleged in the cross-bill is supported by the testimony, and we shall state only the material parts of the testimony bearing on this question.

The appellant and appellee were married on the 15th day of January, 1903, and on the 22d of October of the same year a bill for divorce was filed by her. They lived together as man and wife until the 11th of October, 1903, when he left his home, and took with him his household effects. The basis of the suit rests upon certain letters which the husband found on his wife's bureau, on his return home on the 11th of October, 1903. Two of the letters were from Dellahunty to the appellee, dated October 1, 1903, signed "Del," and addressed the wife as "dearest." They contain expressions of the following import: "I, however, will be at the meeting place designated Saturday evening. I would much prefer to be with you, and you alone. I wish you would get away to-morrow evening, Friday, but I suppose you can't, for I want to see you and be with you more than I can tell you. Let me know by return messenger if you can see me to-night, if only for a moment, as per our arrangement of last evening. Let me know where and the exact time. Will send you flowers this afternoon, accept them with my fondest hopes for the future." The wife's letter to Dellahunty, is dated the 11th of October, 1903, was sealed, and contains such expressions as, "Dearest Della. Sweet letter received. Meet me at our same place (M. & N.) at 8 p. m." "Excuse hasty note this time as it might be dangerous." "Do not fail to come." "Lots of Love, I am, Yours, Leonore." In addition to these letters, there was testimony by the wife that she had met Dellahunty on September 30th, in the afternoon and again that night, and on the 1st of October. There was also proof that the

appellee allowed men to visit her home in the absence of her husband, and that she had been seen with men in the bedrooms on the second floor, and in the parlor of the house, under circumstances that conclusively established her guilt. Police Officer Pease testified that he knew the appellee before her marriage, that she lived with her sister, and they entertained men in their bedroom at night, drinking and otherwise carousing. In answer to the question, What conclusion did you form as to the character of the appellee and her sister?" he said: "Well, I would not think very much of the appellee, knowing her sister was a kept woman and she knew it, at the time." It is not necessary to state here with any further particularity the proof contained in the record which supports the appellant's case.

It is sufficient to say that the letters heretofore referred to, in connection with the other proof in the record before us, sustain and establish the charge of adultery against the appellee. It is impossible, as was said by this court in *Kremelberg v. Kremelberg*, 52 Md. 553, to reconcile the testimony before us with the innocence of the appellee, and we must therefore infer her guilt. In *Shufeldt v. Shufeldt*, 86 Md. 529, 39 Atl. 416, it is said: "It is not necessary in cases of this character that there be any one act proven which is conclusive of guilt; but the court must consider the opportunity for the commission of the act, the conduct of the parties and all circumstances, and then determine from the whole testimony whether it should convince unprejudiced and cautious persons of the guilt of the parties." And in *Burgess v. Burgess*, 4 Eng. Eccl. 529, it is said: "It is not necessary to prove the fact of adultery at any certain time or place, modo et forma, loco et tempore. It will be sufficient if the court can infer that conclusion, as it has often done between persons living in the same house, though not seen in the same bed, or in any equivocal situation." In the case at bar, the conduct of the parties, the secret correspondence between them, lead to the fair inference and conclusion that the relations between them were not innocent, apart from the positive testimony of the witnesses Handy and Geddes, as to improper relations between the wife and other men. We find no sufficient evidence to support the charge of infidelity on the part of the husband which would constitute a bar to the relief now asked by him. The testimony upon this branch of the case is too uncertain and contradictory to establish an inference of guilt. On the contrary, it is positively denied by the testimony of the husband, and not sustained by the facts and circumstances of the case. Nor do we find the contention of the appellee that there has been forgiveness or condonation of the wife's guilt by the husband supported by the evidence. He abandoned his wife as soon as the letters were discovered, and did not again return to her.

We are therefore of the opinion, after a careful consideration of all the testimony in the record, that the charge of adultery against the wife has been established, and, for the reasons stated, the decree of the circuit court No. 2 of Baltimore City will be reversed, and the cause remanded, to the end that a decree granting a divorce a vinculo matrimonii to the husband may be passed.

Decree reversed, and cause remanded; costs to be paid by the appellee.

(79 Conn. 676)

BLAKE v. BROTHERS.

(Supreme Court of Errors of Connecticut.
May 1, 1907.)

ELECTIONS — OFFICERS — MODERATOR — PERSONAL LIABILITY FOR OFFICIAL ACTS — REJECTION OF VOTE.

A moderator of an electors' meeting being a quasi judicial officer is not personally liable in damages to an elector for any error in rejecting his ballot; no malice or bad faith being shown.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Elections, § 53.]

Appeal from Superior Court, New Haven County; Milton A. Shumway, Judge.

Action by Henry T. Blake against Frederick J. Brothers. From a judgment for defendant, plaintiff appeals. No error.

Action for damages against the defendant for depriving the plaintiff of his rights as an elector brought to the superior court for New Haven county. The complaint states the following facts: The plaintiff at the state election held November 6, 1906, secured an official ballot, duly issued by the Secretary of State in blank, and wrote thereon in his own handwriting the names of those persons for whom he desired to vote for Governor and other state officers, each under its appropriate title. He sealed the ballot up in an official envelope duly indorsed, as the statute requires, and deposited it upon the ballot box in the First Ward in the city of New Haven, where he was entitled to vote, and it was received by the moderator and duly placed in the box. During the counting of the ballots, after the polls were closed, the defendant, who was moderator of the meeting in said ward, discovered that the plaintiff's ballot had upon it certain identifying marks (in addition to the plaintiff's handwriting) within the meaning of the statute which makes ballots void therefor. No explanation was offered or suggested with regard to said marks. The defendant, as such moderator, on account of said marks and also because said ballot was in writing and not printed as required by law, refused to count it or permit it to be counted, and rejected it as a void ballot, and caused it to be placed in a package of rejected ballots and sealed up and deposited with the town clerk as the law requires concerning rejected ballots. This action of the defendant is alleged to have deprived the

plaintiff of his rights as an elector, to his damage. The defendant demurred to the complaint (1) because it appears from the complaint that the plaintiff's ballot was not printed, but was wholly in his own handwriting; (2) because it appears that the ballot had upon it, in addition to the handwriting of the plaintiff, certain other identifying marks within the meaning of the statute making ballots void therefor; (3) the defendant is not liable to the plaintiff in damages because it appears from the complaint that in rejecting the plaintiff's ballot the defendant was acting in accordance with the statutes relating to the conduct of elections and prescribing the moderator's duties as to the counting and rejecting of ballots; and (4) because in rejecting the plaintiff's ballot the defendant was acting in a judicial or quasi judicial capacity, and therefore is not liable in an action for damages, no malice or bad faith on his part being alleged.

The court, Shumway, J., sustained the demurrer and rendered judgment for the defendant. The plaintiff appealed assigning as error the sustaining of the demurrer. No error.

Henry T. Blake and George D. Watrous, for appellant. Leonard M. Daggett, Livingston W. Cleaveland, and Clarence W. Bronson, for appellee.

THAYER, J. (after stating the facts). The complaint does not allege, and the plaintiff in his brief states that it is not claimed, that the defendant acted maliciously or that he overstepped the duties imposed upon him by statute. The plaintiff's contention is that the statute under which the defendant acted violates the Constitution of the state in several respects, and especially in that it deprives the duly qualified elector of the right of free suffrage, including the right to vote a written ballot and the right to otherwise so mark his ballot that it may indicate who cast it, and that being thus in violation of the Constitution the statute is no protection to the defendant, although he acted in good faith and without malice.

The duties which the statute imposed upon the defendant as moderator of the elector's meeting were of a quasi judicial nature. He was called upon to determine a variety of important and difficult questions, involving judgment and discretion and some of which might require the hearing of testimony. An examination of the numerous cases referred to in the plaintiff's brief, in which some of these questions were brought before this court by parties claiming to have been aggrieved by rulings of such moderators, show the importance and difficulty of the questions upon which the defendant was called to rule as well as their quasi judicial character. The defendant was therefore acting as a quasi judicial officer in doing the acts now complained of by the plaintiff. In *Perry v. Reynolds*, 53 Conn. 527, 535, 3 Atl. 555, we held that such

officers are not personally liable in damages for errors or mistakes committed by them when so acting. It follows that the complaint shows no cause of action against the defendant, and the demurrer was therefore properly sustained.

It is unnecessary to consider the other questions raised in the case.

There is no error. The other Judges concurred.

(79 Conn. 664)

LEONARD v. GILLETTE et al.

(Supreme Court of Errors of Connecticut. May 1, 1907.)

1. ADMINISTRATORS—CLAIMS AGAINST ESTATE—EVIDENCE—ADMISSIBILITY.

In an action brought to recover for services rendered defendants' intestate during the six years prior to his death, it appearing that plaintiff and intestate had stood in the same relation to each other for 16 years, evidence that at the commencement of the relation intestate asked plaintiff to look after him and take care of him was relevant as tending to show that the services performed within the 6 years were performed at the request of intestate.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 22, Executors and Administrators, § 1871.]

2. SAME.

In an action to recover for services rendered defendants' intestate, evidence as to the value of the estate of intestate was relevant as tending to show that intestate requested plaintiff to perform the services, and as offering an explanation of the fact that for six years plaintiff performed the services without insisting upon payment.

3. APPEAL—REVIEW—HARMLESS ERROR—REMARK OF COURT.

In an action to recover for services rendered defendants' intestate, the court, in admitting testimony, remarked that he believed that in another case a similar question was admitted as possibly bearing on the value of the services. The court charged that the only purpose of the testimony was to corroborate plaintiff that intestate as a man in possession of a competence expected to pay for the services, and that the value of the services was to be determined apart from the value of the estate. *Held*, that the court's remark in view of the charge was harmless.

4. WITNESSES—IMPEACHMENT—INCONSISTENT STATEMENTS.

Where, in an action to recover for services rendered defendants' intestate, a witness for defendants testified to the effect that, so far as he knew, no services had been performed for intestate, evidence of a conversation with witness in which he stated in reply to plaintiff's remark that she would put in a claim, "All right, I won't kick over your claim," was admissible.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, §§ 1209-1225.]

Appeal from Superior Court, New Haven County; William S. Case, Judge.

Action by Elizabeth M. Leonard against Charles W. Gillette and others, administrators, to recover the reasonable value of services rendered defendants' intestate. From a judgment for plaintiff, defendants appeal. Affirmed.

The complaint alleged that for six years prior to the date of the death of Joseph E.

Lawrence, the defendants' intestate, the plaintiff performed housework, general work, boarded and cared for said Lawrence continuously, and nursed him when he was sick, on his request and promise to pay for the same; that said services were reasonably worth \$3,225; that the plaintiff duly presented to the defendants as administrators of said Lawrence her claim for payment for said services, which claim was disallowed. The answer denied the allegations of the rendition of services and of their value, and averred that, if said Lawrence was at any time indebted to the plaintiff for services as alleged, he had made full payment for the same, which averment the plaintiff denied. On these issues the case was tried to the jury. The rulings on evidence assigned in the appeal as error are three: (1) The plaintiff offered evidence to show that she had been a tenant in one of the houses of Lawrence for 16 years before his death, and that this house stood near that in which Lawrence resided alone during the same period. The plaintiff testified as to the relations existing between Lawrence and herself during the period of her tenancy, but claimed to recover only for services rendered during the six years next preceding Lawrence's death. Upon her direct examination she was asked, "When you first began to work for him sixteen years ago, what did he ask you to do?" The defendants objected to the question and the court admitted it; the defendants duly excepting. The witness answered: "He asked me to see him and take care of him." The witness subsequently testified that Lawrence repeatedly during the six years before his death promised that she should be rewarded for her services. (2) The defendants introduced as a witness one Louis C. Archambault, one of the appraisers of the Lawrence estate. Upon his cross-examination he was asked if he appraised all of the estate, and, having answered that he did, he was further asked, "How much did it appraise?" The defendants objected to this question. The plaintiff claimed it as material to show that Lawrence "was acting in good faith by" the plaintiff "to show the condition of affairs there." The court said: "I believe, in the case of *Grant v. Grant*," 29 Atl. 15, 63 Conn. 530, 38 Am. St. Rep. 379, a similar question was admitted "as possibly bearing on the value of the services. I will admit it for that limited purpose." The defendants duly excepted, and the witness answered: "Somewhere in the neighborhood of \$24,000 or \$25,000, I believe." No inquiry was made of said witness concerning the appraisal or value of said estate on his examination in chief, nor of any other witness during the trial, nor was there any other evidence offered by either party of the value or appraisal of said estate. In the charge the court cautioned the jury against putting the wrong estimate on this testimony as to the amount of the Lawrence estate, and said: "I have already cautioned you

that the rule of damages in this class of cases does not concern itself with the amount of the estate, or the size of the expected inheritance. The only legitimate purpose of the testimony before you lies in its claimed tendency to corroborate the claim of the plaintiff that the deceased as a man living quite alone and in possession of a competence expected to, and understood that he was expected to, pay for such services as the plaintiff may have rendered. It must have no effect beyond this in any event. The value of the services, if you come to that, is a matter to be determined quite apart from the size or value of the estate." (3) One Frank Lawrence, a nephew and heir at law of the decedent, was offered as a witness by the defendants. He testified at length as to his acquaintance with his uncle during the latter's last years and as to his uncle's methods of life, and said that on his visits to his uncle he had never observed that he was being materially assisted or cared for by any one, and that he had not seen the plaintiff in attendance upon his uncle. He was not asked to give an opinion as to the value of the plaintiff's claimed services. The plaintiff was a witness on rebuttal, and in her direct examination testified that since the decedent's death she had had a conversation with Frank Lawrence regarding his uncle and in regard to her services for him. She was then asked: "Won't you tell the jury what it was?" To this question the defendants objected, on the ground that the conversation was not binding upon the administrators. It was claimed by the plaintiff as showing bias in the witness Lawrence. The court admitted the question, the defendants duly excepting. The witness answered: "I told him I was going to put in a claim, and he said: 'All right.' I told him I didn't want him to kick over it. I said: 'You know I have taken good care of your uncle, and I want my pay for it.' And he said: 'All right.' He said: 'I won't kick over your claim, if you don't kick over what I get.' I said: 'I have nothing to do with what you get. All I am looking for is what belongs to me.'" In the charge the court cautioned the jury in respect to this testimony as follows: "As to certain statements made by Lawrence, the nephew, to the plaintiff, after the elder Lawrence's death, you will be careful to remember, as I cautioned you when this testimony was admitted, that no statement of this witness Lawrence is of weight as tending to bind the estate, and his statements are admitted here only for the limited purpose of affecting his credibility as a witness, and it is for you, of course, to say whether they have any weight in that direction."

William E. Thoms, for appellants. Ulysses G. Church, for appellee.

HAMERSLEY, J. (after stating the facts). The first exception is not well taken. It appearing that the plaintiff and Lawrence, the

defendants' intestate, had stood in the same relations to each other for 16 years, the fact that at the commencement of these relations Lawrence asked the plaintiff to look after him and take care of him is not irrelevant to the fact that during the last 6 years of this period the services of the plaintiff in taking care of Lawrence were rendered at his request. Whether or not the relevancy should be deemed too remote to be material, under all the circumstances of the case, was within the discretion of the trial judge, and the record does not indicate that this discretion was abused.

For similar reasons the second exception is not well taken. The fact that Lawrence possessed a modest competence, in connection with other facts, is not wholly irrelevant to the fact that Lawrence requested the plaintiff to perform for him the general duties of a housekeeper and nurse, promising to pay her the reasonable value of such services, nor to the fact that for six years she performed these services without insisting upon payment. The expression of the judge at the time this testimony was admitted of his belief that in another case a similar question had been admitted as possibly bearing on the value of the services, if in any event it could be regarded as harmful, was certainly harmless in view of the charge of the court upon this point.

The third exception is not well taken. The testimony of Frank Lawrence was to the effect that during his visits to his uncle the plaintiff had rendered the latter no assistance, and that, so far as he knew, his uncle during his last years had not been assisted or cared for by any one. The testimony of the plaintiff admitted in rebuttal tended to show that the younger Lawrence did know that the plaintiff had taken care of his uncle. If it did not show this, its admission in connection with the charge of the court was harmless.

This appeal illustrates the necessity of calling attention to a seeming misconception as to the relative duties of a trial court and Court of Errors in respect to the application of the law of evidence to the peculiar conditions that may be developed in a trial. Strictly speaking, the law of evidence is a part of the law of procedure, and harmless error in its application in the course of a trial is not ground for new trial. In the main, its application to the circumstances of each case is a duty necessarily allotted to the trial court, and in most instances the judge conducting a trial is in a far better position to settle justly a doubtful application than a Court of Errors reading the printed record. The rule of logic or theory of chances which determines the relevancy of evidence must in nearly all cases of doubtful application be understood in connection with conditions and circumstances peculiar to the case on trial, evanescent in their character and difficult of adequate apprehension unless by the presiding

judge. Appeals to this court based on alleged mistakes of the trial judge in the exercise of his power and discretion in determining such doubtful questions of relevancy and remoteness must ordinarily prove futile. To entertain and discuss all such appeals would tend to promote prolixity, uncertainty, and injustice in trials, and to obscure rather than make clear the practical duties of the trial court; and for this court to set aside judgments and compel new trials for such immaterial or academic reasons would tend to defeat rather than to serve the administration of justice.

There is no error in the judgment of the superior court. In this opinion the other Judges concurred.

(79 Conn. 682)

FINCH v. BURR et al.

(Supreme Court of Errors of Connecticut.
May 1, 1907.)

FORCIBLE ENTRY AND DETAINER—GROUND OF ACTION—IRREGULAR EXECUTION.

After a judgment of foreclosure and the expiration of the time for redemption, the mortgagee was put in possession of the premises by the voluntary act of the mortgagor, and then died. The mortgagor returned, and the administrator of the mortgagee, finding him in possession, and the execution of the judgment not appearing on the records of the court, had the attorney who had obtained the foreclosure to procure and have served a writ of execution in ejectment founded on the foreclosure judgment. The clerk who issued it did not know of the mortgagee's death, and consequently that his attorney was no longer entitled to the writ. The attorney, although he knew of his client's death acted in good faith in the matter. *Held* that, although it was both a misuse of process and the use of an irregular process, the writ was not absolutely void, and the administrator was not liable to an action of forcible entry and detainer for causing its service.

Appeal from Court of Common Pleas, Fairfield County; Howard J. Curtis, Judge.

Action by George M. Finch against Gilbert B. Burr and others. From a judgment for defendants, plaintiff appeals. Affirmed.

Howard W. Taylor, for appellant. Samuel A. Davis, for appellees.

BALDWIN, C. J. The complaint alleges that the defendant Burr, as administrator of the estate of John P. Keeler, deceased, forcibly put the plaintiff out of possession of certain lands, and, with the other defendants, is keeping him, with a strong hand, out of possession of them.

The material facts are these: The plaintiff on December 26, 1905, was occupying the premises as his homestead. He had mortgaged them to Keeler, who had obtained a decree of foreclosure, and that day was the last on which he could redeem. He did not redeem, but on that day sold part of his furniture to one Durgy, and Durgy hired the premises from Keeler and moved in, with the plaintiff's consent. The plaintiff a few days afterward left the premises, not intending to return to the state. A month later he did

return, and Durgy sublet to him four rooms. Durgy's lease expired April 1, 1906, and on that day he moved out, but the plaintiff did not and proceeded to extend his possession to the entire house. Keeler had died on March 24th. On April 7th Burr was appointed administrator of his estate, and retained an attorney to put the plaintiff out. The attorney was the same who had obtained the foreclosure, and had previously, on April 5th, procured from the clerk of the court the issue of a writ of execution in ejectment, founded on the foreclosure judgment. This execution he now had served, and the plaintiff was forcibly ejected upon it. The administrator thereupon let the premises to the two other defendants, who went into possession under the lease. There was no evidence of any use of "force and strong hand" except in serving the execution. It is plain, therefore, that judgment was properly rendered for the two defendants who came in later as tenants under the administrator. The administrator himself was liable to the action if he procured the dispossession of the plaintiff with force and strong hand, without other warrant than a void writ. The judgment in favor of Keeler was for two things—a foreclosure and possession. By force of it before his death Finch's equity of redemption had been forever extinguished. The judgment for his dispossession provided for a stay of execution until January 5, 1906. Before that time Finch removed from the premises and from the state, turning over the possession to Durgy. Durgy, having hired them from Keeler, must be deemed to have taken possession for him. The judgment was therefore fully executed before Keeler died. Nevertheless, as its execution did not appear on the records of the courts, it remained the prima facie duty of the clerk to issue final process on demand of the plaintiff's attorney. The attorney who demanded it had, in fact, ceased to be the plaintiff's attorney by reason of the plaintiff's death. He acted, however, it is found, in good faith, and, while he knew of this death, the clerk, so far as appears, did not.

An execution issued upon a judgment satisfied in fact, but not of record, is not void, although the defendant in the action may have preventive relief against its service, and if it should be served by the plaintiff's direction, with knowledge of the facts and malicious intent, there will be a liability to respond in damages. *Luddington v. Peck*, 2 Conn. 700. The same principle must govern when an execution is issued on a judgment in favor of a dead man; the death not having been suggested upon the record, and not being in fact known to the clerk of the court. The sheriff who, acting in good faith, may serve it, is no trespasser. He has a process valid upon its face. The party who put the execution in his hands, if acting in good faith, is also no trespasser. While the proper

method of proceeding for Burr as the administrator of Keeler's estate would have been to sue out a scire facias, his failure to pursue that course was but an irregularity. Had it been an execution to collect a sum of money, and the officer had collected the money and made return accordingly, the judgment, according to a decision of the superior court in the eighteenth century, would have been discharged. *Worthington v. Hosmer*, 1 Root, 192. A judgment is not annulled by the death of the judgment creditor. Whether the state sees fit still to enforce it in his name, or in that of his personal representatives, and whether in the latter case a preliminary writ should first be applied for, is a matter of mere form. The whole law of executors and administrators is bound up in the legal fiction that their title relates back to the moment of the death of him whom they represent, and that through them his personality, for certain purposes, is prolonged. To make this the more effectual, courts have never hesitated, in case of the death, pending suit, of a party to the action, to date back some of the steps in the proceeding so as to make them appear to have been taken before they were. Had the judgment in Keeler's favor been rendered after his death, on a hearing had while he was in life, it would have been fully effectual if entered *nunc pro tunc*. So, under the English practice at common law, if an execution bore tests of a date before the plaintiff's death, on which it might lawfully have been granted, it was of force, although not issued until after that event. *Center v. Billingshurst*, 1 Cow. 33. Forms of proceeding for the accomplishment of justice, whether through the use of a legal fiction or of particular kinds of judicial processes are but means to an end. They are not so essential to its attainment that every departure from them makes what is done a nullity. In the case at bar, after a judgment for possession, the plaintiff had been put in possession by the voluntary act of the defendant, and had then died. The administrator upon his estate, having subsequently found the original defendant again in possession, employed an attorney to eject him, and the attorney proceeded to do so, under an execution on the satisfied judgment. It was both a misuse of process and the use of an irregular process, but neither of these facts rendered the writ absolutely void. *Reynolds v. Corp*, 3 Caines, 267, 273; *Day v. Sharp*, 4 Whart. 339, 34 Am. Dec. 509; *Hughes v. Wilkinson*, 37 Miss. 482; *Jenness v. Circuit Judge*, 42 Mich. 469, 4 N. W. 220. The plaintiff, while conceding the actual good faith of Burr in using the execution to dispossess him, contended that it was not good faith in law. This apparently rests upon the claim that the facts found exclude the possibility of such good faith as would constitute any legal defense to the action. Burr's knowledge that Keeler was dead was not legally inconsistent with his honest be-

lief that he had a right, as the representative of the decedent, to enforce the judgment for possession previously recovered. To charge him with a scienter in the respect mentioned does not convict him of malice.

In view of the law which we have taken, the exceptions founded on the refusal of the court to alter its finding of fact in certain points become immaterial.

There is no error. The other Judges concurred.

(79 Conn. 670)

GORHAM v. CITY OF NEW HAVEN.

(Supreme Court of Errors of Connecticut.
May 1, 1907.)

1. PLEADING—DEMURRER—MISJOINDER OF CAUSES OF ACTION.

A misjoinder of causes of action can be properly raised only by demurrer as provided by Practice Book, p. 50, § 170.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, § 435.]

2. APPEAL—CAUSES OF ACTION—ELECTION—PREJUDICE.

Plaintiff sued in one count to recover damages for the pollution of a water course, and in another to recover a penalty of \$1,000 for defendant's violation of an injunction prohibiting such pollution. Before any evidence was introduced plaintiff was compelled to elect on which cause he would proceed, and elected the first count, "without waiving any right to a trial on the issues framed under the second." Defendant's objection to this reservation was overruled, and after verdict plaintiff was permitted, over objection, to amend the complaint by striking out the second count. *Held* that a verdict having been rendered in excess of the penalty sued for in the second count, defendant was not prejudiced by such reservation, because, if the court had not permitted it, plaintiff might have elected to have proceeded on the second count.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Appeal and Error, §§ 4077, 4079.]

3. PLEADING—COUNTS—ELECTION—WITHDRAWAL.

Where plaintiff, having alleged a cause of action for damages in two counts, on being compelled to elect on which he would go to trial, chose the first, such election was none the less final because he attempted to attach a reservation that he did not waive any right to a trial on the issues framed under the second count. Hence the court did not err in permitting plaintiff to withdraw the second count after verdict.

4. JUDGMENT—ALTERNATIVE REMEDIES—CONCLUSIVENESS.

Plaintiff sued in two counts, the first to recover actual and punitive damages sustained by pollution of a water course, and the second to recover a penalty for defendant's violation of an injunction restraining the same acts. On the trial plaintiff, pursuant to an order to elect, elected to proceed on the first count, and recovered judgment in excess of the injunction penalty. *Held*, that such remedies were alternative, and that, plaintiff having recovered on the first count, his judgment barred an action to recover the penalty.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, § 1106.]

5. WATER COURSES—POLLUTION—PUNITIVE DAMAGES—EVIDENCE.

In an action for damages for the pollution of a water course, the record of a former injunction suit brought to restrain the same acts and the judge's testimony respecting the efficiency of certain filter beds installed for the

filtration of defendant's sewerage, after the commencement of the first action, were admissible, as bearing on plaintiff's right to recover punitive damages.

6. JUDGMENT—RECORD—ISSUES—EVIDENCE.

Where, in an action for pollution of a water course, the record of a former suit to restrain the same acts was introduced, but did not show whether defendant's system of filtration would wholly prevent any future injury to plaintiff, was raised or determined in the prior action, testimony of the judge who tried the same that such question was within the issues and decided was admissible.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, §§ 1823, 1824½.]

7. WATER COURSES—POLLUTION—DAMAGES—EVIDENCE.

In an action for pollution of a water course running through plaintiff's dairy farm, evidence of the extent of the milk business that plaintiff conducted on the farm before the stream was polluted, in connection with evidence of the amount of such business possible during the period for which damages were claimed, was admissible to prove the diminished value of the use of the farm from the acts complained of.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Waters and Water Causes, § 65.]

8. SAME.

Evidence that there had been numerous cases of typhoid fever in a building, the drainage from which was conducted by defendant to its filtration beds, which emptied into the stream, was admissible in connection with evidence that the stream continued to be contaminated by the drainage after the use of the filter beds, to show the diminished value of the use of the farm of plaintiff and the diminished market value of such use, without proof that the germs of the disease actually reached the plaintiff's stream, or that the water was then used for drinking purposes.

Appeal from Superior Court, New Haven County; Alberto T. Roraback, Judge.

Action by Charles E. Gorham against the city of New Haven to recover damages for polluting a stream on plaintiff's land by sewage, and also to recover a penalty for violating an injunction granted in a previous action, restraining pollution of such stream. From a judgment for plaintiff for \$2,300 on the first cause of action, defendant appeals. Affirmed.

Leonard M. Daggett and James Kingsley Blake, for appellant. Henry G. Newton and Ward Church, for appellee.

HALL, J. The complaint, dated August 20, 1904, contained originally but one count. The second count was added by amendment April 28, 1905. The first count, as amended, alleges, in substance, that ever since November 7, 1899, the defendant has polluted a stream running across the plaintiff's dairy farm by depositing therein the sewerage from the "Springside Home," where the poor of New Haven are kept, and from the wash-house and piggery connected therewith, whereby the plaintiff has been unable to use his farm for pasture purposes, and has been deprived of the benefit of it, and on account of which the profits therefrom have been reduced, and several of his animals have died; that the defendant was enjoined

against the further pollution of said stream by a judgment of the superior court rendered November 7, 1899, and has since willfully and wantonly continued such pollution. The second count sets forth the record of said former action in the superior court between the same parties, including the judgment rendered November 7, 1899, enjoining the defendant, under a penalty of \$1,000, against further polluting said stream by causing or permitting any of said sewerage or drainage to flow into it, and alleges a violation of said injunction. The complaint asks for \$10,000 as the damages, "including exemplary damages," sustained by the acts described in the first count, and \$1,000 "being the penalty of the injunction set forth in the second count." Demurrers to the second count and to said prayers for relief having been overruled (which rulings are not made reasons of appeal), and, the defendant having filed its answer to both counts, the court, upon the defendant's motion, before any evidence was introduced, ordered the plaintiff to elect upon which count of the complaint he sought to recover. The plaintiff thereupon moved that the issues framed upon the second count be withdrawn from the jury. The court declined to pass upon this motion, and called upon the plaintiff to elect upon which count he would proceed to trial. The plaintiff, claiming to do so without waiving any right to a trial of the issues framed under the second count, elected to proceed to trial to the jury upon the first count. The defendant objected to any reservation by the plaintiff of a right to a subsequent trial of the issues framed under the second count. The court required the plaintiff to make no other election than that above stated. After the verdict and before judgment, the court, against the defendant's objection, permitted the plaintiff to amend the complaint by striking out the second count, and the second claim for relief. The defendant claims that by these rulings the court enabled the plaintiff to speculate upon the chances of recovering the penalty for a violation of the injunction by subsequent proceedings under the second count, in case he should not be satisfied with the amount which the jury might award him under the first count.

We are satisfied that the defendant was not so prejudicially affected by these rulings as to entitle it to a new trial. They were in effect favorable to the defendant. Assuming that the defendant was entitled to have the plaintiff elect upon which count he claimed to recover, as to which no question is made before us, it is difficult to see how the defendant has been injured or was placed at a disadvantage by the fact that, in making his election, the plaintiff attempted to reserve the right of a possible future trial of the issues raised under the second count. The court did not decide whether or not the plaintiff could reserve any such right by making the election in the form he did, nor was

it required to do so, nor to decide whether there was a misjoinder of causes of action; the latter question being properly raised only by demurrer. Practice Book, p. 50, § 170. It may be said that it is possible that the plaintiff would have elected to proceed under the second count had the trial court expressly ruled that an election to recover under either count would be a final relinquishment of any right of recovery under the other. But, even if the court ought to have required the plaintiff to make his election without condition or reservation, we ought not to grant a new trial merely to enable the defendant to try again the issues raised under the first count, which are now the only ones remaining in the case; nor would the mere possibility that the plaintiff, if required to make upon another trial an unqualified choice, might elect to proceed under the second count, justify us in setting aside the entire proceedings, including the withdrawal of the second count, and restoring the parties to the position they were in when the plaintiff was ordered to elect. As a matter of law, the fact that the plaintiff in making his election as he did claimed that he might by subsequent proceedings recover under the second count did not render his election any the less a final one, and there was no error in permitting the second count to be afterward withdrawn. The plaintiff was not entitled to recover under both counts. Such remedy as he had of enforcing payment for his own benefit of the penalty for the violation of the injunction (Rogers Mfg. Co. v. Rogers, 38 Conn. 121) was no longer open to him after a verdict under his election to go to the jury for the recovery of both actual and punitive damages under the first count, nor would it have been, even had the verdict been for a less sum than the injunction penalty. To the extent that the two remedies, namely, an action for damages and an election to recover the injunction penalty for his own benefit, were open to the plaintiff, they were alternative remedies for the same injury, a recovery upon one of which barred all recourse to the other.

The trial court admitted in evidence, against the defendant's objection, the record of the former action between these parties, including the judge's memorandum of decision, and the judgment of November 7, 1899, granting the injunction described in the first count of the complaint, and also admitted the testimony of Judge Elmer, who tried and decided said action, that upon the trial before him testimony was offered respecting the efficiency of the filter beds, for the filtration of sewage, which had been placed in operation after the commencement of said first action, and also the testimony of said judge that the efficiency of such system was one of the issues contested and decided in that case. This evidence was admitted only in support of the plaintiff's claim for punitive damages, and upon condition that it should

be shown that the discharge of sewage into the plaintiff's stream since November 7, 1899, was a continuation of the nuisance enjoined against by the judgment of that date. It is unnecessary to discuss the admissibility of the memorandum of decision, as the court in its charge withdrew it from the consideration of the jury. The testimony of Judge Elmer in connection with the record of the former action was admissible. Whether the system of filtration which had been put into operation would wholly prevent any future injury to the plaintiff from the drainage complained of was an issue which the parties might properly have raised and have had determined in the former case. As the record does not show whether it was or not, extrinsic evidence was admissible to prove that it was, if that fact was pertinent to any of the issues in this case. *Mosman v. Sanford*, 52 Conn. 23, 32; *Supples v. Cannon*, 44 Conn. 424, 429. That it was so put in issue and decided, as testified to by Judge Elmer, was pertinent evidence upon the question of punitive damages made in the present case, although the record does not expressly state that such issue was so made and decided in the first case, and although there was no other evidence than such record, and such evidence of Judge Elmer that the defendant knew that such issue was so decided in the former case. Proof that the acts complained of in this case were a continuation of those prohibited by the injunction in the former action was evidence of willfulness or gross negligence upon the part of the defendant. *Sutherland on Damages*, § 1052; *Paddock v. Somes*, 51 Mo. App. 320.

Evidence of the extent of the milk business carried on by the plaintiff on this farm before the stream was contaminated, in connection with evidence of the amount of such business possible during the period for which damages are claimed in the complaint, was admissible as tending to prove the diminished value of the use of the farm from the acts complained of.

Evidence that there were numerous cases of typhoid fever in a building, the drainage from which was conducted by the defendant to the beds for filtering the sewage that ran into the plaintiff's stream, was also admissible in connection with evidence that the plaintiff's stream continued to be contaminated by the drainage after the use of the filter beds, as tending to prove both a diminished value to the plaintiff of the use of the farm and a diminished market value of such use, even without further proof that the germs of such disease actually reached the plaintiff's stream, and although it appeared that the water of the plaintiff's stream was not then used for drinking purposes. Under such circumstances the plaintiff could neither be expected to use such a stream for drinking purposes for his own cattle nor to be able to procure others to so use it. No objection was made to this evidence upon the ground that

it related to a time since the commencement of this action.

As the facts are stated in the record, we discover no error in the ruling of the trial court excluding the question asked by the defendant of its witness Dr. Lewis, whether he was informed of the sources from which the ice was taken which he had inspected the previous summer.

There is no error. The other Judges concurred.

(79 Conn. 679)

Appeal of COLE.

(Supreme Court of Errors of Connecticut.
May 1, 1907.)

1. INTOXICATING LIQUORS—PROCEEDINGS TO REVOKE LICENSE—APPEAL FROM DECISION.

In a proceeding to vacate a liquor license under Gen. St. 1902, § 2680, providing that a taxpayer who shall be aggrieved may appeal to the superior court from the decision of the county commissioners granting a liquor license, the court may set aside the action of the commissioners in granting a license when satisfied that the license was improperly granted, though the evidence as presented to the commissioners is not before the court.

2. SAME.

In a proceeding to vacate a liquor license under Gen. St. 1902, § 2680, providing that a taxpayer who shall be aggrieved may appeal to the superior court from the decision of the county commissioners granting a liquor license, the court may hold the granting of the license to be illegal upon being satisfied that the proposed location is not a suitable place for the sale of liquor, though not convinced of misconduct by the commissioners in other ways.

Appeal from Superior Court, Fairfield County; Milton A. Shumway, Judge.

Application under Gen. St. 1902, § 2680, to set aside as illegal the action of county commissioners in granting a license to sell liquors. From a judgment of the superior court vacating the license, William H. Cole, the licensee, appeals. Affirmed.

Jacob B. Klein and Robert G. De Forest, for applicant. John W. Banks, Frank L. Wilder, and James A. Turner, for taxpayer.

PER CURIAM. The construction of Gen. St. § 2680, by which that section is held in legal effect to authorize, under the name of "appeal," a proceeding by way of original application to the superior court to set aside certain action of the county commissioners in the matter of liquor licenses, when in excess of their power or in the unlawful abuse of that power, the summary and informal nature of that proceeding, and the power of the superior court in the conduct of a hearing upon the questions thus presented, have been fully considered and determined in recent decisions. *Malmö's Appeal*, 72 Conn. 1, 6, 43 Atl. 485; *Malmö's Appeal*, 73 Conn. 232, 234, 238, 47 Atl. 163; *Moynihan's Appeal*, 75 Conn. 358, 360, 361, 362, 363, 366, 53 Atl. 903; *Burns' Appeal*, 76 Conn. 395, 396, 397, 398, 56 Atl. 611; *Hewitt's Appeal*, 76 Conn. 685, 688, 58 Atl. 231; *Londry's Appeal*, 79

Conn. 1, 5, 63 Atl. 203. It follows that the action of the trial court in this case in overruling the appellee's claim of law that the court could not set aside the action of the commissioners in issuing the license, unless satisfied that upon the case as presented to them the license was improperly or illegally issued, is manifestly correct.

The further claim, apparently made, that the judge cannot hold the issue of a license to be illegal upon being clearly satisfied that the licensee does not possess an essential statutory qualification, unless he is also convinced of misconduct by the commissioners in other ways, is untenable. It is not legally impossible that a licensee's place of business may be found by the trial judge to be so manifestly unsuitable to the sale of liquor by the licensee as to justify a conclusion that the license for such sale was illegally issued.

The appellee also seems to claim in his brief that in this case it appears from the memorandum of decision, judgment, and finding as printed in the record that the trial judge did not find that the commissioners acted illegally, nor, in fact, believe that the place of business was so obviously and undeniably unsuitable to the sale of liquor by the licensee as to justify the conclusion that the commissioners acted illegally in issuing the license. Certainly such conduct should not be imputed to a judge when it does not surely and unmistakably appear in the record, and in this case it does not so appear. On the contrary, the judge indicates that he considered the unsuitability of the place as incident to determining whether the commissioners acted within the limits of their power; and, in overruling the appellee's claim that the court could not upon the evidence produced find that the commissioners had acted illegally or in abuse of their power, the judge implies that he did find illegal conduct upon evidence he deemed sufficient to support that finding. This finding of the judge, that the commissioners acted in excess of their power and illegally in issuing a license to sell at a place which was not a suitable one, is the real judgment of the court. There is in this summary and informal proceeding no prescribed way of expressing the finding in a formal order or judgment. The way followed by the trial judge of recording his finding that in fact "the place in question is not a suitable one in which to sell spirituous and intoxicating liquors," and the consequent conclusion of the law that the license is vacated or revoked indicates the substance of the judgment, and for practical purposes is sufficient. In a case like this, however, a way more in accord with the legal effect of section 2680, Gen. St. 1902, in authorizing under the name of "appeal" this application as settled by our decisions would be an explicit statement of the finding that the commissioners acted in excess of their power and

illegally in issuing the license, and that the license is vacated. The conduct of the judge in this case, after a lawful hearing given the parties, in reaching his conclusion from all the evidence produced that the commissioners acted illegally in issuing a license to the appellee to sell liquor at the place mentioned, is not reviewable.

There is no error in the judgment of the superior court.

(79 Conn. 659)

HOUGHTON v. CITY OF NEW HAVEN.

(Supreme Court of Errors of Connecticut.
May 1, 1907.)

1. TRIAL.—REQUEST TO CHARGE.—REFUSAL.

It was not error for the court to refuse plaintiff's request to charge, which was substantially and correctly covered by the charge of the court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Trial, §§ 651-659.]

2. MUNICIPAL CORPORATIONS — DEFECTIVE SIDEWALKS — MAINTENANCE — DUTY — INSTRUCTIONS.

Where the court had previously stated the correct rule of a city's duties of maintaining crosswalks as a part of the streets, a subsequent instruction that the law did not require that crosswalks used by foot passengers should be constructed or maintained in the same manner that sidewalks, intended exclusively for foot travel, were constructed and maintained, was not objectionable as misleading the jury to believe that the duty owed with respect to the crosswalk was something less than the true legal duty.

3. TRIAL.—INSTRUCTIONS.—COMMENT ON EVIDENCE.

Where, in an action for injuries on a city crosswalk, the jury's right to determine the facts, independent of any opinion of the court, was unmistakably suggested to them in the court's charges, an instruction with reference to the evidence introduced to support plaintiff's claim that a hole existed in the crosswalk by which she was injured was not objectionable for failure to add a statement that, notwithstanding what the court might say or think, it was the province of the jury alone to pass on the evidence and determine what was thereby established.

Appeal from Court of Common Pleas, New Haven County; William L. Bennett, Judge.

Action by Annie Houghton against the city of New Haven for injuries claimed to have been caused by a defective crosswalk in defendant city. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

The defect in question is alleged to have been a hole in a crosswalk leading from one corner of a street to an opposite corner. It is alleged that the plaintiff, while a lawful traveler upon the highway, tripped and fell into this hole while she was in the act of crossing the street and just as she had left the sidewalk. The accident occurred on February 26, 1905. The statutory notice was alleged to have been given to the defendant on April 25th following, and therefore more than 30 days thereafter. Upon the trial to the jury the defendant claimed to have shown that any

depression which may have existed in the street was occasioned by formations of snow and ice upon its surface, and not by any improper inequalities therein. Two boys and one man were produced by the plaintiff as witnesses to testify to the existence and character of the alleged hole. All had observed the spot only when it was covered by water and slush, which was the condition of the street at the time of the accident, and no one of them professed to have seen the underlying surface of the ground. There was some want of harmony in their testimony as to the precise location of what they agreed in calling the hole, and their descriptions of the conditions affecting the surface of the street were vague and indefinite.

During the charge the court, in commenting upon the plaintiff's claim in this regard and this testimony, used the following language: "Now, gentlemen, when you speak of a 'hole,' you know that there may be all sorts of depressions in the ground which may be called by the witnesses 'holes.' If there were a deep hole, two or three feet deep, upon that crosswalk, and the city had notice of it and left it there, you would say undoubtedly that that was such a defect in the highway that the city ought to be liable, if a person fell into it, whereas, if there was merely an uneven depression, an unevenness in the surface, even a depression which might possibly be called a hole, you might, if you knew exactly what it was, find that it was so shallow or so situated that it was reasonably safe for persons to pass over, and therefore that the city was not liable for its remaining there, if it knew that it was there. It is therefore of very great consequence in this case that you should know, and should find from the evidence, what that hole was, and you should try and find out from the evidence what the hole in the surface of the highway was, if there was a hole there at all, in order to ascertain whether its remaining there and its being suffered to remain there made the crossing unreasonably dangerous for public travel." And later on: "You will consider all the evidence that has been given in regard to that hole, and consider whether you have had any witness who testified to you in detail and with clearness of observation in regard to a hole in that crosswalk at this time and place. It would have been, it seems to the court, easy, after this plaintiff fell, to have inspected and to have shown to the jury beyond a question that there was a hole there, and to have described it; but we have in this case but the testimony of the children, the testimony of the plaintiff, and the testimony of Mr. —, the gentleman, the Italian named Turelli, possibly of another witness, in general terms, not describing the hole, so that I, at least, have not derived a clear idea of the depressions that they claim were in the highway itself; and I desire to call your attention particularly to this point, because it is fair and just that the city should only be called into ac-

count, should only pay, for its breach of duty."

The plaintiff presented the three following requests to charge, no one of which was specifically charged: "(1) While the burden is on the plaintiff to prove her case by a preponderance of the evidence, still, if the jury find that the evidence bearing upon the plaintiff's case preponderates in her favor, although but slightly, that would be sufficient to warrant the jury in finding in her favor. (2) Notice of the defect in the street crossing or sidewalk may be reasonably inferred where it is of such a character or has continued for such a length of time as that the officers of the city charged with the supervision of its street crossings or sidewalks might and probably would have discovered it if they had used ordinary care in the discharge of their duty. Actual notice need not be shown in all cases. Notice may be inferred from the notoriety of the defect, or from its being so visible and apparent and having continued for such a length of time as that in the exercise of reasonable observation and care the proper officers of the city ought to have known of and remedied or removed the defect or obstruction. (3) Until the plaintiff became aware of any claimed defect or dangerous condition in the crosswalk, she had a right to assume that the city had performed its duty in keeping the same in a reasonably safe condition for her to travel thereon; and, if you find that the plaintiff, not knowing of the existence of a hole in the crosswalk, fell therein and was injured, and that said hole was there long enough for the city to have discovered the same, and that the plaintiff was not negligent in falling therein, then the defendant is liable for such damages as she had suffered therefrom."

In the course of the court's instructions as to the defendant's duty in respect to the care and maintenance of that part of the street where the plaintiff claimed to have been injured, it used the following part of a sentence: "The law does not require that crosswalks, so-called, used by foot passengers in crossing the roadway of the street, shall be constructed or maintained in the same manner that sidewalks intended exclusively for foot travel are constructed and maintained. * * *"

The failure of the court to charge as requested, its instructions hereinbefore recited, and its failure to tell the jury that its opinion as to the weight or effect of the evidence was not binding upon them, and that they were the sole judges of the facts as disclosed by the evidence, are assigned as reasons of appeal.

Walter J. Walsh, for appellant. Leonard M. Daggett and James Kingsley Blake, for appellee.

PRENTICE, J. (after stating the facts). The court's instructions embodied in its own language the substance of the first two re-

quests to charge. They also contained a careful and correct statement of the law attempted to be covered by the third in so far as was necessary for the proper guidance of the jury under the issues and upon the claims of the parties. The plaintiff was entitled to nothing more. *State v. Rathbun*, 74 Conn. 524, 528, 51 Atl. 540; *McGarry v. Healey*, 78 Conn. 865, 867, 62 Atl. 671.

The extract from the court's instructions as to the defendant's duty of maintenance is made a ground of appeal, for the reason that the statement embodied in it was inconsistent with the correct proposition that the defendant had resting upon it the duty of using reasonable care to keep both sidewalk and crosswalk alike in a reasonably safe condition, or at least was calculated to mislead the jury into the belief that the duty owed with respect to the crosswalk was something less than the true duty. The court, immediately before using the language criticised, had clearly stated the correct rule of duty. In the language which is now wrested from its context for criticism there is nothing inconsistent with that rule, nothing which is not literally true, and nothing which, considered in connection with its context, was susceptible of producing a false impression. The statements of the court in this connection were not only correct, but such as ought to have been made for a clear understanding on the part of the jury of the defendant's duty in the premises.

The observations of the court with respect to the alleged hole were well within its right of comment upon the evidence as that right has been repeatedly defined by this court. *Banks v. Connecticut Ry. & Lgt. Co.*, 79 Conn. 116, 122, 64 Atl. 14, and cases there cited. The duty resting upon the court to see that evidence might not be misused was in the present case emphasized by the fact that by reason of the date of the notice recovery could only be had upon proof of a defect in the structure of the highway and by the fact that the question of the existence of such a defect was involved in difficulty and uncertainty by reason of the admitted presence of water and slush, and the claimed presence of underlying ice formations creating any irregularities in the crossing which may have existed at the time of the accident.

The complaint made in connection with these comments that the court in order to avoid the commission of error was required to accompany them with a statement that notwithstanding what the court might say or think it was within their province alone to pass upon the evidence and determine what was thereby established is not well founded. The right of the jury in this regard underlay all that was said to them and was unmistakably suggested in all the court's instructions. Express statement could scarcely have made the matter more clear. It is inconceivable that the jury, after hearing the charge, could have gone to their deliberations

with a false conception of their power or duty.

There is no error. The other Judges concurred.

(79 Conn. 697)

STATE ex rel. DOOLAN v. THE GREYHOUND.

(Supreme Court of Errors of Connecticut. May 10, 1907.)

FISH—OYSTER BEDS—STATUTORY PROVISIONS—SEARCHES AND SEIZURES.

Gen. St. 1902, § 3241, provides for the seizure and sale under order of court of any boat or vessel illegally used in dredging oysters or in depositing and dumping material. It was charged in the complaint that defendant's boat illegally dredged on ground located in state jurisdiction, in the possession of the May Oyster Company, which owned a franchise for planting and cultivating oysters, etc., on the ground. *Held*, that the statute does not apply to dredging on private grounds, and hence defendant's boat could not be seized and sold as therein provided for the offense committed.

Appeal from Court of Common Pleas, Fairfield County; Howard J. Curtis, Judge.

Proceeding by the state, on the relation of Peter Doolan, against the Greyhound, Emma Sprague owner, under section 3241 of the General Statutes 1902 for the seizure and sale of a boat, etc., claimed to have been illegally used in dredging, brought before the city court of Bridgeport, and thence by appeal of the owner to the court of common pleas, where it was tried to the jury, and a verdict and judgment rendered in favor of the owner, from which an appeal to this court in the name of the state by the officer who made the seizure was taken. Affirmed.

Stiles Judson, Edward H. Rogers, Howard H. Knapp, and Albert McC. Mathewson, for appellant. Robert E. De Forest and Jacob B. Klein, for appellee.

HALL, J. This is a proceeding under section 3241 of the General Statutes 1902, instituted by one Peter Doolan, a deputy sheriff of Fairfield county, hereinafter referred to as the "plaintiff," for the condemnation of a certain boat named Greyhound, seized by him at Bridgeport on May 21, 1906, as having been illegally used in dredging. On said day, after such seizure, the plaintiff presented to the city court of Bridgeport a written notice or complaint, stating that said boat had been seized as having been illegally used in dredging, the first paragraph of which, as afterward amended, alleged that "on the 8th day of May, 1906, at about 1 o'clock in the afternoon, said boat did illegally dredge on ground located in state jurisdiction, within the meridian boundary lines of the town of Bridgeport off Seaside Park so called, said ground being known as lots 801, 802, and 803, and in the possession of the May Oyster Company, a corporation organized under the laws of the state of Connecticut, and located in the town of Bridgeport, * * * which was the owner of the

perpetual franchise for planting and cultivating oysters, clams, and mussels on said ground, and all without the consent of the owner of said grounds." Paragraphs 2 and 3 of the complaint, under which no questions are made, allege that on said 8th of May, while at work on natural oyster beds of this state, said boat neglected to display upon her mainsail the number of her license, as required by law, and that while working on such natural beds said boat unlawfully displayed a certain number which was not her license number. One Herbert Clark was the manager of said boat, and one Emma Sprague, who appeared at the trial, and hereinafter called the defendant, was the owner thereof. Upon the trial evidence having been offered by the plaintiff that said lot No. 801, owned by said May Oyster Company, was bounded on the north and east by the Bridgeport natural bed, upon which latter bed said boat was duly licensed to dredge, and that on said 8th of May said boat, while sailing northerly, dredged on said lot No. 801 some 400 feet before crossing the north line of said lot, and some evidence having been introduced by the defendant in contradiction of portions of the plaintiff's evidence, the parties stipulated that, without further evidence, the court, by instructing the jury, should decide the question whether upon the plaintiff's evidence said boat could properly be found to have been illegally used in dredging, within the meaning of the provisions of section 3241, while so dredging upon private oyster grounds, in the absence of the owner, and the court thereupon charged the jury that "dredging upon a private ground would not be considered to be illegal dredging under the terms of the statute in question," and directed the jury to return a verdict for the defendant.

The sole question before us is whether this instruction was correct. In support of the charge of the court it is claimed, first, that section 3241, under which the seizure was made, and which is an exercise of the police power of the state, does not purport to authorize the confiscation of boats used in dredging upon private oyster grounds; and, second, that, if it does, it is an unreasonable and invalid exercise of the police power of the state, in so far as it authorizes the confiscation of private property for the protection of individual and not of public interests. The language of section 3241 is as follows: "All sheriffs, deputy sheriffs, oyster police and constables shall, and any other persons may, seize any boat or vessel illegally used in dredging, or in depositing and dumping material, with its tackle, apparel and furniture, wherever found within one year thereafter; and shall forthwith give notice to two justices of the peace, or if in New Haven County or Fairfield County, to any city, town or borough court, in the county where the seizure was made, which authority shall

forthwith order reasonable notice to be given to the person who is in possession of the property seized, or to the owner thereof, if known, of the time and place of trial; and shall at the time and place appointed determine whether such property was used contrary to law, and if found to have been so used shall order it to be sold at such time and in such manner as said authority shall direct; and the avails thereof, after deducting all costs and charges which said authority may allow, shall be paid half to the person who made the seizure and half to the town where the offense was committed. * * *

A right of appeal to the court of common pleas or superior court is given to any party aggrieved by such order. The unconstitutionality of this section is urged, and especially in so far as its provisions are intended to apply to such an act of dredging over a private bed, as that shown by the evidence, upon the grounds that it authorizes an unreasonable seizure of one's "possessions" by permitting them to be taken without a warrant by a person who is not an officer at a time long after the commission of the offense, and permits the appropriation by the state of the property of an innocent person, without compensation therefor, even when the offense committed has worked no injury either to the public or to any individual. Certainly, before subjecting the property of the defendant to such seizure and confiscation, it ought clearly to appear from the language of our statutes that the provisions of this section were intended to apply to the offense shown to have been committed in the present case.

Although the question before us must be determined by the law as it existed when the offense complained of was committed, and which is found in the General Statutes of 1902, some light may be thrown upon the meaning of the section of those laws under consideration by a review of some of the previous legislation upon the same subject. In 1848 a law was passed, the first section of which prohibited any person who had not been an actual inhabitant or resident of this state during the preceding six months from taking, raking, or gathering any oysters in any waters of this state, and imposed a forfeiture of \$20 for a violation of such law, and the second section of which authorized a seizure and sale, similar to that described in said section 3241, of any vessel, etc., used in taking or raking oysters contrary to said provisions of that act. Pub. Acts 1848, p. 56, c. 66. In the Revision of 1849, in the same chapter with this act of 1848, we find a law imposing no other penalty than a forfeiture of \$7, and in certain cases of \$25, and imprisonment in the workhouse for entering upon and gathering oysters from any private inclosure staked out as provided by law in any of the navigable waters of the state. Revision of 1849, pp. 399-401, c. 2. In 1855 an act was passed, which was extended in 1878, and is now embodied in section 3247 of the

General Statutes of 1902, punishing by fine and imprisonment, but without any forfeiture of boats, etc., injuries to inclosures marked and staked out according to law. Pub. Acts 1855, pp. 113, 114, c. 92; Pub. Acts 1878, p. 275, c. 24, § 6. Afterward acts were passed expressly extending such penalty of seizure and sale of vessels to certain cases of taking, raking, or injuring oysters planted in private designated grounds, and to cases of injury to designated inclosures by willfully depositing mud upon the grounds so inclosed. Pub. Acts 1865, p. 61, c. 56; Pub. Acts 1877, p. 199, c. 93.

The first act making dredging unlawful appears to have been passed in 1871. Its first section prohibited the collecting of any shells or shell fish by means of dredges in parts of New Haven Harbor and its adjacent waters and of the navigable waters of East Haven, under a penalty of from \$25 to \$100 or imprisonment; and its second section authorized a seizure and sale similar to that described in said section 3241 of any vessel, etc., employed in dredging contrary to the provisions of said first section. Pub. Acts 1871, p. 676, c. 119. While that law was in force, an act was passed in 1874 and extended in 1878, and now embodied in section 3246 of the General Statutes of 1902, punishing by fine and imprisonment the willful taking and carrying away of oysters lawfully planted upon any bed within the waters of this state, but without imposing the penalty of seizure and sale of any boat, etc., used in the commission of such offense. Pub. Acts 1874, p. 205, c. 42; Pub. Acts 1878, p. 275, c. 24, § 5, and page 311, c. 85. These acts of 1871, 1874, and 1878 remained practically unchanged in the Revision of 1875, excepting that in place of the words of the original act of 1871, "any vessel * * * used * * * in dredging contrary to the provisions of the first section of this act," we find in the Revision of 1875 the words, "any boat or vessel illegally used in dredging." Revision 1875, pp. 216, 217, c. 4, §§ 16, 22, 23. And we also find in the same Revision (page 218, c. 4, § 26) a provision forbidding any person from taking, raking or gathering any oysters in any of the waters of this state on board of any boat unless he or his employer has been a resident or actual inhabitant of the state during the preceding six months, but imposing no punishment or penalty whatever for such an offense; but by an act passed in 1876 any boat, etc., so used was made subject to seizure and sale, in the manner now provided in section 3241. Pub. Acts 1876, p. 104, c. 39. From 1882 to 1895 the following acts were passed, in each of which any boat, etc., used in violation of the provisions of the act was expressly made liable to seizure and sale by proceedings similar to those described in section 3241 of the General Statutes of 1902: In 1882 and 1883, acts now embodied in section 3242 of the General Statutes of 1902, forbidding the deposit-

ing of mud and other refuse material in certain of the waters of Long Island Sound. Pub. Acts 1882, p. 208, c. 126, § 4; Pub. Acts 1883, p. 306, c. 122, § 1. In 1893 an act, embodied in sections 3234 and 3237 of the General Statutes of 1902, requiring the procuring of a license to use any boat, etc., in taking and gathering oysters from natural oyster beds. Pub. Acts 1893, p. 316, c. 171, § 4. In 1893 an act, embodied in section 3236 and section 3237 of the General Statutes of 1902, forbidding the use of any naphtha, steam, or electric engine, in operating dredges on natural oyster beds. Pub. Acts 1893, p. 316, c. 171, § 4. In 1893 and 1895 acts, embodied in section 3254 of the General Statutes of 1902, forbidding the taking of oysters or shells from certain natural oyster beds and in Housatonic river, etc. Pub. Acts 1893, p. 252, c. 90, § 2; Pub. Acts 1895, p. 483, c. 81, § 6. In 1899 an act was passed, which is now section 3253 of the General Statutes of 1902, punishing by fine and imprisonment "any person, who shall without permission of the owner of any properly designated oyster ground, tow any oyster dredge or contrivance for taking oysters, under water upon such oyster ground," but imposing no penalty of seizure or forfeiture of the boat or vessel used in violating the provisions of such act. It is in effect the contention of the plaintiff that under the present law, as it appears in the General Statutes of 1902, the jury should have been instructed that they might find that the defendant's boat was "illegally used in dredging" within the meaning of those words as used in said section 3241, upon finding that the boat, while dredging at the time in question, was used in the violation of the provisions of section 3246, punishing the stealing of oysters from private oyster beds, or of section 3247, punishing injuries to any oyster inclosure or the taking of shells therefrom; or of section 3253, above quoted, prohibiting the towing of a dredge over private oyster grounds.

But the defendant is not charged with stealing oysters, nor injuring inclosures or taking shells therefrom. The only charge in the count relied upon is that at the time named "said boat did illegally dredge" upon the described private oyster grounds. It is for the act of dredging only for which the boat can be condemned, and the only section which makes the mere act of dredging upon private grounds illegal is said section 3253, prohibiting the towing of a dredge under water over private oyster grounds. But, assuming that upon the evidence before them the jury might have found that the boat in question was dredging in violation of the provisions of each of said sections 3246, 3247, and 3253, we are satisfied that such dredging upon private grounds in violation of the provisions of either or all of these three sec-

tions was not an illegal dredging within the intention of the language of section 3241, which would subject the defendant's boat to forfeiture. In addition to the fact that these sections are to a considerable extent for the protection of private property, we find no provisions in either of them, either in its present form or in the original act which it embodies, rendering boats, used contrary to its provisions, liable to seizure and forfeiture. Again, although the language of section 3241, "used in illegal dredging," is broad enough to include dredging upon private grounds contrary to law, we must interpret these words not only in view of our previous legislation upon this subject, but also with reference to other sections of the General Statutes of 1902 which have a direct bearing upon section 3241. In that connection section 3258 is very important. Under the heading of "Seizure," that section provides that "any boat or vessel used in the commission of any offense contrary to any of the provisions of sections 3234, 3235, 3236, 3237, 3242, and 3254, may with its tackle, apparel and furniture, be seized and proceeded against in the form and manner as provided in section 3241." Among the sections here enumerated we find neither of the three, in violation of the provisions of which the plaintiff claims the boat in question was used. All of the sections so enumerated embody legislative acts which, as we have already shown, expressly provided when originally passed, for a forfeiture of the boat, etc., used in violation of their provisions. All of them are applicable to natural oyster beds, and none of them are made applicable to private grounds. That it was not the purpose of section 3258 to extend the provisions of section 3241 to offenses not within the language of the latter section, and not before made punishable by such a penalty, is apparent from the fact that most of the offenses described in the sections enumerated in section 3258 are embraced in that of illegally using boats, etc., "in dredging or depositing or dumping material" described in section 3241, and that all of said offenses were expressly made punishable by such forfeiture of boats, etc., by the original acts embodied in said enumerated sections. As we regard section 3258, it was intended to designate all the sections for a violation of the provisions of which a boat was liable to seizure and sale, under the provisions of section 3241, which contained no express provision for such seizure. By the language of our statutes, the defendant's boat was not liable to such seizure for the offense committed.

This conclusion renders it unnecessary for us to decide the constitutional question raised.

There is no error. The other Judges concurred.

(79 Conn. 693)

LOWNDES et al. v. CITY NAT. BANK.

(Supreme Court of Errors of Connecticut. May 1, 1907.)

SET-OFF AND COUNTERCLAIM — PARTIES — BRINGING IN NEW PARTIES—ENABLING DEFENDANT TO PLEAD SET-OFF.

Where an administrator misappropriated money, which passed into the hands of a bank, and his surety indemnified the estate, and sued the bank in the name of the succeeding administrators at the surety's own expense and for its sole benefit to recover the amount, the bank had no right to have the surety cited in as a party, to enable the bank to set up a claim against the surety for indemnity on another bond given by the administrator as the bank's cashier, since the main controversy could be fully determined without consideration of the bank's claim and without prejudice to either party; the absence of the surety as a party in no way affecting the judgment to be rendered, and that a multiplicity of actions might be avoided affording no ground to cite the surety in.

Appeal from Superior Court, Fairfield County; Milton A. Shumway, Judge.

Action by Abbie S. Lowndes and another against the City National Bank; the *Ætna* Indemnity Company being cited in as co-defendant. From orders refusing to cite the company in as coplaintiff and sustaining a demurrer to the motion asking that it be cited in as codefendant, and from a judgment for the company, defendant appeals. No error.

Civil action by the administrators of the estate of Theodore S. Lowndes, deceased, to recover a balance of \$58,000 of the moneys of the estate deposited in the defendant's bank. The defendant filed a motion that the plaintiffs be ordered to cite in the *Ætna* Indemnity Company as a coplaintiff. This motion was denied by the court, and the defendant then filed a motion that the *Ætna* Indemnity Company be ordered to prosecute the action in its own name or be cited in as a codefendant. It was cited in as codefendant and filed a demurrer to the motion, which was sustained by the court, and judgment was rendered in its favor for costs. The defendant appealed to this court, assigning these rulings as error. The facts sufficiently appear in the opinion.

John H. Light and William F. Tammany, for appellant. James H. Webb, for appellee *Ætna* Indemnity Company.

THAYER, J. (after stating the facts). This action was brought to recover a balance of moneys and funds of the estate of Theodore S. Lowndes, deceased, deposited in the defendant's bank by one Layton, who was the predecessor of the plaintiffs as administrator of the estate, and was also cashier of the defendant. The motions state that this balance was misappropriated by Layton, and the complaint shows an attempt on his part, with the knowledge and consent of the defendant, to appropriate it to the purpose of taking up worthless and dishonored checks, notes, and other securities of various per-

sons, which the defendant had paid and was then carrying as a part of its cash assets, and for which the estate was in no manner liable or obligated, and received no benefit. Layton was removed as administrator, and the plaintiffs appointed in his place. They demanded said balance of the defendant, and it refused to pay the same or honor their checks drawn therefor. Layton had given an ample probate bond, with the *Ætna* Indemnity Company as surety, for his faithful discharge of the duties of administrator. The surety, upon demand by the plaintiffs, paid them the amount of said balance, \$58,000, and took from them an assignment of all their rights and claims against the defendant. It thereupon instituted this suit in the name of the plaintiffs, and his prosecuting it at its own expense and for its sole benefit. Layton, as cashier, gave the defendant a bond of \$10,000, with the *Ætna* Indemnity Company as surety, for his faithful performance of his duties as cashier. He was unfaithful in the performance of those duties, whereby the defendant lost upwards of \$10,000, and has a claim for that amount against the surety. After this action was brought the defendant requested the *Ætna* Indemnity Company to maintain the action in its own name, and it refused. It thus appears that the defendant has an independent claim against the *Ætna* Indemnity Company, which is in no way connected with the cause of action set up in the complaint or the transaction out of which it arose. All questions between the parties to the controversy in suit can be fully determined, without consideration of the defendant's claim, and without prejudice to the defendant or any other party. Treating the action as one between the plaintiffs and the defendant, it is too clear for discussion that the indemnity company cannot properly be made a codefendant, to enable the present defendant to litigate with it a claim in no way connected with the matter in suit. *State v. Wright*, 50 Conn. 583. The court was right, therefore, in sustaining the demurrer to the second motion, so far, at least, as it asked that the indemnity company be cited in as codefendant. The same is true of the court's action in denying the defendant's motion that the *Ætna* Indemnity Company be cited in as a coplaintiff. Its presence or absence could not in any way affect the judgment to be rendered between the plaintiffs and the defendant, and in such a case, as was said in *Carroll, Trustee, v. Weaver*, 65 Conn. 76, 84, 31 Atl. 489, the practice act does not permit it to be made a party.

The defendant urges that, by making the indemnity company a coplaintiff or sole plaintiff, a multiplicity of actions may be avoided. While the law encourages, it does not compel, the settlement of all controversies between the same parties by a single action. A plaintiff, therefore, may bring suit upon a single one of several causes of action which

he may have against the same party, and a defendant may or may not, as he sees fit, plead a set-off or counterclaim which he has against such plaintiff. Thus the defendant in the present case, if his motion were to be granted, could not be compelled to set off his alleged debt against the indemnity company's demand. It does not follow, therefore, that a multiplicity of suits would be avoided, were the defendant's motion to be granted. But the indemnity company, as assignee of a chose in action, had an election to bring the suit in its own name or in that of the assignors. At common law it must have brought it in the name of the assignors; but now, by section 631 of the General Statutes it may bring it in its own name by setting forth in the complaint that it is the bona fide owner of the claim, and when and how it acquired it. The statute, however, does not supersede the bringing of actions in the name of the assignor. *Saugatuck Bridge Co. v. Town of Westport*, 39 Conn. 337, 349. Having elected to bring the action in the name of the assignors, and as a full adjudication upon the subject-matter put in controversy can manifestly be had without prejudice to the rights of the defendant or any other party, the court cannot deprive it of such election at the election of the defendant. The court, therefore, properly sustained the demurrer as a whole upon that ground.

The record discloses that the *Ætna Indemnity Company* was summoned in as codefendant, and that it appeared, answered to the complaint, demurred to the motion, and moved for a more specific statement of the cause of action set up in a counterclaim, which was filed by the defendant after the demurrer was filed. As no question of any irregularity in this procedure was raised, if there was such, we deem it to have been waived.

There is no error. The other Judges concurred.

(79 Conn. 687)

WATSON v. RUDERMAN.

(Supreme Court of Errors of Connecticut. May 1, 1907.)

1. PLEADINGS—REPLY—OFFICE.

A reply may not be used to set up facts to obtain distinct affirmative relief; and, where plaintiff desires relief not prayed for in the complaint, he should amend it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, §§ 342, 358.]

2. INFANTS—NOTE—VALIDITY.

An infant's note is voidable, being subject to his disaffirmance on his reaching majority.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Infants, §§ 128, 129.]

3. SAME—MORTGAGE.

An infant's mortgage of land is voidable, and not subject to disaffirmance before he reaches his majority.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Infants, §§ 27–30.]

4. SAME—MORTGAGES—FORECLOSURE.

An infant's mortgage may not be foreclosed until and unless its status shall have been first established as that of a conveyance not subject to avoidance at the will of the mortgagor.

5. SAME—JURISDICTION OF EQUITY.

A mortgagor cannot invoke equity to compel the present exercise by or for an infant mortgagor of his right to affirm or disaffirm, or to exercise for him the choice, or in any other way fix the status of the transaction, and thus either establish the validity of the note and mortgage as a preliminary to a foreclosure, or in any other way permanently settle the rights of the parties; there being no averment of fraud or concealment on the infant's part, and it not appearing that plaintiff was not fully aware of the infancy and voluntarily chose to assume the risk of dealing with him.

Appeal from Court of Common Pleas, Fairfield County; Howard J. Curtis, Judge.

Action by David F. Watson against John Ruderman. From an order sustaining a demurrer to the reply, plaintiff appeals. No error.

The complaint is one framed in the ordinary form of a foreclosure of a mortgage of lands. The defendant is described as the maker of the note and mortgage. The defendant pleaded infancy, alleging that at the time the note and mortgage were made by him, to wit, January 18, 1906, he was only 19 years of age. The plaintiff in his reply admitted these allegations of infancy, and then proceeded under the introduction "by way of equitable relief" to reaffirm by reference the allegations of the complaint, and further to allege, in substance, that on said January 18th the plaintiff sold and conveyed to the defendant the equity of redemption in the described premises, in consideration of the assumption by the defendant of the mortgage of \$600 already upon the property, \$150 then paid in cash, and a note for \$200 then made and delivered to the plaintiff by the defendant, which note was secured by a mortgage of said equity, also then executed and delivered by the defendant, said note and mortgage being those in suit; that the defendant has paid only \$28 on account of said note, or of the prior assumed incumbrance; that there is located upon said premises a building since occupied by the defendant for the conduct of business; that the use of said property is reasonably worth \$10 per month, and that the plaintiff is ready and willing to pay into court for the use of the defendant so much of the amount the defendant has paid as the court should find ought equitably to be repaid to him. The plaintiff thereupon claimed the following relief: "(1) A decree affirming said purchase, payment, mortgage, and note, and a judgment of foreclosure; or (2) a decree disaffirming said purchase, payment, mortgage, and note; and (3) a judgment fixing the amount which the defendant is equitably entitled to have paid into court for his use on account of said payment; and (4) a decree or judgment for a reconveyance of said property to the plaintiff, or otherwise vesting title thereto in

him; (5) such other and further appropriate relief as to equity may appertain." The defendant thereupon demurred to said prayers for relief, for the reason that the facts stated did not entitle the plaintiff to the relief sought. This demurrer was sustained, and judgment for the defendant thereafter followed in due course.

William H. O'Hara, for appellant. Henry Greenstein, for appellee.

PRENTICE, J. (after stating the facts). The plaintiff contends that the court's action in sustaining the demurrer to the reply was erroneous for reasons which in the brief of counsel are resolved into three, to wit: First, because, for the purposes of the demurrer, the defendant must be regarded as having waived the defense of infancy, since it was not therein specifically appealed to; second, because a foreclosure might have been properly awarded upon the facts set up; and, third, because equity might grant relief, either by compelling the infant defendant to elect to affirm or disaffirm the transaction, or by making such election for him and thereupon establishing what had in form been done, or, as the case might be, setting the same aside and restoring the parties to their former status.

The reply, in so far as it sets up facts for the purpose of claiming and claimed the relief demurred to, was not a proper pleading. The office of a reply is to meet matter averred in the answer. It may not be used, as here, to set up facts for the purpose of obtaining distinct affirmative relief. Prayers for relief have no place, save in a complaint, cross-complaint or answer embodying a counterclaim. When the plaintiff discovered that he desired relief not already prayed for, he should have amended his complaint to embody it and such facts, in addition to those already therein, as were deemed pertinent. Instead of pursuing this course, which would have presented a complaint disclosing the defendant's legal incapacity to enter into the contracts and conveyances set up, he sought to avoid in his reply the effect of that incapacity, which had been asserted and admitted, by an appeal for distinct and affirmative equitable relief. To this and certain facts, in part new to the case, were stated in a form suggestive of an equitable counterclaim, and such relief as was conceived to be appropriate to the facts of the case, including the admitted infancy, prayed for. Under such circumstances the defendant was in fairness entitled to have the appropriateness of the prayers for relief contained in the reply put to the test of his demurrer, with a regard, not only for the facts alleged in the reply, but also for the other fact to which the reply was specially addressed, and without which the prayers had no pertinence. The plaintiff's first reason for claiming error,

which it is to be noticed was not sufficiently assigned in the reasons of appeal, must therefore, for a double reason, fail.

The plaintiff's argument in support of his second contention, that a foreclosure might have been granted, establishes nothing more than that a minor may be foreclosed. This is, of course, true; but the effort here is, not only to foreclose a minor, but to do so upon a note and mortgage executed by such minor. The contract embodied in the note and the conveyance of title effectuated by the mortgage were alike voidable. The defendant, by the accepted rule of public policy, was entitled to disaffirm them. This disaffirmance might be exercised after the attainment of majority—a time still in the future—and in so far as the mortgage was concerned could not by the current of authority be sooner exercised. *Kline v. Beebe*, 6 Conn. 494, 503-505; *Shipman v. Horton*, 17 Conn. 481, 483; *Bestor v. Hickey*, 71 Conn. 181, 184-186, 41 Atl. 555; *Coburn v. Raymond*, 76 Conn. 484, 491, 57 Atl. 116, 100 Am. St. Rep. 1000; *Sims v. Everhardt*, 102 U. S. 300, 309, 26 L. Ed. 87. The plaintiff, therefore stands in the position of asking a mortgage to be foreclosed which, as far as appears, has no established status. Such a mortgage may not be made the subject of foreclosure until and unless its status shall have been first established as that of a conveyance not subject to avoidance at the will of the mortgagor.

We are thus brought to the underlying question of the case, which is whether or not a court of equity may, by compelling the present exercise by or for the defendant of his right of affirmance or disaffirmance, or by exercising for him the choice which is his, or in some other way, fix definitely and finally the status of the transactions recited in the record, and thus either establish the validity of the note and mortgage as a preliminary to a foreclosure, or in some other manner permanently settle the rights of the parties. In answering this question we must bear in mind that the incapacity of infants to enter into binding contracts or make valid conveyances is the same in equity as at law, and that the same rules of public policy govern and the same consequences attach. *Pomeroy's Equity Jurisprudence*, § 945. It follows that, in the absence of other facts than that of an infant's participation in a contract or conveyance, there cannot exist a situation in which, through the operation of an estoppel, validity will be given to it, or through equitable intervention it will be set aside, and thus by one means or the other an effect be given to the transaction different from that which the general policy of the law has seen fit to attach to it. *Baker v. Stone*, 136 Mass. 405; *Corey v. Burton*, 32 Mich. 32. In other words, a court, whether of equity or of law will not hold itself justified in depriving an infant, who was of the age of presumed natural capacity at the time

of his participation in a property transaction, of the right or privilege which is deemed essential to his proper protection of affirming or disaffirming it upon his arrival at the age of legal capacity, unless there appears in the situation presented some fact in addition to such participation—some fact which is recognized as furnishing the basis for equitable interposition generally, or as laying the foundation for an estoppel. The active fraud or false representation as to age by the infant has been recognized as furnishing such a fact. *Ex parte Unity Bank*, 2 De Gex & J. 63; *Nelson v. Stocker*, 4 De Gex & J. 464; *Wright v. Snow*, 2 De Gex & Sm. 321; *Lampere v. Lange*, L. R. 12 Ch. Div. 675; *Hayes v. Parker*, 41 N. J. Eq. 632, 7 Atl. 511; *Rice v. Boyer*, 108 Ind. 472, 9 N. E. 420, 58 Am. Rep. 53; *Williamson v. Jones*, 43 W. Va. 562, 27 S. E. 411, 38 L. R. A. 694, 64 Am. St. Rep. 891; *Ryan v. Growney*, 125 Mo. 475, 28 S. W. 189, 755; *Kilgore v. Jordan*, 17 Tex. 341. Such conduct on the part of an infant has, however, frequently been held to be insufficient to create an estoppel. *Sims v. Everhardt*, 102 U. S. 300, 28 L. Ed. 87; *Burley v. Russell*, 10 N. H. 184, 34 Am. Dec. 148; *Whitcomb v. Joslyn*, 51 Vt. 79, 31 Am. Rep. 678; *Studwell v. Shap-ter*, 54 N. Y. 249; *Wieland v. Koblick*, 110 Ill. 16, 51 Am. Rep. 676; *Corey v. Burton*, 82 Mich. 32; *Alvey v. Reed*, 115 Ind. 149, 17 N. E. 265, 7 Am. St. Rep. 418; *Conrad v. Lane*, 28 Minn. 389, 4 N. W. 695, 37 Am. Rep. 412; *Lackman v. Wood*, 25 Cal. 147. Mere concealment of infancy has by common consent been regarded insufficient to that end, or as in any way creating an enforceable obligation. *Strikeman v. Dawson*, 1 De Gex & Sm. 90; *Baker v. Stone*, 136 Mass. 405; *Davidson v. Young*, 38 Ill. 145; *Stoolfoos v. Jenkins*, 12 Serg. & R. (Pa.) 403; *Brantly v. Wolf*, 60 Miss. 420.

We have no occasion to consider the questions which are suggested by these cases. Reference is here made to the attitude which the courts have assumed only for the purpose of showing their reluctance to withdraw from infants the privileges as respects their property engagements which are bestowed upon them for their protection, and that such withdrawal is never countenanced, except under strong justification from circumstances other than their participation in the transaction. The facts spread upon this record will be examined in vain for such a circumstance. It contains nothing pertinent to the plaintiff's right to invoke judicial aid, save that the plaintiff sold and conveyed to the defendant minor the equity of redemption in the land in question, in consideration of the latter's assumption of an existing mortgage thereon, the payment down of a sum in cash, and the execution and delivery by the defendant to the plaintiff of the note and mortgage in suit, and that this note has never been paid. There is no averment of any fraud or fraudulent representation; not even one of con-

cealment. In fact, it does not appear that the plaintiff was not fully aware of the defendant's infancy and voluntarily chose to assume the risk of dealing with him. The substance of the plaintiff's allegations and prayers, therefore, is that he dealt with a minor and now asks the law to relieve him from the inconvenience, hazard, and possible loss attending such transactions. He wishes to escape the consequences which the law has seen fit to attach to the situation in which he finds himself, and no reason for that escape is presented, save such as the general policy of the law has adjudged inadequate. Clearly he has failed to show a case for equitable intervention.

There is no error. The other Judges concurred.

(79 Conn. 706)

AVERY v. WHITE.

(Supreme Court of Errors of Connecticut.
May 10, 1907.)

1. APPEAL—RECORD—AMENDMENT IN APPELLATE COURT.

Where an application to rectify an appeal was filed under Gen. St. 1902, § 801, supported by the affidavit of counsel that all the statements of fact set forth therein were true, the failure to file an answer, supported by a like affidavit by the adverse party, as required by section 14 of the rules of the court, was not excused by the fact that there was not a strict agreement between the finding sought to be corrected and the application.

2. TRIAL—INSTRUCTIONS—APPLICABILITY TO ISSUES.

Where, on the trial of an action to recover damages for cutting trees, defendant admitted that the cutting was done by his servants and no claim was made that he was not liable for their acts beyond the scope of their employment, nor as to the distinction between the relation of master and servant and that of employer and contractor, there was no occasion to instruct that the acts of the servant beyond the scope of his employment are not the acts of the master, and to explain the distinction between the relation of master and servant and that of employer and contractor.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 596-612.]

3. TRESPASS—ACTIONS—EVIDENCE—ADMISSIBILITY.

In an action to recover damages for cutting timber on plaintiff's land, evidence on behalf of defendant as to the size of trees he cut upon the adjoining lots, of which he claimed plaintiff's lot was a part, and at what rate he paid his choppers, was inadmissible.

4. MASTER AND SERVANT—LIABILITY FOR ACTS OF SERVANT.

A principal, having sent his choppers to work to cut only trees above a certain size on the land of another, is nevertheless liable if they cut smaller trees; it not appearing that the cutting of the smaller trees was necessary to the cutting and removal of the larger trees.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 1217-1225.]

Appeal from Superior Court, New London County.

Action by Sherwood G. Avery against Charles E. White, under Gen. St. 1902, § 1097, to recover treble damages for cutting

trees on land of plaintiff. Verdict for plaintiff. Defendant appeals. Affirmed.

C. F. Thayer and G. W. Melony, for appellant. W. H. Shields and D. G. Perkins, for appellee.

THAYER, J. The complaint alleges that the defendant by his workmen and servants entered upon the plaintiff's land and did the cutting complained of. The defendant complains of the charge of the court, because it fails to explain to the jury that acts of a servant beyond the scope of his employment are not the acts of the master, and that the master is not responsible for a trespass or wrongful act of his servant unless such act is done in the execution of the master's orders or with his assent or approbation. He also complains that the charge fails to explain the distinction between the relation of master and servant and the relation of employer and contractor. It is true that no instruction was given upon these questions, and the plaintiff claims that there was no occasion for such instruction, because on the trial the defendant admitted that the cutting was done by his servants by his order; that no claim was made that he was not liable for their acts, nor any claim in relation to the master's liability for the acts of his servant beyond the scope of his employment, nor as to the law or legal distinction between the relation of master and servant and that of employer and contractor. It is not clear, from the record sent up, whether the plaintiff's claims are correct or not. But he has filed with this court an application to rectify the appeal, under section 801, Gen. St. 1902, which, if allowed, makes it entirely clear that the plaintiff's claim in this respect is correct. The application is informal, in that it is not, strictly speaking, addressed to the court, its different statements of fact are not paraphrased as they should be to facilitate the specific admission or denial of each by the adverse party, and it does not close with a request for the specific changes and additions to the finding which are sought. It is, however, entitled "Application to Rectify Appeal," and the additions to the finding sought for sufficiently appear, and no objection to it on the ground of informality is made. It has annexed to it the affidavit of counsel that all the statements of fact set forth in the application are true; but no answer, supported by like affidavit, has been filed by the defendant, as required by section 14 of the rules of this court. The purpose of the rule is to save the expense of taking depositions in support of the application, and to obviate, so far as possible, the trying of questions of fact in this court upon depositions. An answer should have been filed, unless the defendant was prepared to have the sworn facts taken as true. His only excuse for his failure to comply with the rule is that the finding shows, as he claims,

that the facts set forth in the application are not true. That there is not strict agreement between the two is not strange, inasmuch as the object of the application is to have the finding corrected. A discrepancy between the two affords no excuse for noncompliance with the rule. Timely notice of the application having been given, the neglect of the defendant's counsel to deny its allegations under oath indicates that they could not consistently do so. Cases may arise where applications of this kind, although no answer is filed, will be denied by the court, unless further proof than the affidavit of counsel is furnished. In the present case we think the application should be granted. The appeal, therefore, is rectified in accordance with the application. This removes the sole ground upon which the defendant's objections to the charge are founded.

The record shows that the defendant cut timber and poles upon one entire tract, within which was included the land claimed by the plaintiff. The defendant contended that the land claimed by the plaintiff was part of the adjoining land cut over, known as the "Rogers and Burgess Lots," on which the defendant had acquired the right to cut all the timber and poles. He claimed that the plaintiff had failed to show title to the land in dispute, and that, if he had shown title, the defendant's cutting upon it was under the honest belief that it was part of the Rogers and Burgess land, and therefore that he was only liable for the actual value of the trees cut. The defendant, being a witness in his own behalf, was asked by his counsel the following questions: "Now, won't you state to the jury what sized trees you cut on the Rogers and Burgess lots, and how you paid the choppers; that is, by what rate?" "Now, Mr. White, what were your instructions with reference to cutting trees, and especially relating to dimensions?" On objection these questions were excluded, and such exclusion is assigned as error. The first question clearly had no relevancy to the issue to be determined by the jury. The claimed purpose of the second was to show that only trees above a certain size, 10 or 12 inches, were ordered to be cut, and that the smaller sticks were therefore cut without authority. It is possible that this evidence would have been admissible upon the question of damages, had it appeared or been claimed, in connection with the offer, that the cutting of the smaller stuff was not necessary to the cutting and removal of the larger timber from the tract in dispute. No claim of this kind was made, however. The defendant, having set his choppers to work to cut the larger timber upon the tract in question, would be responsible, clearly, for the necessary consequences. The evidence, therefore, was properly excluded.

There is no error. The other Judges concurred.

(217 Pa. 307)

In re THEWLIS' ESTATE.

(Supreme Court of Pennsylvania. April 1, 1907.)

MARRIAGE—EVIDENCE—PRESUMPTIONS.

A married man in 1858 deserted his wife in England and came to America, and in 1868 he married again by a ceremonial marriage, and his wife in England married again in 1869. The first wife died in 1891, and the man died in 1904, and from 1891 to 1904 the woman to whom he had been married in 1868 was recognized by all persons as his lawful wife, and in 1896 they executed a deed reciting that they were husband and wife. *Held*, that it would be presumed, either that the man had obtained a divorce from his first wife before he married his second wife, or that the marriage relation was created after the death of the first wife, if no such divorce had been obtained.

Appeal from Orphans' Court, Philadelphia County.

In the matter of the estate of John W. Thewlis, deceased. From a decree dismissing exceptions to adjudication, Eliza Fenton appeals. Affirmed.

The following is the opinion of Penrose, J., in the court below:

"In view of the fact that within a few years after the decedent came to this country, in 1858, both he and his wife, whom he left in England, whom he had married in 1854, married again, he in 1868 and she in 1869, the conclusion cannot be avoided, without a disregard of settled principles of the law of presumptions, that there was a legal dissolution of their marriage. By her marriage in 1869 to James Hirst, the wife became the mother of six children, and, he having died, in 1880 she became the wife of Charles Dyson. Thus, if the decedent continued to be her husband, they were both guilty of bigamy, and the children by her second marriage were all illegitimate. But the presumption against crime, and still more the presumption in favor of legitimacy, forbid such a result; and nothing less than positive, affirmative proof to the contrary can be accepted as sufficient to overcome such presumptions, especially in view of the great lapse of time and of the further fact that both parties are dead. Every intendment and every inference will be made in favor of innocence and legitimacy. Best on Evidence, § 346. 'So strong is this presumption,' it is said in 1 Greenleaf's Evidence, § 35, 'that, even when the guilt can only be established by proving a negative, the negative must, in such cases, be proved by the party alleging the guilt, though the general rule of law devolves the burden of proof on the party holding the affirmative.' See, also, Wile's Estate, 6 Pa. Dist. Rep. 384; *Id.*, 6 Pa. Super. Ct. 435; Richardson's Estate, 132 Pa. 292, 19 Atl. 82. Upon this point no importance whatever can be attached to the testimony of the daughter, who remained with the wife in England, with regard to the absence of a divorce. She was but 2 years old when her father came to America, and

but 13 when her mother married James Hirst, in 1869.

"The conclusion reached by the auditing judge in favor of the claim of the wife whom the decedent married in 1868 might well be sustained on the ground thus suggested; but he has placed it upon grounds which are unanswerable and conclusive. If, when the decedent contracted the second marriage, he had not been divorced from the woman whom, years before, he had left in England, the marriage, although solemnized in church, as it was, with due religious ceremony, was void, in spite of the conceded innocence of the wife and her ignorance of the existence of any obstacle. Nor could it have acquired validity if the first wife had survived the husband, no matter how great the lapse of time, or what the belief in the community in which the parties resided. But the first wife did not survive. She died in May, 1891, and the decedent lived until October, 1904. During all this time, a period of more than 18 years, the person to whom he had been formally married in 1868 was recognized by him and by herself and by the community as his lawful wife. Naturally there was no repetition of a marriage ceremony, or any formal expression of marriage contract, for the wife never had knowledge that the one already entered into was not valid; but each day during these many years that they thus lived together there was an assertion by acts and conduct which in law are as efficacious as words for establishing a contract by implication. That marriage may be established by long-continued cohabitation and reputation is too well settled to require citation of authority. See *Richard v. Brehm*, 73 Pa. 140, 13 Am. Rep. 733. And while there is a presumption of continuance as to a relation illicit in its inception, under such circumstances as existed in *Hunt's Appeal*, 86 Pa. 294, where the interval during which it might have become lawful was but two months (December 13, 1873, to February 16, 1874), or in *Grimm's Estate*, 131 Pa. 199, 18 Atl. 1061, 6 L. R. A. 717, 17 Am. St. Rep. 796, where it was but one week, the doctrine of those cases is not to be extended to one like the present, where in good faith the parties continue to live together as husband and wife, after the complete removal of the only obstacle in the way of a valid marriage, and so for many years continuously proclaim themselves to the public until the relation ceases by the husband's death.

"The presumption of continuance of an illicit relation, under such circumstances, gives away to the superior presumption in favor of compliance with the requirements of the law, of morality, and of common decency. See *Greenleaf on Evidence*, § 41; *Bergdoll's Estate*, 7 Pa. Dist. Rep. 137. In *Hantz v. Sealy*, 6 Bin. 405, which is supposed by the exceptant to establish the doctrine that, when the relation was originally illicit, it cannot become lawful without a formal and

express declaration, the woman, who did not make such declaration, appears to have left the man after his divorce from the wife, and, without asserting a marriage, sued him in her unmarried name for a legacy which had been left to her by a testator of whose will the defendant was executor; the defense being, *inter alia*, that the suit could not be maintained because the plaintiff was the wife of the defendant. What was said by the court with regard to the marriage was said with reference to the facts thus disclosed by the evidence, and has no application to the very different facts of the present case.

"But the case does not rest upon the mere long-continued cohabitation and reputation after the death of the first wife. There was not only the introduction of the wife as such to strangers by the husband, but the fact that they were husband and wife was solemnly recited and declared in a deed, duly executed and acknowledged by both, to the city of Philadelphia, in December, 1896, and in the face of this deed a finding that there was then no valid marriage would be impossible. The case might safely rest on this alone. Nothing need be added to what has been said by the auditing judge on the subject of commissions. See, also, *Mayberry's Appeal*, 33 Pa. 258.

"The exceptions are dismissed, and the adjudication confirmed absolutely."

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

Joseph H. Taulane, of White, White & Taulane, Ernest E. Prevost, and Thomas Earle White, for appellant. N. Dubois Miller, of Biddle & Ward, and H. Alan Dawson, for appellee.

PER CURIAM. Decree affirmed, on the opinion of Judge Penrose, dismissing exceptions to the adjudication.

(117 Pa. 330)

FINDLAY et al. v. CITY OF PHILADELPHIA.

(Supreme Court of Pennsylvania. April 1, 1907.)

APPEAL—REVIEW—FINDING OF REFEREE.

A finding by a referee, with evidence to justify it, which has been approved by the court, will not be reversed on appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4015-4018.]

Appeal from Court of Common Pleas, Philadelphia County.

Action by Harry C. Findlay and George Findlay against the city of Philadelphia. From an order dismissing exceptions to report of referee, defendant appeals. Affirmed.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

Harry T. Kingston, Asst. City Sol., and John L. Kinsey, City Sol., for appellant. Arthur F. Schneider, for appellee.

PER CURIAM. There is nothing in this case but a question of fact, depending on the accuracy of the witnesses' recollection of dates; plaintiff contending that there was a hole in the pavement at the time which caused the accident, and defendant that it had been repaired a week before. The referee "had all these witnesses before him, he noted their manner of testifying and has had the benefit of having heard the live evidence as it came from the lips of the witnesses, rather than reading their words in cold type, and he is free to say that the testimony of Mr. Lawrence—that he repaired the hole on April 8, 1904—did not impress him in point of accuracy as to date of repair. The referee is therefore constrained to disregard the evidence of repair on April 8, 1904, and to find that from at least March 31, 1904, to and including the day of the alleged accident to the plaintiff, a defect or hole as described by the witnesses actually existed in the footway in question." He therefore found that the accident was due to the city's negligence. This finding was approved by the court, and there is nothing to justify us in disturbing it.

Judgment affirmed.

(117 Pa. 330)

BEAVER BOROUGH v. BEAVER VALLEY R. CO.

(Supreme Court of Pennsylvania. April 1, 1907.)

1. APPEAL—REVIEW—OBJECTIONS NOT RAISED BELOW.

A borough filed a bill to restrain a railroad company from constructing a siding in the street. It was conceded that the company had a right to construct its main line in the street. *Held*, on appeal from a decree dismissing the bill, that, no assignments of error raising the question of such right, it would not be considered in the Supreme Court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Appeal and Error, § 1074.]

2. RAILROADS—TRACKS ON STREET.

Where a railroad company has a right to maintain tracks in a street 100 feet wide, it may construct a siding thereon if such siding did not unreasonably obstruct public travel.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, § 199.]

Mitchell, C. J., and Brown and Mestrezat, JJ., dissenting.

Appeal from Court of Common Pleas, Beaver County.

Bill by Beaver borough against the Beaver Railroad Company. From a decree dismissing the bill, plaintiff appeals. Affirmed.

The court below, per Williams, P. J., filed an opinion which was in part as follows:

"Findings of Fact.

"(1) That the borough of Beaver is a municipal corporation, duly chartered by an act of the General Assembly of the commonwealth of Pennsylvania, approved March 29, 1902, and, by a decree of the court of quarter sessions of Beaver county, entered in a pro-

ceeding at No. 2, September sessions, 1866, became subject to the provisions and entitled to the benefits of the act of Assembly approved April 3, 1851 (P. L. 320), commonly called the 'general borough act.'

"(2) That the defendant is a railroad corporation organized and existing under the provisions of an act of the General Assembly of the commonwealth of Pennsylvania, entitled, 'An act to authorize the formation and regulation of railroad corporations,' approved April 4, 1868 (P. L. 62), and the several supplements thereto, chartered September 5, 1899, for the construction and operation of a railroad from a point, the eastern terminus being at or near a point where the Beaver and Mercer state road, commonly called 'Sharon Road,' crosses the Pittsburgh & Lake Erie Railroad, in Beaver county, Pa., and the western terminus at or near a point on the Ohio river about 500 feet south of the residence of John Moore, in Borough township, in said county and state, the length of said road being 3.15 miles, intersecting the Cleveland & Pittsburgh Division of the Pennsylvania Company's lines, through Borough township, the borough of Beaver, and the borough of Bridgewater, to a point in the borough last named, and intersecting the Pittsburgh & Lake Erie Division of the New York Central Lines, all in the county of Beaver.

"(3) That at the time, and for some time prior to the incorporation of the defendant company, and the location of its railroad on Fifth street, said street was 100 feet wide between property lines; that the roadbed of said street was 40 feet wide between curb lines, the space between the said curb lines and the property lines being used partly for sidewalks and partly as a grass plot, and the sidewalks, where any were laid, being 8 feet wide, laid next the curb, thus leaving 22 feet of an intervening grass plot.

"(4) That on September 15, 1899, the town council of the borough of Beaver passed an ordinance authorizing the construction of the railroad of the defendant company upon and along Fifth street, in said borough, in the center and at the grade thereof, placed certain burdens upon said defendant, and provided, inter alia, that cars of said railroad company should not be allowed to unnecessarily stand on said track, said ordinance having been approved by the burgess of said borough on September 15, 1899, and accepted by the defendant company on September 20, 1899.

"(5) That the defendant company, in pursuance of its charter and said ordinance, had located, constructed, and was, at the time of the filing of the bill in this case, operating its railroad along and upon Fifth street, in the borough of Beaver, from the western line of Buffalo street to the eastern line of said borough, at or near Leopard lane, all within the borough of Beaver, the total length of

said railroad being 3.15 miles, and of which 4,368 feet is located on said Fifth street.

"(6) That in the operation of said railroad the defendant company has no fixed schedule for the running of its trains, nor does it run any passenger trains thereon; its business being confined to the carrying of freight and merchandise, and it has but one locomotive for the movement of its trains.

"(7) That said company has no freight depot or other place within said borough for the receipt and discharge of freight and merchandise to and from its cars, but had for some time prior to and up to the filing of this bill in this case been receiving and discharging freight and merchandise at such points along said Fifth street as were most convenient to said company and its patrons; that in pursuance of a bill filed by the plaintiff in this case, on November 24, 1905, a preliminary injunction was granted enjoining and restraining the defendant company, its officers, employes and workmen from allowing cars to stand on its track, and the loading or unloading of freight or merchandise from its cars on said track, in, upon, and along Fifth street, which preliminary injunction was made perpetual by an opinion filed by the court on May 29, 1906, thus permanently enjoining the defendant company from receiving or discharging freight or merchandise to and from its cars at any point along that part of its railroad located upon Fifth street, in said borough of Beaver.

"(8) That Cook & Anderson are residents of the said borough of Beaver, and the owners of a piece or parcel of land having a frontage of 260 feet on the southerly side of said Fifth street, the eastern boundary of which is 100 feet west of the westerly line of Elk street, and about 1,730 feet west of the westerly line of Sharon road.

"(9) That the said firm of Cook & Anderson are engaged in the business of general contracting, and have erected on said land an office and other buildings and sheds used in the prosecution of their business, and handle large quantities of lumber, brick, plaster, hardware, and other building materials, amounting in the aggregate to something like 100 or 150 car loads per year.

"(10) That some time during the year 1903, and again in September of 1904, Fred. H. Cook, of the firm of Cook & Anderson, appeared before the council of the borough of Beaver and asked for permission to put in a switch leading from the main line of the defendant's railroad to their place of business located on the south side of Fifth street, that the council of said borough laid said request on the table, and, as far as the testimony in this case shows, no further action has been taken thereon.

"(11) That after the granting of the preliminary injunction restraining the defendant company from loading and unloading its cars upon that part of its track located in and up-

on Fifth street, in said borough, and before the final determination thereof, the defendant company, on February 26, 1906, by and with the consent of said firm of Cook & Anderson, began making the necessary excavations preparatory to constructing a switch from its main line to the lot or premises of said firm, for the purpose of enabling the defendant company to receive and deliver freight and merchandise from and to said firm.

"(12) That the switch or turn-out leading from the main line of the defendant's railroad on Fifth street to the property of Cook & Anderson, located on the south side thereof, is necessary for the proper and convenient operation of said railroad in the receipt and delivery of freight from and to the said firm, and said business cannot be reasonably handled in any other manner.

"(13) That if said switch is laid at grade from the main line of the defendant's railroad into the property of Cook & Anderson, as proposed by the defendant company and averred in its answer, it will not be an unreasonable obstruction to public travel along said Fifth street.

"Conclusions of Law.

"(1) The letters patent of the Beaver Valley Railroad Company, in connection with the ordinance passed by the council of the borough of Beaver on September 15, 1899, and accepted, in writing, by the defendant company on September 20, 1899, vested in said company the right to construct, maintain, and operate a railroad in, upon, and along Fifth street in the borough of Beaver.

"(2) The right to construct, maintain, and operate a railroad in, upon and along Fifth street in the borough of Beaver, vested in the defendant company by its charter and said ordinance of the borough of Beaver, carried with it the right to construct, maintain, and operate such turn-outs, switches, sidings, and other appendages as are reasonably necessary for the convenient operation of said railroad.

"(3) When permission was granted by the borough of Beaver to the defendant company to lay and construct its railroad in, upon, and along Fifth street, by the ordinance approved September 15, 1899, the right to construct, maintain, and operate such turn-outs and switches as are reasonably necessary to accommodate the business establishments along said Fifth street was necessarily implied.

"(4) That the preliminary injunction heretofore granted should be dissolved and the bill dismissed at the costs of the plaintiff."

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

William A. McConnel and John B. McClure, for appellant. James L. Hogan and John M. Buchanan, for appellee.

STEWART, J. The Beaver Valley Railroad Company, organized under the act of April 4, 1888 (P. L. 62), and its several supplements, in the exercise of its corporate rights and privileges, constructed, and has been operating for several years past, a line of railroad in the county of Beaver, between three and four miles in length, connecting the Pittsburgh & Lake Erie Railroad with the Cleveland & Pittsburgh Railroad. With respect to the termini of the road, the borough of Beaver is intermediate. By and with the consent of the municipal authorities, expressed in an ordinance passed September 15, 1899, the railroad company constructed its main track upon Fifth street in the borough of Beaver longitudinally for a distance of 4,368 feet. In the early part of the present year the company, for greater convenience in receipt and delivery of freight at that point, began the construction of a switch and siding, from its main line on said Fifth street, to the warehouse and yards of Cook & Anderson, situate on the south side of said street. Thereupon the borough of Beaver filed its bill, alleging that the company, in attempting to construct such siding, was acting without authority of law, and praying that it be restrained. The appeal is from the decree dismissing the bill after final hearing.

The question so earnestly pressed upon our attention in the argument, as to the right of the railroad company under its charter to construct and maintain a track upon the public street, even with municipal consent, is not raised by any assignment of error, nor could it be. Since it was not brought to the attention of the court below, the settled rules of practice forbid its consideration here. An exception cannot be urged in the appellate court on different grounds than those taken in the court below. The right of the railroad company to maintain its tracks on Fifth street was conceded in the court below, and for present purposes must be conceded here. The only question, then, before us is: Has the company the right to construct the proposed switch and siding from its established main line upon the public street for the purpose indicated? The thirteenth finding of fact by the court below was as follows: "If said switch is laid at grade from the main line of defendant's railroad, to the property of Cook & Anderson, as proposed by the defendant company, and averred in its answer, it will not be an unreasonable obstruction to public travel along said Fifth street." No attempt was made to controvert this finding. In view of the fact that Fifth street is 100 feet wide, this is not surprising. This is not, then, the case of a railroad company attempting, for its own convenience, and under no compelling condition, to appropriate with the consent of the borough an entire street, thereby diverting it from its original

use and purpose, and defeating public enjoyment of the same. The use of the switch and siding would be consistent with the continued use of the street as a public thoroughfare. Under such circumstances the right of the company in the premises is not open to question. The right to build the switch and siding is included as a necessary incident in the right to build a railroad. So much we have repeatedly asserted. In *Cleveland & Pittsburgh R. R. Company v. Speer*, 56 Pa. 325, 94 Am. Dec. 84, we said that, even where there is no expressed power in the charter to construct switches, it is clearly to be inferred from the general power conferred, and the essential purposes of the grant. In *Getz's Appeal*, 10 Wkly. Notes Cas. 453, and in a number of other cases, we have said the same thing. To what extent this right may be exercised where the continued maintenance of the street as a public thoroughfare is involved is a question not raised in this proceeding. It is enough to know that in the present case no such interference is contemplated or would result.

The appeal is dismissed at the costs of the appellants.

MITCHELL, C. J., and BROWN and MESTREZAT, JJ., dissent.

(217 Pa. 286)

JONES v. BURNHAM et al.

(Supreme Court of Pennsylvania. April 1, 1907.)

1. MASTER AND SERVANT—INJURY TO EMPLOYÉ—ASSUMPTION OF RISK.

Where an employé continued in an employment which he knew was dangerous because of defects in the machinery, he assumed the risk resulting therefrom, unless he remained under the promise of his employer to immediately repair and the danger did not seem imminent.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 574–600, 638–640.]

2. SAME—EVIDENCE.

In an action for injuries caused to an employé by a defective appliance, evidence held not to show negligence on the part of the employer.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 954–977.]

Appeal from Court of Common Pleas, Philadelphia County.

Action by William Jones against George Burnham and others. Judgment for defendants notwithstanding verdict, and plaintiff appeals. Affirmed.

At the trial the jury returned a verdict in favor of the plaintiff for \$5,500. On a motion for judgment non obstante veredicto, Ralston, J., filed the following opinion:

"The plaintiff is a skilled workman, having followed the trade of blacksmith for 11 years. He went into the employ of defendants in July, 1903. On January 20, 1904, a chip flew off from a tool called a 'flatter,' with which he was working, entered his eye,

and destroyed the sight. Plaintiff was at this time 28 years of age. He testified that if he wanted new tools he got them from Mr. Preisen, who was termed 'a contractor' and was his immediate superior. One of the plaintiff's helpers told him the flatter was cracked. Plaintiff asked Preisen for a new flatter. He replied: 'Go ahead and use it. I haven't any more. It is good enough. Go ahead with it.' Plaintiff worked with the flatter for about an hour, the helpers striking it with sledges weighing about 13 or 14 pounds, when the piece of steel flew off where it was cracked and struck him in the eye. On cross-examination, he said that he complained about the flatter because it was worn down and he needed a new one; that it might be dangerous, and might break, and might not break at all. He thought there was a little danger there, but not that dangerous. He stated that he would dress up a tool like this when it became worn by putting it in the fire and trimming it down. Duffy, one of the plaintiff's helpers, testifies that Jones asked Preisen for a flatter, and said that one was a little bit cracked. Preisen said he had no more; to go on and work with it. It was not claimed that Preisen promised to remedy the defect. It appeared that a flatter is a hand tool, consisting of a square piece of metal with a hole for the insertion of a handle. It is held like a hammer, with one side against the metal to be shaped, and upon the other side blows are struck with sledges. The plaintiff was in the habit of using this tool, and of fixing it up when repairs were required. According to his testimony, he did not tell Preisen that the flatter was cracked, but asked him for a new one, because the old one was worn.

"The plaintiff was as good a judge of the safety of the tool as Preisen, and did not regard it as dangerous. It does not appear that the tool was shown to Preisen, or that he had an opportunity to discover that it was dangerous or unfit to use. It was the duty of the plaintiff to repair his tools, and the only knowledge of the condition of the tool imputed to Preisen is that it was worn and a little bit cracked. If there was any danger in using the tool, it must have been better known to the plaintiff than to any one else. While the testimony of the plaintiff is that the chip flew off at the place where the flatter was cracked, there is no evidence that it flew off because of the crack, or that there was anything in the condition of the tool to indicate to an experienced observer that a chip was likely to fly off from it and do injury. In *Lehman v. Carbon Steel Co.*, 204 Pa. 612, 614, 54 Atl. 475, Mr. Justice Fell said: 'The danger of the work was not mentioned, and apparently not contemplated, by any one. If there was unusual danger, it was manifest to the plaintiff—more manifest to him than to any other person.' There is no evidence of negligence on the part of the defendants; while, if a defect of a dan-

gerous character existed in the flatter, it was one which the plaintiff observed and of which he should have had intelligent knowledge and ability to estimate by reason of his experience and special training. A servant will be presumed to have notice of all risks which to a person of his experience and understanding are or ought to be open and obvious. *Railroad Company v. Keenan*, 103 Pa. 124. 'He is not bound to risk his safety in the service of his master, and he may, if he thinks fit, decline to do that which exposes him to imminent peril.' *Rummell, Adm'r, v. Dilworth*, 111 Pa. 343, 349, 2 Atl. 355, 363. It was said by Mr. Justice Brown, in *Talbot v. Sims*, 213 Pa. 1, 62 Atl. 107, 110 Am. St. Rep. 513: 'The oft-repeated rule as to this is that an employé, who continues in an employment which by reason of defective machinery or appliances he knows to be dangerous, assumes the risk of any accident that may result therefrom, with the qualification that if in pursuance of the promise of his employer to remedy the defect, and the risk be not such as to threaten immediate danger, the employé continue in the employment and be injured without fault on his part, the employer may be liable.'

"The motion for judgment non obstante veredicto upon the whole record is allowed, and judgment is entered for defendants."

Argued before MITCHELL, C. J., and BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

Joseph W. Shannon, for appellant. John G. Johnson and James Wilson Bayard, for appellees.

PER CURIAM. Judgment affirmed, on the opinion of the court below entering judgment for defendant non obstante veredicto.

(117 Pa. 290)

HUTCHINSON v. DENNIS et al.

(Supreme Court of Pennsylvania. April 1, 1907.)

1. EQUITY—BILL—MULTIFARIOUSNESS.

A father filed a bill against his children, alleging that the money in a savings bank in the name of his deceased wife should be declared to be the property of complainant, and that certain real estate in the wife's name should be declared to be that of complainant's because he had paid the price of the sale; also, for the reason that certain conveyances to the children were procured by undue influence. *Held*, that the bill was bad for multifariousness.

2. SAME—JURISDICTION.

A husband, having been appointed administrator of his wife's estate, took possession of certain savings bank deposits. *Held*, that the title to the money must be adjudicated in the orphans' court, and he cannot thereby file a bill in equity for such a purpose.

3. QUIETING TITLE—JURISDICTION.

The remedy by bill in equity to determine title to realty is not abolished by Act May 25, 1893 (P. L. 131), and Act June 10, 1893 (P. L. 415), giving the right to a person in possession to compel one out of possession, but claiming title, to bring ejectment.

Appeal from Court of Common Pleas, Philadelphia County.

Bill by Thomas Hutchinson against Hugh Dennis and others. From a decree dismissing the bill, plaintiff appeals. Affirmed.

The bill alleged: (1) That plaintiff's wife died in 1905, and Margaret Dennis and James Hutchinson are their children. (2) Plaintiff can neither read nor write, and during his constant occupation earned considerable money, which he invested in real estate and deposited in the saving funds. That the money invested in the properties and deposited was the money of plaintiff. That plaintiff was always the owner of these properties. The deeds to two of them were in his wife's name, although this was unknown to plaintiff. That the moneys in the saving funds were also that of the plaintiff, but were deposited in his wife's name for convenience in making and withdrawing deposits. That these properties and deposits were not gifts to the wife. (3) That plaintiff's wife died intestate. (4) That immediately after the death of his wife plaintiff executed deeds conveying one property to his son and another to his daughter. These properties were originally in plaintiff's name, and said deeds were executed by plaintiff in consequence of the solicitations and importunities of his children. Plaintiff was without legal advice, and did not know that he was parting with his entire interest in said properties. (5) Plaintiff was advised by his family that he must take out administration on his wife's estate, in order to withdraw the deposits from the saving funds, and was taken by his family to the register of wills and took out letters of administration and deposited the funds in the Colonial Trust Company. That he was without legal advice in this matter. (6) Prays for reconveyance; that he is the owner of the money deposited, etc.

The demurrer alleged: (1) Plaintiff has remedy at law. (2) The jurisdiction over deposits is in the orphans' court exclusively. (3) Plaintiff's remedy to determine title to the properties in wife's name is at law. (4) The court cannot cancel deeds to the children. (5) Bill is multifarious in joining distinct causes of action.

Argued before MITCHELL, C. J., and BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

Wm. H. Burnett and Wm. H. Wood, for appellant. Daniel A. Stewart, Charles W. Freedley, and Albert B. Welmer, for appellees.

PER CURIAM. The learned judge below rightly held that as to the money deposited in the saving funds in the name of the wife the common pleas would have jurisdiction on a proper bill to determine that it was in fact the property of the husband. But, the husband having taken out letters of administra-

tion on the wife's estate and thereby possessed himself, "got control" of the money, he had brought himself within the jurisdiction of the orphans' court and should have his title to the money adjudicated there.

The claim that the real estate in the wife's name was in fact the complainant's by virtue of a resulting trust from the payment of the purchase money, and his claim to rescind his conveyance of other real estate to his children as procured by undue advantage taken of his ignorance, were proper bases of equity jurisdiction. It does not appear that he was in actual possession, and therefore the acts of 1893 have no apparent application. But, even if they were applicable, the remedy under them would not be exclusive. Where equity has jurisdiction, it is not taken away by a subsequent jurisdiction conferred on courts of law.

But the two claims were essentially distinct and rested on different grounds. Each must be adjudicated on its own evidence, without any reference to the other. The bill was multifarious in joining them, and the demurrer was properly sustained on that ground.

Decree affirmed.

(117 Pa. 306)

In re BONING'S ESTATE.

(Supreme Court of Pennsylvania. April 1, 1907.)

TRUSTS—RELIEF IN EQUITY—APPOINTMENT OF SUCCESSOR.

A decree provided that a trustee should turn over to his successor in trust the balance found in his hands on an adjudication of his accounts. No exception was taken, and the decree was confirmed absolutely. *Held*, that the court may order the trustee to pay to his successor without a formal separate proceeding by such successor showing service of a certified copy of the award, demand for payment, and noncompliance therewith.

Appeal from Orphans' Court, Philadelphia County.

In the matter of the estate of William Boning, deceased. Appeal by H. C. Terry, surviving trustee, from the decree directing him to pay over certain moneys. Affirmed.

Henry C. Terry was the sole surviving trustee of the estate of William Boning, deceased. In the adjudication of his account as trustee the court below made the following award: "Balance of principal, per account \$13,375. It being stated that the account was filed for the purpose of enabling the accountant to be discharged and relieved from further duties of the trust, the above balance is awarded and directed to be paid by him to his successor when appointed and qualified." This adjudication was confirmed absolutely on June 9, 1906. No exceptions were filed thereto or appeal taken. On July 7, 1906, Margareita D. B. Boning was appointed by the court below trustee of the said estate, and, after having entered the required security, made demand upon the appellant that he

pay over the amount of the award. Upon failure of the appellant to comply with this demand, the appellee presented her petition to the court below for an order upon the appellant to pay to her the amount of the award. The appellant filed an answer in which he claimed that no certified copy of the award had been served upon him and a proper demand made thereafter. He also further set forth in his answer that the auditing judge had, before the final confirmation of the decree, his attention called to certain matters which made the decree erroneous, and that the judge had requested respondent to permit the matter to stand over until he was physically able to give it attention, but that he died before he could do so.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

John A. Clark, for appellant. Fell & Spalding and Alfred Moore, for appellee.

PER CURIAM. A decree was regularly made that appellant should turn over to his successor in the trust the balance found to be in his hands on the adjudication of his accounts. Whether or not the appellant is correct in his assumption that the auditing judge, the late president judge of the orphans' court, became convinced that the decree was erroneous, and would have corrected it, no exceptions appear on the record and the decree was confirmed absolutely. There is therefore nothing to show any error in the decree now appealed from.

Appeal dismissed.

(117 Pa. 339)

LOTZ v. HANLON.

(Supreme Court of Pennsylvania. April 1, 1907.)

MASTER AND SERVANT—TORTS OF SERVANT—LIABILITY OF MASTER.

Where plaintiff sued to recover for injuries received by being run down by an automobile owned by defendant, he must show, not only that the person in charge of the machine was defendant's servant, but also that he was at the time engaged on the master's business, with the master's knowledge and direction.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 1217-1225.]

Appeal from Court of Common Pleas, Philadelphia County.

Action by Casper Lotz against Felix L. Hanlon. Judgment for defendant, and plaintiff appeals. Affirmed.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

Thad. L. Vanderslice and G. A. Swayze, for appellant. John G. Johnson and George L. Crawford, for appellee.

STEWART, J. It was essential to a recovery in this case that it be made to appear that the accident from which plaintiff's in-

jury resulted occurred while the person in charge of the automobile was using it in the course of his employment, and on his master's business. Plaintiff offered no direct evidence as to this, but, having shown the ownership of the machine to be in the defendant, sought to derive from this circumstance, and this alone, not only the fact that the person in charge was defendant's servant, but the further fact that he was at the time engaged on the master's errand. If when plaintiff rested a nonsuit had been ordered, he could not have been heard to complain. Ownership of the machine in cases of this character is at best but a scant basis for the inference that was here sought to be derived from it. It is allowed as adequate only when the attending circumstances point to no different conclusion. In itself it is but one of a series of circumstances, and its significance depends on the extent of the general concurrence of these. If they indicate something different, the scant basis that this single fact otherwise might afford is reduced below the point of sufficiency. Because its value as a probatory fact so entirely depends upon attending circumstances, it is always the duty of the party seeking to establish through it a *prima facie* case to develop the whole situation, so that its significance may be correctly measured. When he fails in this regard, and his evidence leaves the general situation undisclosed, and this without explanation of the failure, he is liable to suffer from the inference that what was not disclosed was prejudicial to his case. Where this occurs, the mere fact of ownership can count for little.

The plaintiff's case discloses nothing more than that the plaintiff had been run down by an automobile in a frequented street in the city, after nightfall; that the machine was at the time occupied by four persons, one being the driver whose identity was established; and that the machine was registered in the name of defendant as owner. There was absolutely nothing in the evidence to establish the relation of master and servant between the defendant and the driver of the automobile, outside the defendant's ownership. It was not even attempted to be shown that the man driving the machine had ever been in defendant's employ in any capacity whatever. The defendant was not identified as one of the party of four in the machine, and not one of the four was called to testify in regard to the matter. The jury had a right to be informed as to who these persons were, where they were going, upon what mission, at whose invitation they were occupying the automobile, and in what relation they stood to the defendant, so that they might intelligently determine the question of defendant's liability. The significance of the ownership of the machine could be measured only as the facts here suggested were disclosed. Had the case gone to the jury, it would have been the duty of the court to

instruct as matter of law that, no explanation having been given as to why testimony in relation to these circumstances was not produced, the jury might draw the inference that such testimony would be unfavorable to plaintiff's contention. It would be an inference of fact; but in determining whether plaintiff had or had not made out a case warranting a submission it would be for the court's consideration.

Was this manifest insufficiency of plaintiff's case supplied in any way by the evidence offered on part of the defendant? The evidence establishes the fact that the man driving the machine when the accident occurred was in the defendant's regular employment as chauffeur; that the machine was entrusted to his care and keeping only, however, for defendant's own use as he might direct. So much is supplied. But it comes to nothing that the driver was the defendant's servant, if it appears that at the time the accident happened he was not on the master's errand or business. If he were on an errand of his own, then as long as so engaged he did not stand in the relation of servant. The evidence on part of the defendant, and not attempted to be contradicted or discredited, leaves it clear of all doubt that the three persons occupying the machine with the driver when the accident occurred were there by invitation of the driver, that they were entire strangers to the owner of the machine, and that the machine was being employed by the driver on this occasion without the knowledge of the owner. We are considering now so much of the evidence offered by the defendant as may be claimed to supplement that offered by the plaintiff, and therefore we may regard the facts as admitted. It shows that without the knowledge of the owner or of any one with right to use the machine in absence of the owner from the country the driver on the morning of the day the accident occurred arranged to take some friends of his own choosing for a drive during the course of the evening. He personally invited a female friend, and through her invited two others, a man and woman, to join the party. He had it in mind to stop in the course of the drive at a store where automobile supplies were sold to purchase some sparks for future use in connection with the machine. It is clear that this purpose was simply incidental to the evening's trip, and was suggested by consideration of the driver's own convenience. The main purpose of the drive was for the pleasure and enjoyment of the driver and his selected friends. The persons invited by him resided quite a distance from each other, and in assembling them the driver at the start was obliged to go a considerable distance in the opposite direction from where the supply store was. It was after all were in the machine that the accident happened, but it was while he was at a point further from the supply store than was his starting point.

But had it happened while on the direct route to the store, even though the obtaining of sparks was the main purpose of the drive, this would not have made it an errand on the master's business, without some evidence that it was taken with the knowledge and approval of the master. There was not a particle of evidence in the case that the use of the machine for such purpose had ever been allowed by the master. The most that appeared was that the driver had been allowed on some occasions to purchase the necessary supplies for the machine at this store on the master's credit; but none that he had ever used the machine in going to the store to get them, or that he ever employed it in any way except as ordered by the master in connection with each particular occasion. So far as appears, the use of the machine by the driver on the evening when the accident occurred was wholly unlicensed, was for his own convenience and pleasure, and therefore entirely apart from his master's business. The case as exhibited by the plaintiff was insufficient to warrant a recovery, its insufficiency was not supplied by anything shown on the part of the defendant, and it therefore became the duty of the court to direct the verdict.

Judgment affirmed.

(217 Pa. 299)

LEFFERTS v. DOLTON.

(Supreme Court of Pennsylvania. March 11, 1907.)

1. VENDOR AND PURCHASER—TENDER OF DEED.

Where the agent of a vendor of land states to the vendee that he has in his pocket a deed of the vendor, but does not produce it and give the vendee an opportunity to examine it, it is not a sufficient tender.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Vendor and Purchaser, §§ 292, 293.]

2. SAME—WAIVER OF TENDER.

A vendee does not waive a tender of a deed where he does not say that he will not accept a deed for the property, nor refuse to pay the purchase price, nor say that he could not make the payment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Vendor and Purchaser, § 295.]

Appeal from Court of Common Pleas, Bucks County.

Action by Simon V. Lefferts against Richard L. Dolton. From a judgment for defendant notwithstanding the verdict, plaintiff appeals. Affirmed.

Argued before MITCHELL, C. J., and FELL, MESTREZAT, POTTER, and ELKIN, JJ.

Hugh B. Eastburn, for appellant. William C. Ryan, for appellee.

POTTER, J. This action was brought to recover the balance of the purchase money on an agreement for the sale of realty. The plaintiffs averred, and the defendant denied, that a sufficient tender of a deed for the property in question was made to the de-

fendant by the authorized representative of the vendor. Under the agreement the balance of the purchase money was to be paid "on or before the first day of April, 1904, upon execution, and delivery of the deed." John Lefferts, a son of the vendor, on April 1, 1904, took a deed of the farm, which had been executed a day or two before, to the residence of the defendant. Not finding him at home, he sought for and found him, later in the afternoon, at the residence of his son. Lefferts said to the defendant that he had come to tell him that everything was now ready; that he had brought the deed; that all the liens were cleared off; that they had moved away from the property, and everything was ready for defendant; that they had now performed their part of the agreement, and they wanted the defendant to perform his part. Lefferts admits, however, that he did not produce the deed to defendant, and that it was not shown to him, and, of course, he did not examine it. The testimony does not show that the defendant, Dolton, refused to take the property, or that he made any statement that he would not comply with the conditions of the sale. Lefferts said merely that he told the defendant that his father, the vendor, had signed the deed, and that he then had it with him, in his pocket. Nor does it appear that any demand was made by the representative of the vendor upon the defendant, for the payment of the balance of the purchase money at that time, except in so far as it might be inferred from the general statement that Lefferts made to the defendant, when he told him that they wanted him to perform his part of the contract.

We are not able to see in this testimony anything that can properly be construed as a sufficient tender of the deed. The mere statement by Lefferts that he had the deed in his pocket, without producing it to the defendant, and giving him an opportunity to examine it, was not sufficient. Before being called upon to pay his money, the defendant was entitled to see that the conveyance was properly signed, sealed, and acknowledged, and that the description of the land to be conveyed was correct. The learned judge of the court below stated the rule accurately when he said that, "to constitute a valid tender, a duly executed deed must be produced by the vendor to the vendee, so that the vendee may see that it is regular in form, and that it conveys the estate he bargained for." The vendor in the present case fell short of this requirement. Nor can we see anything in the evidence to support the contention of plaintiffs that the conduct of the defendant amounted to a waiver by him of the tender of the deed. It is true that Dolton did question the fact of the liens having been removed, but he did not say that he would not accept a deed for the property, nor did he refuse in terms to pay the balance of the purchase money. He did not say that he could not make the payment, or that he would not.

So that in this respect the facts of the present case do not come within the principle of *Herman v. City of Allegheny*, 29 Pitts. Leg. J. 347, cited by counsel for appellants. We are of opinion that the learned judge of the court below committed no error in entering judgment for the defendant non obstante veredicto.

The assignments of error are dismissed, and the judgment is affirmed.

(317 Pa. 238)

WOOD v. PAUL et al.

(Supreme Court of Pennsylvania. April 1, 1907.)

1. EJECTMENT—EVIDENCE.

Where, in ejectment, defendant claimed to hold the land as a gift from plaintiff's testator, and the evidence tended to show a parol gift unaccompanied by possession, and that the testator lived in the house and paid the taxes until his death, judgment was properly rendered for plaintiff.

2. EVIDENCE—CONCLUSIONS OF WITNESS.

In ejectment, where plaintiff claimed to hold the land under a parol gift from the owner, now deceased, opinions of neighbors as to who seemed to be the head of the house were inadmissible.

Appeal from Court of Common Pleas, Philadelphia County.

Action by Mary Emma Wood against Catherine Paul and Maud R. Paul. Judgment for plaintiff, and defendants appeal. Affirmed.

At the trial it appeared that prior to March 20, 1904, George R. Landes was the record owner of the property in question. He died on that date, leaving a will by which he gave all the residue of his estate to his sister, the plaintiff. The defendant offered testimony which tended to show that she and her daughter, the other defendant, went to live with testator, who was her brother, in the year 1892, and that she lived with him until his death. She claimed that in 1892 he gave the property to her by parol gift, and that after the gift the testator lived with her.

The court charged in part as follows: "On March 14, 1888, George R. Landes became the owner of the property in question; it having been conveyed to him by deed. On March 20, 1904, George R. Landes died, leaving a will, dated January 25, 1901, which contains the following clause: 'All the rest, residue and remainder of my estate, real, personal and mixed, of what kind or nature soever, and wheresoever, the same shall be at the time of my death, I give, devise and bequeath unto my beloved sister Mary Emma Wood, her heirs and assigns forever.' There is no specific disposition by the will of the property in question, and consequently, under the will, Mary Emma Wood, the plaintiff in this case, acquired the title to the property. The defendants rely upon a verbal contract made be-

tween Catherine R. Paul and Mr. Landes, the testator, in 1892, whereby he gave the property to Mrs. Paul. Maud R. Paul, the daughter of Catherine R. Paul, testified that Mr. Landes invited his sister, Mrs. Paul, to come to live in the house, permitting her to run the shop on her own account, and that she kept house for him. This witness was, at the time this happened, 14 or 15 years of age, and her testimony is not satisfactory as establishing the title of Catherine R. Paul. Catherine R. Paul came to the house with her daughter in 1892, and remained there until the testator's death, and until the present time. The testator, however, had lived in the house for some years before 1892, and continued to live there until the time of his death. In the opinion of the court, the defendants have not made out such a title as would justify or support a verdict in their favor. Consequently I instruct you to render a verdict for the plaintiff. The plaintiff is further entitled to recover mesne profits during the time that this defendant occupied the premises after the death of Mr. Landes. The defendant's real estate expert testified that the value of the property was \$25 a month, and the plaintiff is willing to accept that as the correct amount. Consequently you will render a verdict for the plaintiff and assess mesne profits at the rate of \$25 a month. Maud R. Paul is not to be considered as having been in possession of the premises, as she was simply there with her mother. You will render a verdict in favor of Maud R. Paul, the defendant, and against the other defendant, Catherine R. Paul."

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

Isaac Hassler and Edward F. Doehne, for appellants. Charles Hunsicker, George T. Hunsicker, and Joseph W. Hunsicker, for appellee.

PER CURIAM. All that appellants' evidence tended to show was a parol gift of land, *prima facie* ineffective under the statute, and not within any of the exceptions, as there never was any possession in the donee. The holder of the legal title lived in the house, paid the taxes, and, so far as the evidence showed, was in actual, as well as legal, possession.

The opinions of the neighbors as to who appeared to be the head of the house were irrelevant gossip, properly excluded.

The disclaimer of title by Maud R. Paul, the other defendant, should have been admitted of record, and a verdict in favor of the plaintiff directed against her. But the error in that regard did no harm of which appellants can complain.

Judgment affirmed.

(79 Conn. 714)

STATE v. LEVINE.

(Supreme Court of Errors of Connecticut. May 14, 1907.)

1. LARCENY—PROPERTY LOST.

Where the finder of a bank check handed the same to defendant, inquiring whether he knew the owner, and defendant, to induce the finder to leave the check with him that he might convert it to his own use, falsely represented that he expected the owner to call at his store, and that he would give it to him, and, upon its being left, converted it to his own use, he was guilty of larceny.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Larceny, §§ 39, 42, 43.]

2. SAME—CUSTODY BY SERVANT OR AGENT.

Where a person, though he accepted in good faith the custody of a lost bank check for delivery to its owner, subsequently appropriated it to his own use with felonious intent, he was guilty of larceny.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Larceny, §§ 39, 42, 43.]

Appeal from Superior Court, New London County; Milton A. Shumway, Judge.

Michael Levine was convicted of larceny, and he appeals. Affirmed.

William H. Shields and John H. Barnes, for appellants. Hadlai A. Hull, for the State.

BALDWIN, C. J. In was undisputed on the trial of this case that the check in question, which was drawn on a New York bank and bore the indorsement of the name of the payee, one Skawinski, was received by the defendant at a store which he kept in Colchester, from one Rosen. The state offered evidence tending to prove that the check had been lost in the course of its transmission by mail to Skawinski; that it had come into the possession of a Mrs. Train, who had put it in Rosen's hands, with a request that he find the owner; that Rosen handed it to the defendant, asking if he knew the owner, whereupon the defendant handed it to his daughter, who told him the name of the payee; that the defendant then made to Rosen, in the presence of two witnesses, Sush and a young woman, the false, fraudulent representation that he expected the payee to call at his store that day, and would then give it to him; that Rosen, in reliance on this statement, left the check with the defendant and his daughter, who placed it in the money drawer of the store; and that afterwards the defendant deposited it to his own credit in a bank in Norwich, and collected and converted it to his own use, well knowing that he had no right to it. The defendant offered evidence tending to prove that Rosen asked him to cash the check; that he consented, paying him part in cash and Rosen buying goods to the amount of the balance; and that Sush and the young woman were not present at the time.

The defendant requested the court to tell the jury that, to warrant a conviction, they must find that at the time he accepted the check he formed the intent to appropriate it to his own use. Instead of this, the court in-

structed them that if the defendant knew when he took the check, or knew soon after he took it, that it belonged to Skawinski, and then converted it to his own use or took the proceeds of it, he was guilty of larceny. They were also charged that while ordinarily, to constitute larceny, a felonious intent to convert the thing taken to the taker's use, without the owner's consent, must exist at the time of the taking, for the purpose of the case on trial, should they find the facts to be as claimed by the state, the rule of law pertaining to lost property applied, namely, that although the act by which the finder assumes control of it may not be a trespass, and he may pick it up with no intent to steal it, yet that if such an intent be formed later, and after the property actually came into his possession, on his appropriating it to his own use by assuming actual dominion over it, knowing or having reasonable means of knowing the owner, and meaning to deprive him of his property, the crime of larceny is committed. The jury having returned, after a consultation of an hour or two with a request for further information as to what constituted larceny and theft, the court, after instructing them that these terms were synonymous, gave this additional charge: "It seems to me the only question is whether you believe the story which Rosen and Sush have told you, which was that they informed Levine that that was a lost check, that Levine said he knew to whom it belonged, and that the owner was to be there that day, and that he would give it to him. If you believe that story, why, it seems to me, you should convict the accused; but, if you believe the story that the accused tells, that he, Rosen, approached him and asked him to cash the check, and Levine said 'No, I haven't the money, take it into the store and my wife or daughter will cash it for you'—if, under those circumstances he did take the check and deposit it to his own account, taking it and not knowing that it was lost or that Rosen had not any title to it, and if he did not know anything about how Rosen came by the check (as in its form it was negotiable, transferable by delivery, it did not require any further indorsement, in law, to pass title), if he did not know it was a lost check, simply told Rosen to go in and get the money, he had a right to deposit the check in his own bank account, and, even if he did afterwards learn that it was stolen or was a lost check, perhaps he might have been liable to refund the money, but he would not be liable for theft. * * * If Levine simply cashed that check for Rosen, I do not think he ought to be convicted for theft, but if he took the check knowing that it was lost, informing himself who the owner was, and he knew that he had no title to it, and afterwards appropriated it to his own use, he is guilty of theft."

The evidence offered by the state tended to prove that Rosen handed the check to Levine, inquiring whether he knew the owner, that

Levine passed it over to his daughter, and that she told Levine the name of the payee, after which he made a fraudulent representation which caused Rosen to leave the check in her hands. If these were the facts, the possession remained in Rosen until after the fraudulent representation was made. He handed it to Levine to look at. Levine handed it to his daughter, that she might look at it. It was from her that Levine learned what was the name of the person in whose favor it was drawn. It was by a fraudulent representation which he then made to Rosen that the latter was induced to leave it in her hands.

It is plain that Levine committed no trespass when he first took the check from Rosen. When he passed it over to his daughter, it was presumably for the legitimate purpose of ascertaining who the owner was. If the jury found that subsequently, upon receiving information as to this, he made a false and fraudulent representation to induce Rosen to leave the check at the store, and that, having been thereupon so left, it was converted by Levine to his own use, he was guilty of larceny. He had at first the bare, temporary, and lawful custody of the check for a certain purpose. This purpose fulfilled, his fraudulent representation resulted in its coming into his possession as the subagent of Mrs. Train to deliver it to Skawinski. If he accepted this agency and the accompanying possession of the check with the felonious intent to appropriate it or its proceeds to his own use, the act of acceptance constituted a taking, and the first taking, of the check from the constructive possession of the owner. It remained in Skawinski's constructive possession while in the custody of Mrs. Train. *Ransom v. State*, 22 Conn. 153, 158. No change of this possession could be wrought by her handing it to Rosen, nor by his handing it to the defendant, nor by the defendant's handing it to his daughter; each of these acts being in strict subordination to the title of the owner. The wrong to Skawinski would date from the fraudulent acquisition by Levine of the custody of the check for delivery to the rightful owner, with the secret intent to appropriate it to his own use. But larceny would have been committed, also, had he accepted the custody of the check for delivery to Skawinski, in good faith, and subsequently appropriated it to his own use with felonious intent. His custody of the check as an agent for its delivery to Skawinski would have left it in law still in the latter's possession, and that possession would have been first invaded by the wrongful appropriation to his personal benefit. Whenever that was made, the check would have first been taken and carried away. *Williams v. State*, 165 Ind. 472, 75 N. E. 875, 2 L. R. A. (N. S.) 248; *State v. Anderson*, 25 Minn. 68, 33 Am. Rep. 455; *People v. Call*, 1 Denio (N. Y.) 120, 43 Am. Dec. 655. So, in the case of a felonious conversion of goods by a servant to whom

they have been intrusted, larceny may be committed, although the intention to convert them was not conceived until after they had come into his keeping. *State v. Fairclough*, 29 Conn. 47, 49, 76 Am. Dec. 590. His custody remains that of his master until he assumes an antagonistic and criminal position by the act of wrongful appropriation, and thus for the first time takes the goods away from what in law has been their owner's possession. The charge of the trial court, taken as a whole, correctly stated the rules of law on the points above considered, so far as was necessary for the proper disposition of the cause. It would have served no useful purpose to bring to the attention of the jury the technical distinctions that might be raised between a bare custody of goods, and their possession, or between actual possession and constructive possession. The vital question was whether the transaction between Rosen and Levine was as Rosen stated it or as Levine stated it; and this was plainly put before the jury in terms which they could not fail to comprehend.

The defendant contends that the positions on which our judgment is founded are inconsistent with those taken in the cases above cited of *Ransom v. State*, 22 Conn. 153, and *State v. Fairclough*, 29 Conn. 47, 76 Am. Dec. 590. In the former we held that the charge of the trial court was erroneous because it withdrew from the jury (page 161 of 22 Conn.) the question on which the guilt of the accused depended, namely, whether the lost pocketbook, which he found on the highway, was originally taken by him with a felonious intention, and allowed them to find him guilty, although he first took it honestly, intending to return it to the owner, but subsequently changed his mind, and resolved not to restore it, but to convert it to his own use. In the cause now before us the taking by the defendant which the state relied on as felonious was not his original taking of the lost check into his hands. That, it was conceded, was a lawful and innocent act. The felonious intent, if any, came later, when, having been informed of the name of the payee, and thus, having notice of a fact which might naturally lead to the discovery of the owner, he changed his attitude in such a way as to amount to a new taking, resolved to withhold it from him, and appropriated it to his own use. In *State v. Fairclough* a conviction for larceny was upheld where the jury were told that if the defendants received a package of goods upon an agreement to transport it to a neighboring town and there deliver it to the owner, and on the way broke the package with felonious intent and converted the contents in whole or part, they might be found guilty. We observed that, if regarded as servants of the owner, they would be plainly chargeable with larceny, under such circumstances; and that, if regarded as bailees, the wrongful breaking of the package and abstraction of the contents would terminate

the bailment, divest them of the special property in the goods incident to the relation of bailee, and thus leave them in no better situation than if they had been originally servants. The only substantial distinction in law between servants and agents is that the main function of the agent is to alter his principal's relations to third persons, while that if the servant is to execute his master's orders. "An agent represents his principal in an act intended or calculated to result in the creation of a voluntary primary obligation or undertaking. A servant represents his master in the performance of an operative or mechanical act of service, not resulting in the creation of a voluntary primary obligation, but which may result, intentionally or inadvertently, in the breach of an existing one." *Huffcutt on Agency*, § 4. An agent, in other words, is to perform acts primarily intended or adapted to cause a change in the legal relations of third persons to his principal. A servant is to perform acts not primarily intended or adapted to cause a change in the legal relations of third persons to his master. The agent creates new relations; the servant acts upon existing relations. *Id.* § 6. In the case at bar A. (that is, Mrs. Train, or her agent, Rosen), having in his hands goods of B., intrusts them to C. (the defendant) to deliver to B. C. is not thus empowered to alter A.'s relation to B. or to anybody else. He is simply to perform a particular service, which A. owes to B. He is therefore the servant of A. But whether the defendant in the present case be called servant or agent, with respect to the relations assumed by him to Rosen or through Rosen to the owner of the check, can have no important bearing on the consequence of his repudiation of the duties which those relations involved. In neither case would he have any special property in the check. In each his possession of it, so long, and so long only as it was held as agent or servant, would be the possession of its owner.

There is no error. The other Judges concurred.

(79 Conn. 700)

RUSSELL ELECTRIC CO. v. BASSETT
et al.

(Supreme Court of Errors of Connecticut. May 14, 1907.)

1. BILLS AND NOTES—AMOUNT OF RECOVERY—DEDUCTIONS.

A person was hired as manager for one year by a corporation. Afterwards the board of directors rescinded the contract, and one of the members of the corporation gave him a note and mortgage for his year's salary; he agreeing to hold himself ready to work for the corporation at any time called for during the year. He was not called upon to resume his services, but earned \$700 in other employment during the year. In an action to foreclose the mortgage, *held*, that the mortgagor had no right to deduct the \$700 from the amount of the note.

2. SAME—CONSIDERATION.

A promise of a person not to secure his claim by suit and attachment as he had intend-

ed, nor to press for interest on the note until the end of the year, and, if requested, to assist the payor to pay interest on a mortgage, and to hold himself ready to perform services for the payor during a stated period, is a sufficient consideration for a note for the amount of his salary during such period, though he was not called upon to perform any services.

[*Ed. Note.*—For cases in point, see *Cent. Dig.* vol. 7, *Bills and Notes*, § 166.]

3. APPEAL—REVIEW—QUESTIONS OF FACT.

The conclusions of the trial court as to the credit of witnesses and the weight of conflicting evidence cannot be reviewed on appeal.

[*Ed. Note.*—For cases in point, see *Cent. Dig.* vol. 3, *Appeal and Error*, §§ 3955-3969.]

Appeal from Superior Court, New Haven County; John M. Thayer, Judge.

Action by the Russell Electric Company against Mary S. Bassett and others. From a judgment for plaintiff, defendants appeal. Affirmed.

The complaint alleges that the defendant Mary S. Bassett was on November 19, 1904, indebted to one Charles B. Russell in the sum of \$2,000, as evidenced by her promissory note of that date, payable to said Russell, or order, one year from date, with interest at 6 per cent. payable semiannually, and on the same day, to secure said note, mortgaged to said Russell a piece of land in the town of Derby; that subsequent to November 19, 1905, said note and mortgage were duly assigned and quitclaimed to the plaintiff, and that said note is due and unpaid and is still owned by the plaintiff, who is the bona fide owner and holder thereof; that the defendant Lillian M. Bassett claims to have an interest in said property. The answer admits the execution and delivery of the note and mortgage, and alleges that they were executed and delivered to said Russell on account of his agreement to withhold the issue of a writ of attachment in a threatened suit against the Bassett Bolt Company, a corporation, which threatened suit was based upon a pretended claim of said Russell against said corporation; that said pretended claim was invalid and illegal, and that said corporation was not indebted to said Russell, as he well knew, and that said Russell fraudulently concealed from Mary S. Bassett the facts concerning said pretended claim; that there was never any consideration for said note and mortgage or the payment thereof by Mary S. Bassett, except as aforesaid. The reply denies these allegations of the answer. The court found the issues thus raised for the plaintiff, and found all the allegations in the complaint to be true, and that \$2,187.11 is due from Mary S. Bassett to the plaintiff on the mortgage debt, and rendered judgment for foreclosure.

The facts found by the trial court, and upon which it based the conclusion that the note and mortgage were given upon a valid consideration and were not obtained by fraud, are in substance these: Prior to the year 1904 the Bassett Bolt Works were owned and operated by one D. M. Bassett, the hus-

band of the defendant Mary S. Bassett and the father of the defendant Lillian M. Bassett. D. M. Bassett died in the spring of 1904, and just prior to his death he organized the Bassett Bolt Company, a corporation. He turned over to the corporation the assets of the bolt works theretofore operated by him, and transferred to his said wife and daughter 498 of the 500 shares into which the capital stock was divided. After his death, one J. Gibb Smith held the remaining two shares. In the summer of 1904 Mrs. Bassett persuaded Charles B. Russell, a mechanical engineer then employed in Ohio, to give up his business there and come to Derby and manage said bolt works corporation and its business. The board of directors of said corporation, at a regular meeting, voted to employ said Russell as general manager for one year beginning September 1, 1904, at a salary of \$2,000, he to have power to sign checks for and to transact the necessary business of the corporation. At this time Mrs. Bassett, her daughter Lillian, and J. Gibb Smith constituted the board of directors. Shortly after Russell's employment the administrator of D. M. Bassett's estate, claiming to hold the corporation's assets for the payment of the debts of said Bassett, stopped the operation of the corporation by attachment in favor of the estate. Thereafter, in October, 1904, the corporation rescinded its vote employing Russell as manager. On the 15th of the following November he gave notice to the corporation that he should claim his salary. At the suggestion of the counsel for the corporation, who was also counsel for Mrs. Bassett and her daughter, Russell, with his counsel, met Mrs. Bassett and her daughter in the office of their counsel on November 19th. At this conference the situation was fully explained by counsel for the defendants and for Russell. It was thereupon agreed by Mrs. Bassett to give the note in question, secured by said mortgage, said Russell agreeing not to secure his claim upon the corporation by suit and attachment, as he had proposed, not to press for payment of interest on the note until the end of the year, and, if requested, to assist Mrs. Bassett to pay interest on a prior mortgage on the same property (which he did), and to hold himself ready to work for the corporation at any time called for within the year. He was not called upon to resume his services for the corporation, although it resumed operation and the defendants retained control of it. He earned during the year \$700 in other employment.

Wayne M. Musgrave and William T. Minor, for appellant Mary S. Bassett. William H. Cable, for appellee.

HAMERSLEY, J. (after stating the facts). Upon the trial the defendants claimed that, notwithstanding there was a valuable consideration for the note and mortgage given by

Mrs. Bassett to Russell, yet the plaintiff could not recover of Mrs. Bassett the full amount of the note, but only such portion thereof as would remain after deducting the \$700 which it appeared that Russell had earned in other employment. The trial court did not err in overruling this claim. Upon the facts as found by the court the note in suit evidenced a direct indebtedness from Mrs. Bassett to Russell. This indebtedness was created on November 19, 1904, by a direct contract between Mrs. Bassett and Russell, based upon a valuable consideration and entered into by the parties under advice of counsel and with full knowledge of the facts. All the agreements of Russell, which constituted the consideration on his part, have been fully performed. There was no promise on his part to earn money in other employment, or to credit Mrs. Bassett, upon her note to him, the amount of any money he might so earn. It is well settled that in contracts of this kind, where the consideration for a promise is in part an act done by the promisee at request of the promisor by which the former sustains any loss, trouble, or inconvenience and of a benefit to him who makes the promise, courts of law or of equity will not in the absence of fraud interfere with the valuation which the parties themselves placed upon the considerations that induced the contract. *Sage v. Wilcox*, 6 Conn. 81, 83; *Clark v. Sigourney*, 17 Conn. 511, 517; *Clark's Appeal*, 57 Conn. 565, 572, 19 Atl. 332; *Mascolo v. Montesanto*, 61 Conn. 50, 54, 23 Atl. 714, 29 Am. St. Rep. 170. The plaintiff, having proved the execution and delivery of the note and mortgage by Mrs. Bassett to Russell and the assignment of the note and mortgage to the plaintiff, the value of the property mortgaged, the amount due upon the note, and that the same had not been paid, rested his case. The defendants then moved that the complaint be dismissed on the ground that no consideration for the note had been proved. The court properly overruled this motion. The other question of law presented by the appeal, namely, that the court erred in deciding upon the facts appearing in the finding that there was a sufficient consideration for the note and mortgage in question to support the action, is disposed of by the cases above cited.

It is patent from the record and the irrelevant reasons for appeal assigned by counsel that the real grievance of the defendant is that the trial court in passing upon the credit of witnesses and the weight of conflicting evidence reached conclusions of fact different from those the counsel for the defendant think the court ought to have reached. This court cannot retry upon the testimony facts thus settled by the trial court. *Hourigan v. Norwich*, 77 Conn. 358, 369, 59 Atl. 487.

There is no error in the judgment of the superior court. The other Judges concurred.

(102 Me. 240)

WHITE v. FITTS.

(Supreme Judicial Court of Maine. Dec. 15, 1906.)

1. FRAUDS, STATUTE OF—AGREEMENTS NOT TO BE PERFORMED WITHIN YEAR—INTENT OF PARTIES.

When upon the reasonable construction of the terms of an oral contract for the performance of work or labor, which does not state the time within which such contract is to be performed, it appears to have been understood by the parties thereto that the contract was not to be performed within the year, such a contract comes within the statute of frauds.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Frauds, Statute of, §§ 72, 73.]

2. SAME.

An oral contract for the performance of work or labor, which does not specify the time within which such contract is to be performed, must be interpreted in the light of its subject-matter and the circumstances surrounding it, and, if the manifest intent and understanding of the parties thereto are that it was not to be performed within the year, such contract falls within the statute of frauds.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Frauds, Statute of, §§ 72, 73.]

3. SAME.

The plaintiff and the defendant made an oral contract, wherein the plaintiff was to cut and saw into suitable lengths all the stave wood on a certain tract of land belonging to the defendant. The contract itself did not specify the time within which this work was to be performed by the plaintiff. The tract of land on which the plaintiff was to operate contained 350 acres, but about 100 acres of the same had been cut over previous to the making of the contract. The lowest estimate of the amount of stave wood on this tract of land was 2,400 cords. The capacity of the defendant's mill where this stave wood was to be manufactured was 3¼ cords per day, and the plaintiff was to cut this stave wood only as fast as the defendant needed it for use in his mill. After operating a few weeks, the defendant refused to allow the plaintiff to operate further. Thereupon the plaintiff brought suit against the defendant to recover damages for breach of the contract. *Held*, that it was not the intention of the parties that this contract should be performed within a year from the making thereof, and that the same falls within the statute of frauds.

4. SAME—OPERATION AND EFFECT—DEATH OF PARTY.

Also, *held*, that the death of the plaintiff within the year would not have taken the contract out of the operation of the statute of frauds, for the reason that in such event the contract would not have been fully performed.

(Official.)

Exceptions from Supreme Judicial Court, Penobscot County.

Action by Robert H. White against Frank Fitts. Verdict for plaintiff, and defendant moves for a new trial and excepts to the rulings of the court. Exceptions sustained.

Action to recover damages for an alleged breach, on the part of the defendant, of an oral contract wherein the plaintiff was to cut and saw into suitable lengths all of the stave wood on a certain lot of land belonging to the defendant. The alleged breach was the refusal on the part of the defendant to allow the plaintiff to continue to cut and saw

said stave wood after he had been operating a few weeks. Plea, the general issue, with a brief statement alleging that the agreement was one which was not to be performed within one year from the making thereof, and that there was no memorandum or note of the agreement in writing and signed by the party to be charged therewith or by any person thereunto lawfully authorized.

Tried at the January term, 1906, of the Supreme Judicial Court, Penobscot county. At the conclusion of the evidence, the defendant requested the presiding justice to direct the jury to bring in a verdict for the defendant, on the ground that the contract was within the statute of frauds, and that the action could not be maintained. The presiding justice refused to direct such verdict, but ruled, pro forma, to give progress to the case, that the action was maintainable upon oral evidence. The verdict was for the plaintiff for \$500. The defendant then filed a general motion for a new trial. The defendant also excepted to the aforesaid ruling of the presiding justice.

The case appears in the opinion.

Argued before WHITEHOUSE, SAVAGE, POWERS, PEABODY, and SPEAR, JJ.

Martin & Cook, for plaintiff. Charles H. Bartlett, for defendant.

WHITEHOUSE, J. This is an action to recover damages for the breach of an oral contract to cut and saw into logs the stave wood standing on a lot of land owned by the defendant. The breach alleged is the refusal on the part of the defendant to allow the plaintiff to complete the work after he had entered upon the execution of the contract and cut a part of the wood.

In the brief statement of defense, it is alleged: First, that the agreement between the plaintiff and defendant set forth in the plaintiff's declaration was an oral one, which was not to be performed within one year from the making thereof, and that there was no memorandum of the agreement in writing, and signed by the party to be charged therewith; and, second, that the defendant was justified in discharging the plaintiff from the work and terminating the contract by reason of the wasteful and unworkmanlike manner in which the trees were cut and felled and sawed into logs by the plaintiff.

After the introduction of the testimony, the defendant requested the presiding judge to direct a verdict for the defendant, on the ground that the undisputed evidence clearly showed that the contract was within the statute of frauds, because not in writing, and not to be performed within one year, as set forth in the defendant's brief statement, and that the action was therefore not maintainable. The presiding judge declined to order a verdict for the defendant as requested, and ruled, pro forma, that the action was maintainable upon oral evidence.

The jury rendered a verdict for the plain-

tiff for \$500, and the case comes to the law court on exceptions to this ruling of the presiding judge, and also on a motion to set aside the verdict as against the law and the evidence.

In his declaration, the plaintiff avers that "in consideration that the plaintiff promised the defendant to cut timber, suitable for staves, on a certain tract of land of about 380 acres, and saw the same into logs, etc., as fast as the defendant should need the same for use in his mill, the defendant promised the plaintiff to pay him \$1 per cord, payable weekly, for cutting all of said timber suitable for staves on said tract, etc.; said timber to be cut and sawed, as aforesaid, as fast as the defendant should need the same for use in his said mill." In the brief statement of defense, it is alleged that the plaintiff and defendant agreed that the plaintiff should enter on the land of the defendant, consisting of 350 acres, and there cut timber suitable for staves, etc., "at the rate of \$1 per cord, as fast as the defendant should need the same for use in his mill situate on the land."

Thus it will be perceived that, according to the pleadings of the parties, there was no controversy in regard to the terms of the contract, and the evidence is in entire accord with these allegations in the pleadings. It was undisputed that the plaintiff was to cut down and saw into the desired lengths all of the standing timber on the 350 acres of defendant's timber land, as fast as the defendant needed it for use in his mill. There were no specifications and no further stipulations in regard to the time within which the work was to be completed and the contract performed.

The provision of the statute for the prevention of frauds and perjuries here involved is found in chapter 118 of the Revised Statutes (section 1), as follows: "No action shall be maintained * * * (5) upon any agreement that is not to be performed within one year from the making thereof * * * unless the promise, contract or agreement on which such action is brought, or some memorandum or note thereof, is in writing and signed by the party to be charged therewith," etc.

It is contended in behalf of the defendant that, according to the principles of law governing the construction and application of this clause of the statute: (1) The contract must be interpreted in the light of its subject-matter and the circumstances surrounding it, and, if the manifest intent and understanding of the parties thereto are that it was not to be performed within the year, it falls within this clause of the statute of frauds. (2) Any contingency terminating a contract within the one-year clause of the statute of frauds must leave the contract fully and completely performed in order to take it out of the operation of this clause of the statute.

In *Brown on the Statute of Frauds* (5th Ed.) §§ 273, 279, 281, the author says:

"Postponing the questions, what is the performance of such an agreement, and what the meaning of the limitation as to time, we are first to ascertain the force of the words 'to be performed.' And on these words much reasoning has been expended. The result seems to be that the statute does not mean to include an agreement which is simply not likely to be performed, nor yet one which is simply not expected to be performed, within the space of a year from the making; but that it means to include any agreement which, by a fair and reasonable interpretation of the terms used by the parties, and in view of all the circumstances existing at the time, does not admit of performance according to its language and intention, within a year from the time of its making."

"The statute, finding them perfectly free to make a certain contract, without a writing, provides simply that if that contract does by its terms, expressed, or, from the situation of the parties, reasonably implied, require more than a year for its performance, they must put it in writing. In other words, it must affirmatively appear from the contract itself, and all the circumstances that enter into the interpretation of it, that it cannot in law be performed within the space of a year from the making."

And, in section 281: "Where the manifest intent and understanding of the parties, as gathered from the words used and the circumstances existing at the time, are that the contract shall not be executed within the year, the mere fact that it is possible that the thing to be done may be done within the year, will not prevent the statute from applying. * * * Such an accomplishment must be an execution of the contract according to the understanding of the parties."

In 1 Chitty on Cont. (11th Ed.) p. 99, the principle is thus stated: "This enactment applies to all contracts, the complete performance whereof is of necessity to extend beyond the space of a year; the rule being that, where the agreement distinctly shows, upon the face of it, that the parties contemplated its performance to extend over a longer period than one year, the case is within the statute. Accordingly, the provisions of the statute render a verbal contract void, if it appears to have been the understanding of the parties at the time that it was not to be completed within a year, although it might be, and was, in fact, in part performed within that period." See, also, A. & E. Encyc. of Law, vol. 29, p. 94, and Cyc. vol. 20, p. 198.

In the English case of *Boydell v. Drummond*, 11 East, 142, the plaintiff proposed to publish a series of illustrated scenes from Shakespeare in eighteen numbers; one number at least annually. After receiving two numbers, the defendant refused to take any more. Although there was no express agree-

ment that the contract should not be performed within a year, the court held that it was "impossible to say that the parties contemplated that the work was to be performed within a year"; but that, on the contrary, "the whole scope of the undertaking shows that it was not to be performed within a year, and was therefore within the statute of frauds." That decision has been confirmed by both English and American courts in numerous cases. *Hill v. Hooper*, 1 Gray (Mass.) 131.

In *Peters v. Westbrough*, 19 Pick. (Mass.) 364, 31 Am. Dec. 142, the court say: "It must have been expressly stipulated by the parties, or it must appear to have been so understood by them, that the agreement was not to be performed within a year. But who can doubt what the express and specific understanding of the parties in the case at bar was? And that it was not to be performed within one year? Or, at any rate, that it appears to have been so understood by them?"

In *Doyle v. Dixon*, 97 Mass. 206, 93 Am. Dec. 80, it was held that an agreement not to go into business in a certain place for five years was not within the statute, as the death of the promisor would complete the performance of the contract; but the court, after comparing the case with *Peters v. Westbrough*, 19 Pick. (Mass.) 364, 31 Am. Dec. 142, says: "On the other hand, if the agreement cannot be completely performed within a year, the fact that it may be terminated, or further performance excused or rendered impossible, by the death of the promisee or of another person within a year, is not sufficient to take it out of the statute." See, also, *Carnig v. Carr*, 167 Mass. 544, 46 N. E. 117, 35 L. R. A. 512, 57 Am. St. Rep. 488; *De Montague v. Bacharach*, 187 Mass. 128, 72 N. E. 938; *Warner v. Texas & Pac. Ry.*, 164 U. S. 418, 17 Sup. Ct. 147, 41 L. Ed. 495; *Metropolitan Trust Co. v. Topeka Water Co.* (C. C.) 132 Fed. 702.

But it is needless here to attempt a separate examination and analysis of each of the great number and variety of decisions upon this subject, in view of the fact that the correct principle has been deduced from the authorities and the question satisfactorily determined by the decisions of our own court.

In *Herrin v. Butters*, 20 Me. 119, which has been extensively cited, there was an agreement to clear and seed a piece of land in three years, and it was contended that the defendant might have cleared up the land and seeded it down in one year, and thereby have performed his contract; but it was held that, while this was within the range of possibility, the contract would not be taken out of the operation of the statute of frauds unless such a performance of it within a year was in accordance with the understanding and intentions of the parties. In the opinion by Whitman, C. J., it is said: "We must look to the contract itself, and see what he was bound to do; and what, according to the

terms of the contract, it was the understanding that he should do. Was it the understanding and intention of the parties that the contract might be performed within one year? If not, the case is clearly with the defendant. But the contract is an entirety, and all parts of it must be taken into view together, in order to a perfect understanding of its extent and meaning. We must not only look at what the defendant had undertaken to do, but also to the consideration inducing him to enter into the agreement. The one is as necessary a part of the contract as the other; and if either, in a contract wholly executory, were not to be performed in one year, it would be within the statute of frauds. Here the defendant was not to avail himself of the consideration for his engagement, except by a receipt of the annual profits of the land, as they might accrue, for the term of three years. But, whether this be so or not, it is impossible to doubt that the parties to this contract perfectly well understood and contemplated that it was to extend into the third year for its performance, both on the part of the plaintiff and defendant. Its terms most clearly indicate as much, and by them it must be interpreted."

In *Hearne v. Chadbourne*, 65 Me. 302, the court say: "It is true that, in the absence of any words or acts of the parties indicating the contrary, an agreement to work for a year means to work for that time commencing forthwith. The referee reports no express stipulation in the contract to overcome this presumption; but he sets out the acts of the parties showing the contemporary interpretation which both put upon it, and this places the case directly within the doctrine laid down in *Herrin v. Butters*, 20 Me. 119, *Peters v. Westbrough*, 19 Pick. 364, 31 Am. Dec. 142, and *Boydell v. Drummond*, 11 East, 142, where the old idea that it must be expressly and specifically agreed that the contract is not to be performed within the year, as expressed in *Moore v. Fox*, 10 Johns. 244, 6 Am. Dec. 338, and *Fenton v. Embler*, 3 Burr, 1278, is so far modified as to include cases where such appears to have been the understanding of the parties."

In *Bernier v. Cabot Mfg. Co.* (1880) 71 Me. 506, 36 Am. Rep. 343, it was held that an oral contract, wherein a laborer agreed not to leave the services of his employer for two years, nor in summer, nor without two weeks' notice, is within the statute. The court says: "It was oral, and was within the statute of frauds. It could not in any contingency have been fully performed within one year. The death of the plaintiff within the year, or some casualty, might have excused performance, but could not have fulfilled the contract."

In *Farwell v. Tillson*, 76 Me. 227, the defendant had a government contract to furnish stone for the custom house at St. Louis, and made a verbal contract with plaintiff for the transportation of the stone from

Maine to Baltimore. The government contract required defendant to furnish the stone "at such times as may be required" by the government. No time was specified. The court held that the circumstances showed that the parties did not intend or understand that the contract was to be performed within one year, and hence the contract was within the statute of frauds.

The presiding judge instructed the jury, *inter alia*, as follows: " * * * Was it within the understanding and intention of the two contracting parties, as declared by the contract, that it might be performed within a year? * * * The subject-matter of a contract might be a thing which could not possibly be done within a year. A consideration of the subject-matter would show just as clearly that it was not to be performed within a year, as if there was an express agreement in the terms of the contract that it was not to be performed within a year. So, also, a consideration of the circumstances and subject-matter might show that performance of it, within a year, would require such extraordinary methods, such extraordinary appliances or resources, as could not by fair construction be regarded as within the intention of the parties, at the time when the contract was made; and the question is, considering the subject-matter, and the situation of the parties as known to each other, and reading the contract in the light which these give, whether, by fair construction, it was within the understanding and intention of the parties, as expressed in the contract, that it might be performed within a year, or not." These instructions were held to be correct.

In the opinion the court say:

"The meaning of the terms of a contract, it need not be said, is to be ascertained by interpreting them in the light of the subject-matter to which they relate. They may mean one thing when used in reference to one subject, or by parties in one situation, and another thing when used under other circumstances in regard to another subject, and the true construction in each instance will be that which applies the contract to the res about which the parties were dealing, and reproduces the intent which they themselves have expressed in it. A description of the nature and extent of the work stipulated to be done, in the absence of express provision on the subject, may be an indispensable element in determining whether the work was by the contract to be done in a year, or whether the contract was one not to be performed in that time. It may show performance impossible in that period, or so impracticable as to be plainly beyond the scope and intent of the agreement as expressed in the language used. The duty of the defendant to deliver the granite 'at such times and in such quantities as might from time to time be ordered,' as was said in the ruling, did not require of him immediate perform-

ance, upon demand, of the whole contract. Time must be allowed to execute the work, and the limitations upon the right of demand, which necessarily result from that fact, must apply."

"Notwithstanding dicta and some decisions, especially among the earlier cases, which tend to sustain the position assumed for the plaintiffs, we regard the rule of law as established in this state by the opinions in *Herrih v. Butters*, 20 Me. 119, and *Hearne v. Chadbourne*, 65 Me. 302, in conformity with the rulings which were made at the trial."

What was in the contemplation of the parties in the case at bar? What was understood by them as a matter of contract respecting the time within which the work of cutting all the stave wood on the 350 acres of timber land was to be completed? As already seen, it was not in the controversy that the plaintiff was to cut the whole lot, except that 100 acres which had already been cut over, and that it was to be cut only as fast as the defendant needed it for use in his mill. Before the agreement was concluded, the plaintiff went upon the lot and gave the defendant a "sample" of what he would do, by cutting for a week or more within a quarter of a mile from the mill. He was a contractor of 20 years' experience, and substantially all of that time he had been engaged in the business of cutting logs and wood. Not only had the defendant explained to him in Massachusetts the nature and extent of the work, and how fast he desired to have it cut, but, before closing the trade, the plaintiff entered upon the work, noted the situation and circumstances and the capacity of the mill, and as a practical man must have made some estimate of the time required to complete the work. He admits in his testimony that he had "made up his mind to live here for a year or two, perhaps more." In answer to an inquiry by the court, he says he "could finish the lot in a year and a half, if it was necessary, or a year, for that matter." If he had been permitted by the defendant to strip the lot, in violation of the agreement to cut only as fast as the wood was needed for use at the mill, it is probably true that he could have finished the work in a single year by employing a sufficient crew; but the contract did not allow him to do this, and that he so understood it is evident from his conduct in suspending operations during July and August, at the request of the defendant, and resuming the work September 1st, when the defendant was ready to start the mill.

Four experienced lumbermen, two of them entirely disinterested witnesses, testify that with a mill of the capacity of the defendant's, operated as it ordinarily was by the defendant, at least three years, and probably four years, would be required to complete the work; and this testimony is confirmed by a mathematical calculation based upon undis-

puted facts. The capacity of the mill was $3\frac{1}{2}$ cords per day. Of the 350 acres of timber land, about 100 acres had been cut over before the plaintiff went there. The plaintiff estimated that there were 35 cords to the acre where he began to cut, and, at this rate, 250 acres would yield more than 8,000 cords. But the minimum of all the estimates was 2,400 cords, and upon this basis it would require between three and four years for this mill to saw it, as it was ordinarily operated. During the time the plaintiff was cutting in 1904, it is not in controversy that he cut at the rate of less than 1,000 cords a year, and the plaintiff was satisfied with the progress of the work. Such was the practical interpretation placed upon the contract, during the execution of it, by the plaintiff himself.

Considering, then, the terms and subject-matter of the contract, the nature and extent of the work to be done, and the knowledge of the parties respecting the capacity of the mill, and all the circumstances governing the progress of the work, the conclusion is irresistible that it was not contemplated or understood by the parties that the contract was to be performed within one year from the making of it, and that no other reasonable inference can be drawn from the testimony.

Nor would the death of the plaintiff within the year have taken the contract out of the operation of the statute of frauds, for the reason that in such an event the contract would not have been fully performed.

It is, accordingly, the opinion of the court that the action is not maintainable upon the evidence, and that a verdict for the defendant should have been ordered by the court.

Exceptions sustained.

(102 Me. 287)

**MADUNKEUNK DAM & IMPROVEMENT
CO. v. F. E. ALLEN CLOTHING CO.**

(Supreme Judicial Court of Maine. Dec. 17, 1907.)

**1. LOGS AND LOGGING—TOLLS—ACTIONS TO
RECOVER—EVIDENCE—SCALE BOOKS.**

The scale bill of a surveyor agreed upon between the parties in a logging or log-driving operation, or similar transaction requiring a survey, is, in the absence of fraud, binding upon them, and the scale book is evidence of the scale.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Logs and Logging, §§ 24–26.]

2. WITNESSES—REFRESHING MEMORY.

When a surveyor agreed upon by the parties to scale logs employs an assistant to count and scale the logs under his direction, and the surveyor from time to time tests the scale made by his assistant, and the assistant has a book in which he keeps a daily record of the count and scale made by him and put down by him from time to time in the book, and the book is turned over to the surveyor and retained by him, and from it he makes up the final figures of the scale, such scale book, though kept and made up by the assistant, may be used by the surveyor to refresh his recollection of the scale, and the testimony of the surveyor so given is competent evidence as to the quantity of logs cut or driven, and, if not contradicted, is conclusive.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, §§ 874–892.]

3. LOGS AND LOGGING—TOLLS—CONTRACTS.

When a dam and improvement company is authorized to collect tolls on logs driven over its dams at a rate "not exceeding fifteen cents per thousand feet stumpage scale," and such company and the owner of the logs driven over such dams did not expressly agree upon a surveyor or scaler to determine the quantity of logs driven over such dams, it must be deemed that there was an implied contract that they would be bound by a scale made in accordance with the method customarily adopted by surveyors or scalers, and between landowners and operators, and recognized as the stumpage scale.

4. SAME—LIEN FOR TOLLS.

When by its charter a dam and improvement company is given a lien for tolls on logs driven down a stream which such company is authorized to improve "for the purpose of facilitating the driving of logs and other lumber down the same," the party whose interest is directly affected by such lien must be considered liable for such tolls.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Logs and Logging, § 87.]

**5. ASSIGNMENTS—RIGHTS AND LIABILITIES OF
ASSIGNEE.**

When a contract or permit for cutting, hauling, or driving logs has been assigned, the assignee becomes a party in interest, and his rights under the contract are subject to the conditions and burdens of the contract.

6. LOGS AND LOGGING—DRIVING—TOLLS.

When a dam and improvement company, authorized by its charter to collect tolls for logs and other lumber driven down a stream improved by it, undertakes to collect such tolls, it is mainly a question of fact whether or not the improvements made by the company have facilitated the driving of logs. If the improvements are of little value, and there is no substantial compliance with the terms of its charter, such company cannot maintain an action for the collection of tolls; but if the improvements are substantial, and facilitate the driving of logs, then they are sufficient to comply with the condition upon which toll may be demanded, although it might be possible for the owner or driver of the logs to drive the same at times without the aid of improvements.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Logs and Logging, § 36.]

(Official.)

Report from Supreme Judicial Court, Penobscot County.

Action by the Madunkeunk Dam & Improvement Company against F. E. Allen Clothing Company. Reported to the law court for determination. Judgment for plaintiff.

Assumpsit on account annexed brought by the plaintiff, a corporation organized under the provisions of chapter 315, p. 485, of the Private and Special Laws of 1903, against the defendant, also a corporation, to recover tolls on 2,000,000 feet of poplar and spruce logs at 15 cents per 1,000 feet.

Tried at the January term, 1906, of the Supreme Judicial Court, Penobscot county. At the conclusion of the evidence, the case was "reported to the law court for determination upon so much of the evidence as is legally admissible."

The case appears in the opinion.

Argued before WISWELL, C. J., and EMERY, WHITEHOUSE, SAVAGE, PEABODY, and SPEAR, JJ.

W. B. Peirce and B. L. Fletcher, for plaintiff. W. H. Powell and Martin & Cook, for defendant.

PEABODY, J. This was an action of assumpsit brought by the plaintiff, a corporation organized under the laws of Maine, against the defendant, also a Maine corporation, to recover on account annexed tolls on 2,000,000 feet of poplar and spruce logs at 15 cents per 1,000 feet, \$300.

The case is before this court on report. The organization of the plaintiff corporation under chapter 315, p. 485, of the Private Laws of Maine of 1903, and the rate of toll at 15 cents per 1,000 is admitted.

The defense put in issue three material propositions necessary for the plaintiff to establish in order to entitle it to recover under the act of its incorporation:

1. The quantity of logs which are the subject of the tolls must be proved by competent evidence. The defendant contends that no admissible evidence was offered on this point. By the act of incorporation, the plaintiff was "authorized to erect and maintain dams, sluices, and side dams on the Madunkeunk stream in the county of Penobscot and its tributaries, to remove rocks therefrom and to widen, deepen and otherwise improve said stream and its tributaries for the purpose of facilitating the driving of logs and other lumber down the same." Its charter conferred upon it also authority to demand and receive a toll upon all logs and other lumber which passed over or through its dams and other improvements, not to exceed 15 cents per 1,000 feet, stumpage scale, or when such logs or other lumber have not been scaled for stumpage, by the scale rendered at the place of destination, and gave it a lien thereon to be enforced by attachment, to continue for 90 days after the logs and lumber arrived at their destination. The logs specified in the writ were cut from land of O. S. Townsend, J. M. Pierce, owners of fourteen-sixteenths, and Engel and McNulty, owners of two-sixteenths. A stumpage scale was made for them by Joseph J. Porter, a scaler of lumber. The logs were hauled by E. W. Annis, who landed most of them on the ice, leaving a few only on the bank of the Madunkeunk stream. The scale was made there, and Francis M. Burr, the assistant of Porter, under his direction counted and scaled the logs, and Porter went there three different times and tested his scales. The assistant kept on shingles a record of the number of logs and the number of feet each log scaled for his superior to see, and he also had a book in which he kept his daily records, where they were put down from time to time. Mr. Porter retained the book, and from it he made up the final figures for his scale bills. He sent a scale bill so made to each of the landowners by whom he was employed to make the stumpage scale, and mailed one also to

the treasurer of the F. E. Allen Clothing Company, E. F. Gellison, Bangor, at his request. The returns he made show 990,720 feet of logs, and 1,850 cords scaled by the cord, reckoned at 2 cords to the 1,000 feet, a total of 1,815,720 feet of lumber. The scaler testifies that he had been a scaler of lumber about 18 years, and in scaling this lumber he followed the usual manner of himself and other scalers in scaling for stumpage.

The scale bill of a surveyor agreed upon between the parties in a logging, log-driving, or similar transaction requiring a survey is, in the absence of fraud, binding upon them (*Haynes v. Hayward*, 41 Me. 488; *Bailey v. Blanchard*, 62 Me. 168), and the survey book is evidence of the scale (*Whitman v. Freese*, 23 Me. 212; *Fornette et al. v. Carmichael*, 41 Wis. 200).

The scale book, though kept and made up by his assistant acting under his direction, inspected and retained by him, may be used by Mr. Porter to refresh his recollection of the stumpage scale, and his testimony so given is competent evidence as to the quantity of logs in question. If the plaintiff and the defendant did not expressly agree upon a scaler, as the act of incorporation bases the toll the corporation was authorized to collect on logs driven over its dams and improvements on the stumpage scale, it must be deemed that there was an implied contract that they should be bound by a scale made in accordance with the method customarily adopted by scalers and between landowners and operators and recognized as the stumpage scale. *Smith v. Kelley*, 43 Mich. 390, 5 N. W. 437; *Peterson v. Anderson*, 44 Mich. 441, 7 N. W. 56. The scale proved by the uncontradicted testimony of the surveyor must be regarded as proving the amount of toll to be paid by the defendant, if otherwise liable.

2. That the defendant was liable as the party in interest to pay the tolls on the logs. The defendant contends that Edward W. Annis should have been made the party defendant. As the charter gave the plaintiff a lien on logs, the party whose interest would be directly affected by such a lien must be considered liable for the tolls. The evidence shows that a contract for the stumpage of pine, fir, spruce, and cedar logs was made with the landowners and Edward W. Annis, on the 5th day of September, 1904, which was to be fulfilled on the part of Annis on or before the 1st day of June, 1905; the logs were "all to be landed in a suitable place and manner for scaling, so as to be easily counted and scaled by the scaler, who shall be appointed by the parties of the first part, and whose scales shall be final and binding between the parties hereto." Another contract for the sale and delivery of poplar logs was made on the 4th day of May, 1904, between Edward W. Annis and the Penobscot Mechanical Fiber Company; the logs were to

be delivered by Annis during the rafting season of 1905, and were to be measured by some competent surveyor when so delivered, to be appointed and paid by the company. Both these contracts were assigned to the defendant, the first October 1, 1904, and the second August 18, 1904. Whatever may have been the purpose of the assignments, the defendant became in fact the party in interest, and its rights under the contract are subject to their conditions and burdens. In the nature of the case, and by the obligations the assignee assumed, it was necessary to float the logs down the Madunkeunk stream, and, as it received the benefit of the facilities furnished by the plaintiff for floating the logs, it should be held liable for the tolls, as well as for other bills for driving the logs which it paid. *Johnson v. Cranage*, 45 Mich. 14, 7 N. W. 188; *Bohanan v. Pope*, 42 Me. 93. The evidence, direct and circumstantial, shows that this was the understanding of the defendant's managers. The treasurer requested the scale bill, directed the logging operations, furnished teams for hauling the logs in question, and communicated with the plaintiff in reference to the payment of the tolls, from which it clearly appeared that it did not deny that the defendant was the party in interest, but questioned the right of the plaintiff to receive toll on the logs.

This brings the discussion of the case to the remaining ground of defense.

3. That the improvements made by the plaintiff facilitated the driving of logs. This is mainly a question of fact to be determined by the nature and extent of the improvements. The only question of law involved has relation to the degree of perfection in the improvements necessary to give the plaintiff the right to exercise the franchise and to claim its benefits. If the improvements were of little value, there being no compliance with its charter, the plaintiff cannot maintain the action. *Improvement Co. v. Brown*, 77 Me. 41. But if they were substantial and facilitated the driving of logs, although it might have been possible for the owner or driver to float the logs at times without the aid of the improvements, they were sufficient to comply with the condition upon which toll may be demanded. *Genesee Park Improvement Co. v. Ives*, 144 Pa. 114, 28 Atl. 887, 13 L. R. A. 427. There is testimony somewhat negative in character which tends to show that there was little improvement in the facilities for floating logs down the Madunkeunk stream and its tributaries, by any work done by the plaintiff; but there is clearly a preponderance of the evidence proving that important improvements had been made by the plaintiff, in the removal of rocks, widening and deepening the stream, improving and erecting dams, and constructing and maintaining piers and dams, before the logs in question were floated down the stream. Accordingly, we find that the plain-

tiff has sustained the burden of proof upon these propositions by competent evidence.

Judgment for plaintiff for \$272.86 and interest from the date of the writ.

(102 Me. 251)

YOUNG v. CHANDLER.

(Supreme Judicial Court of Maine. Dec. 15, 1906.)

1. TRIAL—DIRECTION OF VERDICT.

At a jury trial the presiding justice is authorized to direct a verdict for either party when a contrary verdict could not be sustained by the evidence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 376-380.]

2. SAME.

Also, if a plaintiff's evidence, when taken to be true, is not sufficient to make out a prima facie case, the presiding justice may direct a verdict for the defendant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 381-389.]

3. SAME.

But, when different conclusions might be drawn from the evidence by different minds, then the evidence should be submitted to the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 338-341.]

4. FIXTURES — WHAT CONSTITUTES PART OF REALTY—ANNEXATION BY LICENSEE.

Where a structure is affixed to the premises of another by a temporary occupant thereof or by a licensee, it is deemed temporary in its purpose, and not part of the realty.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Fixtures, §§ 1-14.]

5. SAME—RIGHTS OF SUBSEQUENT PURCHASERS.

Annexations with the consent of the owner or mortgagee of the realty, made by a bare licensee, are presumed to be removable and to remain the property of the one annexing, in the absence of facts indicating a contrary intention, even against a subsequent purchaser without notice.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Fixtures, § 19.]

6. SAME—AGREEMENT OF PARTIES.

By agreement between the owner or mortgagee of the realty, personal property may retain its status after annexation, and such agreement or intention may be inferred by circumstances.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Fixtures, §§ 3, 32-41.]

7. SAME—FIXTURES AS BETWEEN LANDLORD AND TENANT.

As to what are fixtures, substantially the same rules prevail between grantor and grantee as between mortgagor and mortgagee, but different rules apply in relation to landlord and tenant from considerations of public policy and because of the temporary nature of the tenure.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Fixtures, §§ 22, 44-55.]

8. SAME.

In the case at bar the plaintiff purchased from James Fyles, Sr., a greenhouse with its contents, consisting of potted plants, and plants maturely grown, but not severed from the soil, and loam prepared for gardening purposes. The greenhouse had been removed by the vendor from its original location and placed on posts upon land belonging to his son, James G.

Fyles, with his consent, and had attached it to the barn, through which he cut a door and in the cellar of which he had set up a boiler and connected pipes into the greenhouse for heating the same, and subsequently he and his son carried on business as florists, using the greenhouse in connection therewith. The land on which this structure was erected had been previously mortgaged by James G. Fyles to the defendant. The mortgage was subsequently foreclosed and the equity purchased by the defendant, and James Fyles and son became his tenants at will until their tenancy was terminated by notice immediately before the date of the alleged trespass. The plaintiff had already removed the plants which had been in the greenhouse, and had taken down the structure. He was in the act of removing the glass frames when the defendant ordered him not to remove his property. The plaintiff testified that the defendant ordered him to remove nothing from the premises. The defendant testified that he forbade the removal of anything which was a part of the realty, and that his interference was confined to the class of property which the plaintiff was at the time removing.

Held: (1) That the evidence should have been submitted to the jury.

(2) That the greenhouse was a part of the realty, and belonged to the defendant.

(3) That the plants in the pots and fertilized loam remaining on the premises at the termination of the tenancy were not of the nature of fixtures, but movable personal property.

(4) That the stock plants which, though matured, had not been severed from the soil, were emblements, and the tenant or his vendee had the right to remove them during the term, or within a reasonable time after its termination.

Bryant v. Pennell, 61 Me. 108, 14 Am. Rep. 550, distinguished.

[**Ed. Note.**—For cases in point, see *Cent. Dig.* vol. 23, *Fixtures*, §§ 23-31.]

(Official.)

Exceptions from Supreme Judicial Court, Cumberland, County.

Action by Albert A. Young against James E. Chandler. A verdict was directed for defendant, and plaintiff brings exceptions. Exceptions sustained.

Action of trespass. The writ contained three counts. The first count alleged the detaining with force and arms, by the defendant, of certain goods and chattels, consisting of greenhouse frames, plants, loam, and compost, property of the plaintiff, from the plaintiff's possession. The second count alleged the conversion by the defendant of the goods and chattels described in the first count. The third count alleged the forcible taking and carrying away by the defendant of the same goods and chattels.

The writ was sued out of the superior court, Cumberland county. Plea, the general issue. Tried at the February term, 1906, of said court. At the conclusion of the plaintiff's testimony, the presiding justice, on motion of the defendant, directed the jury to return a verdict for the defendant. To this instruction the plaintiff excepted.

The case is fully stated in the opinion.

Argued before WISWELL, C. J., and WHITEHOUSE, SAVAGE, POWERS, PEABODY, and SPEAR, JJ.

Dennis A. Meaher, for plaintiff. L. L. Hight and H. P. Sweetser, for defendant.

PEABODY, J. This was an action of trespass commenced by writ declaring under three counts, the first alleging the detaining, with force and arms, by the defendant, of certain goods and chattels, consisting of greenhouse frames, plants, loam, and compost, property of the plaintiff, from his possession; the second, the conversion of the goods and chattels described in the first count; and the third, the forcible taking and carrying away of the same property.

After the evidence of both the plaintiff and defendant was presented, the presiding justice, on motion of the defendant's counsel, directed the jury to render a verdict for the defendant. To this instruction the plaintiff excepted, and upon his exception the case is before the law court.

At a jury trial the presiding justice is authorized to direct a verdict for either party when a contrary verdict could not be sustained by the evidence (*Bank v. Sargent*, 85 Me. 349, 27 Atl. 192, 35 Am. St. Rep. 376; *Bennett v. Talbot*, 90 Me. 229, 38 Atl. 112; *Coleman v. Lord*, 96 Me. 192, 52 Atl. 646; *Thompson v. Missouri Pacific R. R. Co.*, 51 Neb. 527, 71 N. W. 61; *Stern v. Frommer*, 30 N. Y. Supp. 1067, 10 Misc. Rep. 219), or if the plaintiff's evidence, when taken to be true, is not sufficient to make out a prima facie case, the court may properly direct a verdict for the defendant (*Heath v. Jaquith*, 68 Me. 433; *Co-operative Soc. v. Thorpe*, 91 Me. 64, 39 Atl. 283; *Jewell v. Gagné*, 82 Me. 430, 19 Atl. 917). But when the case is doubtful, and when different conclusions might be drawn from the evidence by different minds, the facts should be submitted to the jury. *Luhrs v. Brooklyn Heights R. R. Co.* (Sup.) 42 N. Y. Supp. 606, 11 App. Div. 173.

The plaintiff contends that he had the title and right of possession to all property specified in the writ, and that the defendant forcibly took and withheld it from him; and the defendant claims that a portion, at least, of the property was his as part of the realty, he having acquired title thereto by accession, which alone he withheld from the defendant at the time of the alleged trespass.

There are four classes of property which are the subject-matter of this action. The material which had entered into the construction of a greenhouse which James Fyles, who was a florist, had placed on land then owned by his son, James G. Fyles, with his consent, potted plants, growing stock plants, and loam and compost prepared for gardening purposes. The correctness of the ruling directing a verdict depends upon two propositions: (1) Whether the evidence, that submitted by the plaintiff being taken as true, shows prima facie that the defendant forcibly took and withheld from the plaintiff, and converted, or took and carried away, any of this property; (2) whether such evidence so proves that the plaintiff at the time of the alleged taking had title and the right of possession to any part thereof.

It appears that in September, 1905, the plaintiff purchased from James Fyles, Sr., a greenhouse with its contents, consisting of potted plants, and plants maturely grown, but not severed from the soil, and loam prepared for gardening purposes. The greenhouse had been removed by the vendor from its original location, and placed on posts upon land belonging to his son, James G. Fyles, with his consent, and had attached it to the barn, through which he cut a door, and in the cellar of which he had set up a boiler and connected pipes into the greenhouse for heating the same, and subsequently he and his son carried on business as florists, using the greenhouse in connection therewith. The land on which this structure was erected had been previously mortgaged by James G. Fyles to the defendant. The mortgage was subsequently foreclosed and the equity purchased by the defendant, and James Fyles and son became his tenants at will until their tenancy was terminated by notice immediately before the date of the alleged trespass. The plaintiff had already removed the plants which had been in the greenhouse and had taken down the structure. He was in the act of removing the glass frames when the defendant ordered him not to remove his property. The plaintiff testifies that he was ordered to remove nothing from the place, and the defendant testifies, in effect, that he forbade the removal of any which was a part of the realty, and that his interference was confined to the class of property which the plaintiff was at the time removing. The plaintiff's theory is somewhat supported by the testimony of James Fyles as to the claim of the defendant when informed of the sale to the plaintiff: "He said everything belonged to him. What I claimed was mine he said belonged to him because they were on the place." If the plaintiff had the right to understand, from the words and acts of the defendant, that he intended to take and detain from him, not only the frame of the greenhouse, but the other property specified in the writ, there was no technical necessity for him to make any specific demand before bringing his action; the words and acts being equivalent to the defendant's exercise of control over the property inconsistent with the plaintiff's possessory and property rights therein. At least, it is not clear that his inference was not warranted, and, if his right of action depended upon this point alone, it should have been submitted to the jury; but we must still decide whether the plaintiff owned any of the classes of property specified in the writ as against the proprietor of the land at the time of the alleged trespass.

Where a structure is affixed to the premises of another by a temporary occupant thereof, or by a licensee, it is deemed temporary in its purpose and not part of the realty. *Berwick v. Fletcher*, 41 Mich. 625, 8 N. W. 162, 32 Am. Rep. 170; *O'Donnell v. Burroughs*, 55

Minn. 91, 56 N. W. 579; *Meigs's Appeal*, 62 Pa. 28, 1 Am. Rep. 372; *Andrews v. Auditor*, 28 Grat. (Va.) 115.

Annexations with the consent of the owner or mortgagee of the realty, made by a bare licensee, are presumed to be removable and to remain the property of the one annexing, in the absence of facts indicating a contrary intention, even against a subsequent purchaser without notice (*Nelson v. Howison*, 122 Ala. 573, 25 South. 211; *Fisher et al. v. Johnson et al.*, 106 Iowa, 181, 76 N. W. 658; *Sagar v. Eckert*, 3 Ill. App. 412; *Walton v. Wray*, 54 Iowa, 531, 6 N. W. 742), also by agreement between the owner of personal property and the owner or mortgagee of the realty personal property may retain its status after annexation (*Smith v. Odum*, 63 Ga. 499; *Marshall v. Bachelder*, 47 Kan. 442, 28 Pac. 168; *Handforth v. Jackson*, 150 Mass. 149, 22 N. E. 634; *Peaks v. Hutchinson*, 96 Me. 530, 53 Atl. 38; *Russell v. Richards*, 10 Me. 429, 25 Am. Dec. 254; *Tapley v. Smith*, 18 Me. 12; *Hilborne v. Brown et al.*, 12 Me. 162; *Salley v. Robinson*, 96 Me. 474, 52 Atl. 930, 90 Am. St. Rep. 410; *Readfield Telephone, etc., Co. v. Cyr*, 95 Me. 287, 49 Atl. 1047), and such agreement or intention may be inferred from circumstances (19 Cyc. 1048, 1049).

As to what are fixtures substantially the same rules prevail between grantors and grantees as between mortgagor and mortgagees, but different rules apply in relation to landlords and tenants from considerations of public policy and because of the temporary nature of the tenure. *Maples v. Millon*, 81 Conn. 598; *Arnold v. Crowder*, 81 Ill. 56, 25 Am. Rep. 260; *Bishop v. Bishop*, 11 N. Y. 123, 62 Am. Dec. 68.

In some jurisdictions it is held that, even without their consent or agreement, the rights of prior mortgagees, they having parted with nothing on the faith of the fixtures, are subject to those having rights therein (*Broadbudd v. Smith*, 121 Ala. 335, 26 South. 34, 77 Am. St. Rep. 61; 19 Cyc. 1051), but in others, including Maine, it is held that a mortgagor cannot be any agreement with a third party diminish the rights of a prior mortgagee (*Ekstrom v. Hall*, 90 Me. 186, 38 Atl. 106; *Wight v. Gray*, 73 Me. 297; *Meagher v. Hayes*, 152 Mass. 228, 25 N. E. 105, 23 Am. St. Rep. 819; *Thompson v. Vinton*, 121 Mass. 139; *Fisk v. People's Nat. Bank*, 14 Colo. App. 21, 59 Pac. 63; *Watertown Steam Engine Co. v. Davis*, 5 Houst. [Del.] 192; *Fuller-Warren Co. v. Harter*, 110 Wis. 80, 85 N. W. 698, 53 L. R. A. 603, 84 Am. St. Rep. 867; *Dame v. Dame*, 88 N. H. 429, 75 Am. Dec. 195; *Tyson v. Post*, 108 N. Y. 217, 15 N. E. 316, 2 Am. St. Rep. 409; *Jones on Mortgages*, 429).

If the defendant's title to the realty had been acquired simply by his deed from James G. Fyles, by whose consent the greenhouse was erected, his rights would have been subject to the owner of the fixture, but as he was the mortgagee of the realty at the time the

structure was erected it became part of the mortgage security, and by foreclosure he became the owner by accession, in accordance with the doctrine recognized in *Ekstrom v. Hall*, supra, unless his consent to its erection is shown. There seems to be no evidence of his consent, and no fact or circumstance from which any agreement on his part may be presumed that the greenhouse should remain personal property after annexation.

The status of the other classes of personal property described in the writ is to be determined by the more liberal rule which prevails between landlord and tenant. The plants in pots and fertilized loam remaining on the premises were not of the nature of fixtures, but movable property, which the florist had the same right to sell as was his admitted right to sell the hothouse plants. The stock plants, which, though matured, had not been severed from the soil, were emblems which the tenant or his vendee, had the right to remove during the term, or within a reasonable time after its termination. *Davis v. Thompson*, 13 Me. 209; *Cutler v. Pope*, 13 Me. 377. As to this clause of property the case is to be distinguished from *Bryant v. Pennell*, 61 Me. 108, 14 Am. Rep. 550, where the mortgage included plants and shrubs, and it was there held that the cuttings passed to the mortgagee by accession; but these plants were a new acquisition of property, having no relation to any class existing at the time the mortgage was given, and belonged to the tenant as the fruits of his industry. *Cannon v. Matthews*, 75 Ark. 336, 87 S. W. 428, 69 L. R. A. 827, 112 Am. St. Rep. 64. According to these views the case should have been submitted to the jury. Directing a verdict for the defendant was error prejudicial to the plaintiff.

Exceptions sustained.

(102 Me. 263)

PENOBSCOT LOG DRIVING CO. v. WEST BRANCH DRIVING & RESERVOIR DAM CO. et al.

(Supreme Judicial Court of Maine. Dec. 17, 1906.)

WATER COURSES—DETENTION—RIGHTS OF DAM COMPANY.

The West Branch Driving & Reservoir Dam Company, the original defendant, was incorporated by an act of the Legislature approved March 13, 1903 (Priv. Laws 1903, p. 277, c. 174). By its act of incorporation the company was given the right to exercise the power of eminent domain for the purpose of taking certain real estate, dams, and other property of the Penobscot Log Driving Company, the plaintiff, and it was therein provided that when the West Branch Company had acquired the property of the old company, enumerated in the act, that "all the powers, rights and privileges of the Penobscot Log Driving Company pertaining to the driving of logs and the improving of the West Branch of the Penobscot river above the head of Shad Pond on said West Branch but not below the head of said Shad Pond shall be and become the powers, rights and privileges of the West Branch Driving and Reservoir Dam Company, and all the duties of said Penobscot

Log Driving Company pertaining to the driving of logs between the head of Chesuncook Lake and the head of Shad Pond shall be and become the duties of said West Branch Driving and Reservoir Company which shall thereafter be holden to perform said duties except as modified by the provisions of this act."

Section 10 (page 281) of the act of incorporation provides in part as follows: "Said company in any and all dams which may be owned or controlled by it may store water for the use of any mills or machinery which may use West Branch water, subject to the provision that day and night throughout the year the flow of water down the West Branch, so long as there shall be any stored water shall not be less than two thousand cubic feet per second, measured," etc.

Section 15 (page 283) of the act of incorporation is in part as follows: "After said West Branch Driving and Reservoir Dam Company shall have delivered the rear of any annual drive of logs into Shad Pond in manner aforesaid it shall allow to flow out of North Twin dam at such times and at such rates of discharge as the Penobscot Log Driving Company may request for the purpose of driving said logs to the Penobscot boom of their several places of destination above said boom, water equivalent to the amount of water held back by said dam as now constructed when there is a thirteen foot head at said dam measured from the bottom of the dam, or so much thereof as shall be called for by said Penobscot Log Driving Company for said purpose, and in determining the quantity of water which the Penobscot Log Driving Company shall be entitled to request for driving purposes, the two thousand cubic feet per second specified in section ten shall be considered a part thereof at such times and at such times only as water is being allowed to flow from said dam at the instance and request of the Penobscot Log Driving Company."

The West Branch Company, as contemplated by its charter, destroyed the old dam at North Twin, and substituted therefor a new dam, located a short distance below on the river. While the water which the company was to allow to flow, by the charter, was from this new dam, the amount of water to be allowed to flow was to be measured by "the amount of water held back by said dam as now constructed [that is the old dam] when there is a thirteen foot head at said dam measured from the bottom of the dam."

Held, that the 13-foot head of water at the old dam is to be ascertained by measuring from the bottom of the dam; not from the flooring of any gates through the dam, nor from the bottom of any part of the structure, nor from the bottom of the superstructure, but from the bottom of the whole structure of the dam.

Also, *held*, that to ascertain the amount of water held back by the old dam, when there was a 13-foot head of water at that dam, measured as provided by said section 15, a measurement must be taken from the bottom of the dam, in the thread of the stream, where the dam rests upon the natural bed of the stream and holds back water by reason of its being immediately above the natural bed of the stream. The equivalent of that amount of water at the old dam must be allowed to flow from the new dam "at such times and at such rates of discharge as the Penobscot Log Driving Company may request for the purpose of driving said logs to the Penobscot boom or their several places of destination above said boom." In determining this quantity of water, the 2,000 cubic feet of water per second, which, by section 10 of the act, must be allowed to flow at all times, may be taken into consideration only when it is being allowed to flow from the dam at the instance and request of the Penobscot Log Driving Company.

(Official.)

Exceptions from Supreme Judicial Court, Penobscot County. At Law.

Action by the Penobscot Log Driving Company against the West Branch Driving & Reservoir Dam Company and others. Decree for defendants, and plaintiff appeals and excepts to the ruling of the court. Reversed and rendered.

Bill in equity, the substance of which appears in the opinion. Heard before the justice of the first instance on bill, answers, and evidence. After the hearing, the justice signed and filed a decree dismissing the bill with one bill of costs for the defendant, and at the same time filed a memorandum, in which he stated that, for reasons therein given, he had made this ruling pro forma, without consideration of the merits of the controversy between the parties. The plaintiff then appealed from this decree to the law court, as provided by statute, and also took exceptions to certain rulings made on the hearing. The exceptions were not considered.

The case fully appears in the opinion.

Argued before WISWELL, C. J., and WHITEHOUSE, SAVAGE, POWERS, PEABODY, and SPEAR, JJ.

P. H. Gillin and Orville Dewey Baker, for plaintiff. F. H. Appleton, Hugh R. Chaplin, Louis C. Stearns, E. C. Ryder, and Charles F. Woodard, for defendant.

WISWELL, C. J. The West Branch Driving & Reservoir Dam Company, the original defendant, was incorporated by an act of the Legislature approved March 13, 1903 (Priv. Laws 1903, p. 277, c. 174). By its act of incorporation the company was given the right to exercise the power of eminent domain for the purpose of taking certain real estate, dams, and other property of the Penobscot Log Driving Company, the complainant, and it was therein provided that when the West Branch Company had acquired the property of the old company, enumerated in the act, that "all the powers, rights and privileges of the Penobscot Log Driving Company pertaining to the driving of logs and the improving of the West Branch of the Penobscot river above the head of Shad Pond on said West Branch but not below the head of said Shad Pond shall be and become the powers, rights and privileges of the West Branch Driving and Reservoir Dam Company, and all the duties of said Penobscot Log Driving Company pertaining to the driving of logs between the head of Chesuncook Lake and the head of Shad Pond shall be and become the duties of said West Branch Driving and Reservoir Company which shall thereafter be holden to perform said duties except as modified by the provisions of this act."

So much as is material of section 10 (page 281) of the act of incorporation is as follows: "Said company in any and all dams which may be owned or controlled by it may store water for the use of any mills or machinery which may use West Branch water, subject

to the provisions that day and night throughout the year the flow of water down the West Branch, so long as there shall be any stored water shall not be less than two thousand cubic feet per second, measured," etc.

By section 15 (page 283) of this act it was provided: "After said West Branch Driving and Reservoir Dam Company shall have delivered the rear of any annual drive of logs into Shad Pond in the manner aforesaid it shall allow to flow out of North Twin dam at such times and at such rates of discharge as the Penobscot Log Driving Company may request for the purpose of driving said logs to the Penobscot boom or their several places of destination above said boom, water equivalent to the amount of water held back by said dam as now constructed when there is a thirteen foot head at said dam measured from the bottom of the dam, or so much thereof as shall be called for by said Penobscot Log Driving Company for said purpose, and in determining the quantity of water which the Penobscot Log Driving Company shall be entitled to request for driving purposes, the two thousand cubic feet per second specified in section ten shall be considered a part thereof as such times and at such times only as water is being allowed to flow from said dam at the instance and request of the Penobscot Log Driving Company."

The defendant corporation was duly organized, accepted its charter, acquired certain property of the plaintiff corporation, together with all the powers, rights, and privileges and duties of the latter company in relation to the driving of logs above the head of Shad Pond on the West Branch of the Penobscot river; but the plaintiff corporation still retained the power and duty of driving all logs from the head of Shad Pond to the Penobscot boom.

In this bill in equity, filed August 15, 1905, the complainant alleged, among other things, and in addition to the facts already stated, that in the exercise of its public powers and duties in the then log driving season of 1905 it was required to drive, and had accepted and undertaken to drive, below Shad Pond a large quantity of logs which had been delivered to it at Shad Pond on or about the 5th day of August; that it thereby became the duty of the defendant, under its charter, to allow water to flow out of the North Twin dam in accordance with the requirement of section 15 above quoted; that although the defendant had water stored at its various dams, all available to North Twin dam, and all within its control, more than sufficient to comply with the requirements of this section, and although requested by the complainant, that the defendant had refused to allow to flow out of the North Twin dam either the full amount of water to which the complainant was entitled or such parts thereof as the complainant had from time to time demanded, to the great injury of the complainant in the performance of its public duty

of completing the drive to the Penobscot boom. In the prayer for relief, the complainant asked for a temporary and permanent injunction to restrain the defendant corporation and its employes from further holding back the waters of the West Branch then or thereafter stored or available to its North Twin dam, and to command the defendant to allow the water to flow continuously, as requested by the complainant, for its purpose to the full extent described by the defendant's charter.

A preliminary injunction, as prayed for, was shortly after ordered to be issued upon the filing by the complainant of the statutory bond. On the 26th of August, 1905, an arrangement was made between the complainant, the defendant, and other defendants who had intervened, and reduced to writing, wherein the parties agreed as to the amount of water that should be allowed to flow from the North Twin dam during the year 1905, and wherein it was also agreed, upon the one hand, that the plaintiff company should make no claim for damages against the defendant company for its refusal to deliver water from and after the 10th of August up to the date when the water began to be delivered under the terms of the preliminary injunction; and the defendant, and the other corporations which had intervened, upon the other hand, agreed that they would make no claim for damages against the complainant under the statutory injunction bond, or otherwise.

The case came on for final hearing before a justice of this court on February 15, 1906, when it was claimed upon the part of the defendants that the bill could no longer be sustained, since it related wholly to the drive of logs of 1905, and asked for relief only in relation to the logs which the complainant was then engaged in driving to their destination, and because, prior to the time of the hearing, that drive had been entirely concluded. Various other objections to the maintenance of the bill were made. Thereupon, and after all of the evidence had been introduced, the complainant offered an amendment to the bill, which was allowed by the sitting justice, who ruled that no new answer or demurrer to the amended bill was necessary or would be allowed, which rulings were made subject to the defendant's exceptions.

By this amendment, the bill, which originally related wholly to the 1905 drive, and in which relief was sought with reference to the completion of that drive, became, in substance and effect, one in which was sought a determination of the respective rights and duties of the parties, depending especially upon a construction of the defendant's charter and of section 15 thereof, above quoted. After the hearing, the sitting justice signed and filed a decree dismissing the bill with one bill of costs for the defendants, and at the same time filed a memorandum in which he stated that, for reasons therein given, he had made this ruling pro forma, without a con-

sideration of the merits of the controversy between the parties. The case comes to the law court upon the complainant's appeal from this decree.

In view of our conclusion, we deem it unnecessary to consider or determine the defendants' exception to the allowance of the amendment, accompanied with the ruling that no new answer would be allowed to the amended bill, the propriety of a pro forma ruling when a case is heard by a single justice, or the other objections made by the defendants to the maintenance of the bill as amended. It is sufficient to say that, as to the original bill, that bill might have been properly dismissed, since the whole necessity for the relief sought had terminated prior to the time of the final hearing, and since, by virtue of the agreement between the parties, no question of damages remained for determination. Upon the other hand, we have no question as to the power of this court to take jurisdiction of a bill, the purpose of which is to have judicially ascertained and determined the respective rights and duties of the parties relating to the use of water upon a navigable or floatable stream, when such water has been accumulated by a dam erected under a legislative charter, or otherwise.

Because of our conclusion as to the merits of the controversy, and of the necessity for an early and authoritative determination of the important question involved, we express no opinion as to the propriety of the allowance of an amendment, at that stage of the proceeding, the ruling connected therewith, or as to other objections raised by the defendants, but come to a consideration of the merits of the case, viz., the construction of section 15 of the defendant's act of incorporation.

Prior to the time of the commencement of this bill, the West Branch Company, as contemplated by its charter, had destroyed the old dam at North Twin, and had substituted therefor a new dam, located a short distance below on the river. While the water which the company was to allow to flow, by the charter, was from this new dam, the amount of water to be allowed to flow was to be measured by "the amount of water held back by said dam as now constructed [that is the old dam] when there is a thirteen foot head at said dam measured from the bottom of the dam." The complainant's contention is that the standard of measurement of the water to be allowed to flow is a 13-foot head of water at the old dam measuring from the bottom of the deep gates through that dam; that the important and principal part of the clause specifying the amount of water to be allowed to flow is the expression, "a thirteen foot head at said dam," in regard to the meaning of which numerous witnesses were called to testify at the hearing, and much is said in regard thereto by counsel in argument. Upon the other hand, the contention of the defendants is that these words are limit-

ed and explained by the following language, "measured from the bottom of the dam"; that this means the bottom of the whole structure; and that to ascertain the 13-foot head, referred to in the act, a measurement must be taken from the bottom of the whole dam.

If the act had not contained the words "measured from the bottom of the dam," there might have been considerable question as to precisely what was meant by the expression "thirteen foot head," because that expression may have different meanings under different conditions and situations. As said by the court in *Cargill v. Thompson*, 57 Minn. 534, 59 N. W. 688, that expression is a technical term in hydraulics, and experts might be called to testify as to its meaning, or nonexperts, who were acquainted with the meaning with which the term was locally used, might testify in relation thereto. But it must be remembered that the old North Twin dam was not a power dam; that is, no water wheels were ever operated in immediate connection with that dam. It was built and always used exclusively as a storage dam, which is equally true of the new dam substituted therefor.

Apparently the framers of this act appreciated the difficulty that might arise in the construction of the term "a thirteen foot head of water," and added the following words for the purpose of making certain and readily ascertainable that which otherwise might have been the subject of much doubt and controversy. These words cannot be rejected. Their importance is shown by their connection with the other language of the section. They were evidently adopted for the purpose of explaining precisely what was meant by the words "a thirteen foot head at the dam." They limit that phrase, and show precisely what was meant by it, and how that head of water was to be ascertained. With these words of limitation and explanation, the whole phrase becomes plain and free from ambiguity and doubt, to such an extent that no parol evidence as to its meaning, either from experts in hydraulics or others, can be effective in changing the plain and obvious meaning of the whole language.

The 13-foot head of water at the old dam is to be ascertained by measuring from the bottom of the dam; not from the flooring of any gates through the dam, nor from the bottom of any part of the structure, nor from the bottom of the superstructure, but from the bottom of the whole structure of the dam. The lower part of a dam down to the bed of the stream is just as much a part of, and certainly as important a part of, the dam, as is the upper part. For the purposes of this case, the definition given by Webster is as good as any. He thus defines it: "A barrier to prevent the flow of liquid; especially a

bank of earth, or wall of any kind, as of masonry or wood, built across a water course, to confine and keep back flowing water." In 12 Cyc. 1193, and in 8 Am. & E. Encycl. of L. (2d Ed.) 700, the definition is given in the same language, as follows: "The work or structure raised to obstruct the flow of the water in a river." The lower part of a dam holds back water and obstructs the flow of a stream, as well as does the upper part, and comes equally within these definitions.

It is, of course, true that for some dams there may be a foundation laid in the soil under the surface of the bed of the stream or water course, which does not hold back water or obstruct the flow of the stream, because it does not come in contact with the water of the stream, and the only purpose of which is to provide a secure base for the dam itself. No part of such a foundation, below the surface of the bed of the stream, should be considered as a part of the dam, as the word was used in this section; but whatever part of the structure is above the bed of the stream, and does hold back water by coming in contact with the water of the stream, is a part of the dam. That this is in accordance with the understanding of the Legislature is somewhat confirmed by a further analysis of the section. The standard of measurement is not a 13-foot head of water at the old dam, but the amount of water held back by that dam when there is a 13-foot head at such dam, measured from the bottom of the dam. Water in a stream is held back by all parts of the dam in which it comes in contact.

Our construction, then, of this part of this section, is this: To ascertain the amount of water held back by the old dam, when there was a 13-foot head of water at that dam, measured as provided by the section, a measurement must be taken from the bottom of the dam, in the thread of the stream, where the dam rests upon the natural bed of the stream and holds back water by reason of its being immediately above the natural bed of the stream. The equivalent of that amount of water at the old dam must be allowed to flow from the new dam "at such times and at such rates of discharge as the Penobscot Log Driving Company may request for the purpose of driving said logs to the Penobscot boom or their several places of destination above said boom." In determining this quantity of water, the 2,000 cubic feet of water per second, which, by section 10 of the act, must be allowed to flow at all times, may be taken into consideration only when it is being allowed to flow from the dam at the instance and request of the Penobscot Log Driving Company.

Decree below reversed. Amended bill sustained. Decree in accordance with the opinion. Costs to be determined by the Justice who makes the decree.

(217 Pa. 312)

In re SEDGLEY AVE.

In re LEHIGH AVE.

(Supreme Court of Pennsylvania. April 1, 1907.)

MUNICIPAL CORPORATIONS—CHANGE OF GRADE—RIGHT TO DAMAGES.

Where, in proceedings under Act May 22, 1891 (P. L. 117), to determine the injuries arising from the opening and grading of an avenue, the viewers have allowed damages, a subsequent purchaser of land abutting on the street cannot recover for the physical change of grade to the established grade.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, § 955.]

Appeal from Court of Common Pleas, Philadelphia County.

In the matter of the change of grade of Sedgley and Lehigh avenues. From an order making absolute the rule to quash the appeal for appointment of viewers, William F. Read appeals. Affirmed.

The following is the opinion of Beitler, J., in the lower court:

"The petition of William F. Read set out his title to a lot at Lehigh avenue and Nineteenth street, and that under an ordinance of 1900 the city has graded Lehigh avenue, the street being cut down several feet below the surface of petitioner's lot, thereby causing him damage. To this petition the city filed an answer, setting out that Lehigh avenue from Seventeenth street to Twenty-First street was placed upon the confirmed plan on October 30, 1839, and that the last grade was confirmed January 4, 1892, and that since that date there has been no change of lines or grades of the avenue. That on March 25, 1892, upon petition filed in the quarter sessions praying for viewers to determine the necessity of opening Lehigh avenue from Seventeenth street to Twenty-First street, the court appointed viewers who decided in favor of the opening, and filed a report on July 20, 1893, awarding damages and assessing benefits. Exceptions were filed, whereupon the court referred the report back to the viewers, who filed a supplemental report on June 21, 1894, which the court of quarter sessions confirmed on October 6, 1894. With the report was filed an affidavit of service of notice of the appointment of the viewers and the place and date of their first meeting on the property owners and tenants along the line of the said Lehigh avenue. With the report was filed a plan showing the lines and grades confirmed on January 4, 1892. That pursuant to the act of May 26, 1891 (P. L. 117), considering the injury arising by reason of opening and grading the avenue according to the plan, they had awarded damages to the estate of Andrew Root from which the petitioner acquired title in 1895, and the damages were paid by the city. That two other claimants, John C. Frishmuth and the Hale & Kilburn Manufacturing Company, acquired title from the heirs of John H. Smaltz,

to whom damages were awarded and paid. That the grading under the ordinance of 1900 was completed November 3, 1903, and that the avenue was graded to the lines and grades established on the confirmed plan of January 4, 1902, and in accordance with the plan filed with the viewers' report in the quarter sessions. That Lehigh avenue from Glenwood avenue to Twenty-First street, is within the limits of Lehigh avenue between Seventeenth and Twenty-First streets. That the petitioner is not entitled to a jury because "the damages by reason of the grading of Lehigh avenue have been adjudicated by the report confirmed on October 6, 1894, and because his predecessors in title have been awarded and paid damages for the injury due to the grade." The answer prays that the appointment of viewers heretofore made be set aside and the petition quashed.

"The petitioner put the case in the list for argument on the petition and answer. From the petition and answer the following brief history of the case may be made up: Lehigh avenue from Glenwood avenue to Twenty-First street was graded; the work being completed on or about November 3, 1903. The said street was graded in front of petitioner's and the property of the other claimants to the lines and grades established on the confirmed plan on January 4, 1892, and in accordance with the plan filed in the proceedings to open said Lehigh avenue between Seventeenth and Twenty-First streets. The question thus raised is important. The act of May 26, 1891 (P. L. 117), provides 'that in all cases of assessment of damages for the opening or widening of any street or highway in any city in this commonwealth, the award of damages, if any, shall include the damage due to the grade at which said street or highway is to be opened or widened and the plan attached to the report of the viewers awarding the damages shall have therein a profile showing the existing grade.' The city contends that the petitioner and the other claimants have no standing, because all the injury due to the grade has already been adjudicated in the proceedings to open the street. In that proceeding the grades were considered and damages awarded therefor. In *Pusey v. City of Allegheny*, 98 Pa. 522, it was held that the plaintiff was entitled to recover not only for the land taken in the opening of the street, but for damages to the remainder of the property 'consequent upon the construction of the street, its grades, cuts, slopes, fills and walls.'

"In point of fact, the viewers assessing damages for an opening never could consider the question apart from the effect the grade had upon the land left after the opening. To cut 50 feet, say, out of a tract was one thing, and the damages resulting therefrom not usually difficult to ascertain, but, when the new highway was to be above or below the natural surface of the land abutting upon the new street, a new element was introduced, and one

which witnesses and viewers could not eliminate in fixing the damages. To avoid uncertainty, to prevent two actions where one would suffice, and to escape the danger of a property owner in the opening proceedings recovering damages for a taking at a grade other than the natural surface (in which the viewers were sure to consider the grade) and then when the actual grading was done recovering again, the act of 1891 was passed. As a matter of fact, the grading of a street is its physical opening. In very few cases does the city give a bond and proceed to open in advance of the damages being assessed. The ordinance to open is the first step usually. Then the jury is appointed and the damages assessed and paid, and thereafter, when the city is in funds, the physical grading is done and sewers and water pipes and gas pipes are laid as part of the work. The act of 1891 introduced a sensible system and gave the property owner in one proceeding his damages for the opening at a grade always fixed on the plan on which the streets appear when it is confirmed. That the grantors of the petitioner in this case were awarded damages both for the opening and the grading is not disputed, but it is contended that, when the work was done which constituted the physical opening and grading, those then holding the title were entitled to be paid for the grading—that is, for the depositing of dirt upon the strip taken as a street, or the cutting out of dirt from that strip according as the grading consisted of a 'fill' or a 'cut'—and we are referred to cases in line with our own case. In *re Change of Grade of Norwood Street*, 12 Pa. Dist. R. 309, and *In re Plan 166*, 143 Pa. 414, 22 Atl. 689.

"There can be no question that, where there has been a change of grade regulation and subsequently there is an actual grading according to the changed plan, then the property owner's right for damages therefor begins to run. But we have before us not such a case, but an application by one who purchased from the estate of Andrew Root to recover for what that estate had already been fully compensated for. If the plaintiff's contention is to be sustained, then the act of 1891 gives the owner the right to damages for both opening and grading, and, if he is still the owner when the actual work is done, he cannot recover, but if he parts with his title his vendee can recover. We cannot adopt any such view. When the petitioner bought, the record of the quarter sessions showed him that the party he was buying from had already claimed and been awarded damages for the land taken in the opening of Lehigh avenue and for the damage to the part left abutting upon the avenue due to the fact that the street was plotted to be opened below the surface of the land on either side. He was bound by this notice, and, when the city comes to exercise a privilege already paid for, it cannot be compelled to pay again. We

regard Tabor Street (No. 1) 26 Pa. Super. Ct. 167, as directly ruling this case.

"Nor are we able to agree with the petitioner's counsel that the act of 1891 offends against the Constitution. Section 8 of article 16, undoubtedly does provide that the city shall make just compensation for private property injured by the construction of its works; but it does not provide that such payment shall follow and cannot precede the damages done. Suppose the petitioner in this case was claiming damages for land taken in the opening of Lehigh avenue, and his deed from Root purported to convey the bed of the street, surely it would be an answer to say that his grantor had already collected and the physical taking by making the roadway travelable was but the exercise of a right already paid for. Yet a strict reading of section 8, art. 16, would seem to require the city to pay after she opens if the physical opening does any damage. The same record that gave notice to the grantee of the Root estate that the city had paid the damages for the opening also showed that the jury had assessed the damages as per a plan showing, in profile, the grade and taking into consideration the grade. If Root's heirs had executed a deed of dedication and release, as Ritter did in Tabor street, their subsequent vendees would have been prevented when the physical grading was done from claiming damages therefor. If Ritter's vendees could not recover (and Tabor street so decides), then neither can Root's vendee, and we therefore set aside the appointment of viewers heretofore made and quash the petition."

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

Bertram G. Frazier and John W. Frazier, Jr., for appellant. John H. Maurer, Asst. City Sol., and John L. Kinsey, City Sol., for appellee.

PER CURIAM. Judgment affirmed on the opinion of Judge Beitler in *Re Lehigh Avenue*.

(217 Pa. 330)

KOCHESPERGER v. PHILADELPHIA RAPID TRANSIT CO.

(Supreme Court of Pennsylvania. April 1, 1907.)

STREET RAILROADS—INJURY TO BOY ON TRACK.

In an action against a street railway company to recover for personal injuries to a boy struck by a street car at a crossing, evidence held insufficient to show negligence on the part of the defendant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Street Railroads, §§ 239-247.]

Appeal from Court of Common Pleas, Philadelphia County.

Action by Josiah Kochesperger, by his next friend, James W. Kochesperger, against the Philadelphia Rapid Transit Company. From

an order refusing to take off nonsuit, plaintiff appeals. Affirmed.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

Eugene Raymond, for appellant. Thomas Leaming and Russell Duane, for appellee.

PER CURIAM. The only evidence tending in any degree to show negligence on the part of the defendant company was that of a woman who said that, when she saw the motorman approaching the crossing, he was looking to one side into the park. She said the plaintiff was crossing Ridge avenue from the west or park side to the east when he was caught by the fender. In this she was directly contradicted by the plaintiff himself, who testified that he had been in the park, but had come out and crossed Ridge avenue at Cumberland street, played there with another boy for a little while, and then started back again across Ridge avenue, followed or chased by the other boy. These were the only witnesses who testified to personal knowledge of how the accident occurred, and their testimony was in irreconcilable conflict. If it be conceded that the conflict was one for the jury to settle, the plaintiff's case still must rest on the testimony of the woman Agnes Barr. It is very vague and self-contradictory, leaving a strong impression that she was not really there at all. The only direct statement bearing on the question of negligence was that "the man [motorman] was looking on the other side of the park." The car at that time was half a square away from Cumberland street, and she does not say how long the motorman continued to look to the side nor that he was not attending properly to his duties when the car reached the Cumberland street crossing. Even if her testimony had been left to the jury and they found it credible, the court would have been obliged to say that it contained no proof of negligence on the part of the defendant.

Judgment affirmed.

(217 Pa. 285)

In re SINGER'S ESTATE.

(Supreme Court of Pennsylvania. April 1, 1907.)

SALE — ACTION TO SET ASIDE — INADEQUATE PRICE.

Where an owner of an interest in a decedent's estate payable at a future time and having a value of \$5,000 sold it for \$500, the sale will be upheld where there was no evidence of constraint, fraud, or misrepresentation.

Appeal from Orphans' Court, Philadelphia County.

In the matter of the estate of Severin Singer. From a decree sustaining exceptions to readjudication, Sarah C. Hackett and Mary K. Gunkle appeal. Affirmed.

The following is the opinion of Ashman, J., in the court below:

"The exceptions relate to the award of the share in his father's estate of John Singer, a son, to Sarah C. Hackett, an alleged purchaser of his interest. The share amounted to about \$8,000, against which a mortgage for \$3,000 had been given by the son, leaving a net value of \$5,000, for which the claimant paid \$500. The testator's will directed an accumulation of the income of his estate until the arrival at full age of his youngest child, at which time his estate should be equally divided among his children, six in number. John Singer, the son, secured a loan on mortgage of \$1,000, and according to his testimony afterwards applied to George E. Hackett for an additional loan of \$3,000. He sought this aid of Hackett, who appears to have effected a loan for his brother, in consequence of written offers from Hackett to loan money upon his share, or to purchase it outright. The first communication was dated April 22, 1903, and read as follows: 'Mr. John Singer, Dear Sir: Any time you might decide to secure an additional loan or sell your estate interest I would be pleased to have you call and see me.' The note inclosed the card of the writer, headed, 'Loans, Real Estate, Investments, etc., 635 Walnut St.' Singer called upon Hackett, but was put off, and he finally effected the loan through a building association and satisfied the prior mortgage of \$1,000. In November, 1903, Singer asked Hackett if he would secure a loan of \$1,000, to which Hackett replied that the share was not worth that sum, because it was not payable for nine years. He finally declared that his wife would loan \$500, and this offer was accepted by Singer, who thereupon, with his wife, signed and acknowledged certain papers, which he supposed were evidence of a loan. This was the narrative in brief of the transaction as told by Singer and corroborated by his wife. Both admitted the execution of the assignment, the deed, and the transfer of the building association stock, and Singer also admitted that the papers had been submitted to him for examination, but declared that he had only glanced over them, believing them to be simply evidences of a loan.

"The claimant, however, produced a postal card in the handwriting of Singer which was flatly contradictory of the theory of a loan. It was dated November 5, 1903, and read: 'Dear Sir: My interest in my father's estate is for sale. I will sell it for \$1,000 cash, subject to the \$3,000 mortgage. If you wish to buy it let me know as soon as possible, as another party has bid that amount and I will give you the first chance. Yours respectfully, John Singer.' Hackett testified that in answer he offered to purchase at \$500, which reply the son denied receiving. His letter, dated November 26th was thereupon produced, saying: 'I will take your offer of \$500, but I must have the money before next Wed-

nesday.' This correspondence is open to one construction only. If there is any ambiguity, it is removed by the after conduct of the son. He paid no dues to the building association and no interest on his mortgage to the association for \$3,000, which were no longer necessary, if he had parted with his title. We do not hesitate to say that the bargain on the part of the buyer was unconscionable because the price was grossly inadequate. But this, if the bargain was not brought about by fraud, affords no ground for setting the sale aside. *Whelen v. Phillips*, 151 Pa. 312, 25 Atl. 44; *Robbins' Est.*, 199 Pa. 500, 49 Atl. 233. Was there fraud on the part of the purchaser or her agent? None certainly is visible on the face of the transaction. The son makes a distinct offer in writing to sell his share in the estate. He signs and acknowledges the assignment and the deed to the purchaser, and transfers to her the stock in the building association, from which he had procured a mortgage, and he admits that ample opportunity was given for scrutinizing the papers, and he ceases from the date of the transaction to pay the dues and interest to the association which as owner of the mortgaged share he was obliged to pay.

"Was there fraud which arose out of the relations of the parties? The agent of the seller was the agent of the buyer—a relationship which is common enough among real estate brokers, and provocative enough of fraudulent practices; but the purchaser here was the wife of the agent, and from their community of interests a commission paid by the wife practically came from the pocket of the agent. The judicial decision that the trust created by the will was invalid, and that the children's interest vested at testator's death was not rendered until after the dealings between the parties had closed. If the claimant had prior thereto been advised by counsel as to the nature of the testamentary trust, and had continued to assure the son that the interest was uncertain, his concealment of the information might have vitiated the bargain; but it was not shown that he had been so advised, and, besides, the expediency of securing legal advice must have been as apparent to the seller as to the buyer, and the means of obtaining it were as open to one as to the other.

"In *Bennet v. Bennet*, 43 L. T. (N. S.) 246, Sir George Jessel said: "There is no reason why a man should not be a fool." As a corollary to that saying, it may be added that there is no reason why a court should protect a fool against the result of his folly. No new feature of rapacity in the buyer is apparent in this instance to make him a worse offender against the law of fair dealing than an army of Shylocks who have preceded him. The patriarch Jacob bought a large landed estate from an improvident brother for the price of a frugal breakfast, and the common parent when appealed to upheld the bargain. A 'catching bargain' much later in date than

that between Jacob and Esau was passed upon in *Davidson v. Little*, 22 Pa. 245, 60 Am. Dec. 81, when the owner of land worth \$8,000 conveyed his interest for \$200. The court held that the transaction was suggestive of fraud, but that the contract was binding if the vendor was of full age, of sound mind, acquainted with the necessary facts, and subjected to no mental imprisonment.

"The exceptions to the readjudication are sustained, and the award made by the original adjudication is reinstated."

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

J. Albert Miller and Thomas A. Fahy, for appellant.

PER CURIAM. The learned court below found that, while the bargain was unconscionable because of the gross inadequacy of the price, yet it was not fraudulent, and therefore could not be set aside.

The decree is affirmed on the opinion of the court below.

(217 Pa. 315)

LAUTENBACHER et ux. v. CITY OF PHILADELPHIA.

(Supreme Court of Pennsylvania. April 1, 1907.)

MUNICIPAL CORPORATIONS—DEFECTIVE SIDEWALK—EVIDENCE.

Where a woman is carrying a couch on a sidewalk in such a way that her view ahead is obstructed, and she falls into a hole in the sidewalk, she is guilty of contributory negligence, and cannot recover for the injuries received.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, §§ 1673, 1678.]

Appeal from Court of Common Pleas, Philadelphia County.

Action by Albert M. Lautenbacher and Sallie J. Lautenbacher against the city of Philadelphia. Judgment for defendant notwithstanding the verdict, and plaintiffs appeal. Affirmed.

At the trial the jury returned a verdict for the plaintiff for \$2,000. Subsequently the court entered judgment for defendant non obstante veredicto; Carr, J., filing an opinion in which the accident was described as follows: "The plaintiffs sued to recover damages for injuries to Sallie J. Lautenbacher, sustained January 27, 1904, while she was walking on the sidewalk upon the west side of Moss street, opposite No. 608. The plaintiffs lived at 644 Moss street, and Mrs. Lautenbacher was walking from that house engaged in moving her furniture to 604 Moss street; she and her sister carrying a lounge, about 5 feet in length and about 50 pounds in weight. Her sister held the foot of the lounge, walking backwards, and the plaintiff held the head of the lounge, walking forwards, facing her sister. The top part of the curve of the lounge, or the pillow part, was in front of her and reached to about her mouth.

She had passed frequently over the sidewalk of No. 608, where the accident happened. It was half past 8 in the morning, and Mrs. Lautenbacher was not looking under the lounge but straight ahead, and there was no snow or ice on the sidewalk, and she could not see underneath the couch. The defendant's contention was that the pavement was in perfect condition, and that Mrs. Lautenbacher fell against the couch which she was carrying, and, striking its end, broke the kneecap. She, however, testified that she slipped into a hole, which she stated was near the middle of the pavement, 18 inches square and 5 inches deep; and she testified that her foot went into the hole and her knee struck on an iron water box which was in its center, and that it was a hole jagged out around the water box, which was about five inches wide and of the same depth, and her testimony was corroborated by that of her sister. But on behalf of the defendant, four disinterested witnesses testified that there was no hole in the pavement at the place indicated."

Error assigned was in entering judgment for defendant non obstante veredicto.

Argued before MITCHELL, O. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN and STEWART, JJ.

Leo MacFarland, for appellant. William C. Wilson, Asst. City Sol., Charles E. Bartlett, and John L. Kinsey, City Sol., for appellee.

PER CURIAM. By carrying the couch in the way she did, the appellant voluntarily impeded her view and disabled herself from the proper performance of her duty to look where she was going. She might as well have put a bandage over her eyes, and then charged the city with the results of her failure to see the obstruction over which she fell.

Judgment affirmed.

(217 Pa. 321)

JONES v. WEIR.

(Supreme Court of Pennsylvania. April 1, 1907.)

1. APPEAL—ASSIGNMENTS OF ERROR.

Equity rule 92, requiring appellant to file in the court below a brief statement of errors alleged, contemplates the filing of assignments of error also in the appellate court.

2. SAME—SUFFICIENCY.

Assignments of error are insufficient, where they do not set out the decree of the court below, and do not set out separately the exception which is alleged not to have been acted upon, or the evidence admitted and rejected, if the exceptions embrace more than one point.

3. SAME—REVIEW—FINDINGS OF FACT.

A finding of fact on conflicting evidence will not be disturbed, in the absence of manifest error.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3983-3989.]

4. PARTNERSHIP—RESCISSION OF CONTRACT—FRAUD.

A contract of partnership will be rescinded, where it is shown that plaintiff was induced to enter into it by false representations of the other party, though no financial loss may have resulted therefrom.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Partnership, § 11.]

5. SAME—RECEIVER.

Where a partnership has been entered into because of false representations, equity will set the contract aside at the suit of the deceived party and appoint a receiver.

6. SAME—INJUNCTION—DISSOLUTION OF PARTNERSHIP.

Where the court enters a decree rescinding a contract of partnership and appoints a receiver, an injunction follows as a matter of course.

Mitchell, C. J., and Fell and Elkin, JJ., dissenting.

Appeal from Court of Common Pleas, York County.

Bill by Simeon M. Jones against Thomas Weir. Decree for plaintiff, and defendant appeals. Affirmed.

See 62 Atl. 643.

From the record it appeared that defendant bought the York Candy Company's factory for \$51,000 worth of the American Stogie Company's stock at par, paying no cash, but giving a mortgage on Altoona property for \$20,000. Weir induced Jones to agree to pay \$25,500 for a half interest in this property, and enter into partnership and pay \$5,000 more towards working capital, upon the statement that he (Weir) had paid the \$51,000 in cash. Upon discovering the deception, Jones filed his bill, asking for rescission of the contract, dissolution of the partnership, injunction, and the appointment of a receiver until final accounting. The court entered a decree rescinding the contract of partnership and appointing a receiver.

No assignments of error were filed, but there was printed in the appellant's paper book, under the caption, "Brief Statement of Errors," the following: "A brief statement of errors alleged by the defendant to have been made by the order and decree of the court in the above-named case, which order and decree were filed January 15, 1906, and which the defendant appeals from. (1) The learned court erred in appointing a receiver and granting and continuing an injunction against the defendant, as the evidence adduced was insufficient in law and in fact to warrant the appointment of a receiver or the granting of an injunction. (2) The learned court erred in not passing upon the exceptions filed to his finding of facts and law separately. (3) The learned court erred in dismissing the defendant's exceptions to the court's findings of facts and conclusions of law and the admission and rejection of evidence. (4) The learned court erred in his reasons stated for dismissing the exceptions filed by the defendant, as follows: 'The exceptions were argued at length before us on Monday, January 8, 1906. We have not been

convinced of any error committed by the court as set out in either of said exceptions. As to the fifty-eighth exception, it may be said, in support of the court's ruling, that it is not a material question under the pleadings whether the plant was worth more or less than the amount of the mortgage and the price named, \$51,000, in all \$70,000 to \$80,000, as the defendant offered to prove, but whether or not the signature of the plaintiff was obtained by false and fraudulent representations. The real value of the plant is not in issue, and the evidence therefore was properly excluded.' (5) The learned court erred in his reason stated as follows: 'It was not alleged in the bill, or at any time contended by plaintiff's counsel, that the plant was not of the value of \$51,000 and the amount of the mortgage'—and the learned court erred in stating that 'the real value of the plant is not in issue, and the evidence was therefore properly excluded.' (6) The learned court erred in decreeing as follows: 'And now, January 15, 1906, this cause came on to be further heard (on the exceptions filed) at this term and was argued by counsel, and thereupon, on consideration thereof, it is ordered, adjudged, and decreed that the exceptions to the findings of facts and conclusions of law and the admission and rejection of evidence be dismissed, and that the decree of the court made December 4, 1905, be and the same is hereby confirmed.' (7) The learned court erred in refusing to dissolve the injunction and dismiss the receiver at the costs of the plaintiff. (8) The learned court erred in appointing the Security Title & Trust Company of York, Pa., receiver of the Thomas Weir Candy Company. (9) The learned court erred in granting an injunction against Thomas Weir, as prayed for by the plaintiffs in their bill."

Argued before MITCHELL, O. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

Thomas H. Greevy, N. Sargent Ross, and Ross & Brennenman, for appellant. Henry C. Niles, Edward B. Scull, and George E. Neff, for appellee.

POTTER, J. The record in this case does not show that any assignments of error have been filed by the appellant, as required by rule 11. It is true that he filed in the court below a brief statement of errors, in accordance with equity rule 92, which statement has been substituted in the place of the assignments of error. But rule 92, by its terms, contemplates the filing of assignments of error in the appellate court, notwithstanding the fact that a statement of errors has been filed in the court below. This was expressly pointed out in *Croasdale v. Von Boyneburgk*, 208 Pa. 15, 55 Atl. 770, where our Brother MESTREZAT said (page 24 of 206 Pa., page 773 of 55 Atl.): "No assignments of error were filed in this case, and

the appellee would have been entitled on motion to a judgment of non pros. under rule 11. The learned counsel for the appellant misapprehended the purpose of rule 92, which requires the appellant to file in the court below 'a brief statement of the errors he alleges to have been made by the order or decree appealed from.' This, however, does not relieve the appellant from his duty under rule 11 to 'specify in writing the particular errors which he assigns and to file the same in the prothonotary's office' of this court. On an appeal, we can consider only such errors in the record as have been properly assigned under the last-mentioned rule. A failure to observe either of these rules may, at the instance of the other party or on the court's own motion, impose on the offending party the penalty of having his writ non prossed."

In the present case, if we attempt to treat the "Brief Statement of Errors" as a substitute for assignments of error, we find it is not in proper form. It is defective (1) in not setting out the decree of the court *totidem verbis*, and in including a reference to two separate decrees; (2) in not setting out separately and in full the exceptions which it is alleged were not acted upon; (3) in not setting out the exceptions dismissed, or the evidence admitted and rejected, and embracing more than one point; (4) in alleging as error an extract from the opinion of the court below, which is not in the decree. The opinion cannot be assigned as error. Complaint is also made of error in the final decree; but this decree merely dismissed the exceptions to a former decree, and confirmed it. Neither the exceptions dismissed nor the decree which was confirmed are set out; but, in the absence of a motion to quash, and in order to end a litigation already unduly prolonged, we will treat this appeal as though it were regularly here. The bill alleged that plaintiff had been induced to enter into a partnership agreement with the defendant, and to pay the sum of \$5,700 on account of his contribution to the firm, by false and fraudulent representations made to him by defendant. The alleged false representation made by defendant to plaintiff, as an inducement to him to enter into the contract, and purchase a half interest upon that basis, was that he (the defendant) had paid for the plant of the York Candy Company \$51,000 "in cold cash," when the fact was that he had paid for it in stock of the American Stogle Company, which he had purchased for \$20,000 only. Plaintiff testified that he would not have entered into the partnership agreement or made the cash payments if he had known that the consideration for the property at York had been paid in stogle stock, and not in "cold cash," as represented by defendant; that he went into the business relying on the judgment of defendant in paying \$51,000 for the plant, and therefore be-

lieved he was taking no risk in investing his money, in one-half of the interest, based on defendant's good judgment. Plaintiff first learned on May 31st that defendant's representations had been false, and on the same day he made a written demand for an accounting. On June 2d this bill was filed.

Under the pleadings, the case turns mainly upon the question of fact as to whether or not the defendant did, as an inducement to plaintiff to enter into the partnership and purchase a one-half interest upon that basis, represent that he paid for the York Candy Company's plant the sum of \$51,000 in "cold cash." It is admitted that, if such a representation was made by defendant to plaintiff, it was untrue. The plaintiff was corroborated in his allegation as to this representation by two witnesses; one being his wife, and the other a disinterested third party. The trial judge, having the parties and witnesses before him, found, as a fact, that the false and fraudulent representation was made. This finding was not only supported by ample testimony, but it is sustained by the weight of the evidence, and, under such circumstances, we have said many times that a finding of fact will not be disturbed by the appellate court. *McPherran's Estate*, 212 Pa. 425, 61 Atl. 954; *First National Bank v. Coal Co.*, 210 Pa. 76, 59 Atl. 484; *Gundaker v. Ehrigott*, 209 Pa. 284, 58 Atl. 476; *Byers v. Byers*, 208 Pa. 23, 57 Atl. 62. The law is well settled that, where one is induced to form a partnership by the false representation of another, the court will, upon the prompt application of the injured party, after the deceit becomes known, rescind the contract of partnership, and compel repayment of whatever sum may have been improperly obtained. See *Lindley on Partnership* (2d Am. Ed.) 482; *Richards v. Todd*, 127 Mass. 167; *Ingraham v. Foster*, 31 Ala. 123. The general rule is thus stated in 22 Am. & Eng. Ency. of Law (2d Ed.) 209: "Where a partner has been led into a partnership by means of fraud and deceit, he may maintain a suit in equity for a dissolution, even though he proves no pecuniary damage; or he may maintain a suit to rescind the contract, and require his partner to place him in statu quo, provided, of course, he has not ratified the contract after knowledge of the fraud." And in *Smith v. Everett*, 126 Mass. 304, Justice Gray, in discussing this principle, said: "Upon the allegations in the bill, which are admitted by the demurrer, the defendant, by false and fraudulent representations as to the extent of his business, induced the plaintiff to enter into a partnership with him for a definite period, which would make the plaintiff liable to creditors as a partner. Against such liability by reason of the defendant's fraud, a court of law could afford the plaintiff no adequate remedy. Equity has, therefore, jurisdiction to order the partnership

articles to be canceled, and to restrain the defendant from using the plaintiff's name as a partner, and, having obtained jurisdiction for that purpose, may administer complete relief in the same suit, by ordering the defendant to repay the sums advanced or expended by the plaintiff on account of the partnership."

During the trial, defendant made an offer to prove that the plant purchased by him from the York Candy Company was worth as much or more than the amount he stated he had paid for it, in cash \$51,000; but the court excluded the offer as immaterial. An exception was taken, but there is no assignment of error to the ruling, and the question is not properly before us; but counsel for appellant raise the same point in the argument, by contending that, if the property was worth the amount stated, no pecuniary damage was suffered by the plaintiff, and he is not, therefore, entitled to relief in this action. But the attitude of partners toward each other, is one which demands implicit fairness and good faith. No man ought to be compelled to remain in partnership with one who has deceived and tricked him, at the very outset of their career and at the inception of their mutual relations. "The relation of partners is one implying the highest degree of mutual confidence. By such relation each becomes the custodian, not only of the property, but to a great degree of the character and business standing of the other. For the court, therefore, in an equitable action, to uphold a contract consummated by fraud, and thus, as between the deceiver and the deceived, to bind the property and character of the latter, would seem to be not only inequitable, but oppressive. Nor should the relation be continued until the injured and deceived party has been subjected to actual loss, which he may prove in dollars and cents. When he appeals to the court for relief and establishes the fraud, he should be relieved from the hazard of a business combination into which he had been inveigled by fraud and misrepresentation." *Harlow v. La Brum*, 82 Hun, 292, 298, 31 N. Y. Supp. 487.

It having been determined that the contract of partnership in this case was obtained by misrepresentation, it was for the plaintiff, as the party deceived, to elect whether he would be bound. He has chosen to rescind. He has testified that he would not have entered into the contract at all, had he known the facts as to the purchase of the plant by the defendant. How, then, is it possible, with any justice, to enforce the contract against him in any part? The learned court below was undoubtedly right in setting the contract wholly aside. As to the appointment of a receiver for partnership property, at the instance of one of the partners, this court said, in *Sloan v. Moore*, 37 Pa. 217, by Justice Strong: "When a dissolution is intended, or has already taken place, a court

of equity will always appoint a receiver, provided there be some breach of the duty of a partner or of the contract of partnership. See cases collected in Collyer on Partnership, 354, note 4. Indeed, it is difficult to see how the necessity of a receiver can be avoided, on the dissolution of a partnership, when the parties cannot agree as to the disposition of the joint effects, for no one has a right to their possession and control superior to that of the other." In the present case, the court below gave to the defendant every opportunity to effect a settlement with the plaintiff, but without result. Nothing remained, then, but to appoint a receiver. The injunction followed as a matter of course. In 2 Lindley on Partnership, pp. 538, 539, it is said: "The appointment of a receiver always operates as an injunction, for the court will not suffer its officer to be interfered with by any one." And in Sloan v. Moore, 37 Pa. 217, cited above, Justice Strong further said (page 224): "The reasons for the appointment of a receiver apply with equal force to justify the injunction. Indeed, the decree making the latter perpetual was a necessary consequence of putting the partnership property into the hands of the receiver."

The decree of the court below is affirmed, and this appeal is dismissed, at the cost of appellant.

MITCHELL, O. J. (dissenting). The assignments of error are in violation of the rules of court, and the appeal might be dismissed on that ground; but, as the court has concluded to consider and decide the case, I would reverse the judgment.

The value of the manufacturing plant, the subject of the controversy, was relevant and very material on the question of fraud. If the appellant in good faith believed it worth \$51,000, and could show that it, or the stock he gave for it, was in fact worth that amount, then there was no actual fraud, and the representation that he had paid for it in cash was a subordinate circumstance not sufficient to rescind the purchase, though it would justify Jones in dissolving the partnership if he thought it of importance enough to destroy that confidence which the partnership relation requires. A bill for that purpose would, however, have sustained a decree for dissolution only from the filing of the bill, and with a due regard for the rights of both parties. The injunction and the appointment of a receiver were not only irregular and improvident, but highly unjust and injurious, in that they practically confiscated the appellant's property on a charge of fraud which may have been perpetrated, but which certainly was not proved, and which the appellant was denied the opportunity of disproving.

FELL and ELKIN, JJ., join in this dissent.

(217 Pa. 253)

PERRY v. PAYNE et al.

(Supreme Court of Pennsylvania. March 11, 1907.)

1. MASTER AND SERVANT—NEGLIGENCE OF SERVANT—LIABILITY OF MASTER.

Where an owner of a building allows workmen in the employ of a contractor to use the top of an elevator to stand on while painting the upper part of the shaft, and after this is done the painters go to the bottom of the shaft, when the elevator boy in the employ of the owner drops the elevator, and one of the men is killed, the owner is liable.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 1209-1216, 1223-1228.]

2. INDEMNITY—CONSTRUCTION OF CONTRACT.

Building contractors gave the owner of a building a bond to protect him and keep him harmless from damages arising from accidents to persons employed in the construction of or passing near the building. Held not to apply to an accident to a person working on the building through the negligence of a servant of the owner of the building.

Appeal from Court of Common Pleas, Philadelphia County.

Actio by Edward Perry against George F. Payne and Charles G. Wetter. From an order refusing to take off a nonsuit, plaintiff appeals. Affirmed.

Argued before MITCHELL, C. J., and FELL, BROWN MESTREZAT, and STEWART, JJ.

Thomas Leaming, for appellant. Edward W. Magill and Ruby R. Vale, for appellees.

MESTREZAT, J. By a contract in writing dated October 21, 1902, George F. Payne & Co., the defendants, agreed to erect for Edward Perry, the plaintiff and owner of the premises, a building at the southeast corner at Sixteenth and Chestnut streets; and, if the site was delivered to them by a certain date, they agreed to deliver the finished building to the plaintiff on December 15, 1903. By the terms of the contract Payne & Co. promised to execute and deliver to Perry a bond in the sum of \$140,000, indemnifying him, inter alia, "from all loss, cost or expense * * * arising from accidents to mechanics or laborers employed in the construction of said work, or to persons passing where the work is being constructed"; and in pursuance thereof the defendants gave their bond to Perry conditioned, inter alia, that they "shall protect and keep harmless the said Edward Perry of and from all loss, costs and damages, for nonfulfilment of same, or by reason of any liens, claims or demands for material, for labor furnished for the construction of said work, or from damages arising from accidents to persons employed in the construction of, or passing near the said work, or for damages done to adjacent properties by reason of the construction of said work, or by depositing material in such a manner as to damage either the city or the individual." Payne & Co. entered upon their

work, but failed to complete it within the specified time. The time limit was waived by mutual consent, and, as certain parts of the building were completed and ready for occupancy, they were delivered to Perry. In March, 1904, the entire building had not been finished, but Perry was in partial possession and had placed his employes in charge of the engine, machinery, elevators, and every part of the building. A few of the employes of the contractors or of the subcontractors continued to work on the building until about June 1, 1904, when all their workmen were withdrawn from the building, and, although not formally delivered to him, Perry took possession of it. Owing to some defect in the plastering on the side of one of the elevator shafts, a piece of the plastering, about 15 inches wide and 20 feet in height, had to be removed. The side of the shaft was then replastered and painted; but, owing to further defects, the architects refused to approve it, and it had to be removed and replastered again. This was done, and it necessitated the repainting of the shaft from the third floor to the bottom. Payne & Co. were required under the contract to do the work. On June 17, 1904, on request of Payne & Co., Perry consented that their employes might use the elevator as a movable stage in painting the side of the shaft. Perry was then and had been for some months in the exclusive possession of the elevator, and his employes were running it. On the morning of June 18, 1904, two painters in the employ of a subcontractor of Payne & Co. got on top of the elevator at the third floor for the purpose of painting the side of the shaft. As the painting within reach of the painters was completed, the boy operating the elevator would lower it, and, as the work progressed, he continued to lower it until the bottom of the shaft was reached. There were then still about 8 or 10 feet of the shaft, the space occupied by the elevator, to be painted. The painters left the top of the elevator, and after the boy had hoisted it they entered the shaft to complete the painting. Lynch, one of the painters, ascended a stepladder, and, while standing on it and engaged in painting, the boy lowered the elevator, which struck Lynch and caused his death. His widow recovered a judgment against Perry for the negligence of the latter's employe in operating the elevator. This is an action of assumpsit brought by Perry against Payne & Co. on the bond of indemnity. The learned trial judge in the court below held that, under the facts of the case, Payne & Co. were not liable to Perry on the bond for the damages recovered against him by Lynch's widow, and entered a nonsuit. The plaintiff has taken this appeal.

The learned counsel for the plaintiff concedes that at the time of the accident the elevator was being operated by a servant of the plaintiff for whose negligent act, result-

ing in the death of Lynch, the plaintiff was responsible. This admission was fully justified by the evidence, as well as by the judgment obtained against Perry. He claims, however, that the court below made an unwarranted distinction in holding that the servant operating the elevator might have been regarded as being in the employment of the defendants while the painters were on the top of the elevator and using it as a staging for painting, but that after they left the top of the elevator, and began painting under it at the bottom of the shaft, the servant was then in the employ of the plaintiff, and the elevator was under the management and control of the plaintiff. We do not think the counsel's position is well taken. From the facts, which are stated above, it is clear that whatever doubt may exist as to who was the employer of the boy—Perry or Payne & Co.—while the painters were using the top of the elevator as a staging, or who, during that time, was in control of the elevator, there can be no question that after the painters had left the elevator and resumed their work at the bottom of the shaft the boy was Perry's servant, and as such was in control of and operating the elevator. As we have seen, at the time Perry gave permission to Payne & Co. to use the elevator, he was in the exclusive control and management of it, and he consented to its use by them for staging purposes only, and, when it was no longer needed for that purpose, Perry, through his servant, resumed the use of it for his own purpose. The painters did not need it while painting at the bottom of the shaft, and it had to be hoisted above the unpainted portion of the side of the shaft before they could do that part of the work. Having served the purpose for which the contractors had procured it from Perry, the owner of the building then continued to use the elevator in his own business when, by a negligent act of his servant in operating it, it caused the injury resulting in Lynch's death.

The principal and controlling question in the case depends upon the interpretation of the bond on which the action was brought. That part of the condition of the bond with which we are particularly concerned provides that the contractors "shall protect and keep harmless the said Edward Perry * * * from damages arising from accidents to persons employed in the construction of, or passing near, the said work." The plaintiff contends that this bond indemnifies him against all damages arising from injuries to any person employed about the work, whether the injuries were caused by the negligence of the contractors or their employes, or by the negligence of himself or his employes. He contends that the language can bear no other interpretation; that the liability against which he is indemnified does not depend upon who caused the injury, but must be determined by the class of persons to which the victim belongs; and that the indemnifica-

tion covers all damages which he is required to pay arising from injuries to any person who is engaged in the construction of the building. We cannot assent to this construction of the bond. It ignores the well-established rules applicable to the construction of such instruments, and results, as we think, in imposing a liability on the contractors which was not contemplated by the parties. In construing the instrument, it is our duty to ascertain the intention of the parties, and in doing so we are not confined to the language used, but may consider the circumstances surrounding the parties and their object in making the instrument. The nature of the duty of the obligor and the character of the obligee will be regarded as explanatory of the intent of the parties. *Strawbridge v. Railroad Co.*, 14 Md. 360, 74 Am. Dec. 541. Here the obligors were the contractors for the erection of the building, and by their contract they agreed "to furnish all the materials for, and to build, construct and finish complete in every respect, ready for use, a building," within a stipulated time. This necessitated their being in possession of the premises during the time required for the construction of the building, and the plaintiff desired to relieve himself from any liability or from any litigation arising out of a supposed liability for any act done during the progress or the continuance of the work by the contractors. Hence the indemnification clause of the contract and the bond. But against whose negligent or unlawful act or acts was Perry to be indemnified? We think an analysis of the condition of the bond will disclose. He was to be protected from loss and damages for nonfulfillment of the contract. Certainly that obligation rested upon Payne & Co. He was to be protected against any liens, claims, or demands for material or labor furnished for the construction of the work. That protection, manifestly, was to be afforded by Payne & Co. He was to be indemnified against damage done to adjacent properties by reason of the construction of the work. As Payne & Co. were to erect the building, we think there can be no doubt that the damage there contemplated was such as would be done by Payne & Co. or their employes, and not by Perry or his employes. He was also to be indemnified against depositing material in such a manner as to damage either the city or the individual. Again recalling Payne & Co.'s relation to the building, that they were to furnish the material and erect the structure, this evidently only contemplated a liability if the material should be deposited by the contractors, and did not include material which might be deposited by Perry. In neither of the last two instances does the bond designate the party against whose negligent act Perry should be indemnified, but no reasonable interpretation of it would impose liability in either case for the acts of Perry or his employes, because manifestly the necessity for doing so could

not have been anticipated by the parties, and hence it was not intended that the bond should cover such acts by Perry. He was also to be indemnified against "damages arising from accidents to persons employed in the construction of, or passing near, the said work." Against whose acts resulting in damages to such persons did the parties intend that Perry should be protected? Manifestly against the acts of the same parties against whom the bond protected Perry for damages arising from the deposit of materials, or the damages done to adjacent properties by reason of the construction of the work. In those cases the negligent or unlawful acts against which Perry provided were evidently those of the contractors, although not so expressly stipulated, and we think it equally clear that it was the intention of both parties, when the bond in question was given, that the accidents against which the bond indemnified should be those that were caused by the negligence of the contractors or their employes who were engaged in the construction of the building, and not such as might arise from the unanticipated negligence of Perry or his employes. It is contrary to experience and against reason that the contractors should agree to indemnify Perry against the negligence of himself or his employes. It would make them insurers, and impose a liability upon the contractors, the extent of which would be uncertain and indefinite, and entirely in the hands of Perry. The results of such a liability might become most disastrous. While the consideration named in the contract for the construction of the building and indemnifying the owner was large, yet it was wholly inadequate to justify the contractors in assuming liability for his negligence in view of the responsibility in constructing the building. The profits to be realized on the contract were entirely too small to warrant the contractors in agreeing to assume a liability of such great proportions and of such unlimited extent. A single act of negligence on the part of the owner or his employes, over whom the contractors would have no restraint or control whatever, might create a liability which a lifetime of successful business could not repay. An interpretation of the bond which might give rise to such results could hardly be regarded as reasonable or as giving effect to the intention of the parties.

The question presented here has not arisen or been determined in any of the reported decisions of this court. In other jurisdictions, however, the inclination is decidedly against construing a contract of this character as indemnifying the indemnitee against his own negligence; and it is there held that a contract will not be so construed unless express language requires it. In *Mynard, etc., v. Syracuse, etc., R. R. Co.*, 71 N. Y. 180, 27 Am. Rep. 28, it is held that "every presumption is against an intention to contract for immunity for not exercising ordinary dili-

gence in the transaction of any business, and hence the general rule is that contracts will not be so construed unless expressed in unequivocal terms." In *Mitchell v. Southern Ry. Co.*, 74 S. W. 216, 24 Ky. Law Rep. 2388, Mr. Justice Paynter, speaking for the court, says: "If a doubt existed as to its [clause of indemnity] meaning, the court would resolve that doubt against the contention that the contract was intended to indemnify appellee against its own negligence. Every presumption is against such intention. * * * In *Perkins v. New York Central R. Co.*, 24 N. Y. 196, 82 Am. Dec. 281, the court said: 'A party who claims exemption from liability for the negligence of his servants or agents must undoubtedly base his claim upon the express words of his contract. It will not be presumed in his favor.'"

In *Manhattan Ry. Co. v. Cornell*, 54 Hun, 292, 7 N. Y. Supp. 557, affirmed by the Court of Appeals of New York, 130 N. Y. 637, 29 N. E. 151, a contractor, employed to construct an extension to the station platform of a railway, indemnified the railway company against "all loss, cost or damage * * * from any damages arising from injuries sustained by mechanics, laborers or other persons, by reason of accident or otherwise." During the progress of the work a laborer in the employ of the contractor was killed by an engine of the railway company, for which the widow of the laborer recovered damages against the company. Suit was then brought by the company against the contractor on his indemnity contract, but it was held that the contract did not indemnify the company against the negligence of its employees. In the opinion of the court it is said: "For, while the language of this part of the contract is very general, it cannot reasonably be so construed as to impose upon the contractors the obligation to protect the plaintiff against the carelessness or negligence of persons in its own employment. What the party designed and intended by this part of the agreement was to indemnify the plaintiff against liability for any damages or injuries that might be sustained by persons in the employment of the contractors in the progress and execution of their work. * * * There was no relation whatever existing between them (employees of the railway company) and the contractors, and it is not reasonable to suppose that in the use of this language either the plaintiff or the contractors intended or understood the latter to be obligated to indemnify the plaintiff against the carelessness or misconduct of its own servants or employees." In *Johnson v. Richmond & Danville R. R. Co.*, 86 Va. 975, 11 S. E. 829, the contract provided that a railroad company should not be responsible for any injuries to, or death of, any member of a firm which had contracted to construct some work for the company, and that, in the event of any suit being brought against the company or any judg-

ment obtained against it, the contractors should resist the suit and pay such judgment. One of the firm was killed by a train of the railroad company, and in an action for his death the company set up the contract as a defense. The trial court sustained its position, but the Court of Appeals reversed, Mr. Justice Lewis, delivering the opinion, saying: "It was very properly conceded in the argument that the instruction given by the circuit court is erroneous. The theory of that instruction is that the fifth clause of the written agreement, although it in effect stipulates for exemption from liability even for the consequence of the company's own negligence, is notwithstanding valid, and consequently precludes a recovery by the plaintiff, whether the company was negligent or not. It would be strange, indeed, if such a doctrine could be maintained. To uphold the stipulation in question would be to hold that it was competent for one party to put the other parties to the contract at the mercy of its own misconduct, which can never be lawfully done where an enlightened system of jurisprudence prevails. Public policy forbids it, and contracts against public policy are void."

The only case cited by the learned counsel of the plaintiff in support of his position and the one which he contends rules the present case in favor of his client is *Woodbury v. Post*, 158 Mass. 140, 83 N. E. 86. We think, however, that the reasoning of the court there is against the plaintiff's construction of the contract in our case. There is a clear distinction between the contracts in the two cases, and the *Woodbury Case* was ruled in favor of the indemnitee on the ground that the terms of the contract specifically provided indemnity against his own negligence. The letters passing between the parties constituted the contract. The indemnitee's letter contained the following proposition, which was accepted by the indemnitor: "If any injury shall be occasioned to any person or property while you are using such engines or derricks, or as a result of such use, you are to indemnify us against any damage or expense by reason of the same, notwithstanding the condition of the engine, derrick, or appliances, or the negligence of our employees upon the derrick or engine, may have caused or contributed to the injury." Two of the indemnitee's employees were injured by the defective condition of one of the derricks while being used by the indemnitor, and received compensation from the indemnitee for their injuries. In a suit by the indemnitee to recover this compensation from the indemnitor, it was held that the plaintiff could recover the amount he had paid the injured employees, although their injuries were the result of his own negligence. The right to recover was put on the ground that the contract expressly stipulated against the indemnitee's own negligence; the court holding that the language used made it clear that such liability was

imposed by the contract. In the opinion it is said (page 144 of 158 Mass., page 87 of 33 N. E.): "The clause 'notwithstanding the condition of the engine, derrick, or appliances, or the negligence of our [plaintiffs'] employes upon the derrick or engine, may have caused or contributed to the injury,' does not limit the indemnity to damages and expenses caused by the condition of the engine, derrick, and appliances, or the negligence of those employed upon the derrick or engine. Its purpose and effect were to make it clear that those circumstances, which, if no such clause had been inserted, might have been claimed to defeat the right to indemnity, were not to impair the plaintiffs' right. The clause negatives possible exceptions which might in effect be read into the contract by the application of principles of law, unless the parties made it certain that indemnity from the result of all injuries, however occurring, was expressly stipulated." It is therefore apparent from the opinion of the court that the liability of the indemnitor was put upon the ground that the contract expressly stipulated against the indemnitee's own negligence, and that "the clause negatives possible exceptions" to such liability.

We think it clear, on reason and authority, that a contract of indemnity against personal injuries, should not be construed to indemnify against the negligence of the indemnitee, unless it is so expressed in unequivocal terms. The liability on such indemnity is so hazardous, and the character of the indemnity so unusual and extraordinary, that there can be no presumption that the indemnitor intended to assume the responsibility unless the contract puts it beyond doubt by express stipulation. No inference from words of general import can establish it. The manifest purpose, in such cases, to indemnify against the injury which, under the circumstances, could reasonably be apprehended only from the action of the indemnitor or his servant, is a weighty consideration in construing indemnity contracts. The circumstances surrounding the parties, the one, the owner for whom the building is to be erected, and the other, the contractor who is to construct the building and hence from whose acts injury to persons and property may be anticipated, would seem to make the conclusion irresistible that, unless expressly stipulated in the contract, the owner is not to be indemnified against his own negligence. In the case in hand the parties have not expressly stipulated against injury occasioned by the indemnitee's own negligence, and we are satisfied, from the terms of the instrument read in the light of the circumstances surrounding the parties as well as the manifest purpose inducing the bond, that they did not intend to protect the indemnitee against his own or his servant's negligence.

The assignment of error is overruled, and the judgment is affirmed.

(217 Pa. 349)

LEE v. DOBSON.

(Supreme Court of Pennsylvania. April 1, 1907.)

1. MASTER AND SERVANT—INJURY TO SERVANT—ASSUMPTION OF RISK.

Where a servant undertakes to operate a machine obviously wanting in safety appliances, knowing such fact, he cannot recover in case of injury in consequence thereof.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 574, 610.]

2. SAME—CONTRIBUTORY NEGLIGENCE.

Plaintiff injured by machinery at which he had worked held guilty of contributory negligence.

Appeal from Court of Common Pleas, Philadelphia County.

Action by Harry Lee against James Dobson. Verdict for plaintiff. Defendant appeals. Reversed.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

Thomas Earle White, for appellant. Thomas Leaming and John R. K. Scott, for appellee.

STEWART, J. The plaintiff was employed in the dyerroom of defendant's carpet mill, where he was in charge of two of the seven vats there used for dyeing and scouring yarn. What was required of him was to introduce into the vats from time to time a cage or frame on which the yarn was wound, and remove the same when it had sufficiently acquired the dye. This cage or frame was moved rapidly back and forth in the vat containing material by mechanical appliance; the power being derived from a countershaft which ran the entire length of the room at an elevation of eight or nine feet. On this shaft was a sprocket wheel, over which passed a circular chain, which was carried down under a similar wheel attached to the rear of the vat. The power thus derived was communicated to an eccentric, which imparted its motion to the cage in the vat. The chain which thus connected the vat with the shaft was very liable to slip from the sprocket wheel on the shaft, and, when this happened, the movement of the cage necessarily ceased for the time being. When it occurred, it was plaintiff's duty to climb up, by means of the wall and the pipes extending through the room, and readjust the chain upon the wheel. It was while attempting this that the accident complained of occurred—not while in the act of putting the chain upon the wheel, but while getting in position to do this after he had reached the level of the shaft. His own testimony is that, occupying a stooping or crouching position close to the shaft, his jacket or blouse was torn loose from his person by a jet of escaping steam and driven toward the shaft, which caught it and drew him irresistibly, to his injury. In this he was corroborated by his father, who was the only witness to the occurrence.

The latter testified that he saw the jacket driven open by the steam and caught by the shaft. No different explanation of how the accident occurred was suggested; and it is accepted as correct.

The effort on part of plaintiff was to refer the accident to the negligence of the defendant in failing to provide such appliances in connection with his machinery as would enable the party whose duty it might be to adjust the chain when misplaced to throw into rest for the time being the shaft, or that particular section of it to which the sprocket wheel was attached. The fact that such appliances are in common use was abundantly established, and was not controverted. That the defendant's machinery lacked these improved appliances was admitted. No one part of the shaft in this case could be brought to a rest, except as the whole shaft was stopped, and this could only be effected from the engine room, where plaintiff was without control. This was not permitted when nothing but replacing the chain was to be done. Other things being equal, whether ordinary care would have required the furnishing of such safety appliances would be a matter for the jury; but this case presents features which make this inquiry unnecessary. The plaintiff was a man of about 35 years when this accident occurred. He had been in defendant's employment with some interruptions for 12 years, and for the greater part of this time worked in the same room in which he was last engaged. The machinery used in this room was introduced some 10 years ago, and so far as appears is unchanged. For only a period of 10 months, however, before the accident, had plaintiff been working at a vat in which the cage of yarn was moved about in the vat by machinery. In his earlier experience he had worked at a vat in which it was moved by hand, but it was in the same room, so that he had abundant opportunity, both by observation and experience, to acquaint himself fully with the nature and character of the work he was employed to do, and its attending risks. He had frequently done what he was attempting when his accident befell, and had seen others do it. Displacement of the chain was a matter of almost daily occurrence. There is no uncertainty in the law applicable to cases of this kind. The master is not an insurer of the servant's safety. While he is required to furnish reasonably suitable and safe means with which to carry on his business, yet the servant will be deemed to have assumed all risks naturally and reasonably incident to his employment, and to have notice of all risks which to a person of his experience and understanding are or ought to be open and obvious. When one undertakes a perilous employment by operating a machine obviously wanting in suitable appliances for safety knowingly and voluntarily, he cannot afterwards complain in case of injury in consequence thereof that the machinery was of a

dangerous kind, and that it was wanting in appliances reasonably necessary to render it safe. *Rummell, Adm'r, v. Dilworth*, 111 Pa. 343, 2 Atl. 355, 363; *Danisch v. Amer*, 214 Pa. 105, 63 Atl. 416. True, the defendant says that at the time accident occurred he did not know that there were appliances that could be employed to throw a section of the shaft into a state of rest. He did know, however, that the movement of the shaft could be arrested from the engine room, and that his employer, notwithstanding another equally effective way of bringing the shaft to a rest was available, required that the readjustment of the chain be made without this. In other words, that he required this work to be done while the shaft was revolving. His ignorance of the improved methods for stopping the shaft or a section of it without disturbing the whole in no wise misled him as to the risk of the employment. He was daily confronted by an obvious danger which he fully understood and appreciated, according to his own admissions. The defendant owed him no duty to acquaint him with the fact that the machinery was not so safe as that in common use for the same purposes; that in some other, or almost any other mill where like work was done, he would not be exposed to the same danger, because in these other mills when readjustment of the chain on the wheel was required the revolution of the shaft in one way or other was stopped, while in this mill the readjustment was required to be made while it was in motion. In the light of the evidence, the plaintiff's employment was a specially dangerous one, and for this the plaintiff engaged with full appreciation of the risk. Having voluntarily and knowingly assumed this risk, now that he has suffered in consequence, he can have no recourse upon his employer.

Aside from this, the case presented another feature which should have prevented its submission to the jury. The plaintiff's accident must be referred to his own want of care. The evidence admits of no other conclusion. Before attempting the work of restoring the chain to the wheel, fully appreciating the danger to which he would be exposed, he prepared his dress with reference to it. He knew what the result would be if his clothing came in contact with the revolving shaft. He therefore thought to guard against this by tying a string about his person, and thus confining the ends of his jacket. His precautions were inadequate. The ends of his jacket escaped and were carried by the steam or wind against the shaft with the very result which his preparations were expected to avoid. He was not lacking in appreciation of the danger, but his preparations were inadequate. For his failure in this regard his employer was not responsible.

For the reasons stated, defendant's point that under all the evidence the verdict should be for the defendant should have been af-

firmed. The refusal to so instruct is the only assignment of error, and it is sustained.

Judgment reversed, and judgment is now entered for the defendant.

(217 Pa. 354)

HALEY et al. v. AMERICAN AGRICULTURAL CHEMICAL CO.

(Supreme Court of Pennsylvania. April 1, 1907.)

WHARVES—LEASES—CONSTRUCTION.

Land abutting on a navigable river was described in the lease thereof as coterminous with a pier constructed thereon, and as extending into the river to the low-water line. There was in the lease a grant of other wharf property extending into the river from the previously described premises from the low-water line to the pier headline, together with all water rights appurtenant thereto. *Held*, that the tenant could not be compelled to pay the cost of cleaning the adjoining dock or basin between the piers leased required by law to be paid for by the owner of the pier.

Appeal from Court of Common Pleas, Philadelphia County.

Action by Rose Haley and others against the American Agricultural Chemical Company. From an order discharging rule for judgment for want of a sufficient affidavit of defense, plaintiffs appeal. *Affirmed*.

The lease contained a covenant on the part of the lessee to repair. The court discharged a rule for judgment for want of a sufficient affidavit of defense.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

D. Webster Dougherty, for appellants. R. Stuart Smith and Charles E. Morgan, for appellee.

STEWART, J. Adam W. Louth, whose estate is here represented by his executors, plaintiffs in the action, demised by written lease to the defendant company for a term of years certain premises situated along the Delaware river front in the city of Philadelphia. The premises, so far as they are described by metes and bounds, are exactly coterminous with a pier constructed thereon, and which extends into the river as far as the port warden's low-water line. The lease contains this additional grant, following immediately upon the one above stated: "And also all that certain wharf property extending eastwardly into the River Delaware from the above-described premises from port warden's low-water line to port warden's pier headline, as shown in the said plan hereto annexed, together with all water rights appurtenant thereto." Shortly after possession was taken under the lease, the lessor received notice from the board of port wardens that he was required within 30 days thereafter to have the dock between his piers cleansed to the depth of 21 feet, and that, failing therein, the dock would be cleansed at his expense, and a lien entered against his property for

the cost of the work. The lessor acquainted his lessee with this demand, and insisted that the cleansing was a burden the latter had assumed under the terms of the lease. Upon the lessee's denial of its liability and refusal to do the work, the lessor, to avoid the filing of a lien, proceeded with the work, and completed it at a cost of \$2,946.93. This action was brought by lessor's executors against the lessee to recover for this expenditure. In the affidavit of defense filed, the defendant company denies that the dock was any part of the leased premises, or that by the terms of the lease it assumed any duty or liability in connection therewith. The court, without filing an opinion, discharged a rule for judgment for want of sufficient affidavit of defense, and thus we have presented the only question in the case. The case was one for the court. The plaintiffs rest their claim entirely upon the written lease; the affidavit of defense denies nothing contained in plaintiffs' statement of claim, except the inference plaintiffs seek to draw from the lease. No issue of fact is raised calling for the intervention of the jury. The rights of the parties depend upon a proper construction of the lease which gives rise to the controversy.

The leased premises, as we have said, so far as described by metes and bounds, consist wholly and exclusively of a pier in the river with the buildings thereon. No rights or privileges upon either side of the pier—that is to say, beyond the pier limits—were granted under the lease, and indeed none could be, since upon either side are the waters of the Delaware, and in these the lessor had no rights which were peculiar to himself, and therefore none which could be made the subject of a grant. The law imposes upon the owner of a pier the duty of cleansing the dock—which is nothing more than the basin between two adjoining piers—in proportion to the number of feet of his lot or landing on each side of the dock, not because the owner of the pier has any exclusive right or privilege in the dock, but because his pier, constructed under a license, to a greater or less extent occasions, or contributes to, the shoaling of the dock by obstructing the current of the river. It is in part the price he pays for the privilege of constructing and maintaining his pier upon the public domain, and it is in the nature of a charge upon the property which a lessee can be required to meet only as he has expressly so covenanted. It cannot be pretended that any common-law liability attaches to the lessee with respect to it, for not only is the dock distinct from the property leased, but, even were it otherwise, the rule of the common law exempts the tenant from all liability for diminution in value resulting from the natural operation of time and the elements, and these are what conspire to shoal the dock. If the subject of the lease had been the dock, that is to say—the basin between the piers, which, of course, it could not be for the reason we have stated

—it might well be argued that, under the covenant to repair, it became the duty of the lessee to maintain it at the depth required by the authorities; but the subject of the lease is the pier, and neither by express terms nor by implication does the duty to repair extend beyond the actual thing leased. The lease might have stipulated that this particular burden was to be discharged by the lessee, but it does not. Nor is wider operation given the lease, so far as concerns the duty of cleansing the dock in the way of repair, by the added clause which makes the lease embrace that certain wharf property extending eastwardly into the River Delaware from the above-described premises to the pier headlines, "together with all water rights appurtenant thereto." The lessor, as a riparian owner, has the right, subject to conditions and regulations imposed by the board of port wardens, to extend his pier beyond its present terminus at low-water line to the pier headline. This unoccupied space is in the lease described as wharf property, and the lease grants to the lessee the lessor's rights therein; that is, the right to extend the existing pier, with all water rights appurtenant thereto. With respect to such pier extension, the rights would be just the same as those which attach to the existing structure. The owner's control is defined by the limits of the pier, however extended. In front and upon either side is the river highway, in which no individual has any right which does not belong to every other. The pier is the owner's own peculiar property, which he may use to its farthest limit, but which no other may use except upon the owner's terms. What is meant by the water right appurtenant thereto, if anything, is the right to invade the water of the river with the pier so far as the pier headline. If there be any other water right appurtenant, it has not been suggested. In the nature of things, there can be none. All outside and beyond the actual structure is public domain, which admits of no exclusive ownership.

The order of the court below in discharging the rule for judgment for want of sufficient affidavit of defense is affirmed.

(217 Pa. 303)

COMMONWEALTH v. CLYMER.

(Supreme Court of Pennsylvania. April 1, 1907.)

1. STATUTES—TITLE OF ACT.

Act May 18, 1893 (P. L. 94), establishing a medical council and state boards of medical examiners, and defining the duties of the same, providing for the examination and licensing of medical practitioners, and making an appropriation for the medical council, gives sufficient notice of the subject of section 14 of the act, making a violation of the provisions of the act by practicing without a license a misdemeanor.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, § 153.]

2. CRIMINAL LAW — EVIDENCE — ADMISSIBILITY—EXAMINATION OF RECORDS.

Where accused was convicted of practicing medicine without a license, it was not error to

allow a clerk in the office of the state superintendent of public instruction to testify that he had examined the records of the medical council, and had not found the defendant registered therein, particularly where the record from the office of the prothonotary showed that none of the papers filed by defendant for the purpose of registration was a license issued by the medical council.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 3138.]

3. SAME—APPEAL—HARMLESS ERROR.

On a trial for practicing medicine without a license, failure to charge on the subject of costs on acquittal of accused was immaterial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 3165.]

Appeal from Superior Court.

R. S. Clymer was convicted of practicing medicine without a license, and appeals. Affirmed.

The opinion of the Superior Court (Rice, P. J.) was as follows:

"It is argued that the act of May 18, 1893 (P. L. 94), is unconstitutional, because the subject of legislation is not clearly expressed in the title. The particular objection is that the title gives no notice of the provision, contained in the fourteenth section, making a violation of any of the provisions of the act, especially those relating to practicing medicine or surgery without license and registration, a misdemeanor punishable by fine. Inasmuch as the subject of legislation, as expressed in the title, is the examination and licensing of practitioners of medicine and surgery, and the further regulation of the practice of medicine and surgery, any one would naturally suppose, from reading the title, that the act not only provided for the licensing of such practitioners, but declared the consequences of practicing without complying with its provisions. 'For,' as Blackstone says, 'it is but lost labor to say, "do this, or avoid that," unless we also declare, "this shall be the consequence of your non-compliance." We must therefore observe that the main strength and force of law consists in the penalty annexed to it.' 1 Bl. Com. 57. It is not to be supposed that this would be omitted from such legislation as is described in this title, and any one reading it would be led to look into the body of the act to see what consequences it attaches, penal or otherwise, to noncompliance with its provisions. The fact that a title as broad as this does not expressly declare that a violation of the provisions of the act is made a penal offense is not a valid objection. This has been decided in numerous cases wherein the precise question has been duly considered; and Mansfield's Case, 22 Pa. Super. Ct. 224, which is cited by the appellant's counsel as authority for a different conclusion, is not in conflict with them, as an examination of Judge Porter's opinion will show. Amongst these cases are Commonwealth v. Sellers, 130 Pa. 32, 18 Atl. 541, 542; Commonwealth v. Silverman, 138 Pa. 642, 21 Atl. 13; Commonwealth v. Muir, 1 Pa. Super. Ct. 578; Id., 180

Pa. 47, 36 Atl. 413; *Commonwealth v. Moore*, 2 Pa. Super. Ct. 162; *Commonwealth v. Jones*, 4 Pa. Super. Ct. 362; *Commonwealth v. Beatty*, 15 Pa. Super. Ct. 15; *Commonwealth v. Rothermel*, 27 Pa. Super. Ct. 648. The constitutionality of the act was under consideration in *Commonwealth v. Finn*, 11 Pa. Super. Ct. 620, and again in *Re Registration of Campbell*, 197 Pa. 581, 47 Atl. 860. In the latter case the sufficiency of the title as notice of the provision for registration was affirmed in a statement of general principles which fully covers the objection raised in this case.

"The admission of the testimony of a statistical clerk, who assisted in keeping the records of the medical council and the state board of medical examiners, that he had examined them, and could not find the name of R. S. Clymer therein, was not prejudicial error, even though this mode of proving the contents of the record was open to objection. In view of the fact that these records are voluminous, and are kept at Harrisburg, and of the great inconvenience that would be caused by compelling their production for the inspection of the jury, we are not prepared to declare that this testimony was admissible; but it seems unnecessary to go into a discussion of that question, because according to the doctrine of *Commonwealth v. Wenzel*, 24 Pa. Super. Ct. 467, and in view of the state of the record produced from the prothonotary's office, it was not incumbent upon the commonwealth, in the first instance, to prove that the defendant had no license.

"The fact that the defendant practiced medicine, as alleged in the indictment, was established by abundant testimony, and was not in dispute. The legal question was whether he had a right to do so; to be more explicit, whether he had complied with the provisions of the act of 1893. The record produced from the office of the prothonotary, taken in connection with the uncontradicted testimony of the deputy, showed that none of the papers exhibited by the defendant for the purpose of registration was a license issued by the medical council of Pennsylvania, and no such license was produced on the trial, or was proved, and its nonproduction accounted for. Moreover, in the affidavit filed by the defendant with these papers, the clauses of the bank relative to the exhibition of a license issued by the medical council, and to compliance with the provisions of the act of 1893, were all erased, thus showing that the defendant was careful not to assert that he had any such license, or that he had complied with the provisions of the act. In view of these facts the court was justified in expressing to the jury his opinion as to what the verdict should be. It is often permissible, and sometimes advisable, for a judge, in his charge to the jury, to express an opinion upon the facts, provided he does it fairly, and does not give a binding direction as to them. *Commonwealth v. Winkel-*

man, 12 Pa. Super. Ct. 497, and cases there cited. It is even more appropriate for him to do so where the case depends as fully as this did upon questions of law and the construction of public records. We are not convinced that the judge went farther than he was warranted in doing, indeed, even if he had still more explicitly instructed the jury that the record produced from the prothonotary's office showed that the defendant did not exhibit to the prothonotary a license issued by the medical council of Pennsylvania, we cannot say that this would have been error.

"The complaint that the court should have instructed the jury as to the law of costs in case of acquittal is without merit. No such instructions were asked, and it was not important for the jury to know what the law was upon that subject, in the event of their finding the defendant guilty. We have no right to suppose that, if the judge had charged them fully upon that subject, their verdict would have been different.

"All the assignments of error are overruled, the judgment is affirmed, and the record is remitted to the court below, to the end that the sentence be carried into effect."

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, and STEWART, JJ.

James L. Schaadt and C. Oscar Beasley, for appellant. H. W. Schantz, Dist. Atty., and A. G. Dewalt, for the Commonwealth.

PER CURIAM. Judgment affirmed on the opinion of the Superior Court.

(217 Pa. 321)

FOEHRENBACH v. GERMAN-AMERICAN TITLE & TRUST CO.

(Supreme Court of Pennsylvania. April 1, 1907.)

INSURANCE — TITLE INSURANCE — CONSTRUCTION OF POLICY.

Where one in possession of land and claiming a title in fee simple applies, in good faith, to a title insurance company, which issues to him a policy, and thereafter it is decided in partition proceedings that he has only a half interest in the land, and the insured because thereof voluntarily surrenders the premises to a purchaser at judicial sale, he may recover the value from the company, and it cannot claim that, as he never had title to the half interest, he suffered no loss.

Fell and Brown, JJ., dissenting.

Appeal from Court of Common Pleas, Philadelphia County.

Action by Julius E. Foehrenbach against the German-American Title & Trust Company. Judgment for defendant, and plaintiff appeals. Reversed.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

E. Spencer Miller and Maurice G. Belknap, for appellant. Alex. Simpson, Jr., and Francis Shunk Brown, for appellee.

POTTER, J. On September 13, 1894, the plaintiff in this case, under the supposition that he was the owner of the entire interest in a certain property, applied to the defendant for title insurance in the usual form, in the sum of \$5,000, against liens or defects in title affecting the premises. On October 12, 1894, the Title Insurance Company issued to applicant its policy, which set forth, in part, as follows: "This policy of insurance witnesseth that the German-American Title & Trust Company, in consideration of the payment of expenses and twelve dollars and fifty cents (\$12.50) by way of premium or deposit to it paid by Julius E. Foehrenbach, doth hereby covenant that it will indemnify, keep harmless and insure the said Julius E. Foehrenbach and all persons claiming the estate and property hereinafter mentioned under him by descent, by will or under the intestate laws, and all other persons to whom this policy may be transferred with the assent of this company, testified by the signatures of the proper officers of this company indorsed on this policy, against all loss or damage not exceeding five thousand dollars, which the said insured shall sustain by reason of defects of the title of the insured to the estate, mortgage or interest described in schedule A, hereto annexed, or because of liens or incumbrances charging the same at the date of this policy. Saving the defects, objections, liens, or incumbrances excepted in schedule B, or by the conditions contained in schedule C, and hereby incorporated into this contract." Schedule A showed that the interest of the insured covered by the policy was as owner in fee, and that the title of the insured was claimed to be vested in him through the will of his mother, Louisa Foehrenbach, dated December 21, 1888, and registered in the appropriate office in Philadelphia in Will Book 144, p. 463. Louisa Foehrenbach provided in her will as follows: "I give, devise and bequeath unto my said son John Baker for and during his natural life (after said Julius shall have attained the age of twenty-one years) the property No. 643 East Girard avenue, corner Montgomery avenue, 18th ward, and after his death to his lawful issue if any, their heirs and assigns; in default of issue the same to vest in my said son Julius Foehrenbach his heirs and assigns forever." John Baker, named in the will, died June 23, 1894, intestate, unmarried and without issue, leaving to survive him a half-brother, Julius E. Foehrenbach, and three children of William Ellerich, another half-brother. That William Ellerich bore the same relation to John Baker that he himself did, and that William Ellerich left three surviving children, was known to Julius E. Foehrenbach when he made his application for title insurance, but he did not mention these facts to the Title Insurance Company. Presumably, this was because he was acting under the belief that he was, under the will of his mother, the

exclusive owner of the property, as there is no suggestion of fraud or bad faith upon the part of plaintiff. Indeed, there could not be for the will of Louisa Foehrenbach was given by appellant as his immediate source of title, and it was examined and accepted as such by defendant company, as set forth in schedule A, and this will contained a bequest to her son William Ellerich, and made obvious his relationship to the said John Baker. Subsequently, the three children of William Ellerich, claiming a one-half interest in the premises in question, began partition proceedings in the orphans' court. It was there held that John Baker took a fee under the terms of his mother's will, and therefore at his death his half-brother, Julius E. Foehrenbach, instead of taking the entire interest from his mother, took only a half interest from his half-brother, and the remaining half interest became vested in the children of William Ellerich, the deceased half-brother. The property was then sold under the partition proceedings, realizing the sum of \$4,100, its value, and on distribution of the proceeds of sale one-half the net balance was awarded to the Ellerichs, and one-half to a lien creditor of Foehrenbach. The policy of title insurance had been assigned by Foehrenbach to this lien creditor, and the company paid her the difference between the amount awarded her by the orphans' court and her entire lien, being the sum of \$411.87. On November 21, 1904, Foehrenbach, who had been in possession of the premises since the death of Baker, a period of some 10 years, voluntarily delivered possession of them to the purchaser at the partition sale. He then brought this suit in assumpsit against the title company to recover \$1,915.70, being the difference between the value of the property, less the amount of the award by the orphans' court, a few small items of credit, and the money paid his assigns. Defendant filed an affidavit of defense and pleas. A case stated was agreed upon, and the cause submitted to the court below, which entered judgment in the following language: "This policy is not a guaranty of title, but a contract of indemnity. The plaintiff has lost nothing. Judgment for defendant on case stated."

In reaching this conclusion, the learned court adopted the suggestion of the defendant that the plaintiff lost nothing, because he never did, in fact, have the title to the entire interest, as he supposed he had, and therefore he could not be said to lose that which he had never owned. As a logical statement, taken in the abstract, this is unassailable; but, in determining whether or not the failure of his title to the one-half interest in the property constituted such a loss as would entitle him to indemnity under the terms of his insurance policy, we must examine the contract in the light of the purpose or object for which it was made. It is admitted that, if plaintiff had purchased or improved the property in reliance upon the

policy, he could recover; but as he was in possession as owner, before he applied for and received the insurance, it is urged that he lost nothing, because he expended nothing in reliance upon the policy. We cannot see any sound reason for this attempted distinction between the rights of a present and prospective owner, who applies for title insurance. Relief of mind to an owner, obtained through title insurance, is quite as desirable as the same assurance furnished to a prospective purchaser or mortgagee. The sole object of title insurance is to cover possibilities of loss through defects that may cloud or invalidate titles. It is for the assumption of whatever risk there may be, in such connection, that the premium is paid to, and accepted by, the company which issues the policy. Title insurance is not mere guesswork, nor is it a wager. It is based upon careful examination of the muniments of title, and the exercise of judgment by skilled conveyancers. The quality of a title is a matter of opinion, as to which even men learned in the law of real estate may differ. A policy of title insurance means the opinion of the company which issues it, as to the validity of the title, backed by an agreement to make that opinion good, in case it should prove to be mistaken, and loss should result in consequence to the insured. "Loss" is a relative term. Failure to keep that which one has, is loss. The plaintiff in this case, upon September 12, 1894, found himself in possession of a property, devised to him, as he supposed and claimed, in the will of his mother. Wishing to safeguard himself in the enjoyment of his title, he applied to the defendant company for insurance. "Title insurance is an agreement whereby the insurer, for a valuable consideration, agrees to indemnify the insured in a specified amount against loss through defects of title to real estate wherein the latter has an interest, either as purchaser or otherwise." Frost on Guaranty Insurance, § 162. A contract of title insurance is also defined as "a contract to indemnify against loss through defects in the title to real estate or liens or incumbrances thereon." 1 Cooley on Insurance, 12.

It must be borne in mind that the real subject of insurance is not the concrete thing, but the interest which the one to be indemnified has in the concrete thing. The interest which plaintiff desired to protect was the entire interest as owner in fee of the property in question. It was this interest which he submitted to defendant company as the subject-matter of insurance. It was for the company, then, to examine the evidence of his title, and to say whether or not it would assume the risk of making good to him the injury which would result, in case his claim of title to the entire interest should prove defective. The contract which he asked for, and which by its policy the company made with him, was one of insurance against defects in the title, as he claimed it to be,

and as the company agreed with him, after examination, that it was, viz., title to the entire interest in the property. The policy applied to the situation as it then existed. It insured the plaintiff against defects, unmarketability, liens, and incumbrances as of that date. It said to him: "You are, in our judgment, the owner in fee of the entire interest in this property, and we will back our opinion by agreeing to hold you harmless, up to the amount of the policy, in case for any reason, our judgment in this respect should prove to be mistaken." The risks of title insurance end, where the risks of other kinds of insurance begin. Title insurance is designed to protect the insured, and save him harmless from any loss arising through defects, liens, or incumbrances that may be in existence, affecting the title when the policy is issued. It does not protect against any claim arising after the issuance of the policy.

In the present case, the validity of the plaintiff's claim to the entire interest in the property depended upon the construction of the language of the will of Louisa Foehrenbach. Evidently the defendant company, having the will before it, construed the devise as a life estate in the first taker, and a fee in the remainderman; otherwise, it would not have issued its policy insuring a fee in the remainderman. In adopting this construction, it was mistaken, for when, some 10 years afterwards, the question was raised in the orphans' court, under the partition proceedings, it was decided that the first taker took a fee simple. The title of the plaintiff to the property in question was not, therefore, derived from his mother, as claimed by him in his application for insurance, but whatever interest he had came to him through his half-brother, John Baker, from whom he took only an undivided one-half interest. Can there be any doubt that the reduction of his interest in the property from an ownership of the whole, to that of one-half, was a defect, coming directly within the terms of the policy? No matter whether or not the question of the amount of his interest was doubtful when the policy was issued, the risk of insuring him in his claim of title was one which the defendant could legitimately take, if it chose to do so. Insurance carries with it the idea of protection against some risk. If there were no risk, there would be no cause for insurance. The underlying principle of insurance is the contribution of small sums by a large number of insured, to a common fund, from which to indemnify those who actually suffer the loss, which might have fallen upon any of them. Actual loss, of course, must precede the right of compensation; but that is measured by the standard accepted as between the parties. In this case the standard of interest, which was claimed by appellant, was ownership in fee of the entire property. That standard was, after examination of

the muniments of title, by the defendant company, admitted as correct, and the policy of insurance was issued, for a proper consideration, agreeing to insure the plaintiff against any loss or damage by reason of defects in that particular interest or claim of title which he had presented to the company; that is, against any outstanding claim which would reduce his interest below that which he claimed it to be. It requires no argument to show that the absolute failure of title to one-half the interest was a serious defect, as compared in extent and quality with the title to the entire interest, which he had asserted and submitted to the defendant company, as the basis upon which the insurance was to be effected, and which was accepted and approved by it, as set forth in the policy. The estate or interest of the insured which was covered by the policy was that of owner in fee of the entire property. Any defect in title which reduced his interest below that point was, it seems to us, just that much loss, or damage, for which he was entitled to be indemnified. The fact that an application is made for title insurance by one who, at the time, claims to be the owner, is sufficient of itself to put the insurance company on its guard, and ought to be regarded by it as notice that unusual care should be taken in the examination of the title.

There is no merit in the suggestion that plaintiff is not entitled to recover because he voluntarily gave possession to the purchaser at the sale under the partition proceedings. The sale was made under the decree of the orphans' court, in a suit of which due notice had been given to the defendant company, within the period specified in the policy. It was therefore bound by the result. Plaintiff was not bound to carry his resistance to the decree to the point of waiting to be physically expelled from the premises. Proper respect for the court which had made the decree forbade such conduct.

The assignments of error are all sustained.

The judgment of the court below is reversed, and, as we are of opinion that the plaintiff was entitled to recover the full amount of the claim, judgment is here entered for plaintiff in the sum of \$1,915.70, with interest from November 21, 1904.

FELL and BROWN, JJ., dissent.

(217 Pa. 344)

BECKER et ux. v. CITY OF PHILADELPHIA.

(Supreme Court of Pennsylvania. April 1, 1907.)

1. EVIDENCE—RECORD IN ANOTHER ACTION—RES INTER ALIOS ACTA.

In an action by a woman and her husband against a city for personal injuries caused by a fall, plaintiff claimed that she was suffering from a particular physical condition, and defendant claimed that about 10 years prior thereto plaintiff had recovered against a borough for personal injuries, claiming the same physical

condition. Plaintiff denied that she had made any such claim, and the city offered in evidence the record of the prior suit, and the stenographer as a witness to show that a physician testified for plaintiff on the former suit that she was suffering from such physical condition. *Held*, that an objection that the evidence was inadmissible as the husband in the later suit was claiming to recover in his own right, while the wife alone was suing in the former suit, was not well founded as the testimony was not offered to prove the fact of such physical condition, but to contradict the plaintiff.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 2410-2413; vol. 50, Witnesses, § 1252.]

2. SAME.

The record of evidence in a former suit may be admitted in the later suit in evidence in favor of a stranger to the former suit, where it contains a solemn admission of a judicial declaration by one of the parties to a certain fact.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 2410-2413.]

Appeal from Court of Common Pleas, Philadelphia County.

Action by Charles Ellwood Becker and Margaret Becker against the city of Philadelphia. Judgment for defendant, and plaintiffs appeal. Affirmed.

At the trial the court permitted, under objection and exception, the prothonotary of Delaware county to offer in evidence a certified copy of the record of the case of plaintiff against the borough of Clifton Heights. After the record was admitted defendant made the following offer: "Mr. Bartlett: Having offered in evidence the testimony of Charles E. Becker and Margaret Becker, his wife, I again offer to prove by this witness that the testimony of Dr. Charles Cooper, a witness called by Margaret Becker and Charles E. Becker, plaintiffs, in the right of the said Margaret Becker, his wife, in a suit against the borough of Clifton Heights, C. P. Delaware county, No. 18, December term, 1890, to show the identity of the injuries claimed for in said case to those herein claimed for, coupled with proof, by the testimony of the court stenographer and a juror in the case, that Dr. Cooper testified in said case that the injuries sustained by Mrs. Becker consisted of a spot on the spine, permanent in nature, and prolapsus uteri, the falling of the womb, permanent in nature, and other permanent injuries, such permanent injuries being identical with those testified to in the case on trial. Mr. Raymond: Objected to. The Court: I will admit it, on the ground that the declaration of a witness called by a party must be considered a declaration of the party. Mr. Raymond: My objection is the parties are not the same, and it is not the same subject-matter. (Exception.)"

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

Eugene Raymond, for appellants. Charles E. Bartlett, Asst. City Sol., John L. Kinsey, City Sol., and W. C. Wilson, for appellees.

STEWART, J. It was one of the questions in the case whether the uterine disturbance from which the plaintiff Mrs. Becker was shown to be suffering resulted from the fall which was the foundation of the action, or from an earlier occurrence. Plaintiff claimed to recover for other injuries as well; but this, if not the most serious, was one which, if traced to this particular fall as a cause, would, in case of a recovery, swell largely the sum total of compensation. The effort on part of defendant was to disconnect the two. Some eight or ten years before the accident which gives rise to the present suit, Mrs. Becker had been injured by a fall on a public street in the borough of Clifton Heights. Alleging negligence on the part of the municipality in this connection, she brought her action against the borough. The defendant sought to show that one of the injuries complained of in the action, and for which compensation was there asked, was a uterine disturbance; that injuries of this character are permanent, except as corrected by surgical operation; that plaintiff was allowed to recover there as for a permanent injury in this respect; and that a surgical operation had never been resorted to in her case. Such line of defense was of course, entirely legitimate, since, if established, it would eliminate this particular injury from the case, except as the accident for which it was attempted to hold defendant responsible had aggravated the disability that had resulted from the former one. The only question was as to the method of proof. The offer which was admitted under exceptions which are here pressed was, first, a certified copy of the record in the case of *Margaret Becker v. Borough of Clifton Heights*; and, second, to prove by the court stenographer reading from his notes taken at the trial that among the injuries for which compensation was there claimed was uterine disturbance. The offer of the record was but preliminary to the introduction of the stenographer's testimony. In itself it was of no importance, except as matter of inducement to what followed in the second branch of the offer and as preliminary thereto. For this purpose it was both necessary and proper. The objection urged to both is the same. Separate consideration, therefore, is not necessary.

We shall consider the objection more fully in connection with the second offer. On the trial of the case against the borough of Clifton Heights, one Dr. Charles Cooper was a witness called by the plaintiff. He was the physician who attended Mrs. Becker after she had received her injuries, and he testified fully as to their nature and extent. He died before the present action was brought; and the offer was to show by the stenographer from his notes taken at the trial that Dr. Cooper on behalf of plaintiff testified that one of the results of the accident there complained of was uterine dis-

turbance, that he had treated the plaintiff for this ailment, describing how, and that the injury was permanent in its character. This was objected to on the ground that the action against the borough of Clifton Heights, having been brought before the act of May 8, 1895 (P. L. 54), which requires that the rights of husband and wife in cases of this character be redressed in one action, was solely for the wife's benefit, the husband's joinder therein being purely formal, that in the present suit he is claiming to recover in his own right, and that, therefore, the record of the earlier suit is *res inter alios acta*, and consequently not admissible here. The objection might have been valid enough had the effort here been to prove in this way as a substantive fact, admitting its pertinency, that Mrs. Becker at this earlier period suffered from this particular ailment. Whether she did or did not so suffer was wholly aside from the inquiry. She testified in the present case that she had not attempted to recover in the action against the borough of Clifton Heights for uterine disturbance; that she had not sustained such injury in the earlier accident, and had not been treated for any such ailment before her later accident. The purpose of the offer was to discredit her as a witness, and to impute to her want of good faith as plaintiff in the present action. It was pertinent to the issue. How effective was for the jury to say. Dr. Cooper was a witness testifying on behalf of plaintiff. The plaintiff was present at the time he testified according to her own admission. She relied upon his testimony with regard to the nature and extent of her injury, as furnishing a basis upon which she asked the jury to reckon her compensation. She thus adopted and used the declarations and admissions of the witness as her own, and it was the same as though she herself had asserted the fact which they tended to prove. Such is the rule. The purpose of the offer was clearly legitimate, and the mode of proof entirely proper. "A record may also be admitted in evidence in favor of a stranger against one of the parties, as containing a solemn admission, or judicial declaration by such party in regard to a certain fact. But, in that case, it is admitted not as a judgment conclusively establishing the fact, but as the deliberate declaration or admission of the party that the fact was so. It is therefore to be treated according to the principles governing admissions to which class of evidence it properly belongs." The law on this subject is thus summarized by Bell, J., in *Truby v. Seybert*, 12 Pa. 101: "To operate of itself as a bar, a judgment must be between the same parties or privies. But, though the parties be different, a record is admissible to prove the existence of a former action with its legal consequences, as an independent fact; for the mere fact that such a suit was brought and a verdict and judg-

ment rendered, it is said, cannot be considered as *res inter alios acta*. Where, therefore, the introduction of a former judgment is necessary by way of inducement to the full understanding of a collateral fact, or the admissions and allegations of a party to it, the record is always received, not only as legal evidence of the rendition of such a judgment, but as conclusive for that purpose; for it must be presumed the court made a faithful record of its own proceedings. Thus a record may be shown, though the parties are not the same, to let in proof of what was sworn at the trial. 1 Greenleaf, Ev. § 527. So, also, it is admissible against one of the parties or judicial declaration by such parties, in regard to any particular fact. But in these instances, it is received, not as an adjudication conclusively establishing the fact, but as the declaration or admission of the party himself that the fact is so."

The remaining assignment of error relates to the charge of the court, which is complained of as inadequate and partial. We have examined the charge in this case with reference to each of the 12 specifications under this head. In the very careful examination thus made we have failed to find anything affording ground for complaint. It is a full and very careful presentation of the law of the case, and equally full and careful in its exhibit of the evidence. In his comments on the evidence and the positions taken on one side and the other with reference to it, not only did the learned judge make no attempt to force upon the jury views of his own, but he seemed even studious to avoid expressing any view. It is impossible to derive from the charge any inference of favor, and the complaint of inadequacy is groundless. We deem it unnecessary to consider separately these specifications.

They are all overruled, and the judgment is affirmed.

(217 Pa. 361)

LAUBACH v. COPLAY CEMENT MFG. CO.
(Supreme Court of Pennsylvania. April 1, 1907.)

MASTER AND SERVANT—INJURY TO SERVANT—QUESTION FOR JURY.

In an action by a quarryman against his employer for personal injuries, *held*, that the question of defendant's negligence was for the jury.

Appeal from Court of Common Pleas, Lehigh County.

Action by Eli Laubach against the Coplay Cement Manufacturing Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, and STEWART, JJ.

Evan Holben and Arthur L. Biery, for appellant. Arthur G. Dewalt and George W. Geiser, for appellees.

PER CURIAM. Plaintiff was struck and injured by a piece of timber forming one of the braces or crosspieces at the top of a derrick, which was knocked off by collision with a bucket of stone raised from the quarry by a steam hoist. The negligence relied on by plaintiff was, first, that the derrick was defective in regard to its strength for such heavy work as it was called upon to do; and, secondly, that the steam hoist was allowed to be operated on this occasion by a boy of 18 who was only a learner, still under instruction in the management of the engine, and who by lack of proper experience and skill ran the bucket loaded with stone, at such speed that it struck the crosspieces and caused the accident. As there was testimony on both these points, the court could not have taken the case from the jury.

Judgment affirmed.

(217 Pa. 367)

SCOTT MFG. CO. v. MORGAN.

(Supreme Court of Pennsylvania. April 1, 1907.)

1. MECHANIC'S LIEN—WAIVER.

Where materials are sold either on the personal credit of the owner or contractor, it raises a question of fact as to the waiver of a mechanic's lien.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Mechanics' Liens, §§ 383-392, 583.]

2. PLEADING — INSUFFICIENT AFFIDAVIT OF DEFENSE—MOTION FOR JUDGMENT.

In an action for goods sold and delivered, the affidavit of defense averred that notes had been given for the goods and were in the hands of innocent holders. At a hearing on a rule for judgment for want of a sufficient affidavit of defense, the counsel for plaintiff produced the notes to show that they were still in plaintiff's possession. *Held*, that the court had no power to impound the notes and make the rule for judgment absolute.

Appeal from Court of Common Pleas, Montgomery County.

Action by the Scott Manufacturing Company against George C. Morgan. From a judgment making absolute rule for judgment for want of a sufficient affidavit of defense, defendant appeals. Reversed.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, and STEWART, JJ.

R. W. Woods and Wm. F. Dannehower, for appellant. Gilbert Rodman Fox, M. M. Gibson, and N. H. Larzelere, for appellee.

PER CURIAM. This was not a case for a summary judgment. As said by the learned judge below "the defenses set up are numerous and somewhat confused"; but it is by no means clear that several of them do not raise questions of fact as well as law that require a jury; as, for example, whether the machinery in question is a proper subject of mechanic's lien, and whether it was furnished on the credit of the building or on the personal credit of the pur-

chaser. While it is true, as the court remarked, that a creditor may have more than one lien for the same debt, yet a sale of materials on personal credit, either of the owner or the contractor, is some evidence at least of a waiver of the lien under the mechanic's lien law, and raises a question of fact for a jury. *Presbyterian Church v. Allison*, 10 Pa. 413; *Barclay v. Wainwright*, 86 Pa. 191; *Hommel v. Lewis*, 104 Pa. 465; *Green v. Thompson*, 172 Pa. 609, 33 Atl. 702.

But we need not consider any of these matters in detail now, as there is one defect fatal to the judgment. The defendant paid for the machinery (whether absolutely or conditionally being in dispute) by negotiable notes, and the affidavit sets out that these notes, in violation of the agreement, have passed to bona fide holders for value. On this point the learned judge below said: "The counsel for plaintiff produced the notes at bar as evidence that they were still in the hands of the plaintiff. If these notes are deposited with the prothonotary before any execution process issues on the judgment that is hereby allowed to be entered, the defendant will be fully protected. The court can then control the use of the notes so that they may not be used to the prejudice of the defendant, and at the same time the court can make any subsequent order in reference to the notes that justice and equity may demand." This, however, was going outside of the record in an inquiry into the facts at a stage of the case where such inquiry was not permissible. For purpose of judgment the affidavit must be accepted as verity. *Columbia Nat. Bank v. Dunn*, 207 Pa. 548, 56 Atl. 1087.

Judgment reversed, and procedendo awarded.

(217 Pa. 358)

In re DULL'S ESTATE.

(Supreme Court of Pennsylvania. April 1, 1907.)

WILLS—NATURE OF ESTATE.

Testatrix gave "to my son the interest on two thousand dollars, to be paid to him semi-annually, the principal to remain properly secured in the farm on which I reside during his natural life, and at his death, the principal shall be paid to his heirs." Held a bequest of the income of the fund for life only.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, §§ 1412, 1436.]

Appeal from Orphans' Court, Montgomery County.

In the matter of the estate of Sarah B. Dull. From a decree dismissing petition for an order to pay over money, William E. Fritz appeals. Affirmed.

Sarah B. Dull by her will which was probated on November 17, 1885, directed, inter alia, as follows: "Item.—I give, devise and bequeath to my son Ross B. Dull the interest on Two Thousand Dollars, to be paid to him

semi-annually, the principal to remain properly secured in the farm on which I now reside during his natural life, and at his death the principal shall be paid to his heirs." It appeared that in partition proceedings certain land of the decedent was awarded to William B. Dull, charged with the payment of the legacy of \$2,000 above mentioned. It also appeared that by various assignments the interest of Ross B. Dull became invested in the petitioner, William E. Fritz. The petition averred that petitioner was entitled to the principal of the fund, since Ross B. Dull was dead. It appeared that Ross B. Dull left to survive him a widow and one son, Harry B. Dull. The latter claimed the ownership of the principal of the legacy on the ground that his father had an interest only in the income for life. The orphans' court adopted this view, and dismissed the petition.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, and STEWART, JJ.

Louis M. Childs, for appellant. John Faber Miller and Samuel H. High, for appellee.

PER CURIAM. It may be conceded that a devise of realty in the words of this testatrix's will would create a fee. But this is under the rule in *Shelley's Case*, which has become a rule of property, and operates without regard to the donor's intent, and generally to defeat it. But the cardinal rule which dominates all others in the construction of wills is that the intent of the testator if not unlawful shall be carried out. The exception made by the rule in *Shelley's Case* does not extend to bequests of personalty, and, though the analogy may sometimes in default of better guide be followed, it is never allowed to defeat a plain intent. It may also be conceded that a gift of the income or profits of personalty, without more, will carry the absolute property of the donee. But this is never allowed where it appears by words of limitation or by gift over, or in other way, that the testator intended a less estate. In *Eichelberger's Estate*, 135 Pa. 160 (171), 19 Atl. 1006, 1014, an unrestricted gift of a sum of money in the first clause of the bequest was held to be limited to the interest for life by the words that followed directing the sum to be placed at interest and the interest paid annually to the legatee for life, and, if he died leaving no heirs of his body, then the sum bequeathed to go over to testator's other heirs. And in *Ritter's Est.*, 148 Pa. 577, 24 Atl. 120, a bequest of the interest of a sum of money to be paid annually for life, with no trustee interposed, no investment directed, and no specific limitation over, was nevertheless held only a gift for life, because the intent of the testator was clear to give only that much. The principle at the base of all the decisions is expressed in *Bentley v. Kauffman*, 86 Pa. 99, that,

where the intent of the testator is to sever the product from its source and make a gift of the former only, a bequest of income will not carry the principal.

The present case is much stronger than Ritter's Estate, and comes exactly within Bentley v. Kauffman. The testatrix made no gift to her son of anything but the interest of the sum named, limited even that expressly to his life, directed that the principal should be charged on her farm during his life, and that at his death it should be paid to his heirs. It is difficult to see how she could have made her intention plainer.

Decree affirmed.

(217 Pa. 363)

In re SOUTH TWELFTH STREET IN CITY OF ALLENTOWN.

(Supreme Court of Pennsylvania. April 1, 1907.)

1. EMINENT DOMAIN—PLOTING STREET—COMPENSATION.

The plotting of a street through the land of a private owner is not a taking of the land, making the city liable therefor, but simply the expression of an intent to take it when occasion demands.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Eminent Domain, § 164.]

2. SAME—COMPENSATION.

After a street had been plotted over the land of a private owner, he erected buildings thereon and thereafter it was actually opened for public use. *Held*, that the fact that no compensation could be recovered for the removal of the buildings could not be considered as affecting the market value of the land.

Appeal from Court of Common Pleas, Lehigh County.

In the matter of the opening of South Twelfth street, from Walnut street to Union street, in the city of Allentown. Verdict for plaintiffs, and the city of Allentown appeals. Affirmed.

At the trial the defendant presented the following points:

"(1) In estimating the damages to which the plaintiffs are entitled, the jury shall consider the value of the plaintiff's ground before the taking and the value of the remainder after the taking, and the difference, if the damages are greater than the benefits, will be the plaintiff's damages. Answer: This is affirmed as a proposition of law, although in this case the only evidence as to the remainder of the plot that is left to the Grims is that it was of the same value as the portion taken by the street, so that, as I have said before, the real question before you is: what were the 60 feet worth at the time of the taking?

"(2) In estimating the value of the property, the jury shall consider what would affect the market value of the property at the time before the street was opened, whatever a prospective purchaser might take into consideration, its location with reference to other property, its location with reference

to open streets, and its location with reference to plotted streets. Answer: This is negatived. The point contains a true proposition of law, but the only evidence of the plotting of the street is the plotting of Twelfth street over the property in question. In the view of the court that has nothing to do with the case, and the jury is instructed to disregard it.

"(3) If, by the general conduct of the plaintiffs and their predecessors in title, the property at the southeast corner of Twelfth and Walnut streets became in fact a corner lot, and through continuous use or by the deeds of conveyance or otherwise the bed of Twelfth street south of Walnut street became subject to an easement in favor of the lot at the southeast corner of Twelfth and Walnut streets, then this fact must be taken into consideration by the jury as an element decreasing plaintiff's damages and the damages for which defendant is liable. Answer: This is negatived because there is no evidence in the case to support the facts alleged in the point.

"(4) The plotting of a street is an incumbrance, and no person shall be entitled to any damages for any buildings or improvements of any kind which shall or may be placed or constructed upon or within the lines of any located street or alley after the same shall have been located or ordained by councils. The street in question having been ordained and plotted and placed on the city plan in 1870, and the plaintiffs having purchased the property subject to restrictions caused by the ordaining, plotting, and placing of South Twelfth street from Walnut street south upon the city plan, the jury, in considering the value of plaintiffs' property immediately before the taking, must consider its value in the open market subject to the restrictions caused by South Twelfth street being ordained, plotted, and placed upon the city plan over the property in question. Answer: This is negatived.

"(5) The jury, in considering the value of the property before taking, must take into consideration the fact that no buildings or improvements of any kind could be placed or constructed within the lines of the located and ordained street, or, if any buildings or improvements were so placed or constructed, no damages could be recovered for their removal or destruction. Answer: This is correct as a proposition of law, but is negatived for the purpose of this case because there is no evidence on the part of the plaintiff of any buildings or constructions along the street opened.

"(6) Where the owner of ground having sold all the ground adjoining, well knowing or being presumed to know that a street had been laid out over the precise portion which he retained and which neither he nor any other person could use for building purposes, he can recover for the value of the ground only, and that ground with reference to its

condition and value at the time of the taking as affected by the street ordained and plotted upon it. Answer: This is refused."

Verdict and judgment for plaintiff for \$4,900. Defendant appealed.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, and STEWART, JJ.

Leo Wise, City Sol., for appellant. Edwin H. Stine and Thomas F. Diefenderfer, for appellees Jacob W. Grim and others.

STEWART, J. The right of the individual to compensation for land subjected by municipal authority to public use can only arise when the land has been taken. Until this occurs, the owner has not been disturbed in his possession, and is consequently without injury. The plotting of a street through the land of a private owner is not a taking of the land. It is simply the expression of a purpose to take it when occasion for the opening of the projected street arises. In this instance an interval of nearly 40 years occurred between the plotting and the opening of the street. Appellant's contention that the owner's compensation is to be measured by the market value of the land as of the date when the street was plotted finds no support in reason or authority. It is sufficiently answered in what we have said.

Equally untenable is the other position taken, viz., that, if the true measure of compensation be the market value of the land when taken, the fact that no compensation could be recovered for the removal of any buildings erected on the bed of the proposed street after the same had been plotted is to be considered as a circumstance affecting such market value. This is simply asserting the right of confiscation in a modified form, only feebly disguised. By reason of the plotting the owner is virtually denied the privilege of building on his land, and it is argued that, with this privilege extinguished, the land would have a much reduced value in the estimation of the average buyer. Of course, it would. But who is responsible for this reduction? Not the owner. The impairment of value resulted from nothing he had done, but as the immediate consequence of the steps taken by the municipality towards the appropriation, in invitum, of the owner's land. In the present case it is quite clear that without the right to build upon the land, this narrow strip, 60 feet wide, located as it is, would be of little, if any, value. This, then, is the contention, that the municipality in the furtherance of public ends, having stripped the land of nearly its entire value, now, when it seeks to accomplish fully its purposes in connection therewith, is to be allowed to acquire the land by paying a sum measured by the little value the municipality has left in it. Such a result would be a travesty on the constitutional provision which requires in all such cases just compensation to

be made for the property taken. Of course, the case of *Gamble v. Philadelphia*, 162 Pa. 418, 29 Atl. 739, so much relied upon by the appellant, is no authority for any such doctrine. The only resemblance between this case and that is that the demand in both was for compensation for ground taken for a public street. In that case the measure adopted was the market value of the land without the privilege of building thereon; but that was because the owner himself, by his own act, in conveying certain lots fronting on the proposed street, granted to his vendees the right of way upon and over the ground subsequently appropriated by the municipality, but which was then his own individual property. This right of way so conveyed would have existed thereafter had the street never been open; and neither the owner nor those claiming under him could have obstructed it by building or otherwise, so that when the city afterwards appropriated the land, this right of building on the land having been parted with by the owner, the city could only be called upon to make just compensation to the owner for what it had taken from him.

The assignments of error are overruled, and the judgment is affirmed.

(79 Vt. 552)

ROWELL v. RICKER.

(Supreme Court of Vermont. Orange. April 5, 1907.)

BANKRUPTCY — DISCHARGE OF BANKRUPT — DEBTS CREATED BY FRAUDULENT REPRESENTATION.

The United States bankruptcy law of July 1, 1898 (30 Stat. 544, c. 541 [U. S. Comp. St. 1901, p. 3418]), provides that "a discharge in bankruptcy shall release a bankrupt from all his provable debts except such as . . . are liabilities for obtaining property by false pretenses or false representations." *Held*, that a person who obtained a flock of sheep on the fraudulent representation to the seller that he was to receive that day a check for more than the price of the sheep, and would give it to the seller, and converted the sheep to his own use without paying for them, was not discharged from the debt by his discharge in bankruptcy.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Bankruptcy, § 792.]

Exceptions from Orange County Court; Eleazer L. Waterman, Judge.

Action by Martin C. Rowell against B. Frank Ricker. To an order sustaining demurrer to defendant's plea, he excepts. Affirmed and remanded.

Argued before TYLER, MUNSON, and WATSON, JJ., and HALL, Superior Judge.

March M. Willson, for plaintiff. Harvey, Harvey & Harvey, for defendant.

TYLER, J. It is alleged in the amended count that the defendant on December 19, 1904, at Randolph, sought to buy of the plaintiff a large number of sheep of the value of \$1,200; that the plaintiff refused to sell

them to him unless he then and there paid for them the sum named; that the plaintiff refused to trust the defendant. It is further alleged that the defendant then and there falsely, fraudulently, and deceitfully represented to the plaintiff that one Hollis of Boston, Mass., had mailed to him a check for \$1,500, given by the New England Dressed Meat & Wool Company, which check would be delivered by regular course of mail at Randolph at or about 5 o'clock in the afternoon of that day; that the check was for the sheep, and would be delivered to the plaintiff on its arrival as aforesaid; that the plaintiff knew that Hollis was the general manager of said company, and that the company was financially responsible, and that its check was worth that sum in cash. It is further alleged that the plaintiff believed and relied upon these representations, and in reliance upon them delivered the sheep to the defendant, who then and there converted them to his own use. It is alleged that the check had not been mailed; that the defendant knew that fact, and that he made the representations with the deceitful and fraudulent purpose of getting possession of the sheep and of converting them to his own use; that the defendant has never paid the plaintiff anything for the sheep; and that the plaintiff has never received anything for them. The defendant pleaded the general issue, and, in bar of the action, his discharge in bankruptcy. To this plea the plaintiff demurred, and the question is whether the plaintiff's cause of action was discharged by the defendant's discharge in bankruptcy. The suit was pending when the bankruptcy proceedings were commenced.

The declaration presents a case containing all the elements of fraud—a false representation made by the defendant, he at the time knowing it to be false. It was made to deceive the plaintiff, and it did deceive him, for he believed it to be true, and, so believing, delivered the property to the defendant. In Story's Eq. Jur. § 186, the definition is given as the intentional and successful employment of any cunning, deception, or artifice used to circumvent, cheat, or deceive another. The case is like *McCrillis v. Allen*, 57 Vt. 505, where the defendant, by falsely representing himself to be one of a firm of produce commission merchants in Boston, induced the plaintiff to send poultry to said pretended firm to be sold on commission, with the fraudulent purpose of getting possession of it without paying for it; there in fact being no such firm. *Darling v. Woodward*, 54 Vt. 101; *Childs v. Merrill*, 63 Vt. 463, 22 Atl. 626, 14 L. R. A. 264. The declaration does not allege a sale of the property upon the defendant's promise to pay for it, but it alleges in apt terms the obtaining of the property by the defendant by means of his false and fraudulent representations. The intention to deceive, which is a characteristic of fraud, is alleged, and the successful accomplishment of the fraudulent purpose. *Bord Hardwick*

said in *Lawley v. Hooper*, 3 Atk. 278: "The court very wisely hath never laid down any general rule beyond which it will not go, lest other means for avoiding the equity of the court should be found out." Again he said, "Fraud is infinite." In *Bigelow on Fraud*, 3, it is said that judges have declined to attempt a definition, partly on the ground of hopelessness and partly from supposed danger. But, while it may be difficult to frame a definition applicable to all cases in their varying circumstances, all courts agree as to some of the essential elements of fraud.

The United States Bankruptcy Law of July 1, 1898 (30 Stat. 544, c. 541 [U. S. Comp. St. 1901, p. 3418]), as amended by the Act of February 5, 1903 (32 Stat. 797, c. 487 [U. S. Comp. St. Supp. 1905, p. 682]), seems sufficiently explicit in defining the kind of fraud that will prevent a debtor from obtaining a discharge. It says: "A discharge in bankruptcy shall release a bankrupt from all his provable debts except such as * * * are liabilities for obtaining property by false pretences or false representations." But plain as this language is the Supreme Court has had occasion to construe it. In *Neal v. Clark*, 95 U. S. 704, 24 L. Ed. 586, the court said it meant positive fraud, or fraud in fact, involving moral turpitude or intentional wrong, and not implied fraud, or fraud in law, which may exist without the imputation of bad faith or immorality. The rule is restated in *Ames v. Moir*, 138 U. S. 306, 11 Sup. Ct. 311, 34 L. Ed. 951. In *Forsyth v. Vehmeyer*, 177 U. S. 177, 20 Sup. Ct. 623, 44 L. Ed. 723, the court held that "a representation as to a fact, made knowingly, falsely, and fraudulently, for the purpose of obtaining money from another, and by means of which such money is obtained, creates a debt by means of a fraud involving moral turpitude and intentional wrong." The facts alleged bring the present case clearly within these rules. As the court said in the case last cited, "it is so plainly a fraud of that description that its mere statement obtains our ready assent."

Judgment affirmed, and cause remanded.

(28 R. I. 248)

SMITH v. MACOMBER.

(Supreme Court of Rhode Island. April 3, 1907.)

FALSE IMPRISONMENT—DAMAGES—EXCESSIVE.

\$2,500 was not an excessive verdict, where defendant, a police officer, justified his wanton acts of arresting and detaining plaintiff, and sought to escape liability through a defense consisting of maliciously prosecuted libelous pleas that plaintiff was revelling or acting insanely when arrested; plaintiff having gone to defendant when arrested to make well-grounded complaint against those who had assaulted him, and who afterwards repeated the offense.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, False Imprisonment, §§ 112-115.]

Exceptions from Superior Court, Providence County.

Action by Lawrence T. Smith against Edward G. Macomber. From a decision granting defendant a new trial for excessive damages, plaintiff excepts. Exceptions sustained. Argued before DOUGLAS, C. J., and DUBOIS, BLODGETT, JOHNSON, and PARKHURST, JJ.

Cooney & Cahill, for plaintiff. Orrin L. Bosworth, John W. Hogan, and Philip S. Knauer, for defendant.

DUBOIS, J. This is an action of trespass vi et armis for assault and battery and false imprisonment. After verdict for the plaintiff, with damages assessed in the sum of \$2,500, upon the defendant's motion for a new trial, the presiding justice of the superior court held that, although he could not set aside the verdict of the jury on the merits of the case, he would grant a new trial for excessive damages, unless the plaintiff would remit the sum of \$2,300, which the court deemed excessive. To this ruling the defendant took no exception, but the plaintiff did except, and has duly prosecuted his bill of exceptions, based upon the following grounds: That said decision is against the law and evidence, and that the verdict of the jury was not excessive.

The only question that we need to answer, therefore, is whether the damages awarded are excessive. The determination of this question involves a consideration of the circumstances in which the assault and imprisonment were made and the manner in which the same were sought to be justified by the defendant. It appears that on the 10th day of July, 1904, the plaintiff, while in St. Mark's Church, in the town of Warren, R. I., attempted to speak to the defendant's niece, who was a member of his household, as she was being escorted from the church by a young man. Her escort requested the plaintiff not to speak to her, and he desisted. Afterwards, on the same day, the escort of the young lady and a friend of his made an assault upon the plaintiff, who ran away and made complaint of the assault to a policeman of the town. The policeman advised him to make his complaint to the defendant, who was then chief of police and prosecuting officer. The plaintiff then met the defendant on the street and made his complaint, and was arrested by him and taken to the police station and kept in confinement there in a cell for several hours. After that he was brought before the judge of the district court in his private office and permitted to depart, as no warrant had been issued against him. In and about the courtroom, which was in the same building as the lockup, quite a crowd had collected, including the two young men who had assaulted him earlier in the day, and against whom he was trying to make the complaint which resulted in his own arrest. As the plaintiff was departing from the building, he was set upon and horsewhipped by

his former assailants, who were then arrested and fined for this offense. On the 27th day of January, 1905, he brought this suit against the defendant, who was served with process on the 31st day of the same month. The writ was returnable, and with the declaration was filed, on the 20th day of February, 1905. The declaration contained two counts; one for assault and battery, and the other for false imprisonment. On the 1st day of March, 1905, the defendant filed his pleas, the general issue, and another justifying the arrest and imprisonment, upon the ground that at the time of the arrest the plaintiff was revelling, and that as watchman and chief of police it was the duty of the defendant to prevent and suppress the same and to keep the plaintiff until he could be brought before the proper court for hearing; that he was so brought before the justice having jurisdiction in the premises; and that upon his own request to be allowed to depart without further prosecution, and upon his promise to behave better in the future, he was released from custody. Nearly eight months later, on the 26th day of October, 1905, by agreement between counsel of the parties, the defendant filed an additional plea in justification, setting forth his duty as watchman and chief of police to maintain peace and good order, and to protect all persons and property, in the town of Warren; and that the plaintiff on and for a long time prior to the 10th day of July, 1904, at said Warren and vicinity, had conducted himself in a quarrelsome, turbulent, threatening, and violent manner, and had acted in such an unusual, erratic, strange, and violent way that the defendant, before and on the day of the detention of the plaintiff, well knowing the character and reputation of the plaintiff, had good and reasonable cause to believe that the plaintiff would commit some violent and illegal act, unless he was promptly and immediately restrained, and that he was mentally unbalanced, insane, and dangerous to the safety, good order, and peace of the people of Warren; and that on the 10th day of July, 1904, the said plaintiff, at said Warren, at the junction of Main and Church streets, with wild look and expression, was making a great noise and disturbance, swinging his arms, gesticulating, and talking incoherently and in an extravagant, threatening, violent, and disorderly manner, to the disturbance and annoyance of the peaceable inhabitants of said town; and that the said defendant then and there having good and reasonable cause to believe, and then and there believing, that said plaintiff was insane and dangerous to the inhabitants of said Warren, to prevent and suppress a further disturbance, and to protect the people of Warren from the plaintiff, and to keep him safely until he could be brought before the proper court for hearing, to be examined touching the same according to law, then and there gently detained the plaintiff for the

space of four hours, and on the same day promptly and in a lawful manner took him before the justice having jurisdiction over offenses committed in said Warren, and the plaintiff having been heard before said justice, then and there, upon his own motion and of his own volition, urgently requested to be allowed to go without prosecution, and, upon making promises and assurances for better and proper behavior in the future, was, in consideration of the promises and assurances, at once released from custody without further prosecution for his said offenses. To these pleas the plaintiff replied precludi non because de injuria, etc., upon which issue was thereupon joined.

Whether the plaintiff was revelling or acting insanely at the time of his arrest, so that the defendant was justified in taking him into custody and keeping him in confinement, was a question for the jury, and the burden of proof, to make out such justification, was upon the defendant. The jury by verdict have said that he was not, and the presiding justice of the superior court has refused to set aside the verdict in that particular, and no exception was taken to such refusal by the defendant. That finding must remain undisturbed. That question is finally answered. It is no light matter to make such accusations as are contained in the defendant's pleas. An unsuccessful attempt to justify upon such grounds constitutes an aggravation of the original offense. It is an additional injury. Moreover, it was done after mature deliberation. Nearly eight months had elapsed between the time of the arrest and the filing of the first plea, and it was more than fifteen months from the date of the imprisonment to the time of filing the plea of justification on the ground of insanity. No proof worthy of the name was forthcoming to sustain either charge. Malice may well be inferred from such a failure of defense. After reading the transcript of the testimony, we are not surprised at the large damages awarded by the jury. They should be large. Whether we would have awarded as much is not the question. If the defendant had frankly admitted that he arrested and imprisoned the plaintiff to punish him for annoying the niece of the defendant, there is no doubt but that the damages in such event would have been much smaller than those assessed by the jury; but when the defendant justified his wanton acts of arresting and detaining the plaintiff—who had come to him to enter his well-grounded complaint against the young men who had assaulted him, and who afterwards repeated the offense—and sought to escape liability through a defense consisting of libelous pleas maliciously prosecuted, it is no wonder that punitive damages were awarded.

The effort to create for the plaintiff a general reputation of being either criminal or insane, or both, by attempting to turn tattle into testimony and idle rumor into evidence,

justly recoiled upon the defendant. For these reasons we think that the verdict of the jury ought not to be disturbed.

Plaintiff's exception sustained, and case remanded to the superior court, with direction to enter judgment on the verdict.

(38 R. I. 253)

LEAHY v. UNITED STATES COTTON CO.
(Supreme Court of Rhode Island. March 25, 1907.)

1. MASTER AND SERVANT—INJURIES TO SERVANT—CONTRIBUTORY NEGLIGENCE—PROXIMATE CAUSE.

Where an employé negligently stepped into a lighted elevator shaft, without looking to see if the elevator was at that floor, he cannot recover for his injuries because the elevator was not equipped with a device for giving notice that it was in motion, as required by Pub. Laws 1902, p. 43, c. 973, since his negligence, and not the elevator, was the proximate cause of his injury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 795.]

2. SAME—CONTRIBUTORY NEGLIGENCE.

For an employé acquainted with the premises to step without looking into a perfectly lighted elevator shaft was negligence per se.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 706-709.]

Exceptions from Superior Court, Providence County.

Action by David Leahy against the United States Cotton Company. Judgment for defendant, and plaintiff excepts. Exceptions overruled.

Argued before DOUGLAS, C. J., and DUBOIS, BLODGETT, and PARKHURST, JJ.

Hugh J. Carroll and Thomas F. Vance, for plaintiff. Waterman, Curran & Hunt (Lewis A. Waterman, of counsel), for defendant.

DUBOIS, J. This is an action of trespass on the case for negligence, wherein the plaintiff seeks to recover damages from his employer, the defendant, for personal injuries sustained by him, March 26, 1903, through falling into a freight elevator well in the mill of the defendant.

At the time of the accident the plaintiff was 59 years of age, and had been employed by the defendant for more than six years as a "chore man." In the line of his duty it was necessary for him to go from room to room and from floor to floor in the building where he was employed. In one corner of the building, from garret to cellar, an elevator shaft extended and was accessible on each floor through folding doors which opened into it. The shaft was provided for the use of a freight elevator, but was several feet longer than the openings in the floors through which the elevator was raised and lowered, so that between the doors and the elevator well there was a space, within the inclosure, sufficient to accommodate several persons. The customary way of using the elevator, during the period of the employment of the plaintiff, as he testified, was for an employé to open

the doors in the shaft on any floor that was desirable, and to leave them open and wait until the elevator arrived, then to step upon it, close the doors, and put the elevator to such use as the occasion required. He further testified that it was used by any of the employes who wanted it, and that it might be wanted every five or ten minutes during the day; that he used it in going from the weave shop to the upper floors 20 or 30 times a day, and from the weave shop to the cellar the same number; that on the day of the accident he had occasion to use it, but that Joseph Kelleher was using it with a load of cloth, and he walked downstairs to the lower room, opened the doors of the shaft and waited until Kelleher came down to that floor and took his load to the clothroom; that while waiting Mr. Houston, the overseer, gave him a box of filling to take down cellar, with instructions concerning it; that while he was receiving these instructions his head was turned away from the elevator, from which he was distant about a foot; that he went to put the box of filling on the elevator, which he thought was there all the time, and the elevator was gone and he fell with the box in his hand. It was admitted that there was plenty of light in the elevator shaft, so that he could see all right; that, when he got through talking with the overseer, about the same time he stepped sidewise right off, and did not look because he thought the elevator was there. He fell upon the freight elevator, which had descended about five feet from said floor. Said elevator at that time was not equipped with any device for giving notice that it was in motion, as required by Pub. Laws, p. 43, c. 973, passed April 3, 1902. At the conclusion of the testimony for the plaintiff at the trial of said case in the superior court, the justice presiding gave the jury the following instruction: "The evidence shows that the plaintiff was acquainted with this locality. He knew there was no bell there, and that it was perfectly lighted. He knew also that employes were in the habit of moving that elevator up and down, without giving notice. He turned away long enough for the elevator to have been appreciably lowered, and, as he states, he turned back and stepped onto the elevator, as he supposed, without looking to see if it was there, and by that means suffered an injury, and, I think, on the plaintiff's own showing that he contributed to the injury by his own negligence. The court, therefore, instructs the jury to return a verdict for the defendant." To this direction the plaintiff duly excepted, alleging that said action of the court was against the law and the evidence, and brought the case to this court upon his bill of exceptions based upon those grounds.

Pub. Laws, p. 43, c. 973, supra, also provided: "In all cases in which any person shall suffer injury * * * in consequence of the failure of the lessee or owner or owners of

any building to comply with the provisions of this and the preceding section, * * * such lessee and owner or owners shall be jointly and severally liable to any person so injured in an action of trespass on the case for damages for such injury. * * * It shall be no defence to said action that the person injured * * * had knowledge that any elevator was being operated in said building contrary to the provisions of this and the preceding section, or that such person continued to ride in said elevator with said knowledge." If this accident occurred in consequence of the failure of the defendant to equip the elevator with "some suitable appliance which shall give automatically, at all times, on every floor of said building which it approaches, a distinct, audible warning signal that said elevator is in motion," the doctrine of assumed risk cannot be received as a defense to such action, notwithstanding the fact that such omission or neglect of the defendant was known to the plaintiff.

The plaintiff was not injured by the elevator. Its presence, at the time of the injury, did him no harm. If it had been raised, instead of lowered, his fall would have been greater; for, instead of falling five feet to the elevator, he would have fallen the full distance to the bottom of the elevator shaft. It was apparent from his own testimony that the proximate cause of his fall and injury was his neglect to use his sense of sight in a perfectly lighted place. Therefore the question what defenses, under the statute, were open to the defendant, did not arise.

The plaintiff in his declaration alleges that he was in the exercise of due care at the time of the accident. It is a material allegation in an action for negligence, and must be proved by the plaintiff in order to maintain his case. *Judge v. Narragansett Electric Light Co.*, 21 R. I. 123, 42 Atl. 507. It is not even a case where the plaintiff neglected to prove that he did look, for the plaintiff testified that he did not look. To step, without looking, into a hole in a perfectly lighted place, is negligence per se. The fact of the presence or absence of a bell will not excuse a person from the duty of looking, before stepping, in such circumstances. If the plaintiff had been injured by the elevator because no notice of its approach had been conveyed to his hearing, the fact that he knew of the absence of an audible signal, for that purpose, would furnish the defendant no defense, under the statute, in an action for such injury. But the bell or signal was to sound only while the elevator was in motion. When the elevator was at rest, no notice was to be given of that fact. It does not appear how a signal that the elevator was in motion would have assisted the plaintiff if he did not look. Of course, the absence of a sounding signal excused his listening for what he knew did not exist. The duty of looking was not in any way increased by the absence of such signal; neither was it diminished there-

by. Such duty was unaffected by it, and remained the same as it was before the passage of the act. The act did not provide that the plaintiff might recover, in cases brought thereunder, notwithstanding his contributory negligence or want of due care therein, and it has been held correctly in a case involving the construction of a similar statute: "Where the statute does not otherwise provide, * * * the rule requiring the plaintiff, in an action for negligence, to show that at the time of the injury complained of he was in the exercise of due care, is the same, whether the action is brought under a statute or at common law. The doctrine of contributory negligence governs both classes of action." *Taylor v. Carew Mfg. Co.*, 143 Mass. 470, 10 N. E. 308.

As the case is governed by the doctrine of contributory negligence, the justice of the superior court did not err in directing a verdict for the defendant. The plaintiff's exception thereto is therefore overruled, and the case is remanded to the superior court, with direction to enter judgment on the verdict.

(28 R. I. 240)

MITCHELL v. SAYLES.

(Supreme Court of Rhode Island, March 13, 1907.)

1. EVIDENCE—SIMILAR CONDITIONS.

In an action for injuries to a servant through the bursting of a steam pipe, evidence of experiments intended to show the amount of pressure brought on the pipe, not made under conditions substantially identical with those existing at the time of the accident, was inadmissible.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 439.]

2. TRIAL—INSTRUCTIONS.

The refusal of special requests to charge is not error where all such as properly stated the law of the case were substantially included in the charge given.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 651-659.]

Exceptions from Superior Court, Providence County.

Trespass on the case for negligence by Margaret C. Mitchell, as administratrix, against Frank A. Sayles. Verdict for plaintiff, and defendant excepts to a denial of his motion for new trial. Exceptions overruled. Plaintiff's intestate, while in defendant's employ received injuries causing his death through the bursting of a steam pipe.

Argued before DOUGLAS, C. J., and DUBOIS, BLODGETT, and PARKHURST, JJ.

John W. Hogan, for plaintiff. Edwards & Angell and Lewis A. Waterman, for defendant.

PARKHURST, J. This is an action of negligence for damages for death of plaintiff's intestate, Michael Mitchell, brought under the statute by the plaintiff for the benefit of herself as widow of said deceased, who died without issue.

The statement of fact in this case is not in any way essentially different, from that already set forth in the case of *William Hardacre, Adm'r, v. Frank A. Sales*, 28 R. I. 235, 66 Atl. 298, to which reference is hereby made to save repetition; the plaintiff's intestate in this case having died at the same time and as a result of the same accident as in the *Hardacre Case*. Upon trial of this case in the superior court, before Mr. Justice Baker and a jury, a verdict was returned for the plaintiff for \$8,000, with special findings submitted by the defendant and hereinafter referred to. Thereafter the defendant duly filed his motion for a new trial, upon the usual grounds that the verdict was against the law and the evidence, and because of excessive damages, and for newly discovered evidence. After hearing the motion was denied by the presiding justice. Newly discovered evidence was not then, and is not now, urged. The evidence in the two cases is substantially the same and from the same witnesses, differing only in minor and immaterial matters except in two particulars: First, that the evidence of Cooney with regard to his observations of the joint, as to the slipping thereof, and as to his giving information regarding the same to Brassell, was corroborated by Patrick Roach, a helper who was holding the lantern, and testified that he saw the pipe slip in the T, and that he called Cooley's attention to it. The other matter in which the evidence differs relates to the offer by the defendant to put in evidence certain experiments or tests intended to show the amount of pressure or strain brought upon the joint by the expansion and contraction of the pipe. We think it is perfectly apparent that the tests attempted to be shown were not, and could not have been, made under conditions substantially identical with those in existence at the time of the accident, and would not only have been of no aid to the jury, but would have been positively misleading, and that the evidence as to these tests was properly excluded. Therefore all exceptions relating to the exclusion of evidence in relation to these tests must be overruled.

As to the other exceptions, they were of the same general character as in the *Hardacre Case*, and we have examined them with the same care, and do not find any substantial error therein; nor do we see that any useful purpose would be served by the discussion of them *seriatim*. The charge as given to the jury was a clear and satisfactory statement of the law and the court properly refused the special requests to charge the jury, inasmuch as all such special requests as properly stated the law of the case, if any, had already been substantially included in the charge as given. A general and special verdict was returned by the jury, as follows: "The jury find that the defendant is guilty in manner and form as the plaintiff has in her declaration thereof

complained against him, and assess damages for the plaintiff in the sum of \$8,000. As the jury find specially, first, that the defendant did before the accident have knowledge, or reasonable means of knowledge, that the tee joint which burst on the 8th day of December, 1903, was dangerous; second, that the T joint was in a dangerous condition, to the knowledge of the defendant, prior to the accident, and that such dangerous condition was not known, or should not have been known, to Michael F. Mitchell, the plaintiff's intestate; third, that the pipe did move in the tee on the morning of December 8, 1903, before the accident." The special findings are entirely consistent with the general verdict.

Upon the same grounds as set forth in the Hardacre Case, 28 R. I. 235, 66 Atl. 298, we think that the evidence is sufficient to support both the general and the special verdict of the jury both as to liability and as to the amount of the verdict, which we do not find to be excessive.

The exceptions are overruled, and the case is remanded to the superior court, with instructions to enter judgment upon the verdict.

(28 R. I. 242)

Ex parte MOREY.

(Supreme Court of Rhode Island. April 10, 1907.)

1. DIVORCE — ALLOWANCE OF ALIMONY — ENFORCEMENT.

Court and Practice Act 1905, § 1152, provides that whenever any person shall be imprisoned in any action the party at whose suit such person is imprisoned shall pay a certain sum in advance for the board of such prisoner, which payment in advance shall continue to be made by the creditor during the time the prisoner shall be detained at his suit. Gen. Laws 1896, c. 259, § 2, provides that, in case of default in payment of the prisoner's board, the prisoner shall be discharged from jail. *Held*, that Court and Practice Act 1905, § 1152, did not require the wife, as a condition of keeping the husband in jail, for not paying the allowance made her in a divorce action, to pay the husband's board, and that, in case of default in the payment of such board, the husband was not entitled to be discharged from jail under Gen. Laws 1896, c. 259, § 2, since the husband being imprisoned for noncompliance with the decree of the court, and not simply for debt, the provisions of the statutes relating to imprisonment for debt had no application.

2. HABEAS CORPUS — EXISTENCE OF OTHER REMEDY.

The sole remedy of a husband to secure release from imprisonment for not paying the allowance made a wife in a divorce action, whether it originated under an execution or by process for contempt, is by prayer or modification of the decree for sufficient cause addressed to the court which made it, and not by habeas corpus.

Case Certified from Supreme Court, Providence County.

Petition by Albert L. Morey for a writ of

habeas corpus, heard before the superior court, and certified, under Court and Practice Act 1905, § 478, to the Supreme Court. Papers in the cause, with the decision certified thereon, remanded to the superior court for further proceedings.

The facts are fully stated in *Mowry v. Bliss*, 28 R. I. 114, 65 Atl. 618.

Argued before DOUGLAS, C. J., and DUBOIS, BLODGETT, JOHNSON, and PARKHURST, JJ.

James B. Littlefield, for petitioner. John C. Quinn, for Ethel J. Morey.

DUBOIS, J. In the above-entitled proceeding in the superior court, and prior to the trial thereof on its merits, two questions of law arose which, in the opinion of said court, were of sufficient importance to be certified to this court for determination, under the provisions of Court and Practice Act 1905, § 478. The questions are as follows:

"First. Is the wife, as condition of keeping the husband in jail for not paying the allowance, by the provisions of section 1152 of the court and practice act of 1905, required to pay the husband's board?

"Second. In case default is made in the payment of such board, is the husband entitled to a writ of habeas corpus to secure his discharge from jail, if the keeper refuses to discharge him in accordance with the provisions of chapter 259, § 2, of the General Laws of 1896?"

Both of these questions must be answered in the negative. The provisions of Court and Practice Act 1905, § 1152, and General Laws 1896, c. 259, § 2, do not apply to divorce cases or proceedings thereunder which are purely statutory. *Fidler v. Fidler*, 28 R. I. 102, 65 Atl. 609. We have already said concerning this petitioner, in *Mowry v. Bliss*, 28 R. I. 114, 117, 65 Atl. 618, 618: "The prisoner is not simply imprisoned for debt. He is imprisoned for noncompliance with the decree of the superior court which has exclusive original jurisdiction of the subject." As he is not simply imprisoned for debt, the provisions of the statutes relating thereto, including that relative to the payment of board, have no application. It is only necessary to repeat our own concluding remarks in *Mowry v. Bliss*, supra: "The sole remedy of a prisoner for release from such imprisonment, whether it originated under an execution or by process for contempt, is by prayer for modification of the decree, for sufficient cause, addressed to the court which made it." Therefore habeas corpus is inappropriate as a remedy in such case.

The papers in the cause, with this decision certified thereon, are hereby remanded to the superior court for further proceedings.

(28 R. I. 244)

HARTLEY v. RHODE ISLAND CO.

(Supreme Court of Rhode Island. April 10, 1907.)

EXCEPTIONS, BILL OF—ALLOWANCE—STATUTORY PROVISIONS.

Court & Practice Act 1905, § 473, provides that when any person is aggrieved by any order or judgment of the superior court, and from accident, mistake, or unforeseen cause has failed to prosecute a bill of exceptions, the Supreme Court, if justice requires a revision of the case, may on petition allow an appeal. *Held*, that where the bill was retained without approval by the presiding justice until more than 20 days had elapsed, and no application was made within 30 days after the filing of the bill to establish it in the Supreme Court, the fact that the party filing the bill acted in good faith in supposing, according to the practice, that the presiding justice, in retaining the transcript and bill of exceptions for examination, was not intending to act adversely to the interests of that party, did not entitle him to relief under section 473.

Trespass on the case by Gertrude Hartley against the Rhode Island Company. Petition by defendant, under the provisions of Court & Practice Act 1905, § 473, for leave to file and have allowed its bill of exceptions. Petition dismissed.

See 66 Atl. 63.

Argued before DOUGLAS, C. J., and DU-BOIS, BLODGETT, JOHNSON, and PARK-HURST, JJ.

John W. Hogan and Philip S. Knauer, for plaintiff. Henry W. Hayes, for defendant.

PER CURIAM. The above-named defendant, being aggrieved by verdict of a jury, and denial of its motion for a new trial in the superior court, prepared and filed a bill of exceptions to this court. Said bill of exceptions was retained without approval by the presiding justice of the superior court until more than 20 days had elapsed, and no application was made within 30 days after the filing of the bill to establish it in this court. The petition sets out, as the defendant's reason for not making timely application to this court, that "it acted in good faith in supposing, according to the practice, that the presiding justice in retaining the transcript and bill of exceptions for examination was not intending to act adversely to the interests of the defendant."

We are unable to see in this statement any ground to justify us in acting under the provisions of section 473, Court & Practice Act 1905. The omission to apply to this court within the time specified was not occasioned by accident, mistake, or unforeseen cause in the sense of that statute. In *Baker v. Tyler*, 28 R. I. 152, 66 Atl. 65, the party was not in default, for the time had never been fixed within which the statute required him to act.

The petition must therefore be denied and dismissed.

(28 R. I. 256)

SHERIDAN v. GORHAM MFG. CO.

(Supreme Court of Rhode Island. April 3, 1907.)

MASTER AND SERVANT—RISKS ASSUMED BY SERVANT—OBVIOUS DEFECTS IN APPLIANCES.

A servant using an ordinary ladder in the course of his usual employment was chargeable, equally with the master, with knowledge of the fact that the iron points in the end of each side of the ladder were dull and smooth, so that it was likely to slip on the floor, and he assumed the risk of using it in that condition.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 574-600.]

Exception from Superior Court, Providence County.

Action by Hugh J. Sheridan against the Gorham Manufacturing Company. Judgment for defendant, and plaintiff excepts. Exceptions overruled.

Argued before DOUGLAS, C. J., and DU-BOIS, BLODGETT, JOHNSON, and PARK-HURST, JJ.

Thomas J. Flynn, for plaintiff. Vincent, Boss & Barnefeld, for defendant.

PARKHURST, J. This is an action of trespass on the case for negligence, and is now in this court on the plaintiff's exceptions to the action of the superior court in sustaining a demurrer to the declaration.

The declaration states that the plaintiff was a servant of the defendant, and that in the course of the plaintiff's employment as an electrician it became necessary to use a ladder for the purpose of reaching a ceiling of one of the rooms in the defendant's factory; that the ladder which the defendant provided and gave to the plaintiff was unsafe and defective, in that certain iron points, or spurs, with which said ladder was equipped at its lower ends, had become dull and smooth, so that said ladder while in use was likely to slip on the floor; and that while plaintiff in using said ladder was standing on one of its rounds said ladder slipped and precipitated the plaintiff to the floor, thereby injuring him. The usual allegations of knowledge by the defendant and lack of knowledge by the plaintiff, who is alleged to have been in the exercise of due care, are contained in the declaration.

To this declaration the defendant demurred upon the following grounds: First. Because it does not appear in said declaration that the plaintiff could not, in the exercise of reasonable diligence, have known that the iron points in the end of each side of the ladder were dull and smooth before he placed himself upon said ladder. Second. Because it appears in and by said declaration that the plaintiff had an equal opportunity with the defendant of knowing of the condition of said ladder. Third. Because it appears in and by said declaration that the plaintiff was not in the exercise of due care. This

demurrer was heard before Mr. Justice Brown in the superior court on October 30, 1906, and the demurrer was sustained by decision rendered on November 13, 1906. To this decision the plaintiff duly excepted, and filed a notice of intention to prosecute a bill of exceptions according to law. The bill of exceptions was duly allowed, and the case was thereupon certified to this court. The exceptions simply raise the question of whether or not Mr. Justice Brown erred as a matter of law in sustaining the demurrer.

The plaintiff contends that inasmuch as he has alleged in his declaration that he was in the exercise of due care, and had no knowledge of the danger of slipping incident to the use of the ladder, he has tendered proper issues of fact upon these points, and his declaration is not, for that reason, demurrable; but his citations in support of this point fail to sustain his contention. In *Flynn v. International Power Co.*, 24 R. I. 291, 52 Atl. 1089, the only point of the decision relevant to the case at bar was that the failure of the plaintiff to allege that he did not know of the defect complained of as negligence made the first count of the declaration demurrable. It was not decided that the presence of such an allegation under any or all circumstances would forbid a demurrer. And in *Dalton v. R. I. Company*, 25 R. I. 574, 57 Atl. 383, it was held that the want of an allegation negating the assumption of a known risk, or stating an excuse for continuing the work if the risk was known, made the declaration demurrable. It was not decided that the presence of such allegations would under all circumstances forbid a demurrer. On the contrary, the principle laid down by this court in the case of *Baumier v. Narra Brewing Co.*, 23 R. I. 430, 50 Atl. 841, is equally applicable to the case at bar. *Tillinghast, J.*, on page 435 of 23 R. I., page 842 of 50 Atl., speaks for the court as follows: "The plaintiff further argues that the allegation in the declaration that he was in the exercise of due care is sufficient to rebut the claim made by defendant that plaintiff assumed the risk. We do not think so. The court must take the declaration in a case of this sort as a whole in determining whether it states a case; and, if it appears from all the facts stated therein that the plaintiff could not have been in the exercise of due care, the mere fact that it alleges that he was does not save it from being demurrable. We may also add that we do not agree with the plaintiff's contention that the allegations of lack of knowledge of the work, and the location, and lack of warning regarding the same, prohibit the assumption that the danger was obvious and that the plaintiff assumed the risk. When it is apparent, from the facts stated in a case of this sort, that, if the plaintiff had used his senses, he must have known of the danger complained of, no allegation which he may incorporate in

his declaration as to lack of knowledge, lack of warning, or duty of the master will be allowed to overcome and rebut said facts and render the declaration sustainable. Such a declaration is inconsistent, and therefore demurrable."

It has been repeatedly held that an ordinary ladder, such as was used in the case at bar, is to be classed with other ordinary "hand tools," and so that the servant using a ladder in the course of his usual employment is chargeable, equally with the master, with knowledge of its obvious imperfections. Thus it was said in *Cabill v. Hilton*, 106 N. Y. 512, 518, 18 N. E. 339, 341, as follows: "A ladder, like a spade or hoe, is an implement of simple structure, presenting no complicated question of power, motion, or construction, and intelligible in all of its parts to the dullest intellect. No reason can be perceived why the plaintiff, brought into daily contact with the tools used by him; as he was, should not be held chargeable, equally with the defendants, with knowledge of their imperfections." So, also, in *Marsh v. Chickering*, 101 N. Y. 390, 5 N. E. 56, a case very similar to the case at bar, but a stronger case for the plaintiff, inasmuch as the proof showed that the plaintiff had given the defendant actual notice of the want of hooks and spikes to keep the ladder from slipping, and had received the promise of the superintendent that these safety appliances should be placed upon the ladder; and yet the plaintiff had continued to use the ladder without them until he was injured by reason of the slipping of the ladder. He was held to have assumed the risk of the known danger. So, also, in the case of *Borden v. Daisy Roller-Mill Co.*, 74 N. W. 91, 98 Wis. 407, 87 Am. St. Rep. 816, which raises substantially the same question, as in the case at bar; and the court in an elaborate and well-considered opinion, says (page 92, of 74 N. W., page 409 of 98 Wis. [87 Am. St. Rep. 816]), as follows: "A ladder is one of the most simple contrivances in general use. The danger attending such use is a matter of almost common knowledge, and is particularly within the knowledge of men engaged in such work as that in which plaintiff was employed when injured. * * * There was no question in the case as to plaintiff's being an experienced workman in the use of ladders on floors in mills; no dispute but that he had as good an opportunity as defendant for knowing of the defects in the ladder, if any existed, and all the probable consequences that might follow; no dispute but that he might, by an instant's inspection of the ladder, have found out its exact condition; no dispute but that he selected the ladder and used it without any sufficient, or really any, inspection in regard to its being furnished with points to prevent its slipping on the floor. In that state of the case, under the well-settled rule that an employé is chargeable with knowledge of all the dangers that are apparent to

such observation as men of ordinary care, under the circumstances of the situation, would be likely to make, and the duty to guard himself against injury therefrom, and that if, by reason of such dangers, he is injured, he is remediless by reason of his contributory fault, the plaintiff clearly assumed the risk of his using the ladder in the condition it was."

In view of these well-considered opinions, with which we heartily concur, we are of the opinion that there was no error in the decision of the superior court, and the same is affirmed.

The exception is overruled, and the case is remanded to the superior court for further proceedings.

(28 R. I. 245)

O'DONNELL v. RHODE ISLAND CO.

(Supreme Court of Rhode Island. April 10, 1907.)

1. DAMAGES—EVIDENCE—ADMISSIBILITY.

In an action for personal injuries, where plaintiff alleged injury to the internal organs and specific notice that pelvic injury was claimed was given to defendant's surgeon, and immediately reported to its counsel, evidence of pelvic injury was properly admitted.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Damages, § 441.]

2. SAME—GROUNDS—DIRECT CONSEQUENCES—PHYSICAL SUFFERING.

In an action for personal injuries received by being thrown from a street car, an injury to the shoulder was a proper element of damages, whether caused directly by the fall or by the ligating of the arm after the fracture was reduced, since it was a natural result of the accident.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Damages, § 40.]

3. TRIAL—EVIDENCE—WAIVER OF RIGHT TO OBJECT TO INTRODUCTION.

Where, in an action for personal injuries, the question of the permanence of the injury was the subject of extended cross-examination, the defendant thereby waived any valid objection to the introduction of the life tables by plaintiff.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 178.]

4. DAMAGES—PROCEEDINGS FOR ASSESSMENT—INSTRUCTIONS—MITIGATION.

In an action for personal injuries, the court properly instructed that plaintiff must do all that a reasonable person would do to reduce her injuries, and, if she has failed or refuses to do this, defendant would not be liable for the increase of injury due to her negligence, but, if she puts herself into the hands of the physicians and follows their advice, defendant would be liable even though the physicians lack in skill or err in judgment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Damages, §§ 120, 123.]

Exceptions from Superior Court, Providence County.

Action by Annie O'Donnell against the Rhode Island Company. Judgment for plaintiff, to which defendant excepted. Overruled.

Argued before DOUGLAS, C. J., and DUBOIS, BLODGETT, JOHNSON, and PARKHURST, JJ.

John W. Hogan, for plaintiff. Henry W. Hayes, for defendant.

PER CURIAM. The defendant's exceptions are mostly trivial and call for no other comment. Those which are seriously relied upon must be overruled for the following reasons:

1. Injury to the pelvic organs may well be included in the claim in the declaration of injury to the "internal organs," and specific notice that pelvic injury was claimed was given to the defendant's surgeon, and was immediately reported to its counsel, as the surgeon testified at the trial. It is plain that this claim was no surprise to the defendant, and the evidence was properly admitted. The circumstances of the accident made it quite as probable that the injury to the shoulder was caused directly by the fall as by the ligating of the arm after the fracture was reduced. In either case it was a natural result of the accident, and a proper element in estimating the damages.

2. The life tables were introduced against the objection of the defendant, but the question as to the permanence of the injury was the subject of extended cross-examination, and any valid objection to the introduction of the tables was thereby waived.

3. It was contended by the defendant that the adhesions now existing around the shoulder joint could be relieved by forcible rupture and manipulation—a process so painful as to require the administration of an anesthetic—and, further, that it was the duty of the plaintiff to submit to such an operation and so diminish the amount of damages. Much evidence was introduced to the effect that such an operation was not sure to be effectual, and might cause other harmful results. The court, in answer to a question of the jury, instructed them: "I cannot advise you that it is the duty of the plaintiff to undergo, as a matter of law, to submit herself to etherization. It is a matter to be judged in the light of what a reasonable person would do. She must do all that a reasonable person would do to minimize those damages, and if you are of the opinion that a reasonable person would submit to be put under ether to have the arm manipulated, and that that would restore it in a period of three months, then I say to you it is her duty to do it. It is not her duty to do it, unless, in your opinion, that result would be accomplished, that to submit to that operation, putting herself under ether, for the purpose of breaking down those adhesions, and restoring the complete function of the arm, was such a thing that a reasonable person would do. It comes down to the question, in my view of the case, to whether a reasonable person would submit to it. She must do all that a reasonable person would do to reduce her injuries as much as possible, not only in the future, but she must have done it in the past; and, if there is evidence that

shows that her claims of injuries have been increased, of the evidence, of course, you, gentlemen, are the judges, and for such increase and her negligence, the defendant would not be liable. But, if she puts herself into the hands of the physicians and follows their advice, then the defendant would be liable, even though the physicians themselves lack in skill or may err in judgment." We think this instruction was correct. Hooper v. Bacon, 64 Atl. 950, 101 Me. 533.

Some of the remarks of the plaintiff's counsel in arguing the case verge closely upon an improper appeal to passion or prejudice, if not contempt of the authority of the court, but we think the criticisms of the court were sufficient to cure any harm that could have been caused by them.

Upon the merits of the case we think it proven by a fair preponderance of the evidence that the plaintiff suffered the injuries of which she complains by being violently thrown from the defendant's car on account of unusual and excessive speed at which it was propelled around a curve and that the damages assessed are not excessive in view of evidence which the jury were entitled to believe.

The exceptions are overruled, and the cause is remanded to the superior court for judgment on the verdict.

(23 R. I. 261.)

DESAUTELLE v. NASONVILLE WOOLEN CO.

(Supreme Court of Rhode Island. April 19, 1907.)

1. NEGLIGENCE—EVIDENCE—INSTRUCTIONS.

Where, in an action for damages alleged to have resulted from defendant's negligence in operating its mill without providing a suitable person to supervise the regulation of the water power, the evidence showed that always during the daytime, while the mill was running, some employé of defendant made frequent inspection of the water supply, and that on the night when the accident occurred, which was the first night that the mill had been operated, no such employé was present, it was proper for the jury to consider the fact, as bearing on the question of negligence, that such service was treated by defendant as necessary when the mill was run by day.

2. TRIAL—INSTRUCTIONS—CALLING ATTENTION OF JURY TO PORTION OF EVIDENCE.

Under Gen. Laws 1896, c. 223, § 13, and the Court and Practice Act of 1905, § 23, providing, in substance, that the judge shall instruct the jury in the law and may sum up the evidence to the jury whenever he may deem it advisable so to do, but any material misstatement of testimony by him may be excepted to by the party aggrieved, the judge is not forbidden to emphasize such evidence as he considers most important.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 577-581.]

Exceptions from Superior Court, Providence County.

Trespass on the case by George S. Desautelle against the Nasonville Woolen Company. Verdict for plaintiff, and defendant excepts.

Exceptions overruled, and cause ordered remanded for judgment on the verdict.

Argued before DOUGLAS, C. J., and DUBOIS, BLODGETT, JOHNSON, and PARKHURST, JJ.

George W. Greene and James H. Rickard, Jr., for plaintiff. Tillinghast & Murdock, for defendant.

DOUGLAS, C. J. The evidence shows that the defendant corporation was guilty of negligence in operating its mill without providing a suitable person to supervise the regulation of the water power at a time when it had reason to know that the flow of the river would be irregular, and that the injury to the plaintiff was the result of this negligence, and the damages assessed by the jury do not seem to be excessive. The motion to set aside the verdict and direct a new trial was therefore properly denied, and the exception to that ruling is overruled.

The defendant excepts also to certain portions of the judge's charge, in which he instructed the jury, in answer to a request by the defendant, as follows: "The jury cannot find that the defendant is guilty of not making inspection of the regulator on the night in question without evidence that inspection was usual and necessary. But, as explanatory of that, I have already said to you that you may, if you think it is right and just from the evidence, find that an inspection was necessary, and find it from this fact, if you find such to be the fact, that the defendant did keep somebody in the daytime to look after this power and see to it and failed to do so in the nighttime, now, if you find that to be the fact, you may find that the defendant was guilty of negligence in not causing somebody to look after it at night or causing some inspection to be made of it at some time during the night. * * * Mr. Murdock: We desire an exception to that last part of your charge, which I understood you to charge that the jury may find that there was negligence not to have an inspector at night from something that happened during the day. The Court: If I said that, gentlemen, I didn't mean it. All I mean to say is this: That, as bearing upon that question whether the defendant was guilty of not having inspection made at night, you may take into consideration the fact, if you find it to be the fact, that the defendant did have somebody to look after the power in the daytime and failed to have anybody to look after the power in the nighttime. I don't charge you that is negligence. I charge you, however, that as bearing upon that question you may take that fact and circumstance into consideration. That is what I intended to say before." Taking the whole of this instruction together, we cannot say that it was erroneous. The evidence showed that always during the daytime, while the mill was running, some officer or employé of the defendant made frequent inspection of the regulator and water

supply, and that on the night when the accident occurred, which was the first night that the mill had been operated, no such officer or employé was present. In determining whether such a person ought to have been supplied in the nighttime it was proper for the jury to consider that such service was treated by the defendant as necessary when the mill was run by day. The objection urged by the defendant's counsel, however, is not so much to the correctness of this instruction as because they conceive it to be beyond the province of the court to call the attention of the jury to a portion of the evidence.

In many states of the Union the scope of the judge in charging the jury is circumscribed by strict statutes. Some of the cases cited from such states would doubtless forbid the use of the language here excepted to. The law in Rhode Island has never imposed such a restraint upon the discretion of the judge. The Constitution until 1903 required that the judges of the Supreme Court should "in all trials instruct the jury in the law," but was silent as to the facts. Const. art. 10, § 3. The Digest of 1844 required the judges to instruct the jury in the law, and allowed them to "sum up the evidence in each cause for the instruction of the jury whenever they shall deem it advisable so to do." Page 93, § 15; page 97, § 8. Substantially the same provisions appear in Rev. St. 1857, c. 164, § 26, and chapter 165, § 13, in Gen. St. 1872, c. 181, § 31, and chapter 182, § 13, adding the words "but any material misstatement by the court of the testimony shall upon motion of the party aggrieved be cause for a new trial." The same provisions appear in Pub. St. 1882, c. 192, § 82, and chapter 193, § 12, and in Gen. Laws 1896, c. 223, § 13, and in Court and Practice Act 1905, § 23, which is now in force, as follows: "In every case, civil and criminal, tried in the superior court with a jury, the justice presiding shall instruct the jury in the law relating to the same, and may sum up the evidence therein to the jury whenever he may deem it advisable so to do; but any material misstatement of the testimony by him may be excepted to by the party aggrieved." Under these provisions the duty of the judge is imperative in every case to instruct the jury in the law applicable to it, but he is not required to comment upon the testimony unless he deems that by so doing he may assist them in coming to a right conclusion. When the judge shall exercise this right is left to his sound discretion; but the only limitation laid upon him is that in doing so he shall make no material misstatement. The object of this permission is obviously that the jury may have the benefit of an impartial recapitulation of the evidence on both sides of the issues involved before these issues are submitted to them for final determination. But this does not forbid the judge to emphasize such evidence as he considers most important, or require that he shall set the probable and the

improbable with equal force before the jury. While scrupulously reserving to the jury the right and duty of deciding upon the facts according to their own consciences, he should not hesitate, when in his opinion the occasion demands it, to make such comments on the evidence as he believes will direct them to right conclusions. The function of a court of justice is to ascertain and declare the truth upon the issues presented; not to see that truth and error are treated with the same favor. The summing up of the evidence would be of little advantage to the jury if the totals on both sides of the issue were required to be stated as equal. The proper attitude of the judge toward the jury with respect to comments upon the evidence is correctly stated in 11 Ency Pl. & Pr. 91 iv b. as follows: "In England, and in the United States courts, and in such of those states as have no constitutional or statutory provision against charging as to matters of fact, it is competent for the judge to give his opinion of the weight of any part or the whole of the evidence provided the ultimate decision of the facts is left to the jury. But, when the judge gives his own views as to the weight and sufficiency of the evidence, it is absolutely essential that the jury should be made distinctly to understand that the instruction was not given as a point of law by which they are to be governed, but as a mere opinion as to the facts to which they should give no more weight than it is entitled to receive. The charge should not so infringe the province of the jury as to relieve them from the necessity of pronouncing an intelligent judgment. They should be made to feel that upon them alone devolves the responsibility of their verdict." See, also, the numerous cases cited.

It was said by Ames, C. J., in *State v. Lynott*, 5 R. I. 295, in commenting upon a charge in a criminal case: "Had the judge confined himself to expressing this opinion merely, leaving the jury, however, at liberty to draw their own inference in this respect from the evidence submitted to them, we should not deem such expression of opinion the proper subject of an exception, even though we might differ from him in his conclusion." See, also, *Hartshorn v. Ives*, 4 R. I. 471, 476, and *State v. Quigley*, 26 R. I. 263, 269, 58 Atl. 905, 67 L. R. A. 322. The portion of the charge excepted to in the case at bar came well within the rule, and the exception thereto must be overruled.

The cause will be remanded to the superior court for judgment on the verdict.

(23 R. I. 265)

STATE (LOCKE, Complainant) v. THURSTON.

(Supreme Court of Rhode Island. April 19, 1907.)

MUNICIPAL CORPORATIONS—ORDINANCE—CONFLICT WITH STATUTES.

Gen. Laws 1896, c. 74, § 5, as amended by Pub. Laws 1900-01, p. 336, c. 925, declaring a

fine for "every person who shall ride or drive faster than a common pace" in certain cities or in the compact part of town or village, covers the field of a town ordinance, declaring a penalty for one who shall drive an automobile on the public streets of the town at a greater speed than 15 miles per hour; so that under Gen. Laws 1896, c. 40, § 29, forbidding any ordinance imposing any penalty on an act punishable under any statute, the ordinance is void.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, § 1312.]

Complaint by Charles B. Locke against Benjamin Thurston, charging violation of a town ordinance. Question certified to Supreme Court under Court and Practice Act 1905, §§ 478, 479. Decision for defendant.

Argued before DOUGLAS, C. J., and DUBOIS, BLODGETT, JOHNSON, and PARKHURST, JJ.

Frederick A. Jones, for the State. Tillinghast & Murdock and Antonio A. Capotosto, for defendant.

DUBOIS, J. The defendant was arrested upon a complaint and warrant, issued from the district court of the Fourth judicial district, which charged that he "did operate and drive a certain automobile or motor car on the public highway of said Warwick at a speed greater than 15 miles per hour, against the ordinances of said town," etc. Before the trial of the case on its merits, the defendant moved to dismiss the complaint on the following ground, viz.: "That the town council of the town of Warwick had no authority in law to pass an ordinance regulating the speed of automobiles on public highways." Whereupon the justice of the district court, under the provisions of the Court and Practice Act of 1905, §§ 478, 479, certified to us, for hearing and determination, the question of the validity of the following ordinance of the town of Warwick:

"Section 1. No person shall operate or drive any automobile, motor-car, or motor cycle on the public streets or highways of the town of Warwick, at a greater speed than fifteen miles per hour.

"Sec. 2. Any person violating any of the provisions of the preceding section shall be fined not less than \$20.00, or be imprisoned not exceeding ten days."

The power to make ordinances is comprised within the powers possessed by municipal corporations, which are: "First, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the declared objects and purposes of the corporation—not simply convenient, but indispensable." Dillon, Mun. Corp. (4th Ed.) § 89, cited in Staples v. Walmsley, 27 R. I. 181, at page 184, 61 Atl. 141, at page 142. See, also, McQuillan, Mun. Corp. § 46. The power to make and ordain ordinances has been expressly granted to town councils and city councils by Gen. Laws 1896, c. 40, § 21, wherein it is provided, among other things,

that they "may from time to time make and ordain all ordinances and regulations for their respective towns, not repugnant to law, which they may deem necessary * * * to prevent persons standing on any footwalk, * * * or riding, driving, fastening or leaving any horse or other animal or any carriage, team or other vehicle on any such footwalk, sidewalk, doorstep or doorway within such town, to the obstruction, hindrance or annoyance of passers-by or of persons residing or doing business in the vicinity thereof; * * * to regulate the speed of driving horses and cattle over bridges; * * * and, generally, all other ordinances, regulations and by-laws for the well-ordering, managing and directing of the prudential affairs and police of their respective towns, not repugnant to the Constitution and laws of this state, or of the United States." There can be no question but that, under the large delegation of police power granted to them by the final and omnibus clause of the section, town and city councils would have ample authority to pass ordinances such as the one in question, unless such power has been qualified or limited by the Legislature. We find such limitation in Gen. Laws 1896, c. 40, § 29: "No ordinance or regulation whatsoever, made by a town council, shall impose or at any time be construed to continue to impose, any penalty for the commission or omission of any act punishable as a crime, misdemeanor or offense, by the statute law of the state." This provision has been construed by this court, and ordinances inconsistent with the statute law of the state have been declared to be void. Baxter, Petr., 12 R. I. 13; State v. McCulla, 16 R. I. 196, 14 Atl. 81. If the ordinance seeks to impose a penalty for the commission of an act punishable by the statute law of the state it is void. Gen. Laws 1896, c. 74, § 5, as amended by Pub. Laws, p. 336, c. 925, November 26, 1901, provides: "Every person who shall ride or drive faster than a common travelling pace in any of the streets of Newport or Providence or in the compact part of any town or village in the state, or in any road leading from Pawtuxet to the compact part of Providence, shall, unless justifiable cause be made to appear for such riding or driving, be fined not less than five dollars nor more than twenty dollars or imprisoned not exceeding ten days for each offence: one-half of said fine to the use of the complainant and one-half thereof to the use of the town where the offence was committed."

The language used in this section is exceedingly broad: "Every person who shall ride or drive faster than a common travelling pace." The words "ride or drive" are not confined to animals. They are not limited in any manner whatsoever. Anything capable of being ridden or driven comes within the purview of the act. It is argued that the words "ride or drive" are apt words in

a statute designed to limit the fast driving of horses upon the highways of the state. They are apt, but they are not restricted to horses by the terms of the section. They are also apt in the case of bicycles, motor cycles, or automobiles when ridden or driven. In construing statutes of this kind, it is usual and proper to consider the scope and purpose of the act and the danger or mischief that it was intended to guard against. The act was evidently passed for the protection of the public against the dangers incident to fast riding and driving of any sort, not only of the kind with which the legislators were familiar at the time, but also any kind of dangerous riding or driving. In *Taylor v. Goodwin*, [1879] 4 Q. B. D. 223, the appellant, Taylor, was convicted, under St. 5 & 6 Wm. IV, c. 50, § 78, of furiously driving a carriage on a highway, upon proof that he had been riding a bicycle at a furious pace on the occasion in question. The conviction was affirmed, and the opinions of the presiding justices, although brief, are very illuminating upon the subject:

"Mellor, J. I am of the opinion that the decision of the magistrates was right. The words of the section are: 'If any person riding any horse or beast, or driving any sort of carriage, shall ride or drive the same furiously so as to endanger the life or limb of any passenger.' The expressions used are as wide as possible. It may be that bicycles were unknown at the time when the act passed, but the Legislature clearly desired to prohibit the use of any sort of carriage in a manner dangerous to the life or limb of any passenger. The question is whether a bicycle is a carriage within the meaning of the act. I think the word 'carriage' is large enough to include a machine such as a bicycle which carries the person who gets upon it, and I think that such person may be said to 'drive' it. He guides as well as propels it, and may be said to drive it as an engine driver is said to drive an engine. The furious driving of a bicycle is clearly within the mischief of the section, and seems to me to be within the meaning of the words, giving them a reasonable construction."

"Lush, J. I am of the same opinion. The mischief intended to be guarded against was the propulsion of any vehicle so as to endanger the lives or limbs of the passers-by. It is quite immaterial what the motive power may be. Although bicycles were unknown at the time when the act passed, it is clear that the intention was to use words large enough to comprehend any kind of vehicle which might be propelled at such a speed as to be dangerous."

The statute covers the streets of certain cities, the compact parts of all towns, and certain roads within the state, and the ordinance in question assumes to regulate the speed of automobiles, motor cars, and motor cycles on the public streets and highways of Warwick. This includes the compact por-

tion of the town, because the same is not in terms therein excluded. Therefore the ordinance is in conflict with the statute and is invalid.

It is unnecessary to consider the other questions argued.

The papers in the cause, with our decisions certified thereon, will be remanded to the district court for further proceedings.

HONEYMAN v. HAUGHEY et al.

(Court of Chancery of New Jersey. Nov. 24, 1906.)

CORPORATIONS — SUBSCRIPTION TO STOCK — PAYMENT.

Where stock of a corporation was issued as fully paid stock to stockholders in exchange for a patent which was grossly overvalued, the receiver of the corporation may collect from these stockholders money to pay the debts and the expenses of administration.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, §§ 880, 883.]

Bill by A. Van Doren Honeyman, receiver, etc., against Louis C. Haughey and others. Decree for complainant.

E. Q. & G. M. Keasbey, for complainant. Frank H. Hall, for defendant Louis C. Haughey.

BERGEN, V. C. Being so well satisfied that the complainant is entitled to a decree in this cause, I will not call upon counsel for the complainant to make any argument. The situation, as it appears to me, is this: A large plant had been erected near Bound Brook, in this state, for the manufacture of gelatine, under some foreign patent which had been reissued in the United States. It had been exploited for three or four years, by different companies and parties, without any success. The property was incumbered by a mortgage amounting to \$125,000, and, that mortgage being foreclosed, the property was sold and purchased, presumably by the mortgagee, for about \$125,000 or \$130,000. In some way which does not appear in this cause, the title to the property became vested in a Mr. Wallace, who, it appears from the evidence, was a clerk or partner of some law firm in New York City which represented the persons interested in the mortgage company. While matters were in that situation, the present company, the New Jersey Gelatine Company, was organized, and Mr. Wallace in writing offered to sell the property to that company. The price which he fixed was \$1,125,000. The \$125,000, manifestly, was added to represent the amount due on the mortgage or the value of the real estate. The \$1,000,000 is supposed to take the place of the patent, and it is argued here that the patent was worth the \$1,000,000.

I am not satisfied, from the evidence in this cause, that it was worth any such sum of money. It was a patent, which, after years of exploitation, had proven unsuccessful, at

least none of these parties had ever been able to keep the plant in the shape of what we would call a "going concern," and this was manifestly a scheme devised to have this stock issued and divided among these stockholders, because Mr. Haughey, the leading defendant, the only one who has answered here, and on whose behalf it has been strongly argued that it was worth a great sum of money, and that \$1,000,000 was not an excessive valuation, turned over to the company nearly one-half of the capital stock issued to him, which he would not have done if the patent had belonged to him and was of the value which he said it was. It is in evidence that this stock was turned back to the treasury according to some understanding or agreement, which understanding or agreement has not been developed by the defendants in this cause; none except Mr. Haughey having answered, and he not being present. If a proceeding of this kind can be sanctioned by the court, it would be a very simple matter for all stockholders to avoid payment for capital stock issued to them. The principle is well established that the capital stock of all these companies is a trust fund for the payment of creditors. The creditor who deals with the company has no knowledge of nonpayment of stock subscriptions, and deals with the company upon the assumption that this company had valuable assets amounting to \$1,125,000, which in this case is not true. They did not have any such property, and the persons who trusted them on that understanding trusted them upon the theory that the officers of the corporation had done their whole duty, had collected the assessments on the stock, and they are now entitled to call upon these stockholders, who had not paid for the stock, to contribute a sufficient sum to liquidate the indebtedness of the company. In the Court of Errors and Appeals, in *Volney v. Nixon*, 60 Atl. 189, 68 N. J. Eq. 605, Judge Dixon discusses this subject very thoroughly. That was a case where stock was issued for patents, and he held that, as there was no such value to the patent as the parties ascribed to it, it was a mere scheme to procure the issuing of stock, without the payment of money. The corporation laws of this state are liberal, just as liberal I think as they should be, and the courts of the state are not disposed to add to the scope of the corporation act. When parties incorporate, and take stock in corporations, they must either pay money or give money's worth therefor.

In this case, there was not a single stockholder or director of this company that would have been willing to have bought this patent at a quarter of what they now say the stock was issued for it. To my mind, it is a perfectly clear case of the overissue of stock, or rather the issuing of stock for property at a gross overvaluation. You may take a decree in this cause, declaring the contract between the company and the stockholders, that this

stock was issued as fully paid stock, set aside, because it was a fraudulent contract; it never was fully paid. And in the decree there shall be a direction to the receiver to collect a sufficient sum of money to pay the debts, and the expenses of the administration of the estate; that amount must be fixed in the decree. I understand, from the evidence produced before me, that there is \$48,156.03 of unpaid indebtedness. You may add to that amount, for the expense of the administration of the estate, \$1,000, which amount will probably be sufficient to cover the costs and to pay the receiver, perhaps not a very large, but partial, compensation.

I will advise a decree drawn on the lines suggested.

(72 N. J. Eq. 854)

MANNERS et al. v. MANNERS.

(Prerogative Court of New Jersey. May 14, 1907.)

1. WILLS — PROBATE — EVIDENCE — WEIGHT — ATTESTING WITNESSES.

Where a perfect attestation clause is appended to the will, it is *prima facie* evidence of due execution, but this may be overcome by the testimony of even the subscribing witnesses.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, §§ 700, 705.]

2. SAME—EXECUTION—PUBLICATION.

Evidence that testatrix was in the room when the scrivener who had drawn the will, requested the witnesses to come in and witness the execution of her will, but made no sign when he announced that she had made her will and wished them to witness it, and did not sign the paper in their presence, was insufficient to show publication by her.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, §§ 700-702.]

3. SAME—SIGNATURE.

Where a testatrix did not sign her will in the presence of the attesting witnesses, and made no sign of assent when the scrivener said, apparently with reference to the paper, "This is her name," there was no valid acknowledgment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, §§ 302-304.]

Appeal from Orphans' Court, Hunterdon County.

Suit by Jacob S. Manners and others against Jacob H. Manners. From a decree for defendant, plaintiffs appeal. Affirmed.

A. R. Denman, for appellants. Paul A. Queen, for respondent.

MAGIE, Ordinary. The appeal is from a decree refusing probate to a paper writing offered as the last will and testament of Elizabeth V. Manners. The paper writing purported to be signed by the testatrix. There was a perfect attestation clause, to which was appended the signatures of two witnesses, and these witnesses were called and testified on the application for probate. The perfect attestation clause appended to the will was *prima facie* evidence of due execution. The *prima facie* effect of such a clause, however, may be overcome by testi-

mony, and even by the testimony of the subscribing witnesses. *Berdan's Case*, 65 N. J. Eq. 681, 55 Atl. 728.

The questions presented are (1) whether their testimony overcomes the declaration of the attestation clause of the will as to publication by the testatrix; and (2) whether their testimony overcomes the attestation clause in respect to the signature of the will. The evidence renders it clear that the signature was not made in the presence of the subscribing witnesses. When they entered the room in which the testatrix sat, they found there the scrivener who had drawn the will and who had requested them to come into the house to witness its execution. Thereupon the scrivener said that the testatrix had made her will and wanted them to witness it. The witnesses expressed the opinion that this was spoken in a voice loud enough to be heard by the testatrix, who sat some eight or ten feet distant in the same room, but they both declare that she made no sign of assent, and both agree that she did not sign the paper in their presence. It is settled law that a testatrix may publish a will by assenting to a statement made in her presence. Such an assent may be made by some act or sign. If the scrivener declared, in the hearing of the testatrix, that the paper was her will and she had then signed it, publication might be inferred; but, when there was no act or sign by the testatrix, I think that the proof discloses that there was no publication by the testatrix.

As the paper writing was not signed in the presence of witnesses, it is by our statute invalid, unless the testatrix acknowledged "the making thereof"; i. e., the making of the signature in their presence. On this subject the evidence shows that the scrivener said, apparently with reference to the paper writing which was in the room and on the table, "This is her name." Testatrix remained silent, and no act or sign was made by her to that statement. But, if she had signified her assent to the statement of the scrivener, in my judgment, the acknowledgment which the statute requires would not be made out. An acknowledgment that the signature was her name is not an acknowledgment that it was made by her, and I think nothing less than such an acknowledgment will satisfy the statutory requirements.

In my judgment the decree refusing probate must be affirmed.

(73 N. J. Eq. 723)

MAZZOLLA v. WILKIE et al.

(Court of Chancery of New Jersey. March 20, 1907.)

1. TRUSTS—ESTABLISHMENT—DISPUTED FUND IN HANDS OF THIRD PERSON.

An agent of an insurance company collected insurance money under a power of attorney from the beneficiary and deposited it with a third person, who refused to deliver it to the beneficiary unless the beneficiary would give him

one-half thereof to pay to the agent pursuant to an alleged agreement between the beneficiary and the agent. *Held*, that the beneficiary could bring an equitable action against the agent and the third person to impress the money in the third person's hands with a trust in favor of the beneficiary, and after adjustment to compel the payment of the money to the complainant.

2. EQUITY — JURISDICTION — FRAUD — ADEQUACY OF LEGAL REMEDY.

The Court of Chancery possesses a general jurisdiction in cases of fraud, as well where there is a plain, adequate, and complete remedy at law, as in other cases.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Equity, § 139.]

Bill by Pasquale Mazzolla against Edwin Wilkie and others. On demurrer to bill. Demurrer dismissed.

McCarty & McMahon, for complainant. Melosh & Morten, for demurrant Edwin Wilkie.

GARRISON, V. C. This is a demurrer to a bill. From facts charged in the bill the following sufficiently appears: The complainant was the beneficiary named in life insurance policies upon the life of his wife to amounts aggregating \$4,000, payable to him at her death. The same accident which caused her death, namely, the leakage into their sleeping apartment of illuminating gas, seriously affected him, so that he was taken to a hospital for treatment. While in the hospital, Wilkie, the agent who had effected the insurance, prevailed upon the complainant to give to him a power of attorney to collect the insurance money. He effected this by assuring the complainant that he was the only one who could collect the money. The complainant is an Italian, who speaks and understands the English language with great difficulty. Subsequently, upon representations by Wilkie that the first power of attorney was insufficient, the complainant made a second power of attorney to Wilkie, in which the following words were fraudulently inserted: "To pay all necessary and lawful expenses for the proper release and collection of each of said policies, and, after paying all necessary and legal expenses thereon or arising thereunder, to retain to himself for his services, the amount hereto agreed between us for that purpose, and to pay me the balance in his hands as soon as the same is received by him from the said companies. * * *". It is charged that the complainant never made any agreement with said Wilkie to pay him any sum for his services. Subsequently the money was collected by Wilkie, and, upon the complainant applying to him for the same, Wilkie informed the complainant that he had deposited the money in the hands of his lawyer, Henry J. Melosh, of Jersey City. The complainant thereupon applied to Melosh, who refused to pay him the money, or any part thereof, unless complainant would give to him one-half thereof to pay to Wilkie pursuant to an agreement which

Melosh stated the complainant had made with Wilkie. There is then a charge that the agreement as alleged was procured by fraud from the complainant, and that false representations were made by Wilkie. The prayer is that the money in the hands of Melosh may be decreed to be held in trust for the complainant, and that Melosh or Wilkie may be decreed to pay the complainant, and that the alleged agreement may be decreed null and void, and that, in the meantime, Melosh and Wilkie be restrained and enjoined from paying out or disposing of the said money.

It is difficult, because of the phraseology of the bill and its construction, to determine whether the pleader intends to charge that the power of attorney was procured by fraud and misrepresentation, or that the agreement referred to in the power of attorney was so procured, or that the clause inserted in the power of attorney was the fraudulent matter complained of. If the bill were attacked by notice under the rules, I am inclined to think that it would be entirely proper to require the complainant to more clearly state for the defendant's benefit the matters complained of. But in the face of a general demurrer the bill must be sustained, if it is possible, from the charges contained in it to spell out an equity in favor of the complainant.

The demurrer is filed by Edwin Wilkie, one of the defendants, and attacks the bill upon two grounds: First, because the bill is without equity; and, second, because there is a complete and adequate remedy at law. I do not think that the bill is without equity. The complainant alleges, leaving out for the present all charges of fraud, that his agent, under a power of attorney, specifying, among other things, that he was to collect the money, and after making certain deductions therefrom was to pay it over to the complainant, had collected the money, and, instead of paying it over, had deposited it with a third person. The suit is against the agent and such third person to impress the money in the hands of the third person with the trust, and, after adjustment, to compel the payment of the money to the complainant. Under these circumstances, I do not see how the complainant could bring an action at law successfully. If he sued the agent and the depository together, he would fail, because he has no cause of action against them jointly, or any cause of action which could be litigated in a suit at law to which they were both parties. If he sued the agent separately, he could, of course, recover a judgment, but it would be without effect upon this particular property which is not in the agent's possession; and one situated as this complainant is surely is not required to forego his remedy against money earmarked as this is. If he proceeded at law against the depository alone, he would fail, because the depository would only be required to pay it over to him after the rights of the agent in the money were settled. A court of equity is the only tribunal, under

our system, which can settle and adjust the various rights of these parties.

The principle involved is illustrated and enforced in the case of *Leonard v. Camden National Bank*, 70 N. J. Law, 660, 59 Atl. 148 (Court of Errors, 1904). As is there said, the sole obligation of the depository is to hold the fund until the rights of the claimants are settled between themselves, and then to surrender the fund to the rightful claimant. In the situation disclosed by the bill under consideration, the only obligation which Melosh seems to have undertaken is to hold the money until the rights of Wilkie and the complainant are settled with respect thereto. Under such circumstances equity has jurisdiction. This, of course, leads to a dismissal of the demurrer.

Because of the conclusion just reached and stated, I do not think it necessary to consider or determine whether, by reason of the charges of fraud, this is one of those cases in which equity will retain jurisdiction notwithstanding that there is a plain, adequate, and complete remedy at common law. The Court of Chancery in this state possesses a general jurisdiction in cases of fraud, as well where there is a plain, adequate, and complete remedy at law, as in other cases. *Eggers v. Anderson*, 63 N. J. Eq. 264, 40 Atl. 578, 55 L. R. A. 570 (Court of Errors, 1901); *Dawson v. Leschziner*, 65 Atl. 449 (Magie, Ch. 1907).

I will advise a decree that the demurrer be dismissed, with costs.

(71 N. J. E. 743)

BAUR v. CRON et al.

(Court of Errors and Appeals of New Jersey.
March 4, 1907.)

GIFTS—VALIDITY—MENTAL INCAPACITY.

Where a person enfeebled in mind by disease or old age, is so placed as to be likely to be subjected to the influence of another, and makes a voluntary disposition of property in favor of that person, there must, to sustain it, be proof of the fact that the donor understood the nature of the act, and that it was not done through the influence of the donee.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 24, Gifts, §§ 74, 99.]

(Syllabus by the Court.)

Appeal from Court of Chancery.

Bill by Wilhelmina Baur against Louis P. Cron and others. From an order advising a decree that a certain fund belonged to the estate of Elizabeth Cron, deceased, defendants appeal. Affirmed.

The following is the opinion of Bergen, V. C., of the court below:

"The original bill filed in this cause was an interpleader, filed on behalf of a party whose property was incumbered by a mortgage, amounting to \$1,500. In that proceeding a decree of interpleader was taken, the money paid into court; and this contest arises over the disposition of the fund. The mortgage in question belonged to Mrs. Elizabeth Cron, by

virtue of an assignment made to her some years ago. She died, leaving a will, which was admitted to probate, and in the interpleader proceedings William Cron, one of the sons and an executor, filed an answer, claiming that the money should be paid over to the estate for distribution. The other son, Louis P. Cron, answered, insisting that the money belonged to him, because previous to the death of his mother, Elizabeth Cron, she had made him a gift of the mortgage. His story is this: That in March, as his mother died on the 11th of May following, she, being then ill, gave him this bond and mortgage; in other words, made him a present of it. That he took possession of the bond and mortgage, and had since held it in possession. Mr. Wilson, an attorney, was on the 16th day of April, preceding her death in May, present to obtain the material for drafting a will for Mrs. Cron, and he testifies that during a conversation on that occasion she told him that she had given this bond and mortgage to her son Louis; that he inquired how she had made the transfer, and, finding that it was only by delivery, he advised her that she would have to make a formal assignment of it, which he says was afterwards carried out. It appears in the case that the only persons in the house taking care of Mrs. Cron during her last illness were her son Louis, the donee, and a Mrs. Reddinger, who was employed as a nurse; that the care and attention which she received during the latter days of her life came entirely from these two persons. Under this condition of affairs it seems to me that the burden of maintaining this gift is cast upon the party claiming it, and that this conclusion is sustained by the opinion written in *Slack v. Rees*, 66 N. J. Eq. 447, 448, 59 Atl. 466, 69 L. R. A. 393, by the Chief Justice, in a case determined by the Court of Errors and Appeals of this state. The Chief Justice, illustrating the conditions in that case, used the following language, which I will read: 'For a period of nearly three months prior to his death he was an inmate of his daughter's home. He was during all that time dependent upon her for the care and service which a man in his weakened physical and mental condition constantly requires. The normal relation of parent and child as it had existed in earlier years had been reversed, and the daughter had become the guardian of the father. In this situation the law presumes that a gift made by the parent to the child is the produce of undue influence, and casts upon the latter the burden of proving the contrary.' And the Chief Justice in another part of the opinion, speaking of the finding of the Vice Chancellor, used the following language: 'He seems to have considered, however, that such relationship was not shown, unless it was made to appear that the donee occupied such a dominant position toward the donor as to raise the presumption that the latter was without power to assert his will in opposition to that of the donee. But

this is not the situation. The rule has a much broader sweep. Its purpose is not so much to afford protection to the donor against the consequences of undue influence exercised over him by the donee, as it is to afford him protection against the consequences of voluntary action on his part, induced by the existence of the relationship between them, the effect of which upon his own interests he may only partially understand or appreciate.' In using this latter language the Chief Justice was referring to the absence of independent advice, as affecting the paper that was being executed. Applying the facts to this case, we find that Mrs. Reddinger testified that in August, 1903, shortly after the death of the father, the mother said to her that she wanted her son Louis to have this bond and mortgage for \$1,500.

"Without now calling attention, as I shall hereafter, to the apparent interest of this witness, it is enough to say that, if Mrs. Cron used any such language at that time, she afterwards radically changed her mind, because on the 6th of December following she gave instructions to have a codicil to her will prepared, which Mr. Schmidt has testified was executed by her, in which she made no attempt to give her son Louis this mortgage of \$1,500, but, on the contrary, directed how it should be disposed of, which was in a manner entirely different from that suggested by Mrs. Reddinger. Under the codicil her funeral expenses were to be paid, half out of the \$1,500, and the other half out of some money she had in the savings bank. Then her son was to be paid for services which he had rendered to her, and which he might render to the estate, after her death, without fixing the amount, and the balance of this \$1,500 was to become part of her estate, to be divided between her children, so that on the 6th day of December, 1903, she certainly did not have in her mind any determination whatever to give to this son this \$1,500 mortgage. The next step in this proceeding occurs in February—either the latter part of February or the beginning of March, I do not recall the exact date—when the son Louis and Mrs. Reddinger testified that this mortgage was given to the son Louis by delivery. It will be observed that this took place after Dr. Quinn testifies her last illness began, which was the 23d of February. From the 23d of February until her death, on the 11th day of May following, Dr. Quinn was in constant daily attendance, oftentimes going there more than once a day. And at that time this old woman, declining in life, under the influence only of her son and this nurse, and without independent advice, is said to have given this mortgage to her son. Standing just there, manifestly under the case I have read from it would not be a good gift. Next we have the calling in of the attorney to draw the will. In this connection we must recollect that the old friend of Mrs. Cron, a person who had always advised her,

the witness Mr. Schmidt, the person who had drawn her previous wills and codicils, and who had drawn a codicil as late as December previous, and who afterwards, in March, had been sent for and asked to prepare, and who did prepare, another codicil to her will, when he went there with the witness to have the codicil executed refused to have it executed, because, as he said, he was satisfied that this woman was not then in a mental condition to know what she was doing with her property. What turned this old woman from this lifelong friend, why did she have some one else draw a will for her, whom it is admitted had never done any business for her before? The person upon whom she had always relied was unwilling to have the will executed or changed. Who sent for this new lawyer? The evidence is very vague, to say the least. At any rate, this is apparent: That the two people who were interested in having this mortgage assigned were the only people about the house with whom this dying woman could communicate, and they procured and had brought there a lawyer who not only drafted a will, but who caused this mortgage to be formally assigned.

"I confess, with reluctance, that I cannot accept as true much of the evidence of the lawyer. It is manifest that he was drawing upon his imagination when he testified here that Mrs. Cron had told him that she had given Louis this mortgage, and that he had had it a long time, because he had collected interest on it. Mrs. Cron, if she did say that, told him what was not true, as a matter of fact, and which she knew was not true. I am satisfied that the attorney, owing to his many duties, and perhaps to the fact that he afterwards, as the attorney for Louis Cron, collected this interest, supposed that she told him. Certainly it was not told him, because the fact did not exist at the time he testified she told him about it. I know how it is with the lawyer in active practice. He is very apt to forget or overlook, but he ought not to permit his imagination to run away with him, and testify that he was told by Mrs. Cron that Louis Cron had collected interest on that mortgage, when, as a matter of fact, he had not collected it, and did not collect any interest on it until after his mother's death. My notion of the case is that the claimant, the donee, has not met the burden of proof. What he should have done would have been to have immediately told his brother that he had been preferred, and that this mortgage had been assigned to him, instead of keeping it in secret, until the person who had executed this assignment was dead. On the contrary, he refrains from telling about it, and the assignment is not even put on record until a long time after the death of the mother, and I think not until after the will had been probated, although I may be wrong as to that fact. Now, as to the interest of Mrs. Reddinger. I cannot dispose of this case

without referring to it. As far as I can see, there is no reason why she should remain at that house with Louis Cron for more than a year after the death of the person who employed her. She testified that she is staying there because she promised Mrs. Cron that she would remain there until the estate was settled. There is nothing in this estate for her to settle. There can be no difficulty about the settlement of the estate. The only difficulty is about the settlement of this controversy, in which she is one of the most important witnesses, and coupled with the fact that she still remains in this house with this man for more than a year after her duties there ceased, and so far as this case shows without employment, and without compensation, her interest, as I look at it, is substantially as strong as that of the claimant, and I am persuaded that the assignment of this mortgage was a matter arranged between Mrs. Reddinger and Louis P. Cron to get the property away from the old lady to his advantage.

"I will therefore advise a decree that this fund belongs to the estate of Elizabeth Cron."

P. H. Gilhooly and Samuel Koestler, for appellants. Hudspeth & Carey, for respondent.

FORT, J. It is unnecessary to repeat the facts in this case, in view of the full and accurate discussion of them in the opinion of Vice Chancellor Bergen, who advised the decree from which this appeal is taken. With his statement of the facts we agree, and to them refer for the details of the case.

But, upon these facts, we think the complainant is entitled to a decree, not upon the ground that the donor of the mortgage in question was without independent advice at the time it is alleged she gave it to her son, the defendant, or at the time she made the formal assignment thereof to him, but because we think the facts established by the proof raise a presumption of undue influence on the part of the defendant in procuring the alleged gift, and that, because of that presumption, the burthen was cast upon the defendant to show by clear, convincing, and satisfactory evidence that the gift of the mortgage was the voluntary and intelligent act of the donor. *Coffey v. Sullivan*, 63 N. J. Eq. 296, 302, 49 Atl. 520, 20 Cyc. 1219. In this respect he has failed to carry this burthen of proof, and, therefore, we think, the decree below was right, and that the case is governed in its decision by the opinion of this court in *Haydock v. Haydock*, 34 N. J. Eq. 570, 38 Am. Rep. 385, rather than by that of *Slack v. Rees*, 66 N. J. Eq. 447, 59 Atl. 466, 69 L. R. A. 593, upon which the learned Vice Chancellor, who advised the decree below, seems to have put it.

In *Haydock v. Haydock*, Mr. Justice Reed,

speaking for this court, said: "I take the rule to be settled that where a person enfeebled in mind by disease or old age is so placed as to be likely to be subjected to the influence of another, and makes a voluntary disposition of property in favor of that person, the courts require proof of the fact that the donor understood the nature of the act, and that it was not done through the influence of the donee. The presumption against the validity of the gift is not limited to those instances where the relation of parent and child, guardian, and ward, or husband and wife, exist, but in every instance where the relation between the donor and donee is one in which the latter has acquired a dominant position." In the case before us the facts stated by the Vice Chancellor, and justly found by him, show that the donor, the mother of the defendant in this case, was an old woman, enfeebled in mind by disease or old age, or both, and under the influence of the defendant and the nurse, who were with her constantly, and practically her sole attendants. These facts bring the case clearly within the rule laid down by Mr. Justice Reed in the case of *Haydock v. Haydock* above cited.

The decree of the Court of Chancery is affirmed.

(73 N. J. Eq. 457)

THOMPSON v. RAMSEY.

(Court of Chancery of New Jersey. April 18, 1907.)

MORTGAGES—FORECLOSURE—SALE—RENTS AND PROFITS—RIGHTS OF PURCHASER.

Pending a foreclosure, a receiver appointed by this court, and with the approbation of this court, made a lease of the mortgaged premises expiring October 8, 1904. The mortgaged real estate was sold by the sheriff to Carr for \$70,000. Carr paid \$5,000 to the sheriff upon the purchase. The sale was confirmed July 5, 1904. On July 26, 1904, the sheriff executed a deed to Carr, and notified him that it was ready for delivery. Carr did not pay the remainder of the purchase price and take the deed until September 17, 1904, when he paid \$65,000 only. On application for the distribution of the rents collected by the receiver, *held*, that Carr was not entitled to any part of the rents attributable to the real estate mortgaged until after he had performed the conditions of sale and accepted the sheriff's deed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 35, Mortgages, §§ 1568, 1567.]

(Syllabus by the Court.)

Bill by Charles D. Thompson against Rebecca E. R. Ramsey. Decree rendered.

Godfrey & Godfrey, for defendant Charles R. Myers. William M. Clevenger, for defendants Showell & Fryer. Bourgeois & Sooy, for purchaser Joseph H. Carr.

MAGIE, C. It appears from the depositions taken that, under a decree in this cause, mortgaged real estate (consisting of the Hotel Shelburne) was sold by the sheriff on the 4th of June, 1904, for \$70,000. There were prior

mortgages upon the property, alleged to amount to \$223,000 of principal. The purchaser at the sale was Joseph H. Carr, who paid to the sheriff \$5,000 on the day of sale. Exceptions to the confirmation of the sale were interposed, and pending their consideration a receiver of the property was appointed by order of the court, who, with the approval of the court, leased the mortgaged property for a term commencing on the 30th day of June, 1904, and ending on the 8th day of October, 1904, for a rent of \$13,750. The sale was confirmed July 5, 1904. On July 26, 1904, the sheriff executed a deed to Carr for the mortgaged real estate, and notified him that the deed was ready for delivery. The balance of the purchase price, viz., \$65,000, was not paid by Carr until September 17, 1904, and then it was paid without any accrued interest. After deducting the expenses of the receivership and other incidental expenses, there remains in the hands of the receiver, out of the rental money, \$12,204.25, and it is the distribution of this sum which is now sought.

The mortgage foreclosed covered real and personal property. The personal property was the furniture contained in the hotel. This was not sold by the sheriff because the sale of the real estate was ordered to be made first, and that sale produced more than enough to satisfy the mortgage of the complainant. The lease included the hotel and all its furniture. The rents which were received were due in part to the real estate, and in part to the personal property leased. It becomes necessary to determine what portion of the rents remaining is properly to be attributed to one kind of property, and what to the other kind included in the lease. This becomes necessary because the purchaser of the real estate claims that the rents attributable to the real estate, or at least some part thereof, should be paid to him. There is also a judgment entered upon a mechanic's lien upon the real estate, which can only be paid out of the rents which are attributable to the real estate. As there are also subsequent mortgages which include, or claim to include, both real and personal property, it is obviously necessary to make this discrimination with respect to the rents. Unfortunately the evidence leaves this question without much to enable the court to reach a satisfactory conclusion. On one hand, it is claimed that the value of the personal property is less than \$12,000, and that the value of the real estate as indicated by the amount received at the sheriff's sale, subject to previous mortgages, is about \$300,000, and it is insisted that the rents remaining should be proportioned in the ratio which the respective values bear to each other. The valuation of the personal property appears by the testimony to be made by a single witness, and it does not seem to be in accord with testimony as to the cost of the furniture and the annual depreciation from the use thereof. On the other hand, it

is insisted that real estate rented depreciates but little in value if repairs are properly made, while personal property of the nature of this does depreciate quickly and largely in value by reason of its use. There is but a single expert who presents this opinion, but it seems to be in accord with reason. The same expert testifies to the fact that in Atlantic City owners of cottages sometimes unite with the owners of furniture which the latter use in furnishing the cottages for renting, and that in such cases the rents are divided equally between the owner of the real estate and the owner of the personal property. No other witness has been called to express such an opinion, or to indicate such a custom. There is no proof that the custom testified to in renting cottages would be applicable to the renting of large hotels. This leaves me in perplexity. I have so little to rely upon in making an adjudication as to the equitable division of this fund that I am inclined to fall back upon a division to be arrived at by a comparison of the value of the real with the value of the personal property. But I am not satisfied to fix the value of the personal property at the figure named by the expert witness. According to a calculation made from the cost of the furniture with the expert's evidence of the yearly depreciation, I think that the value may be fairly fixed at \$30,000, so that, if the real estate is deemed to be worth \$300,000, the rents in hand are attributable thus: Tenelevenths to the real estate, and one-eleventh to the personal property.

It is next to be determined how these respective amounts are to be distributed among the claimants. First, to whom shall the amount of rents raised from the real estate be paid? The purchaser at the sheriff's sale claims them because he has a sheriff's deed for the leased real estate, dated July 26th, and he insists that his title thereby became perfect as of the date of the sale, which was June 4th. Subsequent mortgagees and lien claimants insist that the purchaser is not entitled to any part of the rents which accrued from the real estate, unless it be that which accrued after September 17th, when he paid the balance of the purchase money, or that, if he is entitled to the whole thereof, he should not be allowed to take the same except upon accounting for a fair rate of interest upon the purchase money retained by him from July 26th, when he was notified that the deed was ready for delivery, until September 17th, when he paid the same. The contention of counsel for the purchaser at the sheriff's sale is that the title the purchaser acquired by the sheriff's deed relates back to the date of the sale at which he became the purchaser. The appeal is to the doctrine of relation, which is described by Lord Mansfield, in *Vaughn v. Atkin*, 5 Burrows, 2764, in this language: "There is no rule better founded in law, reason, and convenience than this: That all the several

parts and ceremonies necessary to complete a conveyance shall be taken together as one act, and operate from the substantial part by relation. The formal effectuates the substantial part, and therefore must relate to it." This definition of Lord Mansfield was treated as expressing the same idea as the definition contained in 18 Viner's Abridgment, tit. "Relation," § 8, and such was the view expressed by Ewing, C. J., in the Supreme Court in *Den v. Steelman*, 10 N. J. Law, 193. The principle was applied in the Court of Errors in *Jacobus v. Mutual Benefit Life Ins. Co.*, 27 N. J. Eq. 604, where a mortgage recorded before delivery was held to become effectual as against lien claims for labor, etc., upon a building commenced after the mortgage was recorded, but before it was delivered, and this was said to be upon the doctrine that deeds when delivered, have operation by relation as of a time prior to delivery, if it be necessary to effect the intention of the parties, and be required for the advancement of justice, and Mr. Justice Depue, in delivering the opinion of the court, points out that the equity of the mortgages was plainly prior to the equity of the lien claims.

But the question before us differs materially from that discussed and decided in the matter last cited. In this case there was a decree for the sale of real and personal property to raise money to satisfy a mortgage incumbrance. It was not a decree of strict foreclosure, which is said to be an alienation, but it was a decree for sale, and the defendants were not foreclosed by such a decree until sale. *Pearman v. Gould*, 42 N. J. Eq. 4, 5 Atl. 811. The sale is to be made by an officer of the court, and must be confirmed by the court, and the title passes by a deed executed by the officer. As was said by Ewing, C. J., in *Den v. Steelman*, with respect to sheriff's sales under common-law judgments in this state, the execution and delivery of the deed of the sheriff is the substantial part. In the language of Lord Mansfield all the rest of the transaction must relate thereto, and the Chief Justice distinguished the cases in which the doctrine of relation was properly applied, such as where the person making the conveyance has an estate in the lands, from those cases where the conveyance is made by one having no estate, but only a power. In such cases he held that an estate does not pass until all the acts requisite thereto are completed, and from the last to the first there is no relation so as to sustain an intermediate transfer. The reasoning of the Chief Justice is entirely applicable to the case of the delivery of a deed by a sheriff to effectuate a sale made by him under a decree of this court, and I should not have the least difficulty in adopting the view that the sheriff's deed delivered to Carr on the 17th of September had no relation to the sale on the 4th of June so as to entitle him to the rents and profits inter-

mediate between the sale and the delivery of the deed, except for the fact that Mr. Justice Depue, in delivering the opinion of the Court of Errors, in *Morse v. Hackensack Savings Bank*, 47 N. J. Eq. 279, 20 Atl. 961, 12 L. R. A. 62, expressed the view that a sheriff's deed, when delivered, had a relation back to the time of the sale of which it is the consummation, and he cited in support of that doctrine the case of *Jacobus v. Mutual Benefit Life Ins. Co.*, ubi supra. But an examination of the case of *Morse v. Hackensack Savings Bank* clearly shows that the view thus expressed was wholly unnecessary to its decision. The doctrine of that case was this: That although heirs at law took an estate which was alienable, devisable, and descendible, and liable to be seized and sold, in lands respecting which their ancestor had, by will, given power to his executors to sell, yet that a purchaser under execution of the estate of an heir would be divested of the estate purchased whenever the power of sale was exercised, and the purchaser under the power would become seised, under the devise, of a title paramount to the title of the heir by descent. It is obvious that, in the view thus expressed by the court, it was immaterial whether the deed of the sheriff which was claimed to pass the title of an heir at law passed that title as of the date of sale or as the date of the delivery of the conveyance.

I have therefore reached the conclusion that Carr, the purchaser, acquired by the delivery of the deed no right in the rents received from the receiver's lease prior to the 17th of September. Whether he can enforce the payment of rents accruing thereunder after the 17th of September might, perhaps, be questioned; but it seems conceded by all the counsel that he is entitled to the rents between that date and October 8th, when the lease terminated. The evidence as to the rental value for that period is meager, but it also seems to be conceded that at the rate of \$20 a day, testified to by one of the experts, the sum of \$420 would be due to the purchaser. That sum should be paid out of the amount attributable to the real estate in the above calculation. When that sum is deducted, there will remain a residuum of the rents received by the receiver, which are attributable to the real estate, and the whole of the rents which are attributable to the personal estate.

The proceeds of the sale of the real estate by the sheriff was sufficient to pay the prior incumbrance of the complainant, and to produce a surplus of over \$40,000, which was applied upon a subsequent mortgage held by one Charles R. Myers. The sum thus applied did not, however, pay the whole amount due him, but left unpaid a considerable sum. The remainder of the fund in the receiver's hands should be next applied to the unpaid claim of Myers upon his mortgage. As the remainder is composed of money derived from the real estate and money derived from the

personal property, I think that each part of the remaining fund should contribute to the payment of Myers' deficiency in proportion to its amount. The reason for this is that there is one subsequent incumbrance covering the real estate alone, and there are subsequent incumbrances covering the real estate and which are also claimed to cover the personal property. Whether the remaining rents attributable to the personal property are properly to be applied to the Myers deficiency (if there remain any deficiency after the application of the rents attributable to real estate) will be considered hereafter. If the rents attributable to real estate and applicable to the payment of the deficiency on the Myers mortgage, when so applied, leave a surplus to be applied to subsequent incumbrances, then the next incumbrance to which it should be applied is the judgment upon a mechanic's lien which, though subject to the Myers mortgage, is, by the judgment of the circuit court, a prior lien to the three next succeeding mortgages. At all events, the lien claim thus put in judgment is entitled to be next paid, but it must be paid from the fund raised from the rents attributable to the real estate alone. If there then remain some part of the rents attributable to the real estate, it must be applied to subsequent incumbrances.

One of the subsequent incumbrances is a mortgage covering the same real and personal property and perhaps other personal property, which was executed to one Edward B. Showell, for the benefit of a firm called Showell & Fryer. The interest of the mortgagee in this mortgage does not seem to be affected by the judgment upon the lien claim. Showell was made a party to the lien proceeding, but it was afterward discontinued as to him. The mortgages of John Wanamaker, Samuel E. Keers, and Walter R. Lewis, who were made parties to the lien proceeding, were expressly adjudged therein to be subject to the lien claim. In behalf of Showell it is contended that the lien claimant ought to have made him a party to the lien proceeding and procured a judgment fixing the priority of the lien and his mortgage, under the provisions of the mechanic's lien act supplement of 1884 (2 Gen. St. p. 2072, § 1), and of the revised mechanic's lien act of 1898 (Laws 1898, p. 547, c. 226), which require the summons to be issued against every person holding a mortgage of record against the lands which would be cut off by a sale under the lien claim. His insistence is that by the discontinuance of the proceeding as to him, and the failure to include in the judgment a fixing of his priority, his mortgage has been advanced above those of Wanamaker, Keers, and Lewis, which were expressly adjudged to be subject to the lien claim. I am unable to agree with the view contended for, or with the conclusions sought to be drawn therefrom, viz., that his mortgage thereby was within the doctrines of Clement

v. Kaighn, 15 N. J. Eq. 47, and Hoag v. Sayre, 33 N. J. Eq. 552. The legislation which now requires a mortgagee, whose mortgage would be cut off by a sale upon a lien claim, to be made a party to the lien claim proceeding, does not prescribe what will be the effect of a failure to do so. It does not advance the omitted mortgage over the lien claim or over other mortgages. It results that the contention made in behalf of the Showell mortgage cannot avail the mortgagee. If any of the fund attributable to the real estate remains after payment of the lien claim, the surplus should be applied to the three mortgages of Wanamaker, Keers, and Lewis, in order of priority, which will doubtless exhaust the whole of that part of the fund.

The only question remaining is as to the disposition of so much of the fund as was raised by the lease of the personal property. By a cross-bill in the foreclosure of Myers v. Ramsey, and in other modes, all the mortgages are attacked with respect to their being liens upon personal property. The contention is that they were not recorded in the manner required by law. I think that every one of the mortgages in question has failed to become a lien as against other mortgagees or purchasers in good faith. The mortgage of Charles R. Myers was recorded as a real estate mortgage on October 11, 1900. The affidavit to the chattel mortgage was made October 15th, and it was recorded on October 29, 1900. The affidavit did not truly state the consideration of the mortgage, and the mortgage was not recorded within a reasonable time. The mortgage of John Wanamaker was recorded as a real estate mortgage on October 15th, and, although the affidavit was made on the same day, it was not recorded as a chattel mortgage until October 20, 1900. This affidavit was made by an attorney at law, who was the attorney of Wanamaker, and he declares therein that the true consideration of the mortgage was for goods, wares, and merchandise sold and delivered by Wanamaker to Rebecca Ramsey. It would seem that his knowledge must necessarily have been acquired from information derived from others. The attorney, when called as a witness, admitted that the only knowledge he had of the transaction was derived from a conversation with an agent of Wanamaker. Besides, the mortgage was not recorded as a chattel mortgage within a reasonable time. The mortgage of Keers is defective as a chattel mortgage, because, although the affidavit was taken upon the 15th of October, it was not recorded until the 31st of October, 1900. The mortgage of Showell & Fryer is also defective because, although dated December 15, 1900, and recorded as a real estate mortgage on January 19, 1901, the affidavit thereto was made December 3, 1902, and it was recorded as a chattel mortgage December 8, 1902. *Graham Button Co. v. Spielman*, 50 N. J. Eq. 120, 24

Atl. 571; *Spielman v. Knowles*, 50 N. J. Eq. 796, 27 Atl. 1033; *Roe v. Meding*, 53 N. J. Eq. 350, 33 Atl. 394; *Dunham v. Cramer*, 63 N. J. Eq. 151, 51 Atl. 1011; *Watson v. Rowley*, 68 N. J. Eq. 195, 52 Atl. 160; *Knickerbocker Trust Co. v. Penn Cordage Co.*, 65 N. J. Eq. 181, 55 Atl. 231. This review indicates that every one of these mortgages falls to be effective as against bona fide purchasers or mortgagees in good faith; but they are effective as against Mrs. Ramsey. It is suggested in the briefs that the Hotel Shelburne Company may hold the personal property in the hotel as a purchaser free from these mortgages. But it appears that the deed from Mrs. Ramsey to the Atlantic Title Company, trustee, dated July 12, 1891, gave notice of these mortgages as being incumbrances on the personal property in question. The deed from the Atlantic Title Company, the trustee to the Hotel Shelburne Company, recites the former conveyance as the source of the title conveyed, and therefore the hotel company became a purchaser with like notice.

It follows, therefore, that the mortgages are effective also against the purchaser from Mrs. Ramsey, and they stand in the order of the priority of date so far as they affect personal property. Whatever remains of the fund raised from the rents of the personal property must be distributed among them until it is exhausted, in the order of such priority. The opinion thus expressed disposes of the other case above named, arising upon the bill of Charles R. Myers and the cross-bill attacking the various mortgages, and a decree in that case would be made upon the lines of this opinion. As Myers' claim may be wholly discharged by the distribution in this cause, there can be no action taken or decree made with reference to the personal property, none of which appears to have been sold.

As this appears to be analogous to an application for surplus money in court, I think the costs of the proceeding should be taken from the fund before distribution is made.

(74 N. J. L. 260)

DE LONG et al. v. SPRING LAKE BEACH IMPROVEMENT CO.

(Supreme Court of New Jersey. May 1, 1907.)

1. PLEADING—ARGUMENTATIVE PLEA.

An argumentative plea is good on general demurrer.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, §§ 416, 444, 505.]

2. COVENANTS—RUNNING WITH LAND.

After breach a covenant of warranty becomes a mere chose in action, and no longer runs with the land.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Covenants, §§ 64, 72.]

3. SAME—ACTION—PLEADING.

Plaintiff sued for breach of a covenant of warranty in a deed by defendant to plaintiff's grantor, on the ground that defendant had dedicated the premises to the public, and a plea al-

leged that at the time of the delivery of the deed by plaintiff's grantor to plaintiff, the owners of certain lots of land, which had been conveyed to them by the defendant prior to the date of his conveyance to the plaintiff's grantor, and which were expressly excepted from that conveyance, had each of them, as appurtenant to his lot, an easement in the lands conveyed to the plaintiff for use as a place of resort for pleasure. *Held*, that the plea was bad as setting up a private easement as a defense against the eviction of the plaintiffs under the title of the public.

Action by Frank E. De Long and others against the Spring Lake Beach Improvement Company. On demurrer to pleas. Overruled in part and in part sustained.

Argued November term, 1905, before GUMMERE, C. J., and HENDRICKSON, J.

Thomas E. French, for plaintiffs. Frank Durand, for defendant.

GUMMERE, C. J. The plaintiffs' right of action is based upon the breach of a covenant of warranty contained in a deed made by the defendant to the Spring Lake & Sea Girt Company, the grantor of the plaintiffs.

The declaration alleges entry and seisin of the Spring Lake & Sea Girt Company under that deed, and entry and seisin of the plaintiffs under the conveyance to them by that company. It then avers that the lands embraced in the conveyance to them "had been dedicated by the said defendant to public use as a park and a way of access to the waters of Spring Lake, and that the owners of other lands sold and conveyed by the said defendant * * * and the inhabitants of the borough of Spring Lake and the public at large then had and now have the right to enter upon said lands for pleasure, amusement and recreation, * * * and that their right and title to said lands and premises are paramount." The first of the pleas demurred to avers that before and at the time of the delivery of the deed made by the defendant to the Spring Lake & Sea Girt Company the premises in question were a public park, and were in the actual, open, visible, and notorious use, possession, and enjoyment of the public. The second of the pleas avers that, before and at the time of the delivery of the deed of conveyance from the Spring Lake & Sea Girt Company to the plaintiffs, the premises in question had the actual physical condition and appearance of a public park, and were in the open and notorious use, possession, and enjoyment of the public as such park. Each of these pleas shows, at least argumentatively (and an argumentative plea is good on general demurrer, *Bank v. Hendrickson*, 40 N. J. Law, 52), a complete breach of the covenant before the delivery of the deed to the plaintiffs, by a paramount title which must be assumed to be continuous to the present time. Even if it be conceded that this did not preclude the operation of the covenant, it certainly was effective to prevent the covenant from enuring to the benefit of the plaintiffs as grantees of the land. After breach a cove-

nant of warranty becomes a mere chose in action, and no longer runs with the land. On the facts set up in these pleas the right of action for the breach of the covenant of warranty became vested in the Spring Lake & Sea Girt Company, and did not pass to the plaintiffs. 8 Amer. & Eng. Ency. of Law (2d Ed.) p. 149; 11 Cyc. p. 1097. The demurrer to these pleas must, therefore, be overruled.

The third plea avers that at the time of the delivery of the deed by the Spring Lake & Sea Girt Company to the plaintiffs the owners of certain lots of land, which had been conveyed to them by the defendant prior to the date of its conveyance to the Spring Lake & Sea Girt Company, and which were expressly excepted from that conveyance, had, each of them, as an appurtenant to his lot, an easement in the lands conveyed to the plaintiffs, for use as a place of resort for pleasure, amusement, recreation, and health. This plea seems to us to be bad. It sets up a private easement as a defense against the eviction of the plaintiffs under the title of the public. It probably was intended by it to deny any warranty against the title under which the eviction took place (the theory of the pleader, apparently, being that this is the necessary implication to be drawn from the averment of the exceptions in the defendant's deed to the Spring Lake & Sea Girt Company), but it contains no such denial.

As it stands, it is subject to the same objection which prevailed against the plea which was the subject of discussion by us in our earlier opinion in this cause, reported in 72 N. J. Law, 125, 59 Atl. 1034, and for the reasons therein stated the demurrer to the third plea now under consideration must stand.

(72 N. J. Eq. 485)

BUSHEY v. NATIONAL STATE BANK OF CAMDEN et al.

(Court of Chancery of New Jersey. April 16, 1907.)

MORTGAGES—FORECLOSURE—RIGHTS OF PURCHASER—TAX SALE—INJUNCTION.

Mortgages were made to H. L., who was president of a national bank, to secure moneys due to that bank. H. L. filed a bill to foreclose them, and did not make the bank a party thereto. A decree of foreclosure followed, and upon the fil. fa. thereon issued the sheriff exposed the mortgaged premises to sale, and the complainant in this cause bought three of the mortgaged tracts. These tracts had been sold for taxes, and certificates of sale had been issued which the bank had acquired by assignment, and was proceeding to obtain declarations of sale thereon. On bill to enjoin the bank from enforcing the certificates, *held*: (1) That the mere fact that the bank had not been made a party to the foreclosure exhibits no equity to sustain the relief sought. (2) If the bank (if made a party to the foreclosure) would have been compelled to bring in its claim under the tax sales, to be enforced with the mortgage debt, an equity might arise thereon, but, as the bank acquired its claim not by redemption under notice from the purchasers, but an assignment of the rights of the purchasers, which gave a prior lien on the lands,

it would not have been compelled to bring them into the foreclosure. (3) The claim that a solicitor of this court attending for the bank at the foreclosure sale made representations to the complainant in this cause before he purchased which estopped the bank from enforcing against him the rights it acquired by the assignments of the certificates of sale is not made out by proofs.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 35, Mortgages, §§ 1556, 1557.]

(Syllabus by the Court.)

Bill by Sylvan G. Bushey against the National State Bank of Camden and others. Dismissed.

Ralph W. E. Donges, for complainant.
Edward Dudley, for defendants.

MAGIE, Ch. The purpose of this bill is to procure a decree declaring null and void certain certificates of sale of lands for taxes assigned to and held by the National State Bank of Camden, and an injunction restraining the defendants from assigning said certificates, or proceeding to collect the sums due thereon, or from applying for a deed in fee simple for the lands named in said certificates. The case has been brought to hearing upon the bill, answer, and replication, and a stipulation of the parties that the affidavits annexed to the bill, and the affidavits annexed to the answer, shall be considered and treated as depositions in the cause. From these affidavits there are certain facts appearing without contest. On the 10th of July, 1903, the complainant, Bushey, bought from the sheriff of Camden county three tracts of land which were exposed by the sheriff to public sale. The sale was made upon a fieri facias issued out of this court, and the writ was issued upon a decree in a cause in which Heulings Lippincott, one of the defendants, was complainant, and Aaron Ward and his wife were defendants. That bill was filed for the foreclosure of two mortgages given by Aaron Ward to Heulings Lippincott, and Aaron Ward and his wife were the sole defendants, so far as appears. The mortgages were made by Ward to Lippincott, not for any indebtedness due to Lippincott, but to secure the National State Bank of Camden money owed to it by Ward, and the mortgages were made to Lippincott because he was the president of the bank. While the mortgages were outstanding, and before the bill to foreclose them was filed, the mortgaged lands, including those bought by complainant at sheriff's sale, had been sold for taxes. Some of them had been bought by the city, and one tract by a third person. The sale was under the Martin act, and certificates were duly issued to the purchasers. The bank purchased and took assignments of all the certificates affecting complainant's lands before the bill to foreclose the mortgage was filed. It was about to apply, or had applied, to the city for a deed for said lands. It further appears that at the time the lands were exposed to sale

by the sheriff some conversation occurred between the complainant and a solicitor of this court, who appeared at the sale in behalf of the bank. What the conversation was is a matter of contest. The complainant and the solicitor disagree in their recollection of it, and there is no other evidence of what was said by the parties to the conversation.

It is first suggested that the foreclosure proceeding was defective, in that the National State Bank of Camden, for whose use the mortgages were held, should have been made a party thereto. The complainant, however, having bought the lands under the decree made in that cause, and having taken the sheriff's deed, after the sale had been confirmed, without objection from the defendants in that cause, or from him as a purchaser, cannot, in this collateral way, object to the proceedings therein, or found any equity upon the supposed error in the foreclosure. If the defendants in that cause might have objected to its being proceeded with in the absence of the bank, the cestui que trust of Lippincott (*Tyson v. Applegate*, 40 N. J. Eq. 305, and *Johns v. Outwater*, 55 N. J. Eq. 398, 36 Atl. 483), they presented no objection, and the cause went to a decree. Complainant's purchase on the fieri facias issued on the decree conferred on him the title which Lippincott had acquired by the mortgages, and the title of the mortgagors who made them. *Boorem v. Tucker*, 51 N. J. Eq. 135, 26 Atl. 456; *Wimpfheimer v. Prudential*, etc., 56 N. J. Eq. 585, 39 Atl. 916; *Champion v. Hinkle*, 45 N. J. Eq. 162, 16 Atl. 701. If the bank were setting up any claim under the mortgage taken by Lippincott for its benefit, doubtless, upon the facts shown that the sale produced all that was secured thereby, which presumably has been paid to it, an injunction against the presentation of that claim would be allowed; but the mere fact that the bank was not a party to the foreclosure does not present any equitable ground for relief. But the contention is that, if the bank had been made a party, it would have been obliged to put in and enforce in that proceeding the rights which it had acquired under the assignments of the certificates of sale, and that it was inequitable to so conduct that cause as to omit the claim which the bank had in that respect. If the complainant had sought relief from his contract to purchase, or opposed the confirmation of the sale, the existence of an outstanding lien not affected by the foreclosure proceedings would not have justified relieving him from his obligation. The lien of the taxes and the sales thereunder could have been discovered from the public records. A purchaser at a judicial sale who neglects to acquire such information, and deliberately assumes the hazards of buying in ignorance, must bear the consequences of his negligence. *Hayes v. Stiger*, 29 N. J. Eq. 196.

It is obvious that the contention now under consideration will have no force unless the

bank, if made a party to the foreclosure suit, would have been compelled to set up therein its interest as an assignee of the tax certificates. When taxes are unpaid, a municipality may enforce the lien which is given to that burden upon the land by a sale under the provisions of the sixth section of the Martin act, which seems to be yet substantially in force. The purchaser at a sale for taxes may give notice of the sale to the mortgagee holding a mortgage upon the lands, and the mortgagee may thereupon redeem the lands by paying to the treasurer of the city for the use of the purchaser the sum paid by the purchaser, with interest. 3 Gen. St. p. 3372, § 415. By the eighth section of a supplement to said act, approved April 18, 1889, a mortgagee who redeems lands sold for taxes may retain a first lien thereon for the amount paid to procure the redemption, with lawful interest, and the payment of other taxes afterward assessed thereon. 3 Gen. St. p. 3381, § 442. By the second section of a supplement to the same act, approved May 23, 1890, a redeeming mortgagee is given power to enforce a lien acquired by the redemption by any appropriate proceeding which the section provides may be instituted and maintained, either independently of, or before, or in connection with, proceedings to enforce the mortgage. 3 Gen. St. p. 3383, § 449. Under this legislation, it is plainly open to question whether, if the bank in the case under consideration had been notified by the purchasers of the mortgaged premises at the sale for taxes, and had redeemed the property, it would not have been compelled, if made a party to the foreclosure, to enforce its claim in connection therewith. But this was not the transaction which occurred. It does not appear that any notice whatever was given to the bank, and the bank did not, in fact, redeem under the provisions above referred to. On the contrary, the bank proceeded to acquire the title or interest which the purchasers at the tax sale had acquired, and which was represented by the certificates of sale held by them. The city was the purchaser of some of the tracts. By the provisions of a supplement approved April 16, 1891, the city was expressly authorized to become a purchaser at a sale of lands for taxes, the same as any other purchaser, and the certificate of sale is to be made to the city, and the mayor, in behalf of the city, may cause the notice otherwise required to be served on the owners and mortgagees of the land purchased, and the city may be entitled to a deed in the same manner as any other purchaser, if the lands are redeemed from the sale. 3 Gen. St. p. 3384, § 453. By a supplement, approved March 23, 1895, the certificate of sale issued to any city for lands thus bought may be assigned to any person. 3 Gen. St. p. 3390, § 485. By the provisions of the further supplement, approved March 16, 1893, an assignee of a certificate of sale given under the acts may give notice to the

mortgagees and owners and acquire the title to the lands and receive a deed therefor, in the same manner as if the assignee had been the original purchaser at the tax sale. 3 Gen. St. p. 3389, § 478. It is to be noted that, although the sheriff's sale in this case was made after the passage of the act for the assessment and collection of taxes approved April 8, 1903, the provisions of the sixty-sixth section of that act prevented its operation on taxes previously in default, for the act was expressly declared to take effect only on the 20th of December, 1903. Under the above provisions it is obvious that the bank acquired by the purchase and assignment of the certificates of sale of the mortgaged lands a lien which was superior to the lien of the mortgage in which it had an interest. If the bank had been a party to the foreclosure proceedings, it need not have included the lien thus acquired in its demand for relief. If it had been made a party defendant and had answered, claiming a prior lien, it might have been dismissed from the case, and probably would not have been required to present its claim except for the purpose of redemption. As the holder of a prior lien claim which, if made a party to the foreclosure proceeding, the bank would not have been obliged to enforce therein, no equity arises because the bank was not made a party.

It is further contended that the assignments of the certificates of sale to the bank vested no property or interest in it, because of the limitation on the power of national banks contained in the legislation of Congress. It is conceded that a national bank may acquire property of this sort to protect debts due to it. As it appears in this case that the bank, as a cestui que trust in the mortgage made to Lippincott, held an interest in the lands in question, and as it is proved that the bank purchased the certificates of sale and procured their assignment to it for the purpose of protecting its mortgage interest, I deem it free from any doubt that the bank lawfully acquired such interest as was passed to it by the assignments.

It is lastly contended that the solicitor who attended this sale in behalf of the bank procured complainant to purchase the three tracts by the representation that, if complainant bid for them a certain amount, all claims of the bank would be discharged. The contention is that the bank is now estopped from setting up a claim which it then held. The solicitor in giving an account of the interview testifies that the conversation related only to the claims which were the subject of the sale, that the fieri facias and a statement made therefrom were before the parties, and that any assertion that the bids would cover the claims related to the claims contained in the fieri facias, and which were calculated with interest and costs. If the complainant insists that the solicitor's language went further than to represent the amount of the claims for which the sheriff

was selling, I think he has failed to establish that by proof. If, however, that was the impression made upon his mind, and he chose to rely upon it as an assertion that the amount bid, made up of amounts in the decree with interest and costs, would discharge all claims of the bank, he encounters these insuperable difficulties. There is no proof that the solicitor was authorized by the bank to act for it with respect to any other claims than those which were contained in the decree procured by Heulings Lippincott, the bank's trustee; and, in the next place, the sheriff's deed can only convey the interest of the parties in the mortgage. What that interest is, and to what prior liens it may be subject, an intending purchaser is supposed to discover by searching in the proper place of record.

Upon the whole case, I think the complainant fails to disclose an equity to have the decree which he seeks, or any germane decree upon the subject-matter, made.

The bill will be dismissed.

(73 N. J. Eq. 571)

LEACH v. LEACH et al.

(Court of Chancery of New Jersey. April 3, 1907.)

1. REFERENCE — REPORT AND FINDINGS — EXCEPTIONS.

Where a special order was made in a case on notice in regard to the signing of testimony on reference to a master, and that order has not been appealed from, exceptions to the testimony on the ground that it had not been read over or signed by the witnesses cannot be considered as well founded on exceptions to the master's report.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Reference, §§ 157, 168.]

2. SAME.

Where exceptant was not aggrieved by reason of the failure of a master in chancery to report on a matter as directed, his exceptions on account thereof will be overruled.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Reference, § 167.]

3. CONSTITUTIONAL LAW — DUE PROCESS OF LAW — DEPRIVATION OF PROPERTY—VESTED RIGHTS.

The law authorizing the payment of a sum in gross to the holder of a life estate out of the proceeds of land sold on foreclosure proceedings, on consent of the person entitled thereto (Chancery Act, Revision 1902, § 60 [P. L. 531, 532]), passed subsequent to the marriage of complainant, the remainderman, to one of the defendants and after his title accrued, is not unconstitutional as depriving him of a vested right without his consent, since the amount to be paid to the life tenant is only the value of her interest, and the remainderman's rights beyond that are secure.

Action between Merritt Leach and Harriet G. Leach and others. Merritt Leach excepts to a master's report. Exceptions overruled and decree entered.

James Steen, for exceptant. Arthur H. Lovell, for complainant.

EMERY, V. C. In this case lands to which the wife had title were sold in a fore-

closure suit, and the surplus (\$551.50) overpayment of the mortgage was paid into court. The husband had an estate by the curtesy initiate in the lands, and, on application of the wife for the payment to her of the entire surplus in court, I decided that the respective interests of the husband and wife in the lands sold, and therefore in the proceeds of sale, were as follows, namely: That the wife had an estate for her life in the lands, with remainder to the husband for his life, if he survived the wife, and with remainder over to the issue in fee, on the death of the husband during the wife's life the entire sum invested to be paid to the wife. See my opinion in *Leach v. Leach* (N. J. Ch.) 61 Atl. 562, referring to the cases. Chancery Act, Revision 1902, § 60 (P. L. 531, 532), provides that, when money is paid into court on foreclosure proceedings, the owner of any estate for life may apply for the payment of a gross sum in lieu of the estate, and that the court shall direct the payment of such gross sum as shall be deemed a just and reasonable satisfaction for said estate for life, and which the person entitled shall consent in writing to accept in lieu thereof. The wife applied for the immediate payment to her of all the money to which she was entitled, but the husband did not consent to the payment of any gross sum to the wife, or to take any gross sum in lieu of his interest. He insisted that only the interest on the sum in court should be paid to the wife. Inasmuch as the statute directing payment to the life tenant of a gross sum did not require the consent of the persons interested in remainder, I held that the payment might be made without such consent, and directed that it should be referred to a master to ascertain the amount that should be paid to the wife for her life estate in the lands, and that the balance be invested during the lives of the husband and wife for the benefit of the wife during their lives, and for the further benefit of the husband during his life, if he survived the wife, and that on the death of the husband during the wife's life she should be entitled to the principal sum invested. The wife has filed in court her consent in writing under the statute to accept a gross sum in lieu of her life estate. The master has reported that the gross sum to be awarded to the wife is \$319.93.

Three exceptions are filed to the report: First. That the testimony of the witnesses has not been read over or signed by them since the taking of the same. This exception is not well founded, for the reason that a special order was made in the case on notice, in reference to the signing of the testimony, and that order has not been appealed from. The second exception is that the master has not complied with one direction in the order of reference, namely, fixing the value of the use and occupancy of the premises required by the order. This occupancy was that of

the husband who had been in possession of the premises. The master has not made any report against the husband by reason of the value of this occupancy, but has simply reported the receipts for rents and payments. The husband is not aggrieved by reason of this failure to report on the value, and the exception must be overruled. The third exception is really a reargument of the question decided on the former hearing, namely, whether the court has power under the statute to order the payment of a gross sum to the wife out of the proceeds of sale as the value of her life estate against the consent of the husband as entitled to a contingent estate in remainder. This argument is perhaps irregular, but inasmuch as a question of some importance involving the correctness of that decision is now raised, and was not raised at the original hearing, and this hearing is virtually an application for final decree in the cause on the exceptions, I will consider the case as open for reargument on the new point now raised, rather than put the parties to the expense or delay of a formal application for rehearing or an appeal for the purpose of arguing that question.

The point is that the husband and wife were married in 1878, and before the passage of the law authorizing the payment of a sum in gross to the wife out of the proceeds of sale as the value of her life estate, and that the law was passed after the husband's title accrued. It is now claimed that, as against the husband, this provision of the latter law is unconstitutional, as depriving him of a vested right in property, and that it cannot be enforced against his consent. There is no doubt that the conversion of the lands into money by the sale under foreclosure is a valid conversion under a superior right as to all persons, and the question therefore is whether, on the conversion of lands into money on a forced sale in foreclosure, the Legislature has the right to terminate at its discretion the period when the money resulting from the sale and the interest therein of a person *sui juris* shall cease to be land or to be held as if it were land. The general course of legislation on this subject in the different states has recognized (and without exception, so far as I can find) the power of the Legislature to fix the terms and conditions on which money resulting from the conversion of lands by sales in legal proceedings should be finally disposed of as money to the parties who were interested in the lands and legally capable of receiving the proceeds as money. For example, *Scribner on Dower* (2d Ed.) pp. 653, 654, gives the legislation in the different states on the payment to the widow of a gross sum out of the proceeds of sale of lands in which there was a dower right. Some of them, including New York and New Jersey, give the option to the widow alone to accept a gross sum out of the proceeds of sale, or to take the annual interest. Other states by

legislation require the consent of all parties interested in the funds before the gross sum can be given. In some others the determination and payment of the gross sum on the application of any party interested in the proceeds is left to the discretion of the court. In *Freesman on Partition* (2d Ed.) § 549, p. 726, he says that on the sale and distribution of proceeds of sale of lands in partition the court has the power (among other things) to determine the value of estates for life or years, and of all future estates, vested and contingent, and to direct the amount to be paid to the holders of each of such estates. I find no cases holding that the Legislature has not this power relating to the continuance of interests in the proceeds of sale as money, and the power to terminate this by fixing the present value of the estates of parties *sui juris* who are interested in the money. In our state, as in New York, the option is given to the tenant for the life estate or for years alone, and it therefore requires her assent alone.

There is no question here of the deprivation of property, for the amount to be paid to the wife is only the value of her interest, and the husband's rights beyond that are secure. So far as the mere question of property right is concerned, the conversion of lands into money under a superior right, to which the tenure of the lands was subject, terminates *ipso facto* the precise property right in the lands, and the proceeds of sale in strict legal theory are held not as lands, but rather as in lieu of the lands, for the ultimate purpose of compensating the parties interested in the lands. The money cannot in fact be lands, and, as money, is subject to contingencies (loss, shrinkage, etc.) from which estates in the lands itself would be free. Interest on the money during life is one way of giving compensation to the life tenant; but it is not the only method. A gross sum for the value of the life estate is another way, and it is within the power of the Legislature either to fix this method of compensation or to confer upon the courts the power of fixing it and its terms and conditions. This selection of the methods for compensation is a necessary result of the lawful conversion of the lands into money by the superior right, and is an incident to which the estates in the lands are subject. In *Ross v. Adams*, 28 N. J. Law, 161, 179 (1859), where the purchase price of lands taken in eminent domain proceedings was paid into court, the Supreme Court, in the absence of any statute, directed payment of sums in gross for the value of all the interests where the parties were *sui juris* and could receive it. The Court of Errors in *Adams v. Ross*, 30 N. J. Law, 505, 82 Am. Dec. 237, reversed the decree on the point that the interests were not properly declared by the Supreme Court, and that the husband, to whom a payment was directed, was not entitled to any interest in the lands or proceeds. The judgment reversing directed the

investment of the funds, but no question seems to have been made in the decision as to the power to direct a gross sum to be paid out of the proceeds, and the form of the judgment, which may have been by consent, cannot be considered as an adjudication overruling the opinion of the Supreme Court as to the power to direct a gross sum. It may, however, have the effect of rendering the opinion of the Supreme Court an obiter dictum and of confining its effect on the point now in question to the weight of the opinion of the judges delivering it. This aspect of it, when the question of the constitutionality of a law is raised, is important, for it shows that learned judges appeared to have no doubt of the validity of such procedure, even in the absence of statute, and this circumstance, taken in connection with the general course of legislation and practice under it, apparently unquestioned in this state as well as others, is sufficient to solve any doubtful question in favor of the validity of the law. On full consideration, therefore, of this point now raised, I think the conclusion reached on the original hearing was correct, and that this court has the right, under this legislation, and on the option of the life tenant alone, who is *sui juris*, to terminate the holding of the entire proceeds of sale in court, and to direct the payment to her in gross of the sum which has been fixed as the present value of her interest.

The exceptions will be overruled, with costs, and a final decree be entered in accordance with the opinions.

(72 N. J. Eq. 588)

DIXON v. DIXON.

(Court of Chancery of New Jersey. April 27, 1907.)

1. DOMICILE—CUSTODY OF CHILDREN—DECREE—MODIFICATION—JURISDICTION.

Where a decree awarded the custody of certain children to their mother, but authorized the father to visit them at specified intervals, a letter written to the father by the mother's father that the mother had moved from New York to Portland, in the absence of any showing that the mother had authorized such statement, was insufficient to show that the mother had changed her permanent residence from New Jersey to Maine.

2. HABEAS CORPUS—DECREE—MODIFICATION—CUSTODY OF CHILDREN.

Where, in a proceeding to determine the custody of certain children, the mother answered, claiming the custody of the children, and the court awarded the same to her, with the provision that the father should be permitted to visit them, and it was established in that proceeding that the mother and the children were residents of New Jersey, the court, having acquired jurisdiction in the first instance, was entitled to modify the previous decree, notwithstanding the removal of the mother and children to another state.

3. SAME—STATUTORY PROCEEDING.

A petition for the custody of children as between parents living separately, authorized by P. L. p. 263, § 8, in which a writ of habeas corpus may issue, as provided by section 12, is not a common-law habeas corpus proceeding; such writ being merely ancillary for the purpose

of enabling the court to obtain jurisdiction of the children.

4. SAME.

Where parents are living separately, the court may order their children kept within the state, or, if absent, brought within it.

5. SAME—MODIFICATION OF ORDER.

Where the custody of children was awarded to the mother, who was living separate from the father, a modification of such order would not be made merely because the mother had taken the children to Maine, in the absence of proof that she intended to keep them there permanently and to prevent the father from visiting the children as provided by the decree.

Petition by William H. Dixon against Josephine T. Dixon for the modification of a judgment relating to the custody of certain children. Continued for further hearing.

R. V. Lindabury, for petitioner. Gilbert Collins, for defendant.

STEVENS, V. C. On June 1, 1905, William H. Dixon, the petitioner, filed his petition in this court, alleging that he and the defendant were married on January 30, 1901, in the city of New York, and that they lived together in that city until May 3, 1904, when his wife left him and went to live at her father's residence there; that they have two children, viz., William P., born March 19, 1902, and Barbara W., born April 30, 1903; that on June 8, 1904, the defendant took the children to Madison, in this state, to live with her in a house provided by her father, at which place she had resided ever since. The petition alleged the father's willingness to provide for her children, and stated that he had difficulty in obtaining access to them. The prayer was for a writ of habeas corpus, to the end that an order might be made awarding their custody to the petitioner for the whole or a portion of the time, or for such other order with respect to their care and custody as should be just. The defendant answered, denying that her father was a resident of New York, and averring that he had for several years been a citizen of New Jersey, with a home at Madison, where he resided during the greater portion of each year. She denied that she and petitioner had lived in the city of New York up to May 3, 1904, and averred that they had lived together in Madison during the summer of 1901, and that in May, 1903, petitioner having gone away for his health, she and her children had gone to her father's house, in that town, and that in September, 1903, she and the petitioner, together with her children, after remaining a few days at her father's house in Madison, had taken possession of a neighboring house there, where they had continued to reside during the winter, and that she and her children had continued to live there ever since, except for a short interval. It will thus be seen that at the commencement of the proceeding and for two years prior thereto the defendant and her children had been residents of New Jersey. To the

answer petitioner filed a replication and the case was heard on the merits. The court decreed as follows: "It is on this 3d day of August, 1905, on motion of Collins & Corbin, solicitors of defendant, ordered that the prayer of the petitioner to have the custody of the children in the writ named, to wit, William H. Dixon, Jr., and Barbara Dixon, be denied with costs. And it is further ordered that the petitioner shall be permitted to visit said children once in each week while living in Morristown, at such convenient time and place as the parties may agree, and that, when the said children are living in New York, they shall be taken at least once in each week for a reasonable time, at such convenient hour during the day as the petitioner may desire, to the house of the parents of the petitioner. Either party may apply to this court for further direction as there may be occasion." The petitioner appealed from this decree and on December 3, 1906, it was affirmed by the Court of Errors and Appeals. Its correctness and propriety in all its parts is therefore beyond controversy.

On February 13, 1907, William H. Dixon filed a supplemental petition, stating most of the foregoing facts, and alleging that he had been permitted to have access to his children pursuant to the terms of the order up to Saturday, January 26, 1907, but that on the 8th day of February, 1907, he was notified by her father that defendant had "moved" from Madison to Portland, and, on February 11th, that his wife and children were at the Lafayette Hotel, in that city. The first letter stated that it would be convenient (to Mrs. Dixon) that Mr. Dixon should see the children there, by appointment, as usual. The petitioner states that he is engaged in business in the city of New York, and that all his time is occupied therein except Saturday afternoons, and that it would be quite impossible for him to make weekly or even frequent visits to Portland. The prayer is that, if Mrs. Dixon is desirous of living in Portland, she should not be permitted to keep the children there, and that she should be directed to return them either to the city of New York or to the state of New Jersey, with an alternative prayer that the custody of the children should be awarded to him. An order to show cause why the prayer of the petitioner should not be granted was made upon the filing of the petition. It, with a copy thereof, was personally served upon the defendant in Portland. She appeared by counsel on the return day and opposed the making of any further order, but did not file an answer or make any statement with reference to her future plans. She insisted, by counsel, in addition, that the court was without jurisdiction to make any further order in the premises, inasmuch as it appeared that none of the parties were at present within the jurisdiction of the court. There is no proof on the part of Mrs. Dixon that she is

not a resident of New Jersey. Mr. Dixon's allegation in that regard is not that his wife had ceased to be a resident, but that he has been informed by a letter written by defendant's father in New York that his daughter had "moved" from New York to Portland. It does not appear that Mr. Williams was authorized by his daughter to bind her to this statement. The word "moved" is somewhat indefinite. It may or may not, according to circumstance, warrant the inference of a permanent change of residence on her part. But, if it be assumed that she has changed her residence, I am still of the opinion that the court has jurisdiction to modify its previous order. The wife's answer in the original proceeding demonstrates that she and her children were then residents of New Jersey. The proceeding was not a pure common-law habeas corpus proceeding—a proceeding which either terminated or continued the restraint and so ended—but a proceeding "before the Chancellor under his general power to superintend the affairs of infants and to provide who shall permanently have the custody of them during minority." *Rossell v. Rossell*, 64 N. J. Eq. 22, 53 Atl. 821; *State (Baird) v. Baird*, 19 N. J. Eq. 481; *Buckley v. Perrine*, 54 N. J. Eq. 285, 34 Atl. 1054; *Id.*, 55 N. J. Eq. 515, 36 Atl. 1088.

The proceeding by petition in a case where the parents are living separately is expressly authorized by section 8 of the act of 1902, respecting minors. P. L. p. 263. The petition in this case is entitled in the Court of Chancery, and it prayed the appropriate process of habeas corpus in order to bring the infants before the court. This writ might have issued in such a proceeding prior to the act of 1902 (*State [Baird, Pros.] v. Baird*, 19 N. J. Eq. 481, 487), but it is expressly authorized by section 12. It is also provided in express terms by section 10 that the court may make the necessary orders from time to time in relation to the custody or possession. The situation, then, is this: A proceeding was instituted, whose scope was the permanent custody of two minor children, and it was so instituted under the general jurisdiction of the Court of Chancery as declared and regulated by express statute. Under such a proceeding any order made was, in the nature of things, temporary and open to such modification as the situation itself might, from time to time, call for. The order itself expressly provided that "either party may apply to this court for further direction as there may be occasion." Under the circumstances, it would seem to be clear that the court, having at the beginning acquired complete jurisdiction over the defendant and her children, may continue to exercise that jurisdiction as occasion may require. In *Laing v. Rigney*, 160 U. S. 531, 16 Sup. Ct. 368, 40 L. Ed. 525, a wife resident in New Jersey filed a bill for divorce against her husband, resident in New York. The defendant appeared and answered. Then the

wife filed a supplemental bill charging other acts of adultery subsequent to the filing of the original bill. A copy of this supplemental bill was, pursuant to order, served out of the jurisdiction. To this defendant did not appear, and a decree was made *ex parte* finding him guilty of the adultery charged "in the said bill and supplemental bill" and awarding alimony. On the decree, so far as it awarded alimony, the complainant instituted a suit in New York, and thereupon defendant's counsel applied to this court to have the decree amended so as to make it read that the defendant had been guilty of adultery only as charged in the supplemental bill. The decree was amended accordingly, and then the defense set up to the suit in New York was that inasmuch as defendant had not been served with a subpoena to answer the supplemental bill, and the defendant had not appeared thereto and service of the supplemental bill in New York was irregular and invalid, the court was without jurisdiction to make the money decree. It was held, however, that this decree was, under the federal Constitution, entitled to full faith and credit in the courts of the state of New York, and could not be there impeached. This case goes further than I am required to go in the case at bar. In a certain sense a supplemental bill, alleging a fresh cause of action, arising after the commencement of the suit, is a new proceeding not within the scope or contemplation of the original bill, but yet such a bill was regarded by the Supreme Court as a continuation only of the original proceeding, and, on this theory, it was held that jurisdiction having once attached continued to the end. *Lynde v. Lynde*, 181 U. S. 183, 21 Sup. Ct. 555, 45 L. Ed. 810, is in the same direction. The case in hand differs from the case of *Laing v. Rigny* in the important circumstance that from the very outset the proceeding was designed to regulate the custody and possession of the children by a succession of orders made from time to time, as the then situation might require. The mere fact, therefore, that Mrs. Dixon may be out of the jurisdiction now, cannot prevent the court from making such an order as the present situation may appear to warrant. It is not to be presumed that she will disobey.

As to the children, it has been repeatedly held that, if necessary, the court may order them to be kept within the state (In re *Agar-Ellis*, 24 Ch. Div. 317, 333; *Miner v. Miner*, 11 Ill. 48; *Campbell v. Campbell*, 87 Wis. 208, 221; *Ryce v. Ryce*, 52 Ind. 64), or if absent, brought within it (*Campbell v. Mackay*, 2 My. & Cr. 28; *Reg. v. Bernardo*, 28 Q. B. Div. 305; 24 Q. B. Div. 296; *Gordon v. Gordon* [1903] Oro. Div. 141; In re *Jackson*, 15 Mich. 420, 305; *People ex rel. Billette v. N. Y. Asylum*, 57 App. Div. 383, 68 N. Y. Supp. 279; *People ex rel. Dunlap v. N. Y. J. Asylum*, 58 App. Div. 133, 68 N. Y. Supp. 656). Whether the order already

made, or any subsequent order, is of such a nature as to entitle it, in other states, to full faith and credit, under the federal Constitution is a question suggested by the argument, but not before me for decision. The case was fully heard upon the merits in July, 1905. The children were then two and three years old. They were remitted to their mother because she was thought to be the proper person to care for them at their tender age. Nothing is alleged in the petition going to show that she has become an improper person to have charge of them, or that she should be deprived of their custody now. The order directed, however, that the petitioner should be permitted to visit them once a week, and of this permission he has regularly availed himself. It does not appear that it would be for the welfare of the children that he should not continue to see and interest himself in them. The strong presumption is that he should. I think the mother ought not to deprive the father of the opportunity of seeing them at short intervals, as she would do if she could keep them permanently in Maine. There is as yet little or no proof that she intends to do so, and I doubt whether I ought to make any new order till such proof be forthcoming. I will hear counsel on the question of whether a reference should not be ordered to ascertain the fact.

(72 N. J. E. 642)

McCARTER, Atty. Gen. of New Jersey, v. CLAVIN.

(Court of Chancery of New Jersey. April 4, 1907.)

RECEIVERS—GROUND FOR APPOINTMENT—CONFLICTING CLAIMS TO PROPERTY.

Sufficient ground is shown for the appointment of a receiver to protect decedent's real property, worth \$100,000, claimed by the state to escheat, and also claimed by defendant under an alleged will and by another claiming to be decedent's only heir at law, the lands having been sold for municipal taxes, the rents being collected by the purchasers at the tax sale, a mortgagor having filed foreclosure proceedings, defendant as administratrix having in no way attempted to protect the property, and it appearing that the conflicting claims will produce prolonged litigation.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Receivers, §§ 24–28.]

Bill by Robert H. McCarter, Attorney General of New Jersey, against Mary Clavin, individually and as administratrix of the estate of John W. Russell, for a receiver and an injunction. Receiver appointed, and injunction allowed.

Robert H. McCarter, Atty. Gen., in proper. Raymond, Van Blarcom & Anthony, for defendant.

BERGEN, V. C. On November 28, 1905, John W. Russell departed this life seized of certain real estate in the city of East Orange, N. J., and at that time he was not

supposed to leave any known relatives. The defendant, Mary Clayin, who had lived with him as a servant, claiming to be a creditor, made application for letters of administration, which were issued to her; it being supposed that Russell had died intestate. The real estate consisted of four tracts or parcels known as Nos. 15, 19, 21, and 23 South Maple avenue, East Orange, and he left also a small amount of personal property. Three of the four lots were improved and are occupied by tenants who are paying no rent, for the reason that no one is now empowered to collect rents. One of the lots is subject to a mortgage for \$8,000, upon which interest is in arrears and upon which the taxes for two years have remained unpaid, and the municipal authorities to enforce the payment of taxes have sold the lands and the rents since such tax sale have been collected or claimed by the purchasers at that sale. It also appears that the holder of the mortgage security has instituted foreclosure proceedings, and that as to one lot the property is likely to be absolutely lost to the owner. Since the granting of administration to the defendant of the personal estate, a paper writing has been recently produced purporting to be a last will and testament of Russell, which has been offered for probate, and probably would have been probated except for a caveat filed on behalf of the state of New Jersey, and another filed on behalf of Mary Ellen Hyde, who claims that she is the only heir at law of the decedent.

The bill of complaint charges that Russell died intestate and left no heirs at law, so that the property will escheat to the state, and claims on behalf of the state that the paper offered for probate is not the last will and testament of the decedent, and that Mary Ellen Hyde is not the heir at law. The alleged will devises all of this valuable property, estimated to be worth \$100,000, to the defendant, and it is quite apparent that the questions involved and the great value of the property will produce a litigation likely to cover a considerable period, and it is upon this ground that the complainant files this bill asking that a receiver of the real estate be appointed to hold the property during the litigation, with power to collect the rents and to pay off and discharge taxes, interest, and any other proper lien, the removal of which may become necessary in order to preserve the property for the owner when ascertained, and also that the defendant may be restrained by a writ of injunction from interfering with the real estate or with the possession, care, or custody of the receiver when appointed.

The situation, briefly stated, is this: The deceased died seised of real estate estimated to be worth \$100,000. At the time of his death it was not known that he had any relatives. The defendant being appointed administratrix of the personal estate has not

in any way attempted to protect the real property, and in consequence of the want of an owner, or any person representing an owner, the property has all been sold for taxes and purchased by persons who are now taking, or claiming the right to take, all of the rents from this valuable property without offering to protect it from a foreclosure sale, and equity would seem to require that a receiver should be appointed to protect the property from loss, and to hold it for the benefit of those to whom it may be finally determined it belongs.

The counsel for the defendant appeared, and, without seriously denying the facts stated, insisted that this court was without power to appoint a receiver, but I am of opinion that such power does exist, and will make an order to that effect. Under the title "Cases in Which a Receiver may be Appointed" (section 1832, Pom. Eq. Juris.), the third subdivision of the first class of cases in which receivers may be appointed is declared to be "estates of decedents." During the litigation concerning the admission of a will to probate and during the interval before an executor or administrator is appointed a court of equity has power to appoint a receiver of the personal property, and of the rents and profits of the real estate where there is any danger of their loss, misuse, or misapplication. In the present instance there is a controversy over the admission of the alleged will to probate. There is a contest over the question whether the party claiming to be the only heir is such. The property is in great danger of loss owing to tax sales and threatened foreclosure. It is clear that, in the absence of an heir, in the absence of an executor or of any lawful appointee entitled to hold the property together, it will be lost, and in any event the rents and profits will be misapplied. It appears to me that, if there ever was a case in which the rule I have referred to ought to be applied, it is in this case, otherwise a vast amount of property that may belong to the state will, for want of protection, be swept away and pass, without practical consideration, into the hands of strangers to the decedents.

The course which I am adopting is justified, in my judgment, by *Flagler v. Blunt*, 32 N. J. Eq. 518, in which the learned Chancellor on page 523, speaking of this very question, quoted from *High on Receivers*, §§ 9, 11, as follows: "The principal ground upon which courts of equity grant their extraordinary aid by the appointment of receivers pendente lite are that the person seeking the relief has shown at least a probable interest in the property, and that there is danger of its being lost unless a receiver is allowed."

A receiver will be appointed and the injunction allowed as prayed for in the bill of complaint.

(72 N. J. Eq. 808)

CENTENARY FUND AND PREACHERS' AID SOCIETY OF THE NEW JERSEY ANNUAL CONFERENCE OF THE METHODIST EPISCOPAL CHURCH v. LAKE et al.

(Court of Chancery of New Jersey. April 1, 1907.)

1. WILLS—CONSTRUCTION—NATURE OF ESTATE CREATED—FREE SIMPLE.

The provision in a will, "I do hereby will and bequeath unto * * * all my real estate and personal property not disposed of in some other way," carries the legal title to the real estate referred to, since the word "bequeath," when expressly applied to real estate, is equivalent to the word "devise," and under 3 Gen. St. p. 3763, § 35, words of inheritance are made unnecessary.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, §§ 1319-1326.]

2. SAME—POWER OF SALE—EXTENT OF POWER—SALE.

Where an absolute power of sale is given in a will, no condition subsequent or limitation in trust can be held operative against a title emanating under a proper exercise of the power, since the power of sale *ex proprio vigore* subordinates the condition.

Action between the Centenary Fund and Preachers' Aid Society of the New Jersey Annual Conference of the Methodist Episcopal Church, trustee, under the last will and testament of Ezra B. Lake, deceased, and Martha H. Lake and others on a bill for the construction of the will of Ezra B. Lake. Will construed.

S. Stanger Iszard, for complainant. Bleakly & Stockwell, for defendants.

LEAMING, V. C. I find no uncertain features touching this will. The intention of the testator appears to me to be clearly manifest throughout.

The expression, "I do hereby will and bequeath unto * * * all of my real estate and personal property not disposed of in some other way," carries the legal title to the real estate referred to. The word "bequeath," when expressly applied to real estate, is uniformly treated as the equivalent to the word "devise," and words of inheritance are made unnecessary by 3 Gen. St. p. 3763, § 35.

The apprehensions which appear to have arisen by reason of the forfeiture clauses contained in the will are equally groundless. It is entirely immaterial whether these clauses be treated as conditions subsequent or as limitations in trust; for, where an absolute power of sale is given, no condition subsequent can be held operative against a title emanating under a proper exercise of the power. An intention upon the part of testator to authorize a sale subject to conditions subsequent is an impossible conception. The power of sale *ex proprio vigore* subordinates the condition.

The power of sale is equally clear. Testator expressly authorizes the sale of real estate when there is insufficient cash on hand to

pay the fixed charges. The testator also clearly expresses his purpose that the proceeds of sales of real estate shall be preserved intact except as to the temporary use of such proceeds in anticipation of revenues to be received from other sources to supply the proceeds thus temporarily used. To comply with this requirement, it is now manifestly necessary to sell all the real estate in order that its value may be made revenue producing, and thus afford a fund from which the fixed charges can be paid.

I entertain no doubt as to the power to sell the entire real estate at either public or private sale, and to confer an absolute title upon the purchasers.

(74 N. J. L. 435)

O'KEEFE v. WILLIAM M. BARRY BENEVOLENT & ATHLETIC ASS'N.

(Supreme Court of New Jersey. May 6, 1907.)

1. BENEFICIAL ASSOCIATIONS—STANDING OF MEMBER—RIGHT TO BENEFITS.

The constitution of the defendant, a benevolent association, provided that: "No member of this association shall be allowed benefits, through sickness or disability, unless he is a member six months, and clear of all debts on the books of the association. Any member who may be taken sick or become disabled while in arrears for dues or fines, cannot, by paying the same, become a beneficiary during said sickness or disability, nor can a member who is a beneficiary, on receiving benefits, become in arrears for dues so as to debar him from benefits; the president being authorized to pay the same from the amount drawn from his weekly benefits." O'Keefe, a member of the association, brought suit for sick benefits, and recovered a judgment therefor which was paid. *Held*, that in legal contemplation, in view of constitution of the association and of sections 60 and 61 of the district court act (P. L. 1898, p. 574), he was "clear of all debts on the books of the association" on the date of payment of the judgment.

2. SAME—FUNERAL EXPENSES.

The constitution of the association also provided that upon the death of a member there should be appropriated the sum of \$75 to defray the funeral expenses of the deceased member, provided his dues were not "unpaid for over three months." The dues were 50 cents per month. O'Keefe's dues by legal implication had been paid up to December 17, 1904, and thereafter he paid \$3.50 on account of subsequent dues. He died September 24, 1905. On September 26, 1905, there was tendered the association his remaining arrearages of dues.

Held, that the verdict for the defendant association was erroneous.

(Syllabus by the Court.)

Appeal from First District Court of Jersey City.

Action by Katharine O'Keefe against the William M. Barry Benevolent & Athletic Association. Judgment for defendant, and plaintiff appeals. Reversed, and new trial awarded.

Collins & Corbin, for appellant. James J. Murphy, for appellee.

TRENCHARD, J. This is an appeal from a judgment of the First district court of Jer-

sey City. The action was brought to recover a death benefit, alleged to be owing by the William M. Barry Benevolent & Athletic Association, the appellee and defendant below, to Katharine O'Keefe, the appellant, and plaintiff below, as the representative of her deceased husband, Daniel O'Keefe, who had been a member of the defendant association. At the trial, the parties, by their respective attorneys, agreed that the issue was whether or not Daniel O'Keefe, the husband of the plaintiff, was in such standing as a member of the defendant association, at the time of his death, as would compel that association to pay a death benefit to defray his funeral expenses, as provided by its constitution and by-laws; and it was further agreed that, if the association was compelled to pay such death benefit, it would pay same to the plaintiff, Katharine O'Keefe. The judgment of the district court was for the defendant.

Article 22 of the constitution of the defendant association provides that: "On the death of any member who has been six months in good standing on the books of this association, there shall be the sum of seventy-five dollars appropriated to defray the funeral expenses of the deceased member." It is undisputed that O'Keefe became a member of the defendant association January 23, 1891, and that he paid dues from time to time, making his last payment June 13, 1905. Article 16 of the same constitution provides that: "No member shall be entitled to sick or mortuary benefits who allows his indebtedness to remain unpaid for over three months." The defendant contends that O'Keefe was not in good standing at the time of his death, because, it is alleged, he had allowed "his indebtedness to remain unpaid for over three months." By the state of the case, it appears that there was admitted in evidence the record of a suit in the First district court of Jersey City, in which the plaintiff in this action, as next friend of her husband, was plaintiff, and the defendant in this suit was the defendant, and in which judgment was rendered December 8, 1904, in favor of the plaintiff and against the defendant for \$55; that the suit was brought to recover sick benefits for 11 weeks, due to the husband from the defendant; and that the judgment was paid by the defendant December 17, 1904. Article 21 of the same constitution provides that: "No member of this association shall be allowed benefits, through sickness or disability, unless he is a member six months, and clear of all debts on the books of the association." It seems to be conceded by the defendant that O'Keefe's dues were paid up to the date of the payment of that judgment; but, whether it is conceded or not, such, we think, is the legal implication. If he were not "clear of all debts on the books of the association" at the time the suit for sick benefits was started, such indebtedness would have been a complete defense to that action, under article 21 above mentioned, and was a

material issue, as it is in this action. The parties in both actions represent the same interests. The fact that the subject-matters of the two actions are different is immaterial, as a judgment necessarily affirming or denying a fact is conclusive of its existence, whenever that fact becomes a matter in issue between the same parties or between parties in privity with them, where the same question is involved, whether the subject-matter be the same or not. *Freeman on Judgments*, vol. 1, §§ 253, 256; *Doty v. Brown*, 4 N. Y. 71, 53 Am. Dec. 350. Furthermore, if O'Keefe was indebted to the defendant at the time the suit for sick benefits was brought, it was the duty of the association, under sections 60 and 61 of the district court act (P. L. 1898, p. 574), to set off that indebtedness against plaintiff's demand, and, if such indebtedness was not set off, the association is precluded from setting up the same in this suit. Moreover, article 21 of the constitution of the defendant association also provides that: "Any member who may be taken sick or become disabled while in arrears for dues or fines, cannot, by paying the same, become a beneficiary during said sickness or disability, nor can a member who is a beneficiary, on receiving benefits, become in arrears for dues so as to debar him from benefits; the president being authorized to pay the same from the amount drawn from his weekly benefits." The clear intention of that provision is to protect the sick member from becoming in arrears during illness, and under it a member cannot be in arrears at the time of payment of sick benefits.

Assuming, then, that, when the judgment was paid, O'Keefe was in legal contemplation "clear of all debts" to the defendant up to December 17, 1904, there remains only to be considered the legal effect of the subsequent payment of dues. The state of the case, also, shows that the dues were 50 cents per month, and that, subsequent to the date of payment of the judgment, O'Keefe paid on account of dues the sums following: February 14, 1905, \$1.50; May 23, 1905, \$1; June 13, 1905, \$1—making a total of \$3.50. It necessarily follows, therefore, that his dues were paid up to July 1, 1905. Under article 16 of the constitution of the defendant, his right to death benefit is not barred, unless "his indebtedness remains unpaid for over three months." The three months would not expire until October 1, 1905. He died September 24, 1905. The state of the case also shows "that on September 28, 1905, the plaintiff tendered to the defendant association, at its meeting held on that date, a sufficient amount of money to pay the arrearages of dues of her late husband in said association, for which he was in default at the time of his death." Under these conditions, the judgment for the defendant was erroneous.

The result is that the judgment of the court below should be reversed, and a *venire de novo* awarded.

(72 N. J. Eq. 637)

OLDEN v. SASSMAN.

(Court of Chancery of New Jersey. April 5, 1907.)

1. EXECUTION—LIEN—PRIORITY.

Where no levy is made under a writ of execution before its return, power to perfect the lien of the writ is lost, and any personalty not levied upon before such return may be subjected to a subsequent judgment creditor's execution.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 21, Execution, § 230.]

2. SAME—EXTENT OF LEVY.

A sheriff's levy upon personalty particularly described, "and all other goods and chattels belonging to" defendant, did not cover a leasehold interest not part of the personalty particularly described, the officer who executed the writ not knowing of the property until he was asked to and did levy upon it under another writ after power to levy under the first writ had expired, and hence the subsequent execution creditor was entitled to the proceeds of the sale of the leasehold interest.

Bill by Charles H. Olden against Uriah Sassman. Complainant applies for an order directing the application of moneys raised by the sheriff from the sale of defendant's property under an execution for complainant. Granted.

John T. Bird, for applicant. Edwin R. Walker, for respondent.

BERGEN, V. C. The sheriff of the county of Mercer had delivered to him November 20, 1906, an execution issued out of the Mercer county circuit court in favor of Charles H. Mather against the defendant. By virtue of this execution the sheriff on the same day levied upon certain personal property, a particular inventory of which is attached to the writ, and concludes as follows: "All other goods and chattels belonging to Newton Uriah Sassman." This writ was returnable to the January term, 1907, of the Mercer county circuit court, which opened on the third Tuesday in January, which in the year 1907 fell on the 15th day of the month. On December 29, 1906, a writ of execution was issued out of this court in favor of the complainant and against the defendant, returnable to the February term, 1907, which opened on the first Tuesday of the month. This execution was delivered to the sheriff of Mercer county on January 2, 1907, and on the same day the sheriff levied upon the same personal property which was subject to the levy already made by him by virtue of the execution placed in his hands in favor of Mather, but on the 16th day of January, 1907, the sheriff made an additional levy upon the leasehold interest of Sassman in and to certain real estate in the county of Mercer. This levy was made after the return of the Mather writ; and, unless the chattel interest is included in the closing words of the sheriff's levy in the Mather Case, it was not levied upon by the sheriff under that writ, because on the 16th day of January, the Mather writ having been re-

turned on the previous day, the sheriff's power to further execute it by an additional levy was exhausted. The complainant proceeded with the execution of his writ, and under it the sheriff sold to the complainant whatever rights the defendant had under the lease for the sum of \$1,200. The complainant now asks to have the purchase price, less the sheriff's costs and expenses, applied towards the satisfaction of his writ, which application Mather resists, claiming that, as his writ of execution was placed in the sheriff's hands prior to that of the complainant, it bound all the chattel interest and personal property of the defendant from the time it was delivered to the sheriff, and, as such delivery preceded that of the complainant, he is entitled to have the money realized applied towards the liquidation of his writ, insisting, first, that, even if no actual levy had been made on the disputed property, nevertheless all the personal estate was made subject to his writ from the moment it reached the sheriff's hands; and, second, that the concluding clause in the sheriff's levy is a sufficient levy upon all personal property without a particular statement or inventory.

In support of the first proposition, counsel for Mather relies upon *Evans v. Walsh*, 41 N. J. Law, 281, 32 Am. Rep. 201, but this case does not go to the extent claimed by counsel. It only determines that the delivery of the writ binds the personal property from that time until its return day, and that the officer holding the writ may levy at any time during that period upon defendant's property, and that a subsequent execution issued during that period, under which a particular levy is made, does not acquire priority during the life of the previous writ, for under it the sheriff may, at any time before the return day levy upon defendant's property, and the levy becomes binding from the time the writ was delivered to the sheriff. The language of Mr. Justice Van Syckle, in delivering the opinion of the court in the *Evans Case*, is: "The lien acquired by the delivery is inchoate, and becomes perfected by actual levy. If no levy is made before the return of the writ, the goods of the defendant are free from its burden, either in the hands of a purchaser with notice, or as to subsequent execution creditors. But, if the levy is made, the lien dates from the delivery of the writ so as to maintain its rank against all intermediate incumbrances. Therefore no such title vests in the sheriff by a mere delivery of the writ as will maintain trover; for it may be that he will not pursue and perfect his right by making a levy, but, when the levy is duly made, the writ binds the property by the doctrine of relation from its delivery." In the case which we are considering the sheriff had the right, at any time before the return of the writ, to levy on the property in dispute to satisfy the prior execution, and in my judgment the lien of the

writ must be perfected before its return by a levy, and therefore, if no levy was made by the sheriff under the Mather writ before its return, his power to perfect the lien was gone, and any personal property not levied upon before the return of the writ might be disposed of to a purchaser with notice, or subjected to the execution of a subsequent judgment creditor.

The next question to be considered is whether the disputed property, which was sold under complainant's execution, was levied upon by the sheriff under the Mather writ by the words contained in this levy, "All other goods and chattels belonging" to the defendant; for it is admitted that, although the sheriff made a very detailed and particular levy, the property sold under the complainant's execution is not specially mentioned, and, if subject to the writ, it is only because the expression, "All other goods and chattels," includes it. I am of opinion that it does not. The deputy sheriff who executed this writ was produced as a witness, and testifies that at the time the levy was made under the first writ, and even when the first levy was made under the second writ on January 2, 1907, he had no knowledge of the special property which he levied upon under the complainant's writ on the 26th day of January, on which date it was brought to his attention by the counsel of the complainant with request that he levy upon it, and that he did so. It was held by Vice Chancellor Pitney in *Nelson v. Van Gabelle*, etc., 45 N. J. Eq. 594-597, 17 Atl. 943, that, in order to make a valid levy on chattels, the officer having the writ must do some act in relation to them in the way of taking actual possession, or asserting dominion over them, and in *Lloyd v. Wyckoff*, 11 N. J. Law, 218, Mr. Justice Ford said that it was a well-established principle that if an officer receiving an execution makes a just and true inventory of the debtor's goods, and files it at the return of the writ, it amounts to a constructive seizure, and in this case, while the officer could not see, or perhaps actually seize, the chattel interest, an inventory of it attached to the writ before its return would amount to a constructive seizure. That was done under the complainant's writ, it was not done under the Mather writ, and in the case last cited the entry in the sealing docket was "levied on the goods and chattels of the defendant to the value of \$5," regarding which Judge Ford said: "This does not specify one item for which the judgment creditor could recover value in case it was lost, consumed, embezzled, or wasted. There is no evidence to the debtor of what goods were taken away, nor to the creditors of what goods were left for them. * * * It is not that inventory which in the decisions of the court (conformably to

the meaning of the statute) has been recognized and established as a constructive seizure. They have allowed great efficacy to such an inventory as the statute requires to be made. They have allowed it to avail an officer as much as actual seizure would have availed him, but, if he does not comply with the statute, he must show an actual seizure." Again, in *Watson v. Hoel*, 1 N. J. Law, 136, the sheriff, instead of indorsing a particular inventory of the articles upon which he had levied, had recited a levy upon one or two specified articles of property and added, "and upon all the household goods," etc. This the court held not to be a sufficient levy to protect the sheriff from amercement, and was held to be a direct breach of his duty. Mr. Justice Drake, in *Lloyd v. Wyckoff*, supra, said: "The duty of the sheriff to the plaintiff requires that he should make a sufficient levy, and his duty to the defendant as strongly requires that he should not make an oppressive levy. He ought, then, for both these purposes to have the means of knowing the value of the goods he levies on. He must make the money of the goods and chattels levied on, and he must have them to show to purchasers at the sale, and to deliver when sold. * * * The sheriff should know exactly what he has levied on, and be able to furnish information to parties interested. For this purpose, whenever the sheriff does not take and keep the goods and chattels levied on in his immediate possession, he should take a true list or inventory of them. From what has been said the requisites to a good levy, in all ordinary cases, may safely be laid down to be (1) that the officer should see the goods and have them in his power; and (2) that he should, in addition to this, do some act demonstrating his intention from that time forward to appropriate them in obedience to the commands of his writ."

In the present case, for aught that appears, the goods and chattels actually levied upon by the sheriff under the Mather execution may be more than sufficient to satisfy that writ, and the sheriff may have intended not to levy on more property, because to have done so would have been oppressive. I am satisfied from the testimony taken in this case that the sheriff returned the Mather writ without intending to or in law effectively levying upon the property afterwards particularly levied upon and sold under complainant's writ, that the power to take further proceedings under the Mather writ expired on the 15th day of January last, and that thereafter the complainant discovered property not included in the levy under the Mather writ, and procured the sheriff to levy upon it under his writ, and that he is entitled to the proceeds of the sale of this special property.

(72 N. J. Eq. 708)

ISERMAN et al. v. INTERNATIONAL STOKER CO.

(Court of Chancery of New Jersey. March 19, 1907.)

CORPORATIONS—CLAIMS AGAINST—STOCKHOLDERS OR CREDITOR.

Persons were stockholders and not creditors of a corporation, where they received stock under a resolution in the handwriting of one of them, directing its issuance to them for advances, and retained it over four months, when they attached the certificates to their respective claims filed with the corporation's receiver; the papers in a suit by one of such persons in which the receiver was appointed reciting that they were stockholders, and not disclosing the amount of such advances as debts of the corporation, though a schedule of the corporation's debts was set out.

Suit by Clarence B. Iserman against the International Stoker Company. From the receiver's determination disallowing parts of their claims, complainant and others appeal, and from his determination allowing parts of such claims, other creditors appeal. Determinations sustained.

The main suit was a proceeding under the corporation act to have the company declared insolvent and an injunction issued and a receiver appointed. The injunction was issued, and the receiver appointed, on the 13th of November, 1905. On the 26th day of February, 1906, Clarence B. Iserman and Harvey Iserman presented claims to the receiver; the former for the sum of \$1,200, and the latter for the sum of \$1,686.77. Attached to each claim was a certificate of stock of the defendant corporation. Clarence B. Iserman's certificate called for 100 shares, and was dated October 20, 1905; and Harvey Iserman's certificate called for 270 shares, and was dated the same day. The receiver disallowed the claim of Clarence B. Iserman for \$1,000, and allowed it for \$200. He disallowed the claim of Harvey Iserman for \$1,468.29, and allowed it for \$218.48. Each of these claimants has taken an appeal from the determination of the receiver. Other creditors have taken appeals from so much of the receiver's determination as allows anything to either of the Isermans. The case was heard upon the testimony taken before the receiver, together with the exhibits and documentary evidence.

Geo. G. Tennant, pro se. Cornelius Doremus, for Harvey Iserman and Clarence B. Iserman. Boyd McLean, for Paul L. Crowe, a stockholder and creditor.

GARRISON, V. C. (after statement of issues). The reason given by the receiver for disallowing so much of the claim of each of these claimants as he did not allow was that they had each taken stock in the company in liquidation or satisfaction of so much of the claim as was disallowed. There is no dispute that each of these claimants advanced the amount of money each claims to have ad-

vanced. Their contention, however, is that they are entitled to be considered as creditors for such sums of money; whereas, the contention of their opponents is that, with respect certainly to a portion of the moneys so advanced, they agreed to accept and did accept stock of the company in payment therefor.

Harvey Iserman was secretary and treasurer of this company during the period subject to inquiry. On the 9th day of August, 1904, an agreement in writing was entered into between Paul L. Crowe, Harvey Iserman, and Clarence B. Iserman. This agreement recites that Crowe is the owner of a large block of the stock of the International Stoker Company; that the Isermans desire to purchase stock of Crowe; that Crowe thereby agrees to sell to the Isermans 25 shares for \$500, said money to be used in installing a stoker in the building of the Commercial Trust Company, in Jersey City; that, if said stoker is not a success, then the International Stoker Company is to return the money to the Isermans, and the stock is to be surrendered; that, if the stoker is a success, then Crowe agrees to sell to the Isermans 400 shares, or any part thereof, at any time within six months after the trust company accepts the stoker, the said stock to be sold at \$20 a share. And it is further provided that, in case the said stoker is accepted by the trust company, and more money is required to develop and install other stokers before stock can be sold, the Isermans agree to furnish or obtain the money by taking the stock upon which they were given the option for the amount of cash they might advance, not exceeding \$3,000; the judgment of the board of directors of the company to be binding as to the amount of money needed. There are other provisions in this contract which it is not necessary to recite. In June, 1903, it was determined to double the authorized capital of the company, and on the 17th of October, 1904, there is a resolution of the board of directors, of which Harvey Iserman was a member, in which it is provided that certain stock shall be returned to the treasury for sale for the benefit of the company. "Also, the option given to H. Iserman 200 shares, Clarence B. Iserman 200 shares, * * * be doubled owing to the increase of capital stock and placed in the treasury for the purpose above stated; and if said options are not taken either in part or in whole by the said persons [naming them] the stock be sold and proceeds placed in the treasury as aforesaid." At this meeting the claim of Harvey Iserman for money advanced was audited, and he was shown to be a creditor for \$700. Between that meeting and the 25th of September, 1905, Harvey Iserman advanced moneys which, in addition to the \$700, made his total advance about \$1,500; and Clarence B. Iserman advanced \$500 on the 13th of February, 1905, and \$500 on the 13th of May, 1905. On the 25th of September, 1905, the following preamble and

resolutions were adopted by the board of directors:

"Whereas, Clarence Iserman has taken up 100 shares of the option given to him according to a certain contract with Mr. Crowe, and having paid the treasurer \$500 February 13th and \$500 May 13th, for which he holds receipts with a statement that the certificates of stock will be given him when issued: Therefore, it was unanimously resolved that the certificates of stock be issued and given to him."

"Whereas, H. Iserman has advanced about \$1,500 to carry on the business of the company, said money being payment on the options of stock given by Mr. Crowe as per a certain agreement: Therefore, be it resolved that certificates of stock be issued and given to H. Iserman for the amount advanced according to the terms of the option."

There are numerous provisions in the same resolution, among them one by which Clarence B. Iserman and Harvey Iserman give up the balance of their options, amounting, respectively, to 300 shares and 250 shares, so that the stock is to go into the treasury of the company and be sold by it, and the Isermans are to receive any sum realized over \$25 a share; and there is a further provision that Crowe is to put 1,000 shares of stock in the treasury to be sold at an advance over \$20 a share. The company failed to pay the fee for filing the amended certificate authorizing the increase of the capital stock, and therefore the company at this time had not the right to issue the additional stock, and did not acquire the right until some time after these resolutions were passed, when the fee was paid and the company then was authorized to issue the stock. The testimony is clear that all of the transactions between the Isermans and the company were carried on by Harvey Iserman. He is the father of Clarence B. Iserman, who was a young man just past his majority. It seems too plain to require extended consideration that by this resolution—which, in passing, it may be remarked is in the handwriting of Harvey Iserman—it was agreed and understood between the parties that each of the Isermans was to receive from this company stock for the advances made by them up to that time. And all of the oral testimony bears out the righteousness of this conclusion. Clarence B. Iserman was to receive 100 shares of stock for his \$1,000, and Harvey Iserman was to receive the proper amount of stock for his \$1,500. The reason why the stock was not then issued to them has just been stated. Stock was actually issued to each of the Isermans on the 20th day of October, 1905. It was retained by each of them until the 26th day of February, 1906, when they attached the certificates to their respective claims to the receiver, and delivered them with the claims.

On November 3, 1905, the main suit was instituted by Clarence B. Iserman. The bill recites that Clarence B. Iserman is a stockholder of the defendant corporation, holding 100 shares therein "for which he paid \$1,000 cash." The bill refers to a schedule showing the debts of the company, and such schedule contains no item due Clarence B. Iserman, and recites a claim of Harvey Iserman for \$353.48. In an affidavit annexed to the bill, Harvey Iserman swears that he "now owns 270 shares of the stock of the said company, and that Clarence B. Iserman, the complainant in the foregoing bill of complaint, is now the owner of 100 shares of the stock of said company, and that said company is indebted to various creditors whose names are contained in the Schedule B annexed to the said bill, with the amount due in each case set opposite their respective names." As has just been stated, said schedule does not refer to Clarence B. Iserman as a creditor at all, and only claims on behalf of Harvey Iserman \$353.48. As has been previously stated, the receiver was appointed on the 13th day of November, 1905, and on the 11th day of January, 1906, he sold all the assets of the company, and on the 26th day of February, 1906, the claims of the Isermans were filed; each having annexed to his claim the shares of stock issued to them.

The claimants seek to break the force of the facts just recited, which so clearly indicate that they were stockholders, and were not creditors, by claiming that their standing as stockholders or creditors should be determined with respect to certain agreements between them and Crowe and the company sought to be completed on the 20th of October, 1905. It is shown that there was a series of agreements which had been talked over between the parties, and which were intended to be executed on the 20th of October, 1905. I shall not take time to recite what these contemplated agreements were, or to consider whether the claim of the Isermans with respect to their rights under those agreements would have been well founded, or otherwise, if said agreements had ever been consummated. My reason for disregarding those agreements and the arguments based thereon is that I find as a fact that, prior to the time that those agreements were in contemplation, the Isermans had agreed with the company to accept stock for the sums of money advanced up to the 25th of September, 1905. I can find no evidence in the suit which even tends to prove that, at the time the Isermans agreed in September, of 1905, to take stock under their options for the moneys advanced, there was any qualification or contingency, or that the matters subsequently attempted to be included in the contracts of October 20th were even broached. In fine, I cannot see any connection whatever between the completed arrangement of September 25, 1905, and the unsuccessful and

uncompleted arrangement subsequently attempted to be consummated on October 20, 1905.

The result is that the determination of the receiver is sustained with respect to the amounts disallowed, and the appeals of the Isermans are dismissed.

With respect to the sums of money advanced by either of the Isermans to the company after the 25th of September, 1905, I do not think it anywhere appears that they had agreed to take stock therefor, or that in advancing these sums they were exercising any option to take stock. I therefore think the receiver's determination is correct, in so far as it finds the Isermans creditors for sums advanced to the company after the 25th of September, 1905.

I have not sufficiently examined the accounts in detail to determine whether there are any sums allowed by the receiver to the Isermans which are not proper. It may be that some of the sums claimed were not advanced to the company, or were advanced to the company prior to September 25, 1905. If so, that matter can be adjusted upon settling the final decree or order with respect to these appeals. Such settlement may be made upon notice.

(72 N. J. Eq. 645)

GOODNOW v. AMERICAN WRITING PAPER CO.

(Court of Chancery of New Jersey. April 17, 1907.)

1. CORPORATIONS—STOCKHOLDERS—RIGHT TO DIVIDENDS—DIVISION OF CAPITAL.

The owners of a number of paper mills combined and sold all of their properties to a newly organized company, taking in exchange therefor, besides certain bonds, all of the preferred and common stock of the new company at an admitted overvaluation. The new organization was prosperous, had no debts, and earned annually large sums of money in excess of the amounts advanced to produce and sell its output. It declared a dividend on the preferred stock, payable out of such annual earnings, and some of its stockholders sought to enjoin the payment of the dividends, upon the ground that there could be no surplus or net profits until the amount of the overvaluation had been earned, and the impairment of the capital stock resulting from such overvaluation, extinguished. *Held*, that as between the stockholders, no fraud being charged, the agreement to issue the stock as full paid for property purchased was binding upon the company and its shareholders, and that the stock so issued is not subject to further call either directly or indirectly by suppression of dividends declarable from annual net profits, and that if all of the assets for which the stock was issued still remain in the possession of the company, or, if exhausted, replaced, in kind or with money, a dividend ascertained by reserving for capital the actual cost of the assets for which the stock was issued, they being still in possession, is not a dividing of the capital of the corporation.

2. SAME.

A contract between the company and its stockholders that the stock issued to them as full paid and not subject to further call is, in the absence of fraud affecting other shareholders, binding upon the company and its stockholders, although subject to attack by creditors. (Syllabus by the Court.)

Bill by William Nelson Goodnow against the American Writing Paper Company. Heard by the Chancellor on demurrer. Demurrer sustained.

W. H. Corbin, for complainant. R. V. Lindabury, for defendant.

BERGEN, V. C. The complainant seeks to enjoin the payment of a dividend on stock issued for property purchased, upon the ground that, the property being overvalued, there can be no net profits or surplus from which dividends can be paid, unless the impairment of the capital, caused by the overvaluation, has been supplied, and until that is done the payment of dividends from "the surplus or from the net profits arising from its business," as provided in section 30 of our corporation act as amended (P. L. 1904, p. 275), is a division, withdrawal, or payment to stockholders by the corporation of a part of its capital stock.

The bill charges that the owners of certain paper mills, 28 in number, sold to the corporation their respective properties, and took in payment bonds of the defendant company for \$17,000,000 preferred stock for \$12,500,000, and common stock for \$11,500,000, being all of the preferred and common stock issued by the company. The bill does not disclose in what manner the securities were divided among the respective vendors, but it is fair to assume from the manner of sale, and the manifest object of the parties, that the prices for the respective properties were agreed upon by all of the vendors, and distribution made accordingly, for the bill charges no fraud, concealment, or misrepresentation by any of the parties to the transaction. It admits that the company has no debts; that all of its current obligations incurred in the management of its business are met at maturity; that the affairs of the defendant corporation are well managed; that it is in receipt of large profits annually over and above the advancements made for producing its products and conducting the business; that the net earnings for 18 months prior to the 1st of July, 1906, exceeds \$400,000, out of which it is proposed to distribute as dividends on the preferred stock \$125,000, but charges that the amount paid for good will, patents, and trade-marks exceeds by \$11,000,000 their value, which it is insisted shall be made up from earnings before any dividend can be paid, although all of the parties to the original transaction knew that the stock was issued to each shareholder as full paid for property purchased. The correctness of the complainant's contention is challenged by a demurrer, which confesses the truth of the allegation that the stock was issued for property at an overvaluation, and that the company did not receive for its stock money, or moneys worth; in other words, the stock was "watered" to the extent of \$11,000,000. As the bill admits that there are no unsecured creditors, their rights are elim-

inated from present consideration, and the effect upon creditors of overvaluation of property purchased will not be considered, the only question intended to be determined is whether, under the conditions set up in the bill of complaint, the payment of the proposed dividend out of the admitted net earnings arising from the conduct of the business is, as between stockholders, a division of any part of the "capital stock paid in"; it being admitted that the corporation still owns the identical property taken for the stock, there having been no disposition of the specific property except where the value has been restored from the earnings.

The defendant insists a contract was entered into between the owners of the property and the company, under which the stock was issued as full paid in consideration of the property, with full knowledge by each of the parties of the values agreed upon as a support to the stock. I have no doubt that such a contract is binding upon the parties until set aside, because of fraud in its inception, or for some other legal reason. It does not distinctly appear whether or not the complainant was one of the original parties to the contract, but he charges no fraud or misrepresentation as an inducement to purchase on the part of his transferor, nor does he assert that he did not know the facts he now sets up when he became the owner of the stock. The bill charges that the stock was all issued for property purchased, but not that the complainant acquired his stock by purchase, or otherwise than on account of property sold the corporation, and the presumption is that he received his stock with other shareholders in payment for the payment for the very property which he now claims was overvalued. He participated in the transaction, reaped its benefits, and is not in a position to claim that the good will, bought, to his knowledge, with the stock of which he holds a part, was overvalued. *Washburn v. Nat. Paper Co.*, 81 Fed. 17-21, 28 C. C. A. 312. That a contract between the company and its stockholder, that the stock issued to him is full paid and not subject to further call, is, in the absence of fraud affecting other shareholders, binding upon the company and its stockholders, was declared by Chancellor McGill in *Hebbard v. Southwestern Land & Cattle Company*, 55 N. J. Eq. 18-31, 36 Atl. 122, where a stock bonus was given to purchasers of bonds of the company; the learned Chancellor holding: "Such a contract is binding upon the company and its shareholders, but, as the capital stock constitutes a trust fund for the payment of debts, it cannot be given away from the demands of creditors." In 10 Cyc. 467, the rule is stated to be that a contract between the company and the shareholder that his stock shall be issued in payment of property at an overvaluation is valid, though not binding on creditors, a conclusion which is supported by *Scovill v. Thayer*, 105 U. S. 143, 26

L. Ed. 968. In *Krohn v. Williamson* (C. C.) 62 Fed. 869, 875, there was an agreement that the completion of a bridge, the acquisition of a right of way, and the possession and enjoyment of certain franchises and privileges should be considered a full payment of \$1,500,000 of the capital stock justifying its issue as full paid stock. In upholding this contract Judge Taft said: "Such an agreement as between the company and its stockholders was entirely valid, however subject to attack by creditors it might be."

The rule seems to be established that between stockholders one cannot be legally called upon to make good any shortage in value between assets and the nominal par value of the stock, when his stock is issued under a contract with the company as full paid, whether as a bonus, or for property at an overvaluation, when the issue is consented to by all the stockholders. It is a bargain between the contracting parties, which, in the absence of fraud, they cannot abrogate. They may let in one to participate in dividends, and thus reduce what they would have on that account, and decrease their share of the assets on final distribution, but they are dealing with their own property, and, so long as they do not divide any part of the paid in capital, they may contract to apportion dividends, properly payable, and also the assets, among as many as they choose, subject to the rights of creditors. The policy of our act is to preserve intact for all stockholders the actual capital assets that a stockholder may not unknowingly exhaust his principal fund, but if, with knowledge, the stockholders of the company contract, even for an insufficient consideration as against creditors, that another may have an interest in its property, it is bound by its contract until it is in some lawful way set aside, and if, when they so contract, they are bound, and cannot call upon a stockholder to make good his stock issued full paid in payment for property overvalued, it cannot be that it can withhold his dividend, or share of the net profits of the business for such purpose, and thus accomplish by indirection what cannot be done by a direct proceeding. Stockholders may agree as to the amount of capital to be paid in, and between them this agreement would be binding, and a further call, except in the event of insolvency, and the need of unpaid subscriptions to pay debts, could not be enforced, nor would the company be prohibited from paying dividends out of net earnings until a sinking fund had been created sufficient to supply the unpaid subscriptions. The unpaid subscriptions, under such an agreement, would not represent a debt due the corporation that could be enforced, except in aid of creditors.

A number of English cases were cited on the argument, and, while none of them related to the issue of stock for property at an overvaluation, they uniformly hold that

where the tangible assets with which a corporation starts business, and for which its stock was issued, remain and are in the condition they were when taken over for stock issued, neither depreciation in value, nor a waste, caused by mining and selling the product, is a reason for holding that dividends declared out of the profits of the business, arising from the sale of a product which will ultimately exhaust the capital asset, is a distribution of the capital. *Lee v. Neuchatel Asphalt Co.*, L. R. 41 Ch. Div. (1889) 1.

After a careful consideration of the questions involved, I am of opinion that as between these stockholders, no actual fraud being charged, the agreement to issue the stock as full paid for property purchased, the agreement having been carried out, is binding upon the company and its shareholders, and that the stock so issued is not subject to further call, either directly or indirectly, by suppression of dividends declarable from annual net profits, and that, if all of the assets for which the stock was issued still remain in the possession of the company, or such of them as may have been exhausted replaced, either in kind, or with money, to the extent of their real value, a dividend ascertained by reserving for capital, the actual cost of the assets for which the stock was issued, they being still in possession, is not a dividing of the capital of the corporation, forbidden by our act. As was said by Judge Showalter, in *Northern Trust Company et al. v. Columbia Straw Paper Company et al.* (C. C.) 75 Fed. 936, 937: "Whatever may have been in fact the value of the property turned over to the company for its stock, the company agreed to take it for the stock. The persons interested were the stockholders, and there was no dissent on the part of any person concerned from what was then done. Neither any person then holding stock, nor any person who afterwards became a stockholder by assignment from one who then held stock, can now make complaint, on behalf of the corporation, as against the fairness of that transaction. This I take to be the settled law on that subject." This case was affirmed, 80 Fed. 450, 25 C. C. A. 549.

I will advise that the demurrer be sustained.

(73 N. J. Eq. 736)

FOGG v. OCEAN CITY SEWER CO.

(Court of Chancery of New Jersey. April 11, 1907.)

1. EVIDENCE — PAROL EVIDENCE — MUNICIPAL CORPORATIONS — ORDINANCES.

The official record of the contents of an ordinance may not be varied by parol.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 1703; vol. 36, Municipal Corporations, § 287.]

2. LICENSES — TO CONNECT WITH SEWER — RIGHTS GIVEN.

A paper, entitled "Application for Sewer Attachment," executed by a property owner and

a sewer company, providing that the company agrees to allow the owner to make attachment of his property to the main sewer pipe, sewer to be used at named rates per year, and that the owner makes application for sewer attachment as above, and agrees to comply with all the company's present and future rules relative to the use of sewer, is a license to connect, and an arrangement from year to year only, so that the company, on giving due notice, can charge a higher rate for subsequent years, up to the limit allowed by ordinance.

Suit by Albert Fogg against the Ocean City Sewer Company. Heard on bill, answer, replication, and proofs in open court. Bill dismissed.

Bourgeois & Sooy, for complainant. Thompson & Cole, for defendant.

GARRISON, V. C. Ocean City, in the year 1893, was a borough, having been incorporated under the seaside borough act (Gen. St. vol. 1, p. 254, § 412). On the 28th day of April, 1893, the council of the said borough passed an ordinance, over the veto of its mayor, dealing with the Ocean City Sewer Company. The original ordinance, as laid before the mayor, acted upon by him, and returned to council, is lost. The complainant introduced into evidence the ordinance book of the said borough. The clerk is, by the statute in question, required to keep such a book, in which he is to record the ordinances as passed. From this exhibit it appears that the borough, by the ordinance in question, granted certain powers and privileges in the streets to the said sewer company, and in the eighth paragraph thereof provided as follows: "That the said company charge and collect in advance for the use of said sewer service as follows: For hotels or boarding houses, seventy-five (75) cents per annum for each sleeping room not exceeding thirty, and fifty (50) cents per annum for each additional sleeping room over said number; private dwellings or cottages, seventy-five (75) cents per annum for each room not exceeding ten, and fifty (50) cents per annum for each additional room over said number. * * * " Under the borough act aforesaid, it was necessary, before the ordinance became effective, that it be published for two weeks, and such publication was duly made, and copy thereof was introduced into evidence, and is an exact copy of the ordinance as it appears in the ordinance book.

The complainant, in 1893, was the owner of certain houses in the borough of Ocean City. In 1895 a writing was executed between the complainant, through the plumbers with whom he had contracted to do the plumbing in his houses as his agents, and the sewer company, which, in its material parts, is as follows:

"Application for Sewer Attachment. Ocean City Sewer Co.

"Ocean City, N. J., June 15, 1895.

"The Ocean City Sewer Company hereby agrees to allow Smith & Thorn to make attach-

ment to the main sewer pipe * * *. Owner of property, Albert Fogg * * *. Full number of sleeping rooms, 4 rooms in each cottage, 5 cottages, 20 rooms in all. Sewer to be used at the following rates per annum:

All sleeping rooms of 30 or under, in hotels or boarding houses....	\$.75 each
All sleeping rooms over 30.....	\$.50 "
All sleeping rooms of 10 or under in private dwellings.....	\$.75 "
All sleeping rooms over 10 in private dwellings.....	\$.50 "

"* * * I do hereby make application for a sewer attachment as above, and do grant permission to enter premises for all purposes relating to said sewerage, and do agree to conform to and comply with all laws, resolutions, rules and regulations which have been or may at any time hereafter be enacted relative to the use of sewerage. * * *

"[Signed]

Albert Fogg,
"H. C. Smith."

By the ninth section of the ordinance it was provided that, if the company did not change the outlet of its sewers before the expiration of 10 years from the passage of the ordinance, it must reduce the schedule of rates, as provided in paragraph 8, 20 per cent. The 10-year period expired in 1903. The company did not change the outlet of its sewers. In 1903, therefore, the company was not empowered, under the ordinance, to charge more than the schedule in paragraph 8, less 20 per cent.

Beginning in 1903, the company rendered bills to the complainant for his sewer connections for the private houses or cottages owned by him upon the basis of the number of rooms contained in each cottage. Up to that time, and during the 10-year period from the passage of the ordinance, its bills had always been based upon the number of sleeping rooms in each of such private houses or cottages.

It is the contention of the complainant that the company has no right in the premises to charge him for each house any more than 75 cents per sleeping room, less 20 per cent. The complainant seeks to justify this position by the contention that the original ordinance considered by council, vetoed by the mayor, and passed over the latter's veto, contained the word "sleeping" before the word "room" or "rooms" in the paragraph relating to the rates to be charged for private dwellings or cottages. He argues that, since the paper upon which the original ordinance was printed or written has been lost, he has the right to introduce evidence of a secondary nature as to the contents thereof, and he called two of the members of the borough council, who were members at the time that the ordinance was passed over the mayor's veto on the 28th of April, 1893, to endeavor to prove that the word "sleeping" was in the original paper. At that time the council consisted of five members. Before the complainant can prevail, it must be first settled in his favor as a matter of law that the official record of the contents of an enactment may be varied by parol evidence. It is conclusively settled in

this state that it may not. *Bloomfield v. Board of Chosen Freeholders of Middlesex County* (Sup. Ct. N. J. 1907) 65 Atl. 890, and cases there cited. Even were the law otherwise, I do not think that the complainant in this case has proven the fact for which he contends.

This leaves for consideration the question as to whether or not the written paper, dated June 15, 1895, is a contract between the complainant and defendant of such a nature and kind, and of such duration, that the defendant, under it, is bound to continue to furnish service at the rate of 75 cents per sleeping room for each of the houses of the complainant in said paper mentioned. I think the effect of that paper writing and the conduct of the parties was to license the complainant to connect with the sewerage system of the defendant at the prices therein mentioned (*Fogg v. Ocean City* [Sup. Ct. N. J. 1907] 65 Atl. 885); that there was not constituted thereby a continuing contract of perpetual duration; that in effect the arrangement between the parties was from year to year. Under the ordinance, the rates were to be paid in advance. The complainant was not bound to connect, or to continue a connection once made. If he chose to act upon the license, he could do so, and then became bound to pay the rates specified in the paper. He could discontinue the connection without subjecting himself to any claim for damages on the part of the defendant. The defendant, on its part, was bound to furnish the service at the rates specified for any year it served the complainant until it gave due notice of a change of rates for an ensuing year. It had the right, up to the limit authorized by the ordinance, to change the rates. It was not bound by a definite binding contract perpetually to serve at the rates mentioned in the paper writing.

Since the complainant fails to prove that the charges were unauthorized, he fails to make out a case, and his bill must be dismissed, with costs.

(72 N. J. Eq. 810)

FEINBERG v. FEINBERG.

(Court of Chancery of New Jersey. April 2, 1907.)

DIVORCE—MAINTENANCE OF CHILD—REMOVAL FROM STATE—RELIEF FROM ORDER.

Though the removal from the state, by defendant in a divorce suit, without consent of petitioner or order of court, of the minor child, custody of which was awarded defendant, with right of visitation to petitioner, was contrary to P. L. 1902, p. 259, § 7, petitioner cannot be relieved from making payments for maintenance of such child, which have accrued under the order of court, without complaint to the court touching such removal.

Suit by Haxer Feinberg against Annie Feinberg. Complainant petitions for modification of that part of the decree of divorce (59 Atl. 880, 62 Atl. 562) providing for main-

tenance of the minor child, Sylvia Feinberg, and for correction of taxed costs. Denied in part.

A. J. King, for petitioner. J. W. Wescott, for defendant.

LEAMING, V. C. It is clearly contrary to the terms of section 7 of the act concerning the custody and maintenance of minor children (P. L. 1902, p. 259) for defendant to remove the minor in question out of the jurisdiction of this court, without first obtaining the consent of petitioner or an order of this court for that purpose. I am unable, however, to relieve against the payment of such moneys as have accrued under the existing decree during the period in which no complaint has been made to the court touching such removal. It is not the privilege of petitioner to refuse payments accruing pursuant to the terms of the decree. When new conditions arise, which, in the opinion of petitioner, entitle him to a modification of the decree, he should make application to the court for such modification, if he desires to avail himself of rights arising from the new conditions. On such an application the court may or may not, according to the circumstances of the case, under the terms of the section referred to, permit the custody of the minor to be maintained in another jurisdiction. It is manifest that, in this cause, it would be destructive of the right of visitation to make an order permitting the custody of the minor to be maintained in Pittsburg; but it is not clear that circumstances may not exist which would equitably demand an order for such privilege in Philadelphia. I am obliged to deny the application to reduce the amount now due for maintenance under the terms of the decree, but I am not prepared to make a final order touching the future modification of the decree without further hearing. On Monday, April 8, 1907, the respective parties may, if so advised, file further affidavits to aid the court in determining whether an order should be made discontinuing payments until the minor is returned to this jurisdiction, or whether the order should permit the minor to be maintained in Philadelphia with the right of visitation, as specified in the decree, fully protected. If no further affidavits are then filed, an order will be made on the present record.

Touching the taxed costs, I find that the order of September 4, 1906, as advised by Vice Chancellor Bergen, adjudges it error to include the items based on the petition for rehearing. These items, I find, amount to \$35.69. I will advise that the costs be reformed by the elimination of these items.

The decree of affirmance made by the Court of Errors and Appeals is in the ordinary form of general decrees of affirmance, and reads "with costs." I am not prepared to assume that the court intentionally awarded costs against a wife until opportunity shall

be afforded to her to apply to that court for relief against that part of its decree. Petitioner will be privileged to insist upon the benefit of the decree of affirmance as it exists; but, if insisted upon by petitioner, defendant will be given the opportunity to apply to the Court of Errors and Appeals for its modification before a final order will be here made touching that feature.

(106 Md. 59)

J. H. DUKER BOX CO. v. ROBERT B. DIXON & CO.

(Court of Appeals of Maryland. April 24, 1907.)

SALES—CONTRACT BY CORRESPONDENCE.

Plaintiff, a manufacturer of lumber, after an interview with defendant, relative to a sale of lumber, wrote defendant that he had defendant's order for certain lumber on certain terms, and accepted it. Receiving no answer, he wrote, asking if his offer on the lumber was satisfactory, to which defendant replied that plaintiff's letter did not state "subject to usual wharfage and inspection charges," which defendant stated he had mentioned to plaintiff, plaintiff replied: "We knew this in case of an inspection, but we do not think you will require this * * * any lumber that does not come according to order, then an inspection will be in order." Defendant replied that inspection would be necessary. *Held*, that the correspondence did not evidence a contract of sale.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales, §§ 39-59.]

Appeal from Superior Court of Baltimore City; Alfred S. Niles, Judge.

Action by Robert B. Dixon & Co. against the J. H. Duker Box Company. From a judgment in favor of plaintiff, defendant appeals. Reversed.

Argued before BRISCOE, BOYD, BURKE, PEARCE, SCHMUCKER, and ROGERS, JJ.

Dallett H. Wilson and Francis T. Homer, for appellant. Philip A. Carroll and R. E. Lee Marshall, for appellee.

ROGERS, J. This is an appeal from the superior court of Baltimore city. Suit was instituted in that court by the appellees to recover damages for an alleged breach by the appellants of a contract made by them for the purchase of a large quantity of lumber from the appellees. The breach consisted in the refusal of the appellants to take the lumber when notified by the consignee of the appellees that the lumber was ready to be shipped. The appellants pleaded the general issue pleas. Upon issues joined, the case went to trial before a jury, and, during its progress, there were three exceptions reserved to the rulings of the court; and the questions with which we have to deal are set forth in the bills of exception contained in the record.

The fundamental question lying at the root of the whole controversy is: Was there a contract between the parties at all? On the part of the plaintiffs, appellees here, it is insisted that there was, and that it is evidenced by certain writings, namely, a

series of letters passing between the parties plaintiff and defendant. Upon the hypothesis that these writings evidence the whole contract between the parties with respect to the sale by the one, and purchase by other, of a large quantity of lumber, the first prayer of the plaintiff, appellee, was framed. If that hypothesis was erroneous, the court below was clearly wrong in granting the plaintiffs' first prayer. If the contract was evidenced only by the written papers referred to, their construction was for the court. Inasmuch as the appellees theory was founded on the assumption that the writings alone evidenced the contract, it will be necessary to set out these writings and briefly examine them. Early in March, 1904, Alexander Fountain, one of the members of Robert B. Dixon & Co., called on appellant, defendant below, and offered to sell him certain quantities of lumber to be of certain agreed dimensions, qualities, and prices. No memorandum was taken at the time of this interview, and, according to the testimony of Mr. Fountain, that after returning to his office he wrote in a few days the following letter to the appellant, the J. H. Duker Box Company:

"Easton, Md. March 11th, 1904. Mr. J. Edward Duker, Baltimore, Md.—Dear Sir: We have your order 4-4 Va. edge box 6, 8, and 9 inches at \$13.00 for 200,000 feet, deliverable on or about July first; 4-4 x 10 Va. box at \$14.00 for 100,000 feet, deliverable sometime during the month of June; 4-4 x 12 Va. box at \$16.00 for 100,000 feet deliverable in July. We accept the above offer and will try to get the lumber delivered at times named, although we cannot be held down to a few days delay, but will try and be as prompt as possible. Of course we expect this to be a cash offer all at a cash price subject to no discount.

"Thanking you for the order, and hoping that you will acknowledge same, we are, very truly yours, Robert B. Dixon & Co."

Receiving no answer, on March 16, 1904, he wrote as follows:

"Easton, Md. March 16th, 1904. Mr. J. Edward Duker, Baltimore, Md.—Dear Sir: Please advise us by return mail if our offer to you on lumber was satisfactory, as we want to know about booking the order, and oblige, Yours very truly, Robert B. Dixon & Co.

"Baltimore, March 17th, 1904. Mess. Robert B. Dixon & Co., Easton, Md.—Gentlemen: We have yours of the 16th in reference to your letter of the 11th inst. We have been receiving a discount of 2 per cent. for cash, but as we did not mention that, will waive that, but you did not state in your letter 'subject to usual wharfage and inspection charges' which writer mentioned to you. With that exception the booking of our order regarding time of delivery and price is correct. Very truly yours, J. H. Duker Box Co. J. Edward Duker, President.

"Easton, Md. March 19th, 1904. Mess. J. H. Duker Box Co., Baltimore, Md.—Gentlemen: We are in receipt of your favor of the 17th inst., wherein you accept our offer as per our letter to you of the 11th inst., and you state in your letter that the lumber will be subject to usual wharfage and inspection charges. Of course, we knew this in case of an inspection, but we do not think you will require this. Of course, any lumber that does not come according to order, then an inspection will be in order, but as we expect to ship a great deal of this lumber to you in cars direct from our station in Virginia, we think that we can put it to you in good shape this way, and we would like to know the point you desire it consigned to, so we will have no trouble on this score. Thanking you, and trusting that our business relations will be mutually profitable and satisfactory, we are very truly yours, Robert B. Dixon & Co.

"Baltimore, Md., March 21st, 1904. Mess. Robert B. Dixon & Company, Easton, Md.—Gentlemen: We have yours of the 19th inst. regarding inspection. Wish to say that it will be necessary in order to determine quantity of lumber received, and number of feet of mill culls, if any. As the price of mill culls is \$2.00 per thousand less than box there might be a doubt in your mind if we did not have inspection made by a disinterested person. Inspectors are appointed, licensed and fees fixed by our 'Lumber Exchange' and are therefore disinterested. Our shipping point by rail is 'City Block, Pennsylvania Railroad.' If City Block is omitted when consigning car there would be a charge of \$3.00 for transfer to that point, which would fall upon you. Very truly yours, J. H. Duker Box Co."

It was proved that this letter of March 21, 1904, was the last letter passing between the parties relative to the contract. On May 24, 1904, the following letter passed:

"Easton, Md. May 24th, 1904. Mess. J. H. Duker Box Co., Baltimore, Md.—Gentlemen: Referring to our conversation with you over the phone yesterday, we enclose you herewith all the correspondence relative to order for 400,000 feet of box boards. We think it is clear as daylight that you have given the order and we have accepted it, and we know of no letter wherein we have omitted to answer that has any bearing in the case whatever. Please let us hear from you and oblige. Yours very truly, Robert B. Dixon & Co.

"Baltimore, June 2nd, 1904. Mess. Robert B. Dixon & Company, Easton, Md.—Gentlemen: In reply to yours of May 24th wish to say, as you did not answer ours of March 21st, we came to the conclusion that the charge for inspection did not meet with your approval, and that you had succeeded in obtaining a better price from some one else, and therefore ignored the letter. We did not consider then that you had an order, nor do

we now consider you have. Very truly yours, J. H. Duker Box Co."

This alleged contract was turned over to Tallaferro & Co. of Virginia, Lumber Dealers, by Robert B. Dixon & Co. Tallaferro & Co. wrote to J. H. Duker Box Company, advising it of said transfer and signifying their readiness to ship lumber but receiving no reply wrote again to J. H. Duker Box Company, and received the following letter:

"Baltimore, Md. June 2, 1904. Mess. Tallaferro & Co., Richmond, Va.—Gentlemen: Replying to yours of May 30th wish to say that Mess. Robert B. Dixon & Co. not having answered our last letter to them, we came to the conclusion that they did not intend to book our order for the 4-4 Va. edge Box, to be 6 ft., 8 ft., and 9 ft. wide, and, the 4-4 x 10 ft. and 12 ft. Va. Box. We do not intend to receive any shipment from them and have so informed them. Very truly yours, J. H. Duker Box Co."

These are all of the letters passing between Dixon & Co. and the Duker Box Company, bearing upon the contract. It further appears from the testimony of the witness Fountain, that, not only was the fact that the appellee had transferred the performance of this alleged contract to Tallaferro & Co. of Richmond, Va. unknown to the appellant, but, further, the undisputed testimony of Mr. Fountain clearly shows that he never obtained the consent of the appellant to such transfer. The undisputed testimony is to the effect that, not only did the appellant not know that this contract had been transferred, nor had they ever heard of the firm of Tallaferro & Co. Two questions are presented: First. Was there a contract between the parties? At the close of the appellee's case, the appellant offered the following prayer: The defendant prays the court to instruct the jury that there is no legally sufficient evidence in this case to establish any liability on the defendant under the contract sued upon, and therefore their verdict must be for the defendant; which prayer the court below refused. As this prayer raises the question upon which this case must be decided, viz., whether there ever was a contract between the parties arising out of the correspondence between them we will have to refer to the letters which we have heretofore set out in full.

The letter of March 17th from appellant contains this language: "Subject to usual wharfage and inspection charges," which writer mentioned to you. This was something different from those preceding, and required acquiescence on the part of the appellee. Their reply to this, in their letter of March 19th, is as follows: "We are in receipt of your favor of the 17th inst., wherein you accept our offer as per our letter to you of the 11th inst., and you state in your letter that the lumber will be subject to usual wharfage and inspection charges. Of course we knew this in case of inspection, but we do not think you

will require this. Of course any lumber that does not come according to order, then an inspection will be in order," etc. Now can it be contended that Dixon & Co. agreed by this answer to wharfage and inspection charges? and unless they did there was no contract. By their letter of March 19th, they say in substance that they do not consider that an inspection charge will be necessary, and in no part of their letter do they mention anything about the charge, if any, for wharfage. These charges might or they might not become very practical questions in their settlements. Then on the 21st the appellant wrote to appellee and told them that an inspection would be necessary, and further states as follows: "Our shipping point by rail is City Block, Pennsylvania Railroad, if City Block is omitted when consigning car, there will be a charge of \$3.00 for transfer to that point which will fall on you." It will be seen that here are two very material additions by way of charges—one absolutely certain, and the other contingent—to which the appellee never replied, and yet the appellee contends that there had been consummated a contract between the parties. We think not; for it nowhere appears that the inspection and wharfage charges actual or prospective were ever accepted by the appellant company. In point of fact this series of letters consisted of propositions and counter propositions, and nowhere brought the parties to a distinct and definite conclusion. Various terms were suggested, but the minds of the parties ultimately never met; for it nowhere appears that the appellee agreed to stand the inspection and wharfage charges, nor the additional charge of \$3 for transfer. So that with no distinct agreement as to the inspection, wharfage charges, and transfer charge, it is impossible to conclude that there was definite agreement evidenced by these letters, or any other evidence in the record. In the case of *Hand v. Evans Marble Company*, 88 Md. 226, 40 Atl. 899, this court held "that when negotiations between parties looking to the formation of a contract take place by correspondence, many letters being exchanged, and at a certain point an agreement seems to have been reached, still such an agreement will not be held to constitute a final contract, when the succeeding letters between them show that they did not intend to abide by such terms as a complete expression of their intention." If there had been a final agreement reached between the parties which directly contemplated, and resulted in, any obligation, and without the concurrence of the two elements of agreement and obligation, no legal contract can exist. Why did Duker Box Company write on March 17th to Dixon & Co. in this language: "But you did not state in your letter, subject to usual wharfage and inspection charges which writer mentioned to you." To the same effect is the case of *Winn v. Bull*, 7 Law Reports, Chancery Division, p. 29. It follows from what we have said

that the appellants first prayer should have been granted. The judgment of the lower court will therefore be reversed, and, as the appellee cannot recover, no new trial will be awarded.

Judgment reversed, without a new trial, with costs to the appellant above and below.

(106 Md. 17)

DULANY v. FIDELITY & CASUALTY CO. OF NEW YORK.

(Court of Appeals of Maryland. April 28, 1907.)

1. INSURANCE—WAIVER—POWERS OF AGENTS RESPECTING WAIVER — EFFECT OF PROVISIONS OF POLICY.

The provision in an insurance policy that no agent has power to change it or waive any of its terms relates to the provisions of the contract itself after it has gone into effect, but does not apply to the conditions which relate to the inception of the contract, when the agent has delivered the policy and received the premiums with full knowledge of the actual situation.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Insurance, § 952.]

2. SAME—ACTIONS—ADMISSIBILITY OF EVIDENCE.

In an action on an insurance policy, it was not error to reject a letter from the company's manager, received by the plaintiff's counsel, requesting a conference in reference to the claim, where the conferences between the representatives of the parties did not result in an adjustment or compromise.

3. SAME—WAIVER—TIME BEFORE ACTION CAN BE MAINTAINED.

A policy insuring against accident and disease provided that "legal proceedings for recovery hereunder may not be brought before the expiration of three months from date of filing final proofs. * * *". Insured filed a claim for injury occasioned by a hernia, the result of an accident. *Held*, that the company by refusing to treat the hernia as an accident, but insisting that it should be treated as a disease, and made subject to the limitation attached by the policy to disability arising from that cause, waived the provision as to the time before bringing suit, and an action brought before the time specified was not premature.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Insurance, § 1551.]

4. SAME—CONTRACT—CONSTRUCTION.

A policy insuring against diseases provided for a weekly indemnity for the period an assured "should be necessarily confined to the house." *Held*, that the clause, in the case of a person taking treatment for tuberculosis, meant confined to any part of the house, either inside or upon the porches attached to it on the outside.

5. SAME—AVOIDANCE OF POLICY FOR BREACH OF WARRANTY—MATERIALITY OF MISREPRESENTATIONS—QUESTION OF FACT.

Whether the failure of an insured to mention in his application that he had, within the prescribed period, received medical attention, constituted a breach of warranty material to the risk insured, is ordinarily a question for the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Insurance, § 1738.]

Appeal from Superior Court of Baltimore City; Henry Stockbridge, Judge.

Action by R. Gordon Dulany against the Fidelity & Casualty Company of New York.

From a judgment for defendant, plaintiff appeals. Reversed, and new trial granted.

Argued before BOYD, PEARCE, BURKE, SCHMUCKER, and ROGERS, JJ.

George T. Mister and Bernard Carter, for appellant. Vernon Cook, for appellee.

SCHMUCKER, J. This is an appeal from a judgment of the superior court of Baltimore city in favor of the appellee, as defendant below, in a suit on one of its disability policies. The policy, of which a copy appears in the record, insures the appellant, to whom it was issued, against disability or death resulting from accident, and also against disability resulting from disease. By the terms of the policy the appellant was entitled to receive from the company \$25 per week during a disability resulting from accident, which totally prevented him from attending to any of the duties of his occupation; but to an amount not exceeding \$5,000. If the injuries causing the disability were received by the assured while riding on an elevator or as a passenger in a public conveyance propelled by steam, compressed air, electricity, or cable, or in consequence of the burning of a building while he was in it, he was entitled to receive \$50 per week during total disability, but to an amount not exceeding \$10,000. If the injuries so received by the assured resulted in only partial disability, he was entitled to receive during such disability, for a period not exceeding 26 weeks, "a sum to be determined by the company, but not less than twenty five per cent. nor greater than seventy five per cent. of the weekly indemnity before specified depending upon the extent of the disability." The policy further provided that, "if the assured shall suffer from bodily disease or illness not hereinafter excepted and such disease or illness shall wholly disable and prevent the assured from performing any and every kind of duty pertaining to his business or occupation, the company will pay to him twenty five dollars (\$25) a week for the period of such disability during which he shall be necessarily confined to the house; any disability of less than seven consecutive days or in excess of fifty two weeks is not covered." Other provisions of the policy, pertinent to the present case, required prompt written notice to be given to the company at New York City of any disability for which a claim was to be made, with full particulars and the name and address of the assured, and affirmative proof of the duration of the disability to be furnished, within two months after its termination, to the company. It was also provided in the policy that "legal proceedings for recovery hereunder may not be brought before the expiry of three months from date of filing final proofs at the company's home office, nor brought at all unless begun within six months from time of * * * the termination of disability." It was further provided that claims not

brought in accordance with the foregoing provisions would be forfeited to the company. The policy also provided that an agent had no authority to change it or waive any of its provisions, and that no notice to any agent or knowledge of his or of any other person should be held to effect a waiver or change in the contract or any part of it, and specified that the only method in which a change in the policy or a waiver of any of its provisions could be made was by an indorsement thereon signed by the officers of the company. Attached to the policy is a series of interrogatories and answers thereto made by the assured, designated a "Schedule of Warranties," on which appears the following statement, designated "O": "I have not been disabled, nor have I received medical or surgical attention during the past seven years, except as follows: None."

The appellant testified that he took out the policy through the defendant's agent, Mr. Harrison, who approached him about it, and he took his word for the policy. The record also contains evidence tending to show that on January 2, 1905, the appellant had a slight accident in his automobile, which skidded on a wet pavement and struck the curb stone and jolted him, but he was not thrown out, and "he did not feel any effects" from that accident. Two days thereafter, as he was getting off a trolley car at the corner of Calvert and Pleasant streets, in Baltimore, the motorman started forward, and he was thrown from the car and his body received a severe twist. He walked up the hill on Pleasant street toward his office, and, as he was nearing the top of the hill, he felt very severe pains on his left side such as he had never had before in his life. As soon as he reached his office on Charles street, he examined himself, and found a swelling at the base of his abdomen about the size of an English walnut which pained him very badly. He then went to see Dr. Thomas, who said it was a rupture, and sent him to Dr. Finney, who examined him and advised an operation, and he went to the Union Protestant Infirmary to be operated upon. He there underwent another examination by Dr. Finney, assisted by the house surgeon, at which it was discovered that he had acute pulmonary tuberculosis of recent development, but he was operated on for the hernia and was thereby confined to the hospital for a little over three weeks. He then promptly, before he had entirely recovered from the operation, went, under his physician's advice, to a sanitarium in the Adirondacks to be treated for the tuberculosis. He remained under treatment in the Adirondacks, and neighboring regions resorted to by consumptive patients for that purpose, until November 17th, when he returned to Baltimore, and again took up his business. About the middle of April he paid one short visit to Baltimore, but promptly returned on his physician's positive advice to the Adirondacks. During the first month of

his treatment, he remained in the house or on its porch, where he was required to remain in order to be in the open air as much as possible. He took his exercise on the porch, and he testified that he did not think that he went off of it more than three times in that month, and then only to go to see his doctor. He also described his method of living during the remainder of his treatment in that region. There was other testimony tending to show that between April and November of the time spent by the appellant in the Adirondacks he was never sick enough to necessitate his staying in his house. Before going to the hospital, the appellant saw Mr. Steele, the Baltimore manager of the appellee company, and told him about this claim, and that he could not tell when he ruptured himself, whether it was from the automobile or the street car accident. He also told Mr. Steele, after he had gotten out of the hospital, that he was going to the Adirondacks, when Steele said, "The policy was not good for that," and called his attention to the clause in it restricting the company's liability to the time during which he was closely confined to the house. The appellant filled out upon one of the company's blanks thereafter sent to him for that purpose by Mr. Steele a detailed statement of his claim, which, with the attending physician's statement, was sent to the company on May 1st, with a request to be advised if it was not complete, and was received by the company without protest or objection. In that claim the appellant stated that he had been suffering from illness which he described as "acute pulmonary tuberculosis and surgical operation for hernia performed by Dr. Finney," and also gave the other information called for by the company's blank on which it was made out, but nothing was said as to the cause which produced the hernia.

The appellant on cross-examination stated that for five or six years he had a clearing of his throat, and during one winter had gone about once a week to Dr. Fleming to have his throat and nostrils sprayed to get rid of it. He had also suffered now and then from a cold in the head, and had had the grip over three or four years before the trial, for which he had been treated by Dr. B. B. Brown. There was also testimony by Dr. Thomas, the appellant's family physician, that he had a chronic throat condition which is common to nine-tenths of the people in Baltimore, where what is known as a "throat climate" prevails, and that medical treatment is not ordinarily resorted to for that trouble, but that the appellant was rather prone to consulting physicians.

The declaration in the case contains three common counts in assumpsit and two special counts on the policy, one for the injury received on the street car resulting in the hernia, and the other for the disability resulting from tuberculosis. To this declaration the defendant company in the first in-

stance filed the general issue pleas, and subsequently, by leave of court, filed a special plea, setting up an alleged breach of warranty on the part of the plaintiff in falsely making the answer to the clause designated "O," in the application for the policy, inquiring whether he had received any medical or surgical attention during the seven years prior thereto. To this plea the plaintiff demurred, and his demurrer was overruled and he joined issue thereon.

There are three bills of exceptions in the record, two to rulings on evidence, and the other to the granting of the defendant's third prayer, by which the jury were instructed to render the verdict in its favor on which the judgment appealed from was entered.

The first exception was to the court's refusal to allow the appellant, when on the stand, to reply to a question asking him to state what report he made to Mr. Harrison or to the company in answer to the clause which follows the letter "O," in the application for the policy, relating to the surgical or medical attendance during the past seven years, except as there follows. It does not appear from the record what answer the witness would have made to the question, nor is there any statement or offer of what the plaintiff proposed to prove by the witness in that connection, and we are therefore unable to say whether the plaintiff was injured by the court's ruling. Inasmuch, however, as the question was a proper one and the case must be remanded for a new trial for error in granting the defendant's third prayer, we will briefly express our views upon the admissibility of statements made to an agent of an insurance company under the circumstances referred to in the question. The policy before us contains the usual provision that no agent has power to change it or waive any of its terms, but this court has several times decided that such a clause must be construed to relate to the provisions of the contract itself after it has gone into effect, and not to apply to the conditions which relate to the inception of the contract when it appears that the agent has delivered the policy and received the premiums with full knowledge of the actual situation. *Hartford Fire Ins. Co. v. Keating*, 86 Md. 146, 38 Atl. 29, 63 Am. St. Rep. 499; *Mallette v. British Assur. Co.*, 91 Md. 484, 46 Atl. 1006. The same doctrine has been announced by the United States Supreme Court in *N. J. Mut. Life Ins. Co. v. Baker*, 94 U. S. 610, 24 L. Ed. 268, and *Ins. Co. v. Mahone*, 88 U. S. 152, 22 L. Ed. 593, and by many of the courts of other states in the cases collected under note 5 on page 943 of 2 Ed. of A. & E. Encycl. of Law. If the actual facts were explained by the assured to the agent of the company through whom the policy was delivered to him and the premium collected, and that agent undertook to determine whether the facts were material to the risk and wrote or instructed the appellant to

write the answer appearing on the application, the company would be estopped to set up those facts to defeat an action to recover on the policy.

The second exception was taken to the court's refusal to admit in evidence a letter written by the plaintiff's attorney to the company's Baltimore manager, Mr. Steele, prior to the institution of this suit in reply to a letter received from the manager to whom the claim had been referred by the company for adjustment. The plaintiff's attorney, on being asked by the court for what purpose the letter was offered, replied: "Only for the purpose of bringing in the whole chain of correspondence, and to show that a personal interview was requested again after receiving that; and I want to offer the letter following that from Mr. Steele asking counsel to have another conference in reference to this matter." As none of the conferences between the representatives of the parties to the controversy resulted in its adjustment or compromise, we see no reversible error in rejecting this letter.

At the close of the case, the defendant offered three prayers, of which the first and second were rejected and the third was granted, and the appellant excepted to the court's action in granting it. The third prayer is as follows: "The defendant prays the court to instruct the jury the plaintiff has offered no evidence legally sufficient to entitle him to recover in this case, because this suit, so far as it relates to the plaintiff's claim on account of the hernia, was prematurely brought, and he cannot recover on account of the tuberculosis because there is no evidence in the case legally sufficient to show that said tuberculosis ever necessarily confined him to the house, and that by the uncontradicted evidence in this case it appears that the plaintiff within seven years prior to the issuance of the policy on which this suit is brought several times received medical attention, and was under treatment for throat trouble for nearly an entire winter, as described by the plaintiff himself in his evidence, that there was therefore a breach of the warranty recited in the policy, and this breach was as a matter of law material to the risk as to the clauses of the policy relating to illness, and that, therefore, the verdict must be for the defendant."

This prayer, in our opinion, should not have been granted. In the first place, the suit was not prematurely instituted in so far as it referred to the hernia claim. The company through its resident manager, Steele, had notified the appellant that the policy did not cover the disability resulting from consumption. It had, also, in a letter appearing in the record, addressed to the appellant's counsel by Mr. Steele on June 7, 1905, after the company had referred the claim to him for attention, asserted that its liability for injury occasioned by the hernia was limited to the time the ap-

pellant was confined to his house and the hospital; i. e., from January 11th to February 2d. It refused to treat the cause of the hernia as an accident, but insisted that it should be treated as a disease and made subject to the limitation attached by the terms of the policy to disability arising from that cause. Now, we have already seen that the policy limits the company's liability for disability from disease to the time during which the assured "shall be necessarily confined to the house," while it imposes no such limitation upon its liability for disability arising from accident. The appellant, according to his testimony, had always claimed that the hernia was produced by accident, and the only medical testimony in the record on this subject is that of Dr. Thomas, who said that it was not congenital and ascribed it to the accident in alighting from the trolley car. Under these circumstances we think that the provision of the policy limiting the time within which suit could be brought thereon was waived by the company, and that the appellant did not sue prematurely. 1 Cyc. 281, 282; *Phillips v. U. S. Benevolent Soc.*, 120 Mich. 142, 79 N. W. 1; *Balto. Ins. Co. v. Loney*, 20 Md. 40.

In the second place we think the instruction contained in the prayer that there was no evidence in the case legally sufficient to show that the tuberculosis ever necessarily confined the appellant to the house was erroneous. The policy undoubtedly in plain language limits the disability from disease provided for by it to such as necessarily confines the assured to the house. Under the repeated decisions of this court the policy must, like other contracts, be construed according to the sense and meaning of the language in which the parties have seen fit to express themselves, and they must abide by that language, even though its selection turn out to have been unwise or unfortunate. A party seeking to secure insurance against a certain contingency must pay due regard to the contents of the policy offered him, and select one which plainly provides for the risk which he seeks to cover. At the same time particular expressions found in a policy should not receive a rigid interpretation at the hands of a court, but should be construed in reference to their context, and in such manner as to give due effect to all parts of the instrument. The expression "confined to the house" in the present case is used in a policy which upon its face undertakes for a consideration to insure against disability caused by diseases, not therein excepted (and consumption does not appear by the record to be excepted), for the obvious purpose of describing the duration of the period for which the insured, when totally disabled by disease from discharging the duties of his occupation, shall be entitled to draw a weekly indemnity. That purpose, we think, would be fully gratified by construing "confined to the house" to mean confined

to any part of the house, either inside of the doors or upon the porches or verandas attached to it on the outside. It is a matter of common knowledge that the most approved modern method of treating all diseases of the respiratory organs involves the constant or almost constant exposure of the patient to outer air. Sometimes this result is attained by locating the patient inside of the house and keeping the windows open, at other times it is accomplished by moving the couch or chair occupied by him out upon the porch. It cannot be supposed that the company, which is fairly chargeable with this common knowledge, meant by the use of the expression under consideration to indirectly exclude from the benefits of its policy the victims of a well-known and widely prevalent disease which was not mentioned in the list of excepted diseases contained in the policy. The plaintiff's own evidence, if believed by the jury, would have justified them in finding that he had been confined to the house, according to the construction which we have said should be given to the policy, during part of his stay in the Adirondacks.

In the third place, the granted prayer erroneously instructed the jury as matter of law that the failure to mention in the application for the policy the fact that the applicant had at different times within the prescribed period received medical attention for throat trouble constituted a breach of warranty material to the risk insured against relating to illness. Whatever view may be held in other jurisdictions, this court has definitely decided that the materiality of representations made in an application for a policy of insurance is ordinarily a question for the jury. *Bankers' Life Ins. Co. v. Miller*, 100 Md. 1, 59 Atl. 116; *Md. Casualty Co. v. Gehrmann*, 96 Md. 634, 54 Atl. 678; *Mut. Ins. Co. v. Deale*, 18 Md. 28, 79 Am. Dec. 673. In *Miller's Case*, a woman who was suffering from cancer of the uterus upon whom two surgical operations therefor had been performed, obtained a policy of insurance on her life upon the representation that she was in good health, and had never had cancer or uterine disease of any kind. Within six months thereafter the cancer proved fatal to her. We there held that as it was palpable and manifest from the uncontradicted testimony, and from the nature of the representations themselves, which related to a disease having a tendency to shorten life, that they were material to the risk, the court should have so instructed the jury, but we also stated that the materiality of such representations was ordinarily a question for the jury. The present case does not fall within the class to which *Miller's Case* belonged, as here the only medical testimony appearing in the record as to the nature of the assured's throat trouble tends to prove that it was trivial and unimportant.

For the error in granting the defendant's

third prayer, the judgment appealed from must be reversed and case remanded for a new trial.

Judgment reversed, with costs, and case remanded for a new trial.

(105 Md. 600)

CLARK v. CALLAHAN et al.

(Court of Appeals of Maryland. April 26, 1907.)

1. DEPOSITIONS—FORM OF PROCEEDING.

Code Pub. Gen. Laws, art. 35, §§ 16, 17, provide for the taking of the deposition of non-resident witnesses in actions at law on notice to the opposite party, and section 18 provides that the testimony of nonresident parties to a cause may be taken, whether in their own behalf or by the opposite party, "in the same manner as the testimony of other nonresident witnesses; this to apply to courts of law and equity." *Held*, that the depositions of nonresident witnesses not parties may be taken on notice in equity.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 16, Depositions, §§ 34, 38.]

2. SAME—OBJECTIONS—WAIVER.

Under Code Pub. Gen. Laws, art. 16, § 241, providing that depositions shall remain in court 10 days subject to exception, before the cause shall be taken up for hearing, unless, by agreement of the parties, such time shall be waived, consent of the taking up of a cause before the expiration of the 10 days amounted to a waiver.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 16, Depositions, §§ 330-338.]

3. TRUSTS—ORAL TRUST—VALIDITY.

Where insured in a mutual benefit certificate caused a certain person to be made the beneficiary, on an understanding with her that she would share the proceeds with plaintiff, the fact that plaintiff did not know of such arrangement until the person in question had been made the beneficiary did not defeat a trust in her favor.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 47, Trusts, §§ 13, 45.]

4. SAME.

Where insured in a mutual benefit certificate caused a certain person to be made the beneficiary, and after her designation it was agreed between them that a portion of the proceeds should be given by the beneficiary to plaintiff, there was a valid trust, notwithstanding that the agreement was subsequent to the designation; insured having had the right to change the beneficiary at any time.

Appeal from Circuit Court of Baltimore City; Henry Stockbridge, Judge.

Suit by Agnes Dooley Clark against Edith B. Callahan and another. From a decree in favor of defendants, complainant appeals. Reversed.

Argued before **BOYD, PEARCE, BURKE, SCHMUCKER**, and **ROGERS, JJ.**

Chas. Lee Merriken and J. Kemp Bartlett, for appellant. Conway W. Sams, for appellees.

PEARCE, J. The bill in this case was filed by the appellant against the appellees to procure an accounting from one of the appellees, Edith B. Callahan, for one-half the proceeds of certain benefit certificates received by her, and for an injunction against the said Edith B. Callahan, and the other ap-

pellee, Edward J. Callahan, her husband, restraining them from conveying away or disposing of a certain house and lot in Baltimore, alleged to have been purchased by the said Edith B. Callahan partly with a portion of the proceeds of said certificates, and to be the only tangible property owned by her. It appears in the evidence that the plaintiff, when about 12 years of age, was taken into the family of Col. Charles W. Raphun, of Baltimore, a relative on her mother's side; that she resided there until his death, in February, 1903, when she was about 19 years of age, being maintained and cared for by him as if she were his child; and that he always expressed and evinced a strong affection for her. Col. Raphun was at the time of his death an official in the office of the collector of the port of Baltimore, and was a man of small means, but held a benefit certificate for \$2,000 in the Ancient Order of United Workmen, and another for \$3,000 in the Improved Order of Heptasophs; both payable at his death. These certificates were originally payable to his second wife, Estelle V. Raphun, from whom he was separated about six months before his death; she having filed a bill for divorce, which was pending when he died. After this separation, on June 5, 1902, he surrendered the original certificates, and new certificates were issued, in which Mrs. Callahan was by his direction named as the beneficiary. Col. Raphun had three children, one daughter, Mrs. Callahan, by his first wife, who was married in 1899, and thereafter did not live with her father, and two sons, one of whom resided in Chicago, and the other was under 21 and lived at home. The bill alleged that, about the time of the separation, Col. Raphun declared his intention to have his said daughter and the plaintiff substituted as joint beneficiaries under said benefit certificates, so that the proceeds thereof upon his death should be paid to them in equal shares, but found that this could not be done, because, under the rules of said associations, only blood relatives of members could be made beneficiaries; and that thereupon, after consulting his daughter, and obtaining from her a solemn promise that the proceeds of said certificates should be equally divided between herself and the plaintiff when paid, he caused his said daughter to be made the beneficiary of said certificates in the place of his wife, upon the express trust and condition that said daughter should share said proceeds equally with the plaintiff; and that said trust was accepted by his daughter upon such condition. Soon after Col. Raphun's death, his wife brought a suit in replevin against Mrs. Callahan, and also an action of slander, and claimed to be entitled to the proceeds of said benefit certificates. In May, 1904, while these litigated matters were pending, including interpleader proceedings between Mrs. Raphun and Mrs. Callahan as to their respective rights to the proceeds of said benefit certificates, Mrs. Cal-

lahan, as the bill alleges, without the knowledge or consent of the plaintiff, compromised all the pending litigations between her step-mother and herself by payment to her, out of the proceeds of said benefit certificates, of the sum of \$1,500, and the payment of certain costs and expenses attending said litigations, amounting to \$774.91, and leaving a net amount coming to her from said certificates of \$2,725.09. The defendants answered the plaintiff's bill, denying all the material allegations, and specifically denying that any promise was ever made by Mrs. Callahan to pay any part of the proceeds of said certificates to the plaintiff, or that the name of Mrs. Callahan was substituted as beneficiary therein upon any trust or condition whatever; denying that she accepted any trust whatever, and alleging (under oath) that she could not have done so, because she was not aware until after her father's death that she was named as beneficiary in said certificates. The answer admitted the compromise above mentioned, but alleged that it was made with plaintiff's knowledge, and alleged that the plaintiff was largely the cause of the slander suit mentioned. Testimony was taken by both parties, and after hearing and argument, the court, being of opinion that no valid trust was created by Col. Raphun in the said benefit certificates, the plaintiff's bill was dismissed, and this appeal is taken from that decree.

Before considering the principal question in the case, we will advert to the exclusion of certain testimony which was offered by the plaintiff. The depositions of Mr. and Mrs. Stiles, residents of West Virginia, and of Mrs. Dooley, the mother of plaintiff, a resident of Virginia, were taken before a notary of those respective states in the manner provided by section 17 of article 35 of the Maryland Code of Public General Laws after five days' notice to the opposite party. When it was proposed to read these depositions, the defendants objected, and on their motion the depositions were excluded or suppressed. The principal objection made was that this method of taking the testimony of nonresident witnesses, not parties to the cause, is only available in courts of law, and that the only method of taking the testimony of such nonresident witnesses, in courts of equity, is under a commission issued from the court under its own rules; but it was also contended that as section 241 of article 16 requires evidence taken and returned to be opened by the clerk, and to remain in court ten days, subject to exception, before the cause shall be taken up for hearing, unless, by agreement of the parties, such time shall be waived, and as in this case the testimony had only laid in court five days, and there was no waiver of time when the cause was taken up for hearing, the depositions were properly excluded. Sections 16 and 17 of article 35 should be read together, and so read, unqualified by any other provision of law in

pari materia, section 17 must be regarded as applying only to the courts mentioned in section 16—that is, courts of law—notwithstanding the broader language of section 17. In *Goodman v. Wineland*, 61 Md. 456, it was held that the provisions of section 16, were not applicable to nonresident parties, except in the discretion of the court upon satisfactory proof of permanent inability to attend the court in person. But section 18 of article 35 (Chapter 399, p. 1004, Laws 1898) provides that "the testimony of nonresident parties to a cause, may be taken, whether in their own behalf or by the opposite party, in the same manner as the testimony of other nonresident witnesses; this to apply to courts of law and equity, and to proceedings before magistrates." The defendants contend that, as these witnesses are not parties, that section cannot affect the question; but we cannot agree to this. If that were the case, nonresident parties would be put in a better position than other nonresident witnesses, and this can hardly be supposed to have been the purpose of the lawmakers. We think the purpose was to do away with all discrimination, in this respect, between nonresident parties, and other nonresident witnesses, and also to permit the taking of the testimony of any witnesses in courts of equity, as well as in courts of law, under any method open to nonresident witnesses not parties to the cause. The words used in section 18, "in the same manner as the testimony of other nonresident witnesses," must be taken not only to mean that parties are to have the same privileges as other witnesses, but also that other witnesses are to have the same privileges as parties, both in courts of law and equity. Nor do we think the fact that these depositions had not laid in court ten days warranted their exclusion. The law does not forbid reading the depositions in such case. It forbids that the case be taken up for hearing without a waiver of such time. The proper course was to object to the taking up of the case, and consent to take it up should be held to operate as an implied waiver of time. In *Clogg v. McDaniel*, 89 Md. 419, 43 Atl. 795, it was held that irregularities in the execution of a commission, which might justify the suppression of the evidence if availed of at a proper time and in the proper manner, would not be allowed to prevail "if sprung at a time when it would be impossible to retake the depositions before the case has been fixed and taken up for hearing," and the rule is so laid down in *Miller's Eq. Proc.* § 219. We think these depositions should not have been excluded.

We have carefully read and considered all the testimony, and it amply sustains all the material averments of fact contained in the bill. Col. Raphun told Mrs. Stiles in September, before his death, that the plaintiff had nursed him faithfully; that she had always been as a daughter to him, and hers was the only care he had in his illness; that he had

meant to adopt her, but had put it off too long, but that he had amply provided for her, and he told Mr. Stiles subsequently that he had made the same provision for her as for his own daughter. Mr. and Mrs. Stiles were the adopted parents of the plaintiff's younger sister, which explains their interest in the plaintiff. The plaintiff herself testified that she lived seven years in Col. Raphun's family, going there at 12 years of age; that Mrs. Callahan married about four years before her father's death, and against his consent, which produced an estrangement for a time, though there was a reconciliation later, and Mrs. Callahan did not live in her father's home after her marriage, but came there one month before his death and remained until he died; that in the summer before his death he told plaintiff, in Mrs. Callahan's presence, upon the steps of their dwelling, that he had transferred the certificate to his daughter upon condition that she should share the proceeds equally with plaintiff, and Mrs. Callahan said she would observe his wishes; and that on a later occasion he repeated this statement, and Mrs. Callahan said: "Yes, papa; I will do just as you wish." Mrs. Dooley testified that, three or four days before Col. Raphun's death, she heard Mrs. Callahan promise him she would divide the insurance with Agnes. The plaintiff testified that Col. Raphun said he had made the transfer of the certificates before he told his daughter, in her presence, of the condition upon which the transfer was made; but Mr. Studebaker testified that Col. Raphun discussed the proposed transfer with him several times before it was made, and then said it was to be made to his daughter upon condition that Agnes should receive one-half the proceeds, and afterwards told him he had made the change, and had carried out his previously declared intention. He also testified that in December, 1902, or January, 1903, Col. Raphun referred to the transfer of these certificates, and said that Edith, his daughter, understood the conditions upon which they were changed, and she replied: "Papa, don't worry about that; your wishes or the conditions will be carried out fully." Mrs. Callahan denied that her father ever mentioned Agnes in any way to her in connection with these certificates, and said she had never known or heard that the certificates had been put in her name until after her father's death, when her husband, three or four hours after her father's death, took them from his papers at the custom house, and handed them to her. On cross-examination, she admitted her father had told her they had been put in her name, and when asked whether the conversation upon the steps of the dwelling testified to by the plaintiff had occurred, her only reply was that she did not remember it. She denied ever seeing Mr. Studebaker in her father's house, or that she had ever spoken to him or with him; but both Mrs. Studebaker and Mary Dooley, a sister of plaintiff, testified that she was personally ac-

quainted with Mr. Studebaker, and named two occasions when she was engaged in conversation with him, and plaintiff testified that Mr. Studebaker was a frequent visitor of Col. Raphun during his illness, and that in January, 1903, he was in the sick room conversing with him, and that Mrs. Callahan was in the room during the visit, none of which testimony was denied or contradicted by Mrs. Callahan. In March, 1904, while the litigation before mentioned with Mrs. Raphun was pending, and while the plaintiff was with Mrs. Stiles in West Virginia, she wrote Agnes: "If I had that insurance, I do believe I would spend all my share of it to fight her. That is the way I feel. If anything else turns up I will let you know." When confronted with this letter, and asked what she meant by her share, she said she meant all; that she knew the meaning of the word share, but she meant the share was all hers, though she knew that a share was less than all. There is not a particle of evidence that the plaintiff was in any way interested in the litigation referred to as the replevin and slander suits, though, of course, indirectly interested in the certificates, and there is no evidence that she ever assented to or knew of any proposed compromise of any litigation. The first and only reference to a compromise is made in Judge Sams' letter of May 24, 1904, to plaintiff, stating that "the four cases had been compromised after careful deliberation, for the reasons that litigation is more or less uncertain, and Mrs. Callahan was far from well," and adding, "I am authorized to send you on the part of Mrs. Callahan \$700 as a present." When plaintiff, under advice of Mr. Stiles, being without means to conduct litigation away from home, or at all, determined to accept the \$700, Mrs. Callahan promptly reduced the gift to \$500, which the plaintiff refused, and instituted these proceedings.

From this review of the testimony, we cannot hesitate to hold that the averments of fact upon which the plaintiff relies to sustain her claim had been fully made out, and that the compromise made by Mrs. Callahan, of the litigation with Mrs. Raphun, was made without the knowledge or consent of the plaintiff, and constitutes no defense to her claim. The controlling question in the case, however, is whether, in transferring these certificates to Mrs. Callahan, Col. Raphun created a valid trust in favor of the plaintiff as to one-half of the proceeds of these certificates. In *Smith v. Darby*, 39 Md. 277, it is said "It is a well-established principle that a parol declaration of a trust of personal estate is sufficient." In *Hill on Trustees*, p. 101, it is said: "Any expression manifesting an intention that the donee of property is not to have the beneficial enjoyment of the whole, or some part of it, will be binding on the conscience of the trustee, and will in equity effectually exclude any claim by him to the beneficial interest. For this purpose,

it is by no means necessary that the donee should be expressly directed to hold the property to certain 'uses,' or in 'trust,' or 'as trustee.' It is one of the fixed rules of equitable construction that there is no magic in particular words; and any expressions that show unequivocally the intention of the parties to create a trust will have the same effect." In the *Casualty Ins. Cos. Case*, 82 Md. 500, 34 Atl. 778, this court has said: "In determining whether or not a trust has been created, courts will take into consideration the situation and relations of the parties, the character of the property, and the purpose which the settlor had in view in making the declaration. No technical terms or expressions are needed. It is sufficient if the language used shows that the settlor intended to create a trust, and clearly points out the property, the beneficiary, and the disposition to be made of the property." In *Reiff v. Horst*, 52 Md. 256, Horst received from Eshleman \$400 as a gift, and not as a loan or trust, and 11 years thereafter got \$2,000 more, not as a loan, but to be held in trust for his children, and then for the first time it was agreed and understood that the \$400 previously given should also be treated and held in trust the same as the \$2,000, and it was held that a trust was impressed upon the \$400, because "there was no uncertainty in the subject-matter or object of the trust, nothing optional or indecisive." To the same effect are *Milholland v. Whalen*, 89 Md. 214, 43 Atl. 43, 44 L. R. A. 205, and *Snader v. Slingluff*, 95 Md. 366, 52 Atl. 510. "Nor is a trust rendered void by the appointment of a beneficiary as trustee." *Milholland v. Whalen*, at page 218 of 89 Md., at page 45 of 43 Atl. (44 L. R. A. 205).

We do not understand the principles announced in the cases cited to be questioned seriously by the defendant; but it was contended by her that, according to the plaintiff's own testimony, she had no knowledge of the creation of the alleged trust until after the certificates had been transferred to Mrs. Callahan, and the argument assumed, as a consequence, that the settlor had effectually parted with the dominion over the property before the declaration of any trust, and that, after the property had vested in Mrs. Callahan, it was then too late to fasten a trust upon the property. It is true that the plaintiff had no knowledge of the creation of any trust until after the certificates were transferred, but it was not necessary to the validity of the trust that she should have such knowledge. It is only necessary that the donee should have knowledge of the intention of the settlor to create the trust, in order to fasten the trust upon the conscience of the donee. We think, upon all the testimony in the case, that the proof is clear and satisfactory that the trust was declared at or before the time of the transfer of the certificates, and that it was made known then to Mrs. Callahan. She denies this, it is true;

but her testimony is so weakened by its numerous contradictory and inconsistent statements that little reliance can be placed either in its accuracy or probative force. Moreover, Mr. Studebaker said that Col. Raphun, "in numerous conversations" with him, told him that he intended to transfer the certificates to Mrs. Callahan "upon the condition that Agnes Dooley should receive one-half of the amount of the policies." Mrs. Callahan after first testifying in chief, and also swearing in her answer, that she did not know the certificates were in her name until after her father's death, in the next question but one, said: "My father said: 'Edith, I have changed the name from Mrs. Raphun, my wife, to your name, and you are my daughter, and you are to have these policies.'" We are not called on to assume that though Col. Raphun repeatedly declared his intention to create this trust, and after the transfer of the certificates, several times in the presence of at least two different persons, reminded Mrs. Callahan of the terms of the trust, he yet neglected and failed to declare to her, at or before the transfer, the conditions upon which he had so deliberately determined and so clearly declared to others. Such an assumption would be contrary to all the inherent probabilities of the situation, and would be to shut our eyes to inferences as strong and clear as any that control the actions and conduct of practical men in all the affairs of life. But there is another and equally satisfactory answer to this position of the defendant. This is not a case where absolute dominion over the subject of the trust is parted with by the donor. Where an absolute and unconditional gift of money or property is made, and subsequently the donor attempts to impress a trust upon the subject of the gift, it might be conceded the attempt would be futile. Here, after the transfer of these certificates to Mrs. Callahan's name, Col. Raphun retained the possession of them up to the moment of his death, and he had the same power and right, at any time, without the consent of his daughter, to return them to the orders, and obtain other certificates, naming other beneficiaries, that he exercised when he surrendered the original certificates in the name of his wife, and obtained those in the name of his daughter. If it were conceded then that Mrs. Callahan was substituted as beneficiary without the creation of any trust in the proceeds thereof at or before that time, and the trust was subsequently declared by him, and accepted or assented to by Mrs. Callahan as established by the testimony of Mr. Studebaker, Mrs. Dooley, and the plaintiff herself, can it be doubted that Col. Raphun could and would have revoked the substitution of Mrs. Callahan if she had either, at the time of the attempt to create the trust, declined to execute it, or, having assented thereto, subsequently informed him she would not execute it?

Can she now, after securing to herself the fruits of these certificates by repeated assurances that she would carry out her father's directions to share the proceeds with the plaintiff, be permitted to repudiate her promises after his death, and thus defraud both the dead and the living? We think not. In *Hirsh v. Auer*, 29 N. Y. Supp. 917, 79 Hun, 493, a case almost identical with the present, the court adverted to the revocable character of the interest of a beneficiary under such a certificate, and intimated strongly the view we have expressed, and that case was affirmed on all points in 146 N. Y. 17, 40 N. E. 397. Such conduct as Mrs. Callahan's, even assuming that the creation of the trust was subsequent to her substitution as beneficiary, constitutes fraud, and gives jurisdiction to equity to defeat its consummation. By assenting to her father's wishes and directions, she led him to make no other disposition in favor of the plaintiff, and fastened upon her own conscience a trust or confidence which she cannot repudiate without fraud, and which a court of equity will enforce. The principles involved in this view are well illustrated in *Hirsh v. Auer*, supra, in *Hooper v. Holmes*, 11 N. J. Eq. 122; *Williams v. Vreeland*, 32 N. J. Eq. 736, and in *Dowd v. Tucker*, 41 Conn. 197, and *O'Hara v. Dudley*, 95 N. Y. 403, 47 Am. Rep. 53. We therefore hold there was error in dismissing the plaintiff's bill, and that she is entitled to an accounting and a decree in personam against Mrs. Callahan for one-half of the amount of said certificates, less such credits as are allowed according to the accounting we shall direct. It appears from Exhibit No. 1 filed with the plaintiff's bill, and from the testimony of Mr. Wm. C. Smith, counsel for Mrs. Raphun in all the litigation mentioned by him, that there were four separate cases: (1) The divorce case of Raphun against Raphun; (2) the case of Raphun against Callahan, Dooley and Lingenfelder as executor of Col. Raphun, a bill in equity to set aside the substitution of Mrs. Callahan as beneficiary named in the certificates; (3) the replevin case of Mrs. Raphun against Mrs. Callahan; and (4) the slander suit of Mrs. Raphun against Mrs. Callahan. It also appears from Exhibit No. 1 that fees were allowed by the court, amounting to \$128.30, out of the proceeds of the certificates paid into court. The plaintiff was interested equally with Mrs. Callahan in defeating the proceeding of Mrs. Raphun to set aside the substitution of Mrs. Callahan as beneficiary, and it is therefore proper that he should be charged with one-half of the fees allowed in procuring payment into court of the proceeds of these certificates, and of whatever costs were paid, or are properly chargeable to the defendants, in the bill to set aside the substitution of Mrs. Callahan as beneficiary. But the plaintiff was in no manner interested in the result of the litigation either in the divorce case, the re-

plevin case, or the slander case, and she is not chargeable with any part of the costs in these cases. Mrs. Callahan also paid Mrs. Raphun a lump sum of \$1,500 in compromise and settlement of all these cases. The plaintiff was only interested in the certificate case, and, though she was not consulted at all about any compromise, we think she should bear some part of the \$1,500 as the consideration for settling the certificate case. The divorce case was terminated by Col. Raphun's death, and the plaintiff had no possible interest in the result of that case, nor in the replevin case, which is not shown to have been of much importance to any one, and it may be reasonably assumed that the greater part, if not the whole of this \$1,500, was paid to settle the certificate suit and the suit for slander, and that one-half that sum may be apportioned to each of these cases. The plaintiff was equally interested with Mrs. Callahan in the former, but had no interest in the latter, and upon that basis she should be charged with one-fourth of \$1,500, viz., \$375.

It also appears from Exhibit No. 1 that fees, in addition to those allowed for payment of the certificate money into court, were paid, amounting to \$500, and if upon investigation these fees are found to be reasonable and proper in amount, and to have been paid as the \$1,500 was in a lump sum for professional services in settling the certificate and slander cases, the plaintiff ought also to be charged with one-fourth of that item. She should also be charged with \$70, which she testified she received from Mrs. Callahan after Col. Raphun's death, and which presumably was paid in anticipation of her half of the proceeds of the certificates, as it was paid before Mrs. Callahan had repudiated the trust. The net balance ascertained upon such accounting should bear interest from May 25, 1904, when Mrs. Callahan received the proceeds of the certificates from the clerk of the court, and offered the plaintiff a present of \$700. As the evidence shows that the house, No. 1822 West North Avenue, Baltimore City, is held by Mr. and Mrs. Callahan as tenants in common, the decree to be passed on the accounting directed should be a personal decree against her for the sum found to be due, and inasmuch as she has testified that she has in her possession two bonds of the Anacostia & Potomac Railway for \$1,000 each, purchased with the proceeds of these certificates, and \$500 cash in bank derived from the same source, all representing and constituting part of the trust fund, the circuit court should order her forthwith to bring said bonds and cash into court to await the result of the accounting ordered.

Decree reversed, and cause remanded for further proceedings in conformity with the views herein expressed; the appellees to pay the costs above and below.

(107 Md. 704)

BALTIMORE BRIAR PIPE CO. v. EISENHAUER.

(Court of Appeals of Maryland. April 26, 1907.)

1. APPEAL.—REVIEW.—EXCEPTIONS.

The overruling of special exceptions to prayers cannot be reviewed in the absence of exception thereto shown by the record.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, § 1516.]

2. SAME.

The court having given, without exception thereto, plaintiff's prayer, leaving it to the jury to find whether facts existed which would authorize plaintiff to recover, this cannot be reviewed, though defendant asked and excepted to the refusal of a prayer asking the court to rule that there was no sufficient evidence to entitle plaintiff to recover.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3611.]

3. TRIAL — INSTRUCTIONS — REFUSING REQUESTS.

The refusal of a prayer is harmless, another to the same effect having been granted.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 651-659.]

Appeal from Superior Court of Baltimore City; Ch. E. Phelps, Judge.

Action by George Eisenhauer against the Baltimore Briar Pipe Company. Judgment for plaintiff. Defendant appeals. Affirmed.

Argued before BRISCOE, BOYD, PEARCE, SCHMUCKER, BURKE, and ROGERS, JJ.

Carroll T. Bond and Wm. L. Marbury, for appellant. William S. Bansemer, for appellee.

ROGERS, J. This is an action to recover damages sustained by the appellee, plaintiff below, while in the employment of the appellant defendant, the Baltimore Briar Pipe Company. The verdict of the jury was in favor of the plaintiff, and this is the defendant's appeal.

At the close of the whole case the plaintiff and defendant each offered several prayers. There was also an exception taken to the admission of certain testimony, which, however, was abandoned; but the conclusion we have reached renders it unnecessary to do more than discuss the question presented by the rulings upon the defendant's fifth and ninth prayers, by which it was sought to take the case from the jury. The learned court below rejected these prayers. Both of them deny the legal sufficiency of the evidence to show such negligence on the part of the defendant company in the discharge of its legal obligations to the plaintiff as would entitle him to recover. The facts are as follows: The appellant is a company located in Baltimore city and engaged in the manufacture of briar pipes, and for the purposes of its business used certain machinery operated by electricity, among which was certain shafting running along the ceiling from one end of a 24x20-foot room to the other, and upon this shafting were fastened certain pulleys, upon

which ran belting to lathes below, and upon these machines the several employes performed their work, when the power was applied by means of the belting from the pulleys to the lathes. The appellee, Eisenhauer, was a briar wood pipe maker by trade, and had learned his trade in the factories of Germany 30 years ago, beginning at the age of 12 years. In that country the factories are run by water power, but the machinery, including the shafts, pulleys, and lathes, are the same as used here. In 1887 the appellee came to America and continued at his trade. In January, 1905, he was employed by the appellant in its briar wood pipe factory as a finisher. He worked with it for two months and left. In May following he accepted an offer of increased wages and returned to the same employment. In this factory the pipe bowls are fashioned upon small turning lathes at table height from the floor. The power was applied to such lathes as were to be worked by leather belts about one inch in width. The machinery having been so adjusted that any one lathe might be set in motion or stopped by putting the belt on or taking it off the pulley, the placing of this belt on the pulley was the work of the employes indiscriminately; but some of the operators were boys, and if they could not reach the shafting to adjust the belt they would call upon the appellee, who did this work for others, as others did it for him. Appellee "put the belts on mostly." Between the periods of employment spoken of the lathes in which appellee had been working were moved downstairs to the second floor, and one John Newton, a competent man, regularly employed in this factory by the appellant for the purpose, affixed the pulleys to the shafting as required by the lathes. Two pulleys, described in the evidence, he was directed by the president of the appellant to place so as to run certain lathes, and he did place them on the shafting with a space of three-quarters of an inch between them. It was in this new room with the lathes and their pulleys so arranged as indicated that the appellant went to work in May, 1905, and continued at work for the space of two months. During that time he put belts on every one of the pulleys. He was not in charge of the floor, but it was a part of his duty to show others how to do certain kinds of work. On July 3, 1905, the appellee was directed by the president, Mr. Scott, to put the belt on for a lathe in the middle of the room, and to start it for a boy who was to work with it. The lathe was run by one of the two pulleys adjusted by Newton and heretofore referred to. The appellee climbed up and placed the belt on the proper pulley, saw it make a revolution, and was about to come down, when the belt suddenly burst and he was struck in the left eye and injured. The appellee stated that it slipped, caught between the pulleys, and then burst, and stated further that the bursting of the belt was so quick that he did not see what

happened. After the machinery was stopped the belt was found "jammed" and wrapped in the space between its pulleys and the adjoining one. The appellee and all of his witnesses, except the witness Kaufman and the physician, testified that a belt will often slip off a pulley despite any care and foresight, and it was further testified to by appellee's witnesses that it is impossible to provide against the breaking of a belt, and impossible always to fix afterwards upon the cause of a break.

From this statement of facts, what is the law applicable thereto? The controlling question, as we view it, does not present any novel aspects, as the principle involved has been repeatedly passed upon by the courts, and particularly by this court, as we will show, but every case must be decided upon the law applicable to the facts presented by the record in each particular case under discussion.

The appellee offered four prayers, the second, third, and fourth of which were granted, and the first rejected. The appellant offered nine. The first, second, third, fourth, sixth, seventh, and eighth were granted, and the fifth and ninth rejected. From the view we take of this case it would not be necessary to discuss these in detail.

Before entering upon a discussion of the law applicable to the facts presented, a preliminary question is presented by the second bill of exceptions, viz., the appellant, defendant below, filed the following special exceptions to the plaintiff's second prayer: "The defendant excepts specially to the granting of the plaintiff's second prayer on the following grounds: (1) For the reason that there is no evidence in this case legally sufficient to prove that the belt upon slipping off caught in the space between the two pulleys referred to in the prayer. (2) For the reason that there is no evidence in the case legally sufficient to prove that the said belt burst by reason of having been caught between said pulleys. The court overruled the special exceptions filed by the plaintiff. And to the action of the court in rejecting the defendant's fifth and ninth prayers the defendant excepted, and now prays the court to sign this its second bill of exceptions, which is accordingly done." It will thus be seen that while the defendant excepted to the ruling of the court in rejecting its fifth and ninth prayers, it did not except to the ruling of the court in overruling its special exceptions to the plaintiff's second prayer. The special exceptions to those two prayers were for the court below, and if it desired to bring that particular ruling of the court below up for review before this court, it should have noted its exceptions thereto, and, having taken no exception to the ruling of the court below in reference to the plaintiff's second prayer, it is not open to criticism by this court, and as the plaintiff's second

prayer must stand, which left it to the jury to find the facts in question, the defendant's ninth prayer could not be granted, by which the court was asked to instruct the jury that there was no evidence legally sufficient to entitle the plaintiff to recover, and their verdict must be for the defendant. "If a prayer is rejected, and in lieu thereof an instruction is given by the court, an exception to the refusal of the prayer will not bring up for review the correctness of the instruction. If this is deemed objectionable, an exception should be taken to it also." Poe's Pl. & Prac. (4th Ed.) § 317; also page 313. "Nor shall any question arise in the Court of Appeals as to the insufficiency of evidence to support any instruction actually granted, unless it appear that such question was distinctly made to and decided by the court below." Rule 4, Court of Appeals; Poe's Pl. & Prac. (4th Ed.) p. 313. Consequently, since the adoption of rule 4, if the decision of this court is desired upon the question as to whether there was an insufficiency, or what is the same thing, an absence of evidence to support any hypothesis of an instruction actually granted, it can only be secured by filing a proper objection in the court below raising that precise question and procuring a ruling thereon, and this objection and the ruling thereon must appear in the record by exceptions signed by the trial judge (*Gunter v. Dranbauer*, 86 Md. 11, 38 Atl. 36); but in this case the record does not show that any exception was taken to the action of the court in overruling the defendant's special exceptions to the plaintiff's second prayer. The record is in these words: "And to the action of the court in rejecting the defendant's fifth and ninth prayers the defendant excepted, and now prays the court to sign this its second bill of exceptions." So it is apparent that no exception to the court's ruling on the special exceptions is before this court on this appeal. *Albert v. State*, Use of Ryan, 66 Md. 334, 7 Atl. 697, 59 Am. Rep. 159.

But the appellant has excepted to the ruling of the court below for rejecting its fifth and ninth prayers. The learned judge below granted the appellant's sixth prayer, which is almost identical with its fifth prayer, so that it got by it the benefit of the court's instruction, and it was not hurt by the rejection of its fifth, certainly not to such an extent as would warrant a reversal of the judgment. The appellant's ninth prayer asked the court to rule as a matter of law that there was no legally sufficient evidence in the case which would entitle the plaintiff to recover. This the court refused to do, and we think properly.

It follows from what we have said the judgment below must be affirmed.

Judgment affirmed, with costs to the appellee above and below.

(105 Md. 641)

McCAULEY v. SHOCKEY et al.

(Court of Appeals of Maryland. April 24, 1907.)

1. FRAUDULENT CONVEYANCES—ELEMENTS.

Where two defendants in a pending slander suit mortgaged their real property to their sisters, sold their personal property and withdrew their bank accounts, the result of such acts was to hinder, delay, and defraud the plaintiff in the collection of his judgment against them, and the mortgage, as to the mortgagors, was fraudulent.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 24, Fraudulent Conveyances, §§ 15, 172.]

2. SAME—FRAUD OF GRANTEE—SUFFICIENCY OF EVIDENCE.

In an action by a judgment creditor to set aside a mortgage, executed by the debtor to his sisters during the pendency of the suit at which the judgment was obtained, evidence examined, and held to show that the mortgagees in accepting the mortgage were parties to the scheme of the mortgagors to put their property beyond the reach of their creditor, and the mortgage was therefore void.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 24, Fraudulent Conveyances, §§ 904-906, 908.]

Appeal from Circuit Court, Washington County, in Equity; M. L. Keedy, Judge.

Bill by Jacob S. McCauley against Samuel E. Shockey and others. From a judgment for defendants, plaintiff appeals. Reversed and remanded.

Argued before BRISCOE, BOYD, PEARCE, SCHMUCKER, BURKE, and ROGERS, JJ.

Charles D. Wagaman and Frank G. Wagaman, for appellant. Charles A. Little and J. C. Lane, for appellees.

SCHMUCKER, J. The appeal in this case is from a decree of the circuit court for Washington county, in equity, dismissing a bill filed by the appellant, as plaintiff below, to set aside a mortgage from the appellees Samuel and Abraham Shockey to their sisters, Susan and Ida Shockey. The mortgage was alleged to have been made for the purpose of hindering, delaying, and defrauding the appellant, as a creditor of the mortgagors, with the knowledge and participation of the mortgagees.

The material allegations of the bill of complaint are as follows: The appellant on April 2, 1904, instituted separate suits for slander against the appellees Samuel and Abraham Shockey, and recovered a judgment against Samuel for \$466.66 and one against Abraham for \$1,700. On the 9th of May, 1904, while the slander suits were pending, the defendants therein executed a mortgage upon all of their real estate to their sisters, Susan and Ida Shockey, to secure a pretended indebtedness to them upon promissory notes amounting to \$11,700.45, in furtherance of an attempt on the part of the mortgagors, participated in by the mortgagees, to put the mortgaged property beyond the reach of the plaintiff, and hinder, delay, and defraud him in the collection of

his said judgments. The mortgaged property was located in Washington county, and consisted of the two brothers' undivided one-half interest in a farm of about 127 acres, 55 acres of mountain land, and two houses in Hagerstown, all of which were owned in fee by the two brothers and their two sisters as tenants in common. Prior to the making of the mortgage, the brothers and sisters occupied the farm as a home, and rented out the two houses, and they thereafter continued to use and occupy all of the properties in the same manner that they had done before the mortgage was made. The mortgage indebtedness greatly exceeded the value of the interest in the said property owned by the mortgagors, and they were without other resources except a small amount of personal property which was insufficient to satisfy the plaintiff's judgments. The prayer of the bill was for a decree setting aside the mortgage and directing a sale of the interests of Samuel and Abraham Shockey in the property described in the mortgage, and the application of the proceeds thereof to the payment, respectively, of the plaintiff's judgments, and for further relief. The Shockey brothers and sisters, the present appellees, jointly answered the bill, admitting their ownership of the real estate mentioned in the bill as tenants in common, the recovery by the plaintiff of the judgments against the brothers, and the making by them of the mortgage of their interests in the real estate to their sisters. They jointly and severally denied that the mortgage was made for a false or pretended consideration, or for the purpose on the part of either the mortgagors or mortgagees of hindering, delaying, or defrauding the plaintiff in collecting his judgments, but averred that it was made solely for the bona fide purpose of securing the indebtedness therein mentioned which was asserted to be an actual and subsisting obligation on the part of the brothers to the sisters. This answer was excepted to by the plaintiff on the ground that it did not fully answer the allegations of the bill, that all of the defendants at and prior to the making of the mortgage occupied and were in possession of the farm and rented the other real estate out to tenants, and that since the making of the mortgage the defendants continued to occupy and use the mortgaged property as they had theretofore done, or the allegations that the mortgage conveyed all of the real estate owned by the brothers, and that they were without other property or means from which the plaintiff's judgment could be realized. An amended answer was then filed by the defendants jointly, in which they admitted the allegations referred to in the plaintiff's exceptions, but neither the original or amended answer disclosed the nature or details of the transactions out of which the alleged mortgage indebtedness arose.

The evidence in the record shows that the

mortgaged farm had for many years constituted the family home of the defendants. Their father, David Shockey, died in 1875, leaving the farm and the mountain land to his wife, with remainder to his children, of whom the appellees are the survivors. The four appellees, all of whom are unmarried, acquired the interests of the other children in the farm, and, since the death of their mother, in 1886, lived together upon it and operated it for their joint account. They usually cultivated the farm themselves, but they sometimes let out the land to tenants, who worked it on shares. At intervals of a year or longer the brothers and sisters had settlements with each other, and adjusted the state of accounts between them and notes bearing interest were given for the balances thus ascertained. The sisters, who seem to have been very industrious, also engaged in certain pursuits on their own account. They kept cows and raised chickens and sold butter and eggs and evaporated peaches, and occasionally took boarders, and also at times took in sewing. The one sister, Susan, testified that from 1876 to 1886 their average annual receipts from evaporated fruit were from \$90 to \$130, and from 1887, when they had gotten a hot air evaporator, to 1896, their earnings were from \$350 to \$468 per year. The brothers and sisters all testified with some measure of detail that the promissory notes secured by the mortgage represented the total amount of various loans, with interest thereon that had been made to the brothers by their sisters during a period of twenty or more years. In 1888 the appellees, as tenants in common, purchased one of the two mortgaged houses in Hagerstown for \$2,500, and in 1892 they purchased the other one for \$1,600. They also purchased \$700 of Hagerstown drainage bonds for their joint account. Prior to the institution of the slander suits in which the judgments were rendered against the two brothers, they had a bank account in their names as Shockey Bros. with Eavy, Lane & Co., in Hagerstown, and a similar one with the People's Bank of Waynesboro. The aggregate value of the farm, mountain land, and the two houses in Hagerstown was about \$13,000, so that the half interest therein covered by the mortgage was worth approximately \$6,500.

It further appears from the evidence that, not only was the mortgage executed after the institution of the slander suits in which the judgments were recovered against the mortgagors, but at or about the same time the Hagerstown drainage bonds were sold, and the bank accounts standing in the name of the mortgagors were both closed out, and their share of the farm was leased for a money rent to their sisters, who could at any time retain the rent and apply it on account to the debt due to them, and thus defeat any attempt of the plaintiff to recover it by an attachment issued on his judgment.

By these transactions the two Shockey brothers stripped themselves of all property which could have been resorted to by the plaintiff for satisfaction of his judgment against them. The natural and inevitable result of these transactions of the two brothers being to hinder, delay, and defraud the plaintiff, in respect to the collection of his judgment against them, the normal presumption of innocence on their part is overthrown, and they are chargeable with the intent to produce that result, and the mortgage must, so far as they are concerned, be regarded as fraudulent. The law conclusively presumes every man to intend the necessary and even the probable consequences of an act deliberately done. *Gardner v. Lewis*, 7 Gill, 404; *Whedbee v. Stewart*, 40 Md. 424; *Ecker v. McAllister*, 45 Md. 309; *Lineweaver v. Slagle*, 64 Md. 489, 2 Atl. 693, 54 Am. Rep. 775; *Gebhart v. Merfeld*, 51 Md. 325; *High Grade Brick Co. v. Amos*, 95 Md. 599, 52 Atl. 582, 53 Atl. 148.

The radical question in the case is whether the mortgage is to be considered fraudulent as against the mortgagees, and upon that issue the burden of proof is primarily upon the appellant, who, as creditor, assails its validity. *Crooks v. Brydon*, 93 Md. 643, 49 Atl. 921; *Fuller v. Brewster*, 53 Md. 358, 359; *Cooke v. Cooke*, 43 Md. 522. The mere proof of an intent on the part of a mortgagor to hinder, delay, or defraud his creditor will not avoid the mortgage as against the mortgagee if the latter act in good faith in taking it, even though it operates to secure to him a priority in the payment of his debt. In *Smith v. Pattison*, 84 Md. 344, 35 Atl. 963, we said: "By a long course of decisions, it has been settled that the fraud of the vendor does not vitiate a sale unless the vendee has participated in the fraudulent intent. *Cooke v. Cooke*, 43 Md. 533, *Fuller v. Brewster*, 53 Md. 359, *Totten v. Brady*, 54 Md. 170, and many other cases." In the later cases of *Crooks v. Brydon*, 93 Md. 643, 49 Atl. 921, and *Commonwealth Bank v. Kearns*, 100 Md. 207, 59 Atl. 1010, the rule is said to be that, when the conveyance is regular on its face, it is incumbent on those attacking it to show either that it was not made upon a good consideration, or that it was made with fraudulent intent upon the part of the grantor to hinder, delay, or defraud his creditors, and that this intent was known to or participated in by the grantee. The rule is similarly stated, upon the authority of many cases there cited, in 14 A. & E. *Encycl. of Law* (2d Ed.) p. 270, and in the copious and valuable notes to *Feder v. Ervin* (Tenn.) 38 S. W. 446, 36 L. R. A. 335, and *Rice*, *Stix & Co. v. Wood et al.*, 33 S. W. 636, 61 Ark. 442, 31 L. R. A. 609. Some authorities go so far as to hold that, even if the grantee creditor has knowledge that the effect of the conveyance and the intent of the grantor are to delay or defraud other creditors, the title of the grantee will not

be vitiated if he acts in good faith, and does not participate in the fraudulent intent of the grantor. 20 Cyc. 470-475, and cases cited in notes to *Feder v. Ervin and Rice et al. v. Wood et al.*, supra. From the nature of the case, a creditor attempting to set aside a conveyance as fraudulent can seldom prove as an independent fact the knowledge of or participation in the fraud of the grantor by the grantee. That knowledge or participation must be gathered from the various facts and incidents composing the transactions and its environment. The primary presumption here, as elsewhere, is in favor of innocence and good faith, but a state of facts may be shown which will negative that presumption, and cast upon the grantee the burden of proving his good faith and nonparticipation in the fraudulent purpose of the grantor.

The circumstances shown by the evidence in this case to have surrounded the execution of the mortgage to the two sisters were such, in our opinion, as to negative the presumption of good faith on their part, and call for frank disclosure and full proof of all of their dealings in connection with that transaction. They had for years been living in the same house and eating at the same table with their brothers. The four had conducted their farm and rented their houses for joint account, and had frequent settlements with each other. The sisters had through a long period made successive loans to the brothers, to an amount in the aggregate far greater than the total value of all of the property of the latter, and must have had constant cause to ascertain and consider the brothers' financial condition and responsibility. In the simplicity of that rural home so exciting a subject as threatened or pending slander suits against the brothers and the possible effect upon them of an adverse result of the suits, and the ways and means of providing against such a misfortune, must have formed the theme of current discussion at the common fireside and table. In that situation it was incumbent upon both the brothers and sisters, and especially upon the latter as the parties claiming under the impeached mortgage, to have given in their answers to the bill in the present case frank, clear, and full explanations of their dealings with each other. *Hinman v. Silcox*, 91 Md. 576-585, 46 Atl. 1017. This they failed to do. They made common cause in their answers, and jointly denied any intent on the part of either the brothers or sisters to put the property of the latter beyond the reach of the plaintiff for the satisfaction of his judgments. They did not disclose fully or at all their dealings with each other in relation to the execution of the mortgage or the contracting of the debt which it was intended to secure, but contented themselves with a denial that the mortgage was fraudulent, and an assertion that it was made to secure a bona fide indebtedness existing at the time of its execution, and for no other

purpose. The filing by the plaintiff of exceptions to the original answer was required in order to secure from the defendants a direct response to several material allegations of the bill already referred to by us.

Again, the evidence shows that the sisters participated in some of the other measures adopted by the brothers to complete the withdrawal of their property from the plaintiff's reach. The leasing by the brothers of their interest in the farm to the sisters for a money rent, at or about the time of the bringing of the slander suits and making of the mortgage, could not have been consummated without the concurrence and co-operation of the sisters. The significance of that transaction is too great to be disregarded. Samuel Shockey testified in the case, when asked who had conducted the business after his father's death and his mother quit the farming, "My brother Abe and I superintended the farm altogether"; and when asked, on cross-examination, "In what business are Shockey Bros. now engaged?" he replied, "Superintending the farm up there." And when asked, "What farm?" he said, "The home farm"; and further said that they were now managing it for their two sisters Sue and Ida. It also appears from the testimony of Ida Shockey, one of the two sisters, that, although they have rented the two brothers' share of the farm, all four of them continued to reside upon it as one family and draw their sustenance from it as they have always done. This acceptance by the sisters of the mortgage and lease of the brothers' interest in the farm, while the latter continue to live upon and manage it as before, strongly indicates a purpose on their part to assist the brothers to retain its enjoyment while withholding it from liability to the plaintiff's judgments, which should not receive the sanction of a court of equity. The sale of the Hagerstown drainage bonds, owned jointly by the brothers and sisters, at or about the time of the institution of the slander suits, must also have required the authority or assent of the sisters, unless the sale was made without their knowledge, which has been suggested by no one.

Hubert Detrow and Edward McCauley, both disinterested witnesses, testified positively that, during the trial of the slander suits against Samuel Shockey at Hagerstown, they were engaged in a conversation in the courthouse, when they overheard the Shockey sisters say, in talking to each other, that they expected to lose the suit, but it did not make any difference, as they had fixed it so that he would not get anything anyhow. Both witnesses ascribed to Susan Shockey the statement that she expected the suit to be lost, and to Ida Shockey the reply that it did not make any difference, that they had fixed it so that he would not get anything anyhow. Both of the sisters testified that Ida had not been in Hagerstown at all during that trial, and two other witnesses Mrs.

McCarter and Mrs. Spencer each testified that she had been present during the trial of the case at Hagerstown and had not seen Ida Shockey there. Jennie Spencer testified that she had been with Ida Shockey at her home on the farm during the trial, but could not say exactly how long she had been there. As against this evidence, six other witnesses each testified affirmatively to having seen Ida Shockey at that trial during at least one day. The preponderance of this testimony favors the assertion of the plaintiff's witnesses that the alleged conversation between the sisters at the courthouse in Hagerstown did occur; but, be that as it may, in view of the family connection, daily intercourse, and intimate relations financial and personal existing between the Shockey brothers and sisters, and the undoubted co-operation of the sisters in some portions of the attempt of the brothers to place their property beyond the plaintiff's reach, we are unable to concur in the conclusion of the learned judge below that the sisters accepted the mortgage without knowledge of their brothers' fraudulent intent or participation in its consummation. The sisters were doubtless actuated by a desire to promote what they regarded as their brothers' welfare and safety in assisting them to cover up their property, but the evidence does not satisfy us that they took the mortgage solely for the purpose of securing their own claims without reference to the promotion of their brothers' covinous designs.

We have adverted in the earlier part of this opinion to the evidence appearing in the record touching the making by the sisters to the brothers of the alleged loans for the security of which the mortgage in question was given. We deem it unnecessary to pass upon the weight of that evidence or the sufficiency of the consideration for the mortgage, because we have determined that the mortgage must be declared void as against the plaintiff's judgment because of the mortgagee's knowledge of and participation in the fraudulent purpose of the mortgagors in executing it. To sustain a mortgage made to secure creditors by a debtor in the condition of the mortgagors in this case, it is essential to establish both a sufficient consideration and a bona fide execution. The absence of either one of those two elements will be sufficient to avoid the mortgage in favor of existing creditors. In *Chatterton v. Mason*, 86 Md. 240, 37 Atl. 960, we said: "The bona fides of the transfer of property is as much a subject of inquiry in a case of this character as the consideration. If it be established that the deed was made by the grantor and accepted by the grantee with the intent to hinder, delay, or defraud the creditors of the former, it matters not that a full consideration has been paid."

The appellant is entitled to a decree declaring the mortgage before us void as to his judgments, and directing a sale of the undi-

vided interests of the several brothers in the mortgaged property, or so much thereof as may be necessary for the respective satisfaction of his judgments and the costs of this suit. To that end, we will reverse the decree appealed from, and remand the case for further proceedings in accordance with this opinion.

Decree reversed, with costs, and case remanded.

(105 Md. 663)

SINGER SEWING MACHINE CO. v. LEE.

(Court of Appeals of Maryland. April 24, 1907.)

1. ACCORD AND SATISFACTION—PART PAYMENT—RECEIPT IN FULL.

An offer of a company to settle in full with its agents by paying them at once 50 per cent. of all commissions accrued or to accrue on account of sales theretofore made, and an acceptance thereof in full, is a good accord and satisfaction, since anticipation of time of payment is a sufficient consideration.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Accord and Satisfaction, § 64.]

2. TRIAL—INSTRUCTIONS—NECESSITY—DUTY OF JUDGE.

Where a party interposed a plea of accord and satisfaction and offered evidence tending to support the plea, he was entitled to have that defense presented to the jury by an instruction embodying a hypothetical statement of the facts upon which it was founded.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 478.]

3. TRIAL—INSTRUCTIONS—FORM AND LANGUAGE.

In an action by an agent for commissions, where the defendant pleaded an accord and satisfaction, a prayer intended to present the facts offered to support the plea is properly refused which submits to the jury that the plaintiff was satisfied that the sum upon which the accord and satisfaction was based was the amount appearing on the books to his credit, instead of requiring them to find that it was the amount appearing to his credit on the books.

4. SAME—IGNORING EVIDENCE.

A prayer which ignores the theory of the plaintiff's case and the testimony offered by him in its support is properly rejected.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 613-623.]

5. SAME.

In an action by an agent for commissions, a prayer that the plaintiff's right to a verdict would be defeated if the jury found that he gave a receipt offered in evidence was properly rejected, where the plaintiff, if his evidence was true, would have been entitled to recover notwithstanding the receipt.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 613-623.]

Appeal from Circuit Court, Anne Arundel County; Wm. H. Thomas, Judge.

Action by Joseph A. Lee against the Singer Sewing Machine Company. From a judgment for plaintiff, defendant appeals. Reversed, and new trial granted.

Argued before BRISCOE, BOYD, PEARCE, SCHMUCKER, BURKE, and ROGERS, JJ.

James M. Munroe, for appellant. James R. Brashears, for appellee.

BURKE, J. Joseph A. Lee sued the Singer Sewing Machine Company in the circuit court for Anne Arundel county, and recovered a judgment for the sum of \$191.10, from which this appeal was taken. The suit was in assumpsit upon the common counts, and attached to the declaration was a bill of particulars, which showed a balance due the plaintiff of \$211.04. The defendant filed the general issue plea and two special pleas—first, payment; and, second, accord and satisfaction. The plea of accord and satisfaction, under which the only question presented on the record arises, is as follows:

"That the defendant at the time of the institution of this suit was not indebted to the plaintiff, but that prior to the institution of this suit the plaintiff had a certain claim against the Wheeler & Wilson Sewing Machine Company for commissions to fall due from time to time in the future for and on account of the sales of certain sewing machines, which said claim would not be due and payable in full for a period of five years, and which said claim of the plaintiff was payable only when as the proceeds of sales of said sewing machines were from time to time collected by the Wheeler & Wilson Sewing Machine Company, and that the defendant became and was on the 19th day of December, 1905, the assignee of the said Wheeler & Wilson Sewing Machine Company and assumed to pay all its just debts and liabilities, when and as the same might become due and payable, and that the defendant offered to anticipate the times of said payments which might fall due in the future to the plaintiff and to settle in full its future liability to the plaintiff, which said liability was also dependent upon a contingency, to wit, the collection by the defendant of the proceeds of the sales of said machines which were sold on the installment plan, by paying to the plaintiff in full settlement of all his claims, present and future, against the defendant as aforesaid, a certain sum, to wit, two hundred and twenty-seven dollars and fifty cents (\$227.50), which said offer the plaintiff accepted, and the defendant accordingly paid to the plaintiff the said sum of two hundred and twenty-seven dollars and fifty cents in full satisfaction and discharge of the plaintiff's aforesaid claims, present and future, and procured from the plaintiff the following acquittance and receipt in full in the following words, to wit: 'Singer Sewing Machine Company Central Agency, 19 W. Franklin Street, Baltimore, Md. December 19th, 1905. Received of the Singer Sewing Machine Company the sum of two hundred and twenty-seven dollars and fifty cents in full settlement of all claims I have against the Wheeler & Wilson Sewing Machine Company for commissions accrued or to accrue, growing out of business done by me for them or otherwise. Jos. A. Lee. Witness: H. D. Dietz.' And that in consideration of

said payment of said sum in advance of the due dates of plaintiff's aforesaid claim the plaintiff accepted in full satisfaction and in settlement of defendant's contingent liability therefore, as aforesaid, and discharge of all his aforesaid claims, present and future, the said sum of two hundred and twenty-seven dollars and fifty cents." The plaintiff had been an agent for the sale of sewing machines of the Wheeler & Wilson Sewing Machine Company, and under the terms of his contract with that company, as testified to by him, he was entitled to a commission upon sales and upon collections made by him, and the account which he filed with his declaration, which account is somewhat obscure and difficult to understand, was intended to show exactly how the balance claimed was arrived at. The correctness of the account was disputed by the defendant; but, as that was a matter properly to be determined by the jury, and does not in any manner affect the question here before the court, we will not discuss it further than to say that it is made up upon the basis of sales claimed to have been made by the plaintiff while he was in the employ of the Wheeler & Wilson Company. The defendant company about the 19th of December, 1905, took over the business of the Wheeler & Wilson Company, and proposed to settle with the agents of the latter company all their accounts against said company. It is as to the terms of this settlement that the real question in this case arises.

The contention of the plaintiff was that he was entitled, under the agreement of settlement, to receive from the defendant 50 per cent. of the commissions he would be entitled to on sales made by him for the Wheeler & Wilson Company up to the time of the transfer of the business of that company to the defendant, and, as the total amount due him at the time was \$877.07, the defendant was indebted to him under the terms of the settlement in the sum of \$438.53½. On the 19th of December, 1905, the defendant paid to the plaintiff \$227.50, which he accepted in full settlement and discharge of all his claims against the Wheeler & Wilson Company. The plaintiff's testimony, as to the terms of the settlement and the circumstances under which the sum mentioned was paid and accepted, is as follows: That, when the defendant company took over the business of the Wheeler & Wilson Company, they proposed to all their agents, of whom the plaintiff was one, to anticipate the commission accounts of their agents who had formerly represented the Wheeler & Wilson Company by paying to them 50 per cent. of the commissions that they would be entitled to upon sales made up to the time of the transfer of the business of the Wheeler & Wilson Company to the defendant company, instead of keeping the account running and paying to the agents 50 per cent. of the amounts collected by them from time to time,

and the plaintiff accepted the proposition; that on the 19th day of December, 1905, the plaintiff had a settlement with the defendant on the basis of \$455 of commissions accrued or to accrue in the future on account of the sales made by the plaintiff for the account of the Wheeler & Wilson Sewing Machine Company, receiving the sum of \$227.50 from the defendant company, and giving the receipt which is set out in the defendant's plea of accord and satisfaction; that he expected to receive a larger sum, and that upon returning to his home after the settlement, and after an examination of his accounts, he discovered that he had not been paid by the defendant 50 per cent. of the true amount of the commissions accrued or to accrue to him on account of sales made by him; and that he went back to the company to complain of the settlement, "and to demand that he be paid the difference between what he had received and the true amount due him as shown by his accounts." The contention of the defendant is that the plaintiff agreed with the defendant company to settle in full all accounts for commissions accrued or to accrue for and on account of the sales of the Wheeler & Wilson sewing machines made by the plaintiff on the basis of 50 per cent. of the amount thereof as shown by a statement thereof taken from the books of the Wheeler & Wilson Company. The defendant offered evidence tending to support this contention, and to show that the settlement made with the plaintiff on the 19th of December, 1905, was in accordance with this agreement. The evidence adduced by the defendant, if believed by the jury, was sufficient to support the idea of accord and satisfaction, and thus defeat a recovery by the plaintiff. The defense of accord and satisfaction consists of something given to, or done for, the defendant, and accepted by him upon a mutual agreement that it shall be a discharge of the cause of action. The agreement is the accord, and the thing done is the satisfaction. The mere payment of a smaller sum is no satisfaction of a larger debt due, but the payment of a smaller sum may be a satisfaction of a larger sum where there is a mutual consideration to support an agreement to that effect. The authorities are uniform in holding that anticipation of time of payment is a sufficient consideration to support a plea of accord and satisfaction. As early as the case of *Pinnell*, 5 Co. Reports, 117, it was held that, where the whole sum is due by no intendment, the acceptance of a parcel can be a satisfaction to the plaintiff; but that payment and acceptance of a parcel before the maturity of the debt in satisfaction of a whole would be a good satisfaction in regard to the circumstance of time; "for peradventure parcel of it before the day would be more beneficial to him than the whole at the day, and the value of the satisfaction is not material." In *Sibree v. Tripp*, 15 M. & W. 34, where the

subject of accord and satisfaction was very fully considered, it was decided that a sum of money payable at a different time was a good satisfaction of a larger sum payable at a future day. The reason for the rule that part payment of a debt cannot be taken as a satisfaction for the whole is that the creditor's agreement is without consideration: "The rule, however, supposes the part performance of the original obligation—the payment of part at the time and in the manner originally stipulated for the payment of the whole, from which payment of a part rather than the whole no benefit can accrue to the creditor. But when a new duty is undertaken by the debtor which is, or may be, burdensome to him, or beneficial to the creditor, a new consideration arises out of such undertaking and sustains the agreement, as when the debtor undertakes to pay and pays part at an earlier day, or at another place, or in another article than required by the original obligation." *Rose v. Hall*, 26 Conn. 395, 68 Am. Dec. 402. In *Bowker et al. v. Child*, 3 Allen (Mass.) 434, the facts were that the defendants were indebted to the plaintiffs upon four promissory notes, one of which was nearly due, and the others having some time to run before maturity. A committee of the defendants' creditors, of which one of the plaintiffs was a member, recommended that they should pay 60 per cent. upon all their notes, due or not due, calculating this amount upon the face of the notes, without addition or subtraction of interest, 25 per cent. cash, and 35 per cent. in notes of a certain Lee Claflin or William C. Claflin, payable in six months from June 1, 1857, and upon a final winding up of the defendant's affairs, which should be on or before June 1, 1858, they should pay to the committee from their surplus property, to be distributed among their creditors, such portion as the committee should advise. This recommendation was in writing, signed by the committee, and the defendants on the 27th of May, 1858, executed an agreement under seal attached to the writing by which they bound themselves to comply with its provisions. On the 10th of June, 1857, one of the plaintiffs took the notes to Lee Claflin, and gave them up to him, and received the 60 per cent. of their amount, the 35 per cent. not being in a note, but by a separate agreement in cash with a discount of 5 per cent. The plaintiffs brought suit upon the original notes. The court, speaking through Hoar, J., said: "In regard to the notes, the presiding judge ruled that the making of the agreement, the taking of the 60 per cent., and the giving up of the notes, under the circumstances as testified to at the trial, were a payment of the notes, and a verdict was ordered for the defendants." The expression used by the learned judge was not precisely accurate, as the settlement proved was not strictly a payment, but an accord and satisfaction of the note, but no point has been

made of this at the argument, nor do we suppose the contention of the judge, or the parties was called to any other consideration than whether it amounted to a valid discharge and extinguishment of the notes, and a bar to the plaintiffs' action.

The plaintiffs rely upon two grounds of exceptions: First, that an agreement to take a smaller sum of money in payment of a larger sum is without consideration, and not binding in law; and, secondly, that it was a question of fact, which ought to have been submitted to the jury, whether the plaintiffs agreed to discharge the notes without a further payment on them. There is no doubt of the soundness of the first proposition, as a statement of abstract law. But, as was said by Mr. Justice Dewey in *Brooks v. White*, 2 Metc. 286, 87 Am. Dec. 95: "The same ancient authority which declares the payment and acceptance of a less sum on the day the debt becomes due, in satisfaction of a greater, is no defense beyond the amount paid, also declares that the payment and acceptance of a less sum before the day of payment has arrived in satisfaction of a whole would be a good accord and satisfaction; for it is said, peradventure, parcel of the sum before the day it fell due would be more beneficial to him than the whole at the day, and the value of the satisfaction is not material. *Pinnell's Case*, 5 Co. 117." Here there were four notes given up upon payment of the 60 per cent. as one entire satisfaction. Three of them were not due, one having more than two years to run. The payment was at a different time, and before the debt was due. This was a sufficient consideration to support an "accord and satisfaction at law." The defendant, having interposed the plea of accord and satisfaction, and having offered evidence tending to support the plea, was entitled to have had that defense presented to the jury by an instruction embodying a hypothetical statement of the facts upon which it was founded, and in no event was it proper for the court to have excluded from the consideration of the jury the theory of his defense, or to have ignored it in the instructions granted. *Eureka Fertilizer Company v. Baltimore Copper*, 78 Md. 188, 27 Atl. 1035; *Corbett v. Wolford*, 84 Md. 426, 35 Atl. 1088.

At the conclusion of the testimony the plaintiff offered one prayer, and the defendant submitted five. The record states that the court rejected all the prayers, but it was agreed at the argument that this was a mistake in so far as the defendant's fifth prayer is concerned, which was in fact granted. That prayer merely told the jury that there was no evidence that the receipt offered in evidence was obtained by fraud, and no exception was taken to it by the plaintiff. The court, in lieu of the rejected prayers, granted two instructions of its own. To the instructions granted by the court, and to the rejecting of his prayers the defendant except-

ed. The third prayer of the defendant was intended to present the facts which he had offered in support of the plea of accord and satisfaction, and, except in one respect, is free from objection. It failed to submit to the jury the fact that the sum of \$455 was the amount appearing to the credit of the plaintiff upon the books of the Wheeler & Wilson Company. Instead of requiring them to find that, it merely required them to find that the plaintiff was satisfied that \$455 was the amount appearing upon those books to his credit. For this error, which may be readily corrected at the retrial of the case, the prayer was properly rejected. We find no error in the rejection of the first, second, and fourth prayers of the defendant. The first and second ignored the theory of the plaintiff's case and the testimony offered by him in its support, and the fourth asserted that the defendant's right to a verdict would be defeated if they found the plaintiff gave the receipt offered in evidence, and that the same was given without fraud practiced upon the defendant, and that he gave it after full opportunity to examine the books, etc., of the defendant. If the plaintiff's evidence as to the terms of the settlement be true, he would have been entitled to recover, notwithstanding the facts stated in this prayer. The two instructions granted by the court were fatally defective, because they each entirely ignored the evidence offered by the defendant in support of his plea of accord and satisfaction, which evidence, if believed by the jury, was sufficient, under the authorities cited, to have barred the plaintiff's recovery in this action.

For error committed in these instructions, the judgment must be reversed.

Judgment reversed, and new trial awarded, with costs to the appellant.

(105 Md. 570)

DIAMOND STATE TELEPHONE CO. v. BLAKE.

(Court of Appeals of Maryland. April 24, 1907.)

1. REMOVAL OF CAUSES—DIVERSE CITIZENSHIP—CORPORATIONS.

Where a plaintiff and one of the defendants were citizens of Maryland, the other defendant could not have the cause removed to the United States court on the ground of diverse citizenship, though it was a foreign corporation.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Removal of Causes, § 90.]

2. PARTIES—DEFENDANTS—PERSONS WHO MAY BE JOINED—ACTIONS FOR TORT.

In an action for personal injuries against two defendants, plaintiff must allege and prove a joint participation by both to recover a joint judgment, and the court is not authorized to grant a severance of parties defendant, where both are alleged to be liable for the injuries complained of.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Parties, § 85.]

3. VENUE—CHANGE OF VENUE—RIGHT OF CO-DEFENDANTS.

Where two defendants are alleged to be liable for plaintiff's injuries, and are sued

jointly, the case cannot be removed to some other court of the state on application of one of the defendants, when opposed by the other.

4. JURY—JURY LIST—PROCUREMENT AND SELECTION OF NAMES—STATUTORY PROVISIONS.

Code, art. 51, § 13, provides that in civil cases the lists of jurors furnished the parties contain 20 names, and that the parties may each strike out 4 names from the lists, and the remaining 12 shall constitute the jury. *Held* that, where there are two defendants, they are not each entitled to strike four names from the list.

5. REMOVAL OF CAUSES—TIME OF APPLICATION.

Where an action was brought against two defendants jointly for personal injuries, and at the close of plaintiff's evidence a verdict was directed for one of them, and the other renewed its motion made at the beginning of the trial to have the case removed to the United States courts, but did not file a new application in writing and bond, nor was a non pros entered by plaintiff as to the other defendant, the application was too late.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Removal of Causes, § 136.]

6. SAME.

Where two defendants were sued jointly, and at the close of plaintiff's evidence a verdict was directed for one of them, a renewal of a motion made by the other to remove the case to some other court was made too late, though no verdict had been entered for the other defendant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Removal of Causes, § 136.]

7. JUDGMENT — VERDICT — AMENDMENT BY COURT.

In an action against two defendants jointly, where, at the close of plaintiff's evidence, the court instructed the jury to return a verdict for one of the defendants, and the other defendant renewed its motion to remove the case on the ground that it was then the only defendant, and it was clear that the jury so understood, it was not error for the court to amend the judgment entered on the verdict by inserting after the words "Judgment nisi on the verdict for plaintiff for \$—," the words "as against one defendant and for the other for costs."

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, § 615.]

Appeal from Circuit Court, Kent County; Austin L. Crothers and Wm. H. Adkins, Judges.

Action by David Blake against the Diamond State Telephone Company and another. From a judgment for plaintiff against defendant telephone company, the telephone company appeals. Affirmed.

Argued before BRISCOE, BOYD, BURKE, SCHMUCKER, and ROGERS, JJ.

Hope H. Barroll and James P. Gorter, for appellant. William W. Beck, for appellee.

BOYD, J. The appellee sued the Diamond State Telephone Company and the Chestertown Electric Light & Power Company of Kent County for damages alleged to have been sustained by him by reason of coming in contact with a wire heavily charged with electricity, which caused great injury to him. It is alleged that the defendants negligently permitted a loose wire of the telephone company to come in contact with one of the feed wires of the light and power

company on High street, in Chestertown, and to remain in a condition dangerous to the lives of those lawfully using the highways of that town. The telephone company is a corporation incorporated under the laws of Delaware, the light and power company is a domestic corporation, and the plaintiff is a citizen of Maryland. There are eight bills of exception in the record, and, although the seventh and eighth are principally relied on, as the others were not formally abandoned, we will consider them in the order in which the exceptions were taken.

1. The telephone company made an application for the removal of the cause to the Circuit Court of the United States for the District of Maryland. The light and power company objected to the removal, and the court refused the application, to which action the first exception was taken. As the plaintiff and one of the defendants were citizens of Maryland (a corporation being treated as a citizen of the state by which it is incorporated, under the acts of Congress), the other defendant could not have the cause removed to the United States court on the ground of diverse citizenship, although it was a foreign corporation. As none are suggested in the record, it is unnecessary to refer to exceptions to the general rule, which is settled beyond controversy. *Alabama, etc., R. R. Co. v. Thompson*, 200 U. S. 206, 26 Sup. Ct. 161, 50 L. Ed. 441; *O. N. O. & Tex. Pac. R. R. Co. v. Bohon*, 200 U. S. 221, 26 Sup. Ct. 166, 50 L. Ed. 448. See, also, 18 Ency. Pl. & Pr. 193, etc., where many cases are cited.

2. The two defendants then made a motion for severance, which was overruled, and to that action of the court the second exception was taken. No authority has been, or so far as we are aware can be, cited to sustain that motion. The plaintiff, in an action *ex delicto*, may, at his election, sue one, or any, or all, of several joint tort-feasors. When the plaintiff has elected to sue all, or more than one, of those who are alleged to be responsible for the injuries complained of, he must under our practice allege and prove a joint participation by all the defendants, in order to entitle him to recover a joint judgment against all (1 *Poe*, Pl. & Prac. § 527), and the court is not required or authorized to grant a severance in a case such as this, where both defendants are alleged to be liable for the injuries complained of.

3. The telephone company then filed a suggestion for removal to some other court of the state. The light and power company objected, and the court refused to order a removal. It has been so recently decided by this court that a cause cannot be removed to another court on application of one of the defendants, when the removal is opposed by a codefendant, that it is only necessary to refer to that case to sustain the action of the court. See *Balto. County v. United Railways Co.*, 99 Md. 82, 57 Atl. 875.

4. The telephone company then moved for

leave for each defendant to strike four names from "the panel of jurors furnished," and it excepted to the action of the court in overruling that motion. As the lists furnished, under section 13 of article 51 of the Code, only contain twenty names, "and the said parties or their counsel may each strike out four persons from the said lists and the remaining twelve persons shall thereupon be immediately impanelled and sworn as the petit jury in such cause," it is manifest that the statute only contemplated that each side should strike out four names. If there were five plaintiffs and defendants, all of the names could be struck from the lists, according to the appellant's contention, and in this case it would have reduced the number to less than twelve. There can be no doubt about the meaning of the statute; but in *Hamlin v. State*, 87 Md. 333, 10 Atl. 214, 301, the question was expressly decided in a criminal case, which, by section 17 of article 51, was governed by the rules applicable to the selection of jurors in civil cases.

5. The trial of the case was then proceeded with, and, at the conclusion of the plaintiff's testimony, the light and power company offered a prayer that there had been no evidence offered legally sufficient to show that the injury complained of was caused by the negligence of that company, and the verdict of the jury must be for it. That prayer was granted, and the telephone company "thereupon renewed its motion" to remove the case to the United States court, which was overruled, and the fifth exception taken. Without regard to such questions as whether it was necessary to file a new application in writing and bond, which does not appear to have been done, or what would have been the effect if the plaintiff had then entered a non pros. as to the light and power company, the application as the record stood was too late. *Whitcomb v. Smittson*, 175 U. S. 635, 20 Sup. Ct. 248, 44 L. Ed. 303; *Adams Express Company v. Trego*, 35 Md. 47. The position of the appellant with reference to this exception was not consistent with that taken by its seventh and eighth, which will be referred to later; but, if the verdict had been entered for the light and power company at the conclusion of the plaintiff's testimony, in accordance with the prayer granted, it would nevertheless have been too late to remove the case.

6. The telephone company then renewed its application to remove the cause to some other state, and, the court having refused to do so, it reserved its sixth exception. It has been the settled law of this state since the case of *Price v. State*, 8 Gill, 295, that a case cannot be removed after the trial has begun, which, with reference to a removal, is when the panel of 12 is completed by being duly sworn. That case has been approved in *DeFord v. State*, Use of Keyser, 30 Md. 179; *Sittig v. Birkestack*, 38 Md. 158; *Cooke v. Cooke*, 41 Md. 362; *McMillan v. State*, 68

Md. 307, 12 Atl. 8. In neither of those cases was the question raised whether such application could be filed after the party who prevented the removal on the first application is relieved from liability by an instruction of the court, but the reasoning of the case of *Whitcomb v. Smittson* is applicable. If the light and power company had been duly discharged by a verdict in its favor, we do not think the court would have been justified in then removing the case to some other court. It would delay the decision of cases, and oftentimes work great injustice, to permit a removal at such time. If it is required to be done at the end of the plaintiff's testimony, upon the granting of a prayer such as that in the record, it would be equally obligatory at the end of the defendant's testimony, if such a prayer was then granted in favor of the defendant who originally objected to the removal. Such practice could not have been contemplated by the framers of our Constitution. So, regardless of the effect of there being no verdict of record in favor of the light and power company, we are of the opinion that the application for removal could not properly have been granted when it was renewed.

7. This brings us to the consideration of the exceptions which the appellant relied on at the oral argument. They are the seventh and eighth, which can be considered together. The jury returned a verdict at the conclusion of the case "for the plaintiff for the sum of \$1,950." The appellant filed a motion in arrest of judgment, which the court overruled, "having first directed the correction of the form of the verdict as set out in the eighth bill of exceptions." In that bill there is an order of the court addressed to the clerk, as follows: "You are hereby directed to amend the docket entries in the above-entitled cause, by inserting after the words, 'Judgment nisi on verdict for plaintiff for \$1,950, Oct. 25, 1906,' the words, 'as against the defendant the Diamond State Telephone Company, and judgment for the defendant the Chestertown Electric Light & Power Company, for costs.'" The docket entries show that was filed October 30, 1906, and the court thereupon entered judgment for the light and power company, and an absolute judgment against the telephone company upon the verdict for \$1,950. To that action the eighth exception was taken.

It is said, in 22 Ency. of Pl. & Pr. 962, that: "The power of a court to amend the verdict of a jury existed at common law; the general rule being that the trial court might amend a verdict so as to make it conform to the intent of the jury and effectuate its real meaning, wherever this could be ascertained. This is still not only the power but the duty of the court." Many cases are cited in the notes to sustain that statement. In *Browne v. Browne*, 22 Md. 103, our predecessors quoted from Lord Mansfield in *Hawks v. Crofton*, 2 Burrows, 699, that,

"where the intention of the jury is manifest and beyond doubt, the court will set right matters of form," and from Justice Dennison in the same case, citing Hobart, 54, that, "though the verdict may not conclude formally or punctually to the words of the issue, yet, if the point in issue can be concluded out of the finding, the court shall work the verdict into form and make it serve." It is undoubtedly the duty of a court to sustain a verdict, when that can be done from its language and from the record. While this court has been cautious in allowing amendments to verdicts, after they are recorded, it has not hesitated to do so when there was no reasonable doubt about the intention of the jury. In *Browne v. Browne*, supra, five issues, sent from the orphans' court, were submitted to the jury, which found a verdict "for the defendants," instead of a verdict on each issue, as they should have done; but our predecessors held it sufficient. In *Gaither v. Wilmer*, 71 Md. 361, 18 Atl. 590, 5 L. R. A. 753, 17 Am. St. Rep. 542, so much relied on by the appellant, the verdict was simply "for the plaintiff," without fixing any amount. The lower court amended the verdict by inserting an amount after the verdict had been recorded, and several days after the jury had separated. This court held that the motion in arrest of judgment should have been sustained; but the amendment allowed in that case by the lower court was altogether different from that in this, and upon wholly different grounds. The two counsel for the plaintiff filed an affidavit that during the trial the calculation of the amount claimed by the plaintiff was made, and submitted to one of the counsel for the defendant, that there was written on a blackboard in sight of the jury the sum of \$5,378.72, which was the amount of the verdict, and that the counsel for the defendant admitted that, if the jury found for the plaintiff, the amount so written was the proper sum for which to find a verdict. The defendant's counsel denied such admission, and objected to the reception of the affidavit; but the lower court accepted it, and so amended the verdict. This court held that such affidavits were not sufficient to justify the amendment, and it then considered the contention that the amount had been agreed upon, and said: "But we find no such admission made by the pleadings, either directly or inferentially. On the contrary, the pleas of non assumpsit and set-off put in issue the amount of recovery, as well as the right of the plaintiff to recover at all; and it was the province and duty of the jury to find this amount by their verdict. Nor is it pretended that any written agreement on this subject was ever made between counsel. If such written agreement had been made, filed, and entered upon the docket, the case would have presented a different aspect." The opinion, therefore, strongly implied that if there had been an

admission of the amount to be recovered in the pleadings, or a written agreement had been filed and entered upon the docket, the amendment of the verdict would have been justified, and we can see no possible reason why that would not have been so.

The cases of *Ford v. State*, 12 Md. 514, and *Williams v. State*, 60 Md. 402, also relied on by the appellant, do not reflect upon the question before us. They held that a verdict of "guilty" on an indictment for murder was not sufficient, but it was because our statute requires the jury to "ascertain in their verdict whether it be murder in the first or second degree." Inasmuch as either of those verdicts may be rendered under our practice, on an indictment for murder, and the one is punishable by death, and the other by imprisonment in the penitentiary, of course the jury must determine the degree, and no uncertainty about their verdict can or ought to be allowed. In 22 Ency. of Pl. & Pr. 959, it is said: "Where, in an action against several defendants, the jury finds against one or more, but is silent as to the others, the verdict will be construed as a finding in favor of the defendants ignored." We have no direct decision in this state on that question; but in *Hechter v. State*, 94 Md. 429, 50 Atl. 1041, 56 L. R. A. 457, we held that a verdict of guilty on the first and second counts of an indictment, which charged the traverser with receiving stolen goods, knowing them to have been stolen, but which was silent as to the third and fourth counts, which charged him with being accessory before the fact to the larceny, was equivalent to a verdict of not guilty on the third and fourth counts. We distinctly overruled *State v. Sutton*, 4 Gill, 494, where Judge Spence said: "The law seems to be well settled upon authority that if the jury find but a part of the matters put in issue, and say nothing as to the rest, it is ill."

In this case the prayer instructing the jury that their verdict must be for the light and power company was filed and noted upon the docket entries as granted, and the appellant "thereupon" renewed its motion to remove the case to the United States court, and, that being overruled, renewed its motion to remove the case to another county for trial. The docket entries show: "Plaintiff's first, second, and third prayers granted. Defendant's first and second prayers granted. Oct. 25, 1906." The prayers themselves are not in the record, but the singular "defendant's" is used. The use of the singular, instead of the plural, is, of course, not conclusive, and is oftentimes of but little importance; but it is one of several docket entries which tend to show that it was understood that the light and power company was out of the case, after its prayer was granted. Indeed, the entries are remarkably accurate in their use of the singular and plural, and when both companies were referred to the plural "defendants" was used, and when only one the sin-

gular "defendant" or the possessive "defendant's" was used. Although the record does not disclose the fact, the case was doubtless argued, and as the two companies had separate counsel, if the attorney for the light and power company had taken any part in the trial after its prayer was granted, it would doubtless have been so stated in the bills of exception. Separate pleas were filed by the two companies, signed by different attorneys. The light and power company objected to the removal to the United States court, then to the removal to a state court, and offered the prayer at the conclusion of the plaintiff's testimony which applied alone to it. After its prayer was granted, and the applications for removal were renewed, that company is not shown by the record to have further objected, as it had done before the prayer was granted, or to have taken any part in the case. It is difficult to conceive how the jury could have been mistaken, under these circumstances, as to whether both or only one of the companies were still before them. It would be a reflection upon their intelligence to assume that it was possible for 12 men to then have any doubt as to who were regarded as the parties to the suit, after they had thus been instructed that their verdict must be for the light and power company, had heard the motions made by the appellant, which were renewed on the ground that the light and power company was no longer a party, and had observed what must have taken place in their presence. The proper practice, undoubtedly, was to have taken the verdict when the prayer was granted, but it was overlooked. As it did not occur to the court or to the counsel, it can scarcely be contended that the jury knew or supposed it was necessary to be done, in order to take the light and power company out of the case.

The jury could not have rendered a verdict against the light and power company, after the prayer was granted, without violating their duty and acting in contempt of the court. Nor can we assume that they might have rendered a larger verdict, if they supposed both companies were defendants, than they would have done if they had known that the appellant was the only defendant. As we have seen above, the verdict against the two companies could only have been rendered upon proof of a joint participation by both, although the tort participated in by the two is looked upon as the separate and individual act of each. It was therefore the duty of the jury to allow the plaintiff such damages as was shown he was entitled to—no more and no less—whether against the appellant or both companies. If, by any possibility, the jury could have supposed the light and power company was still a defendant, it would seem that the telephone company would have profited thereby, rather than have been injured, because the jury would have been confined to damages caused by the joint participation of the two.

In the absence of something in the record to the contrary, we must assume this case was conducted in accordance with the practice of our courts. When an attorney representing one of the defendants has obtained an instruction from the court that his client is not responsible for the wrong complained of, it may be assumed that he no longer made any contention before the jury for that client—indeed, the court would not permit its time to be wasted in that way. There would be no evidence offered, no prayers offered, and no argument made for a defendant who had been thus declared not liable, and it is impossible to believe that any 12 men selected to serve as jurors would be so ignorant as not to understand that they were no longer called upon to pass upon the liability of such a defendant. We can see no reason why the court could not make the corrections which were made in this case. It might do the light and power company great injustice to have the judgment arrested, which would result in a new trial, and there is nothing to show that any injustice can be done the telephone company by refusing the motion in arrest. The plaintiff is not asking for a new trial, and the result of our conclusion is that a verdict is made to stand against a defendant that by every presumption of law, and from such evidence as we have before us, was the one, and only one, intended to be held liable by the jury, and the other defendant, which was clearly intended and entitled to be relieved after the instruction was given, is discharged from all responsibility, while the plaintiff's verdict is not disturbed. The order of the court was in the nature of a *nunc pro tunc* order, although not strictly so, and being satisfied, as we are, that it was not possible for any intelligent jury to be mistaken as to the parties it then had before it, and hence there can be no uncertainty as to the intention of the jury in rendering the verdict, the case presented to us is practically such a one as if the jury had said "verdict for the plaintiff for the sum of \$1,950, against the Diamond State Telephone Company," and had said nothing about the light and power company. In such a case there is ample authority for construing the verdict as a finding in favor of the latter company, and there is no decision in this state which in any wise prohibits such construction; but, if there was any doubt about it, in ordinary cases there can be none when the court had instructed the jury to so find, and a formal verdict was simply overlooked.

Judgment affirmed; the appellant to pay the costs.

(105 Md. 650)

WATSON v. STATE.

(Court of Appeals of Maryland. April 24, 1907.)

1. PHYSICIANS AND SURGEONS—PRACTICING WITHOUT LICENSE—INDICTMENT.

Where a law prescribing a penalty for practicing medicine without being registered con-

tained in a separate section a requirement that notices of the provisions of the law should be sent to physicians practicing without being registered, it was not necessary to state, in an indictment for a violation of the law, that the notice provided for had been sent to the accused.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Physicians and Surgeons, § 9.]

2. CONSTITUTIONAL LAW—EQUAL PROTECTION OF LAWS—REGULATING PRACTICE OF MEDICINE—REGISTRATION.

Code 1904, art. 43, § 88, providing for the registering of physicians, and exempting from its provisions those who were practicing in the state prior to January, 1898, and were still in practice and could prove by affidavit that they had treated at least 12 persons within a year, does not violate Const. U. S. Amend. 14, guaranteeing equal protection of the laws, as an unreasonable and arbitrary discrimination or classification.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Constitutional Law, § 688.]

3. PHYSICIANS AND SURGEONS—REGULATION—CLASSIFICATION—REASONABLENESS.

Code 1904, art. 43, § 101, provides that nothing contained in the subtitle pertaining to practitioners of medicine shall be construed to apply to those rendering gratuitous services, or to resident or assistant resident physicians or students at hospitals in the discharge of their hospital or dispensary duties, or in the office of physicians, or to physicians or surgeons from another state or territory when in actual consultation with a legal practitioner in this state, or to commissioned surgeons of the United States army or navy, or Marine Hospital service, or to chiropodists, midwives, masseurs, or other manual manipulators, who use no other means, or to physicians or surgeons residing on the borders of a neighboring state and duly authorized to practice under its laws, and whose practice extends into the limits of the state, but not so as to permit them to maintain an office in this state. *Held*, that the classification is just and reasonable, and falls within the discretion of the Legislature in making regulations to promote the public health and safety.

4. CRIMINAL LAW—FORMER JEOPARDY—ACQUITTAL—SUFFICIENCY OF PLEA.

In a prosecution for practicing medicine without being legally registered, a plea of former acquittal, alleging that the accused was acquitted at a former trial on a count of an indictment charging the offense in the exact language of the count in the present indictment upon which he was convicted, except that the date of the offense was charged to be October 1, 1905, instead of November 6, 1906, as in the present case, and alleging that he was the defendant in the former suit, but which does not allege that the former verdict found that he was duly registered, nor that the act by which the offense charged in the former indictment was committed was identical with the act now charged, is bad upon demurrer, since it did not show an identity of both the crime and the act by which the crime was committed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 688-671.]

5. SAME—DETERMINATION OF SUFFICIENCY—QUESTION OF LAW.

Where a plea of former acquittal is on its face bad in law, it may be decided by the court without reference to the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 679, 1710.]

Appeal from Circuit Court, Allegany County.

John A. Watson was convicted of practicing medicine and surgery without being registered

as a practitioner of medicine, and appeals. Affirmed.

Argued before BRISCOE, BOYD, PEARCE, SCHMUCKER, BURKE, and ROGERS, JJ.

Ferdinand Williams and Charles G. Watson, for appellant. Attorney General Bryan, for the State.

PEARCE, J. The appellant was indicted in the circuit court for Allegany county under section 99 of article 43 of the Code of 1904 for practicing medicine and surgery in this state without being registered as a practitioner of medicine, as required by sections 83 and 89 of that article. There are three counts in the indictment. The first count charges that the defendant, on November 6, 1906, "unlawfully practiced medicine and surgery in Allegany county, without being then and there duly registered as a physician or surgeon in the registry of physicians and surgeons." The second count charges the commission of the offense on November 6, 1906, "by then and there administering medical treatment to a person whose name is to the jurors unknown, without being then and there registered as a physician." The third count charges the commission of the offense on November 6, 1906, "by then and there administering medical treatment to one Michael McDonald, without being then and there registered as a physician." The defendant demurred to the indictment, and the demurrer was overruled.

It was contended that the indictment was insufficient for the following reason: Section 80 of article 43 provides that the board of medical examiners at its meeting on June 1st in each year shall appoint a secretary treasurer, whose duty it shall be within 60 days thereafter, upon receiving from the clerk of the circuit court of Baltimore city and the clerk of the circuit court for each county in the state a list of all who have been legally registered in such court, to send to all physicians then practicing in the state without having been legally registered a printed notice of the provisions of that article relating to the duty of the police commissioners in Baltimore city and the sheriffs of the several counties, which requires them to see that all practicing physicians in the state shall be legally registered, and to report to the state's attorney of the city or county all cases of violation of that subtitle of article 43. The appellant's contention is that, to make this indictment good under this law, it should state that this notice had been sent to the accused. If this requirement as to the sending of notice were incorporated in the clause which enacts the offense, this might be a matter for consideration; but no offense is created by section 80. It is only by section 99 that practicing medicine or surgery without being registered is made a misdemeanor and punishable as such. Even if this requirement could be treated as an exception is treated it would not be necessary to aver the sending of

the notice, because it is not so incorporated in the enacting clause of the statute that the one cannot be read without the other, and it is only in such cases that the indictment must negative an exception. *Stearns v. State*, 81 Md. 344, 32 Atl. 282; *Kiefer v. State*, 87 Md. 568, 40 Atl. 377; *State v. Knowles*, 90 Md. 658, 45 Atl. 877, 49 L. R. A. 695. Where the exception is contained in a subsequent or separate clause or section, it is matter of defense to be pleaded by the accused. And, even if pleaded in this case, it could not avail, because it is clear from all the provisions of article 43 that the receipt of such notice is not necessary to constitute the offense of practicing medicine without being registered. The offense is created solely by section 99 in broad and general language, without exception, qualification, or condition of any sort.

It was also contended that the provisions of section 83 of article 43 are unconstitutional, in that they make an unreasonable and arbitrary class distinction or discrimination. That section requires that "all persons (except physicians who were practicing medicine in this state prior to the 1st day of January, 1898, who are now practicing medicine or surgery, and can prove by affidavit that within one year of said date said physician had treated in his professional capacity, at least twelve persons) who shall commence the practice of medicine or surgery in any of their branches after the 11th day of April, 1902, shall make a written application for license to the president of either board of medical examiners which said applicant may elect, accompanied by satisfactory proof that the applicant is more than 21 years of age, is of good moral character, has obtained a competent common school education, and has either received a diploma conferring the degree of doctor of medicine from some legally incorporated medical college in the United States, or a diploma, or license, conferring the full right to practice all the branches of medicine and surgery in some foreign country; said diploma, if from a college in the United States, must have been conferred by a legally incorporated college requiring a four years standard of education as defined by the American Medical College Association, or the Intercollegiate Committee of the American Institute of Homeopathy respectively." That section of the Code was section 43, c. 612, p. 886, Laws of 1902, which chapter repealed and re-enacted, with amendments, certain sections of article 43 of the Code, including section 43 as enacted by chapter 296, p. 414, Laws of 1892, which latter act in turn repealed and re-enacted, with amendments, almost all the sections of article 43 of the Code of 1888, including section 43, under the subtitle "Practitioners of Medicine," as enacted by chapter 429, p. 697, Laws of 1888, codified in the Code of 1888. Under the act of 1888, physicians who had been continuously practicing medicine within this state for 10 years previous to the passage of that act were not re-

quired to obtain a certificate of qualification from the state board of health, as all other practitioners of medicine were thereby required to do. The act of 1892, as was observed in *Manger v. Board of Examiners*, 90 Md. 667, 45 Atl. 891, swept away the whole scheme devised by the act of 1888, and was specifically made applicable to persons not then practicing medicine, but who should thereafter begin to practice. Under that act, and down to the passage of the act of 1902, all persons practicing medicine and surgery at the date of the passage of the act of 1892 were free to continue to practice without license or other evidence of qualification. Here was a discrimination both broad and emphatic, the evident design of which was to afford protection to the public, without interference with established and recognized practitioners. It may be reasonably inferred that, after 10 years' experience under that act, the Legislature deemed that system too liberal, since the act of 1902, as incorporated in the Code of 1904, provides that "all persons now practicing medicine and surgery, or who shall hereafter begin to practice medicine or surgery in any of their departments, except dentistry, in the state of Maryland, shall possess the qualifications required by this subtitle."

We have already transcribed herein the provision of section 83, under which physicians who were practicing in this state prior to January 1, 1898, and who were practicing at the passage of that act, and could prove by affidavit that within one year from that date that they had treated in a professional capacity at least 12 persons, should be exempt from the requirement to obtain a license; and it is this exemption which is assailed as an unreasonable and arbitrary discrimination or classification forbidden by the fourteenth amendment to the Constitution of the United States. In *State v. Broadbelt*, 89 Md. 579, 43 Atl. 773, 45 L. R. A. 433, 73 Am. St. Rep. 201, this court said, quoting Judge Cooley: "The guaranty of equal protection is not to be understood, however, as requiring that every person in the land shall possess the same rights and privileges as every other person. The amendment contemplates classes of persons, and the protection given by the law is to be deemed equal, if all persons in the same class are treated alike under like circumstances and conditions, both as to privileges conferred and liabilities imposed. The classification must be based on reasonable grounds. It cannot be a mere arbitrary selection." It must be conceded upon all the authorities, and it is conceded by the appellant, that if the classification is reasonable and bears any proper relation to the object sought to be accomplished, that object being in itself a lawful and proper purpose, it is not forbidden by the fourteenth amendment. It is conceded that the states may, in the exercise of the police powers, pass laws for the protection of the health and safety of the public, and this law was passed under that

power. Now the object sought to be accomplished by this law is to protect the public against incompetent and ignorant practitioners of medicine, while at the same time protecting actual practitioners of medicine against arbitrary and unreasonable exclusion from the practice of their profession. The law deals with that class of the people who have adopted and are engaged in the practice of the profession of medicine, and who are dependent upon it for the support of themselves and their families, and with that other and larger class to whom competent medical practitioners are essential for the preservation of their health. These two classes are recognized classes, and each is entitled to consideration in framing the law. In *Dent v. West Virginia*, 129 U. S. 121, 9 Sup. Ct. 233, 32 L. Ed. 623, the Supreme Court of the United States, speaking of the right of every citizen to follow any lawful business or profession he may choose, subject only to such lawful restrictions as may be imposed upon such right, said: "The interest, or, as it is sometimes termed, the estate, acquired in their vocations—that is, the right to continue their prosecution—is often of great value to the possessor, and cannot be arbitrarily taken from them, any more than their real and personal property can be thus taken." It was the recognition of this principle which led to the provision here assailed. Continuous acceptable practice in the community in which one lives is one of the legitimate tests or evidences of qualification—not of uniform qualification of the highest attainable standard, such as can only be ascertained by a thorough examination by competent examiners, but of such reasonable qualification as may justify the continuance, without examination, of practice approved by the limited community in which the practitioner had his field. Without such an exemption from the rigid examination which conforms to the high standard of the principal medical colleges of this day, many worthy men, established in character and reputation, might be prohibited from practice, and this would be especially true among the poorer classes of people, who cannot afford to employ physicians of the highest grade, but whose self-respect and independence will not permit them to seek the charity so generously bestowed upon the poor by the medical profession. In *Magoun v. Illinois Trust Co.*, 170 U. S. 294, 18 Sup. Ct. 598, 42 L. Ed. 1037, the Supreme Court, speaking of the fourteenth amendment, which prohibits the denial to any citizen of the equal protection of the laws said: "This rule prescribes no rigid equality, and permits to the wisdom and discretion of the Legislature a wide latitude, so far as the interference of this court is concerned. * * * Equality of operation does not mean indiscriminate operation on persons merely as such, but on persons according to their relations. * * * Hardships, impolicy, or injustice of state

laws is not necessarily an objection to their constitutional validity."

In *Dent v. West Virginia*, the law which was upheld exempted from examination and license all physicians who had practiced medicine in that state continuously for ten years. The period of practice required under section 83 of article 43 at the time of its passage was a little more than four years, and that law has now been in force five years. If it was within the discretion of the Legislature to fix a ten-year period, it was equally within their discretion to fix a four-year period, since the Supreme Court has said the Legislature has a wide latitude in dealing with such classifications. To justify the striking down of such a classification it must, as was said in *Luman v. Hitchens Bros. Co.*, 90 Md. 27, 44 Atl. 1054, 46 L. R. A. 393, be "obviously arbitrary," and must be shown "not to rest upon some difference which bears a reasonable and just relation to the act—the thing—in respect to which the classification is proposed." This has not been shown in the argument or in the brief of the appellant. On the contrary, re-examination of the authorities and a careful reading of the briefs convinces us that the law is not open to this objection. In *Scholle v. State*, 90 Md. 740, 46 Atl. 327, 50 L. R. A. 411, where the act of 1892 was drawn in question as it related to the right of practicing medicine in this state without registration, the court said: "Where there are differences as to conditions and situations, by which it becomes reasonable that greater precautions are required in some cases than in others, classes may be formed by which certificates can be granted to some without examination, and by which others may be exempted altogether from the burden of registration. These classes must be created upon considerations only that are promotive of the public interests, and, if they are so created, they do not constitute an unlawful discrimination, and do not impair the equal right which all can claim in the enforcement of the laws."

This law was attacked under the demurrer to the indictment upon the further ground that section 101 provides that nothing contained in said subtitle should be construed to apply to the following persons: (1) Those rendering gratuitous services; (2) resident or assistant resident physicians or students at hospitals in the discharge of their hospital or dispensary duties, or in the office of physicians; (3) physicians or surgeons from another state or territory, when in actual consultation with a legal practitioner in this state; (4) to commissioned surgeons of the United States army or navy, or Marine Hospital service; (5) to chiropodists; (6) to midwives; (7) to masseurs or other manual manipulators, who use no other means; (8) to physicians or surgeons residing on the borders of a neighboring state, and duly authorized to practice under its laws, and whose

practice extends into the limits of the state, but not so as to permit them to maintain an office in this state. The third and fourth of the above classes were considered in *Scholle v. State*, supra, and the classification was sustained as just and reasonable, upon grounds so obviously sound that we shall content ourselves with referring to them without repeating them. It was also held in that case that "persons temporarily practicing under the supervision of an actual medical preceptor," who were by the act of 1892 exempted from the provisions of that act, constituted a reasonable and proper class for such exemption. That class is the equivalent of those embraced in class 2 above, and described as students in the discharge of their duties in the office of physicians, which would confine them to the supervision of those physicians in whose offices they were. The reasonableness of the other exceptions made in section 101, when considered in the light of the reasons assigned in *Scholle v. State* for the judgment in that case, are so obvious that we shall not extend this opinion by considering them in detail. It should be sufficient to say that they all come, in our judgment, within the wisdom and discretion of the Legislature, which the Supreme Court has said, in *Magoun v. Illinois Trust Co.*, 170 U. S. 294, 18 Sup. Ct. 594, 42 L. Ed. 1037, has so "wide a latitude," and that this case falls within the language of the court in the recent case of *Dobbins v. Los Angeles*, 195 U. S. 235, 25 Sup. Ct. 18, 49 L. Ed. 169, in which it was said that "every intendment is to be made in favor of the lawfulness of the exercise of municipal power making regulations to promote the public health and safety, and that it is not the province of the courts, except in clear cases, to interfere with the exercise of the power reposed by law in municipal corporations for the protection of local rights and the health and welfare of the people of the community."

The demurrer to the indictment being overruled, the defendant filed two pleas of *autrefois acquit*. The first plea averred that the defendant was indicted at the January term, 1906, of the circuit court for Allegany county, for unlawfully practicing medicine in Allegany county without being registered as a physician, and then proceeded to set out the indictment in full, which contained three counts. The first count charged the offense in the exact language of the first count of the present indictment, except that the date of the offense was charged to be October 1, 1905, instead of November 6, 1906, as charged in this case. The second and third counts in the former indictment were in the exact language of the second and third counts of the present indictment, except that the second count charged the offense to have been committed on November 6, 1906, instead of October 1, 1905, and by administering medical treatment to one John P. Moody and to a person whose name was to the

jurors unknown; and the third count charged the offense to have been committed on November 6, 1906. Instead of October 1, 1905, and by administering medical treatment to one Marie Martin. The plea then averred "that he and the said John A. Watson, defendant in the above-recited indictment, are one and the same person, and the offense therein set out and that now charged are one and the same offense, and that at said trial the only question was whether the defendant could lawfully practice medicine in Allegany county without being registered as a physician and surgeon; that he pleaded not guilty to said indictment, and upon trial by a jury was found not guilty." The second plea was a repetition of the first, except the closing clauses, which are as follows: "That he and the said John A. Watson, defendant in the above-recited indictment, are one and the same person, and that the offense therein set out and that now charged are one and the same offense. Defendant says that at said trial it was proved without denial that he, the said defendant, practiced medicine in Allegany county at the time alleged in said indictment, and that at said trial the only question in issue was whether defendant was entitled and qualified (under article 43 of the Code, subtitle 'Practice of Medicine') to practice medicine in Allegany county; and that by the verdict and judgment in said case it was adjudged that the defendant was so entitled and qualified; and defendant says that the qualification to practice medicine in said county under said law, is now, and since said trial has been, identically the same as it was at the time of said indictment and trial and that at the time of the alleged unlawful acts set forth in said indictment." The state demurred to these pleas, and the demurrer was sustained. The defendant then pleaded not guilty, and a verdict or guilty was rendered on the first count, with which alone, therefore, we are now concerned.

If we were required to consider the second and third counts, it is clear that as to them both pleas would necessarily be held bad, provided the defendant was not in fact found by the verdict in the former case to have been duly registered on October 1, 1905, because in all such cases both the crime defined in the statute and the act by which the crime is committed must be identical (17 Amer. & Eng. Enc. of Law [2d Ed.] p. 597); or, as stated in *U. S. Raudenbush*, 8 Pet. (U. S.) 288, 8 L. Ed. 948, "the crime must be the same in law and in fact." If, therefore, the defendant has never been duly registered as a physician, an acquittal for practicing medicine on October 1, 1905, could not be a bar to a prosecution for practicing medicine on November 6, 1906, because the facts required to support the second indictment would not have been sufficient, nor even admissible, to procure a conviction under the first indictment. *People v. Gault*, 104 Mich. 575,

62 N. W. 724; *Freeman v. State*, 119 Ind. 501, 21 N. E. 1101; *Gormley v. State*, 37 Ohio St. 120. But if, in fact, the defendant was duly registered as a physician on October 1, 1905, or if it appears by the record set out in the pleas of former acquittal that the jury in that case did, by their verdict, find that he was so registered, then such acquittal would be a good plea in bar to any subsequent indictment, because, so long as the statute stands unrepealed, registration would entitle the defendant to practice medicine in Maryland. It becomes necessary, therefore, to examine these pleas carefully, and the effect of the demurrer thereto, in order to determine whether that issue was raised and determined in the former case, and what is admitted by the demurrer to these pleas. The defendant contends that the facts alleged in the pleas should have gone to the jury, and they should have found whether or not the offense was being again brought before a jury.

We think it is clear that the first plea was defective. The necessary averment to the personal identity is made, but the identity of offense is not sufficiently averred, because it does not appear therefrom that the act by which the offense charged in the former indictment was committed was identical with the act now charged, nor does it even attempt to aver that by the former verdict the defendant was found to have been duly registered as a practitioner of medicine. Conceding everything alleged in that plea, it does not appear either that the specific act charged in the former case was the same act here charged, nor does it appear that the former jury found the defendant to have been duly registered as a physician on October 1, 1905, which registration, so found, would be a protection so long as the law was unrepealed. Nor do we think the second plea can be held good. The averment that "it was proved without denial that he practiced medicine in Allegany county at the time alleged in the indictment" is not sufficient. It does not follow that the jury believed the proof. He may have been acquitted because the jury did not find that he practiced medicine at all, or, if he did, that he did not charge for his services, in either of which cases there could have been no conviction. Nor is the mere allegation of the pleader that by the verdict and judgment in the

former case it was adjudged that he was registered as a physician sufficient to sustain the plea, unless that averment is affirmatively supported by the record set out in the plea; and the demurrer must be taken as admitting only the averments of fact fairly deducible from the record relied on and set out in the plea, but cannot be taken as admitting the legal conclusion sought to be drawn from the record by the mere averment of the defendant in the plea. All that this record shows is that the defendant was acquitted of all the charges in the former indictment; but it is silent as to the particular fact or facts found which led to the acquittal. As was said by Judge Grason, in *Bell v. State*, 57 Md. 116: "An acquittal of a party does not ascertain any precise facts. It may have resulted from an insufficiency of evidence as to some particular fact, where several facts are necessary ingredients of the crime. 2 Cowen's Phil. Ev. 55, 56; *Roscoe's Cr. Ev.* 194." In *Hite v. State*, 9 Yerg. (Tenn.) 357, the court said: "The plea of *autrefois acquit* is of a mixed nature, and consists partly of matters of record and partly of matters of fact. The matter of record is the former indictment and acquittal. The matter of fact is the identity of person and offense. In all cases where the plea consists of matter of record and matter of fact, the issue made thereon is to the country; but this does not take from the court the right it possesses of determining exclusively what is of record and what is not." In that case, instead of demurring to the plea, the state filed a replication of *nul tiel record*, concluding with a verification, and the court, without intervention of a jury, decided the issue upon the replication against the prisoner, on the ground that the record, which was copied verbatim into the plea, did not support it. The court held that the better practice would have been, instead of replying *nul tiel record*, to have filed a plea of *autrefois acquit*, to which a demurrer could be filed. And in 9 Enc. Pl. & Pr. 640, it is said: "When the plea is on its face bad in law, it is demurrable, and may be decided by the court, without reference to the jury. There was no error in the ruling on these pleas, and the judgment must therefore be affirmed.

Judgment affirmed; appellant to pay the costs.

(74 N. H. 221)

CASSIDY v. RICHARDSON.

(Supreme Court of New Hampshire. Grafton.
April 2, 1907.)

1. PLEADING—DECLARATION—SUFFICIENCY.

A declaration, alleging that defendant leased to plaintiff certain premises for a boarding house, that during the term, and because of the willful and malicious conduct of defendant in entering the tenements of plaintiff, assaulting occupants thereof, making brutal assaults on plaintiff, and constantly trespassing willfully on plaintiff's premises, and because of the damages and dangers to plaintiff occasioned thereby, plaintiff abandoned the lease, and that, because of the conduct of defendant and abandonment of the lease, he suffered great damages in loss of trade and profits, etc., was demurrable; it being impossible to ascertain therefrom the nature of the action or the ground upon which it proceeded.

2. COVENANTS—BREACH—DECLARATION.

Where a lessee relies on a breach of a covenant in a lease, he must set out the covenant in his declaration, and allege its breach in accordance with legal requirements in such actions.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Covenants, § 191.]

Exceptions from Superior Court.

Action by Margaret E. Cassidy against Israel O. Richardson. Defendant's demurrer to declaration overruled, and defendant excepts. Exceptions sustained.

Action at law. The declaration is as follows: "In a plea of the case, for that the said defendant, on December 13, 1894, leased to the said plaintiff a part of the Northern Hotel, so called, situated on Main street, in said Littleton, as a boarding house; that in October or November, 1905, the said lease was continued for one year, supplemented by some minor agreements on the part of each (a copy of which lease the plaintiff does not have); that on June 15, 1906, because of the willful and malicious conduct of the said defendant, on divers times during said lease, in breaking and entering the tenements of the said plaintiff, assaulting and viciously treating occupants thereof, making slanderous and brutal assaults upon the said plaintiff, and constantly trespassing willfully upon the premises and rights of the said plaintiff, and because of the damages and dangers to the said plaintiff occasioned and threatened thereby, the said plaintiff was obliged to and did quit the said premises and abandoned the said lease; that because of the conduct on the part of the said defendant and the quitting of the premises and abandonment of the said lease by the said plaintiff, all as aforesaid, the said plaintiff suffered great damages, in loss of trade and profits from the boarding house business which she carried on in said hotel, and had during term of said leases, in loss of the summer trade in said business for the season of 1906, and the profits to accrue therefrom, and in loss of peace and comfort and health of mind and body." The defendant's demurrer was overruled by Chamberlin, J., at the Septem-

ber term, 1906, of the superior court, subject to exception.

Harry L. Heald, for plaintiff. Batchellor & Mitchell and Smith & Smith, for defendant.

BINGHAM, J. The demurrer should have been sustained. It is impossible to ascertain from the declaration the nature of the action or the ground upon which it proceeds. It is wholly a matter of conjecture as to what is relied upon as the ground of complaint. It may be that the action is for trespass to the person, or that it is for trespass to land with aggravated damages on account of the plaintiff's eviction and exclusion from the land by the defendant (*Shaw v. Hoffman*, 25 Mich. 162), or, as suggested in the plaintiff's brief, her action may be founded upon a covenant, express or implied, for the quiet enjoyment of certain leased premises, and the breach of the covenant by the defendant by reason of his entering upon and evicting her from the premises prior to the termination of the tenancy. If the last ground is the one relied upon, the plaintiff should have set out the covenant in her declaration and alleged its breach in accordance with the legal requirements in such actions. *Skally v. Shute*, 182 Mass. 367; *Brown v. Company*, 152 Mass. 463, 25 N. E. 966, 23 Am. St. Rep. 844; *Beebe v. Swartwout*, 3 Gilman (Ill.) 162, 179-181; *Keating v. Springer*, 146 Ill. 481, 84 N. E. 805, 22 L. R. A. 544, 37 Am. St. Rep. 175; *Sanderson v. Berwick-upon-Tweed*, 13 Q. B. Div. 547, 551; 1 Tay. L. & T. (9th Ed.) ¶ 308, 309, 309a; 2 Chit. Pl. (16th Am. Ed.) 200, 201; 5 Enc. Pl. & Pr. 362-373.

Exception sustained. All concurred.

(74 N. H. 212)

Ex parte MOEBUS.

(Supreme Court of New Hampshire. April 2,
1907.)

JUDGMENT—CONCLUSIVENESS—HABEAS CORPUS.

Where a petition for habeas corpus has been denied, the questions decided cannot be again litigated as a matter of right, in the absence of anything occurring since such decision affecting petitioner's legal status.

Habeas corpus by Henry E. Moebus. Petition denied.

For former report, see 73 N. H. 350, 62 Atl. 170.

The petition alleges substantially the same facts set forth in *Petition of Moebus*, 73 N. H. 350, 62 Atl. 170, and claims: (1) That "under the extradition laws of the states of New York and New Hampshire, I was entitled to a hearing before my committal to the state prison, no matter on what charge my extradition had been obtained, and no matter on what other ground or for what other reason the authorities of the state of New Hampshire purposed to hold me, and no matter whether or not I was the indi-

vidual named in the extradition papers"; (2) "that, having been extradited on the charge of breaking prison (Pub. St. 1901, c. 285, § 13), I was entitled to a hearing on that charge, and, no hearing having been had, I am entitled to be liberated, unless a hearing can now legally be had on that charge, when then all the questions of fact involved, including the question of identity, could be submitted to the decision of a jury"; and (3) that "I am not the man Mark Shinborn, who is alleged to have made his escape from the state prison in 1866, but I refuse now, as heretofore, to submit the question of identity to the decision of a judge, under any summary proceeding, on the ground that I was entitled to a trial by jury upon an indictment found by the grand jury on the specific charge of crime on which I was extradited from the state of New York." The warden of the state prison filed an answer, stating, in substance, that the petitioner is in fact one Mark Shinborn, who was convicted at the October term, 1865, of the Supreme Judicial Court for the county of Cheshire of the crime of breaking and entering and stealing, and was sentenced to confinement in the state prison for the term of 10 years; that on February 27, 1866, he was committed to the prison to perform the sentence; that on December 3, 1866, he escaped from the prison and fled from the state; that upon extradition proceedings he was brought from the state of New York, and on November 8, 1900, was re-committed to the prison to serve the unexpired term of his sentence, which has not yet expired; and that the warden holds the petitioner by virtue of the original process of commitment.

Henry E. Moebus, pro se. Edwin G. Eastman, Atty. Gen., for the State.

WALKER, J. In this proceeding the petitioner seeks to raise the question whether he was legally committed to prison after he was brought to this state upon extradition. The facts and allegations now before the court do not materially differ from those arising upon his former petition, reported in 73 N. H. 350, 62 Atl. 170, in which the court denied his application. It is not alleged that anything has occurred since that decision affecting his legal status, so that the question presented upon this petition, having been determined against him by the former judgment, cannot be again litigated as a matter of right. He declined then, as he does now, to litigate the question of his identity on a petition for habeas corpus, insisting that it is immaterial, if, as he claims, he was forcibly brought to this state and lodged in the state prison without a judicial hearing. It is apparent, however, that if he is Shinborn he is legally held in prison under the original sentence for breaking and entering, as is alleged in the answer, without regard to the regularity or legality of the extradition proceedings (Pet-

tibone v. Nichols, 203 U. S. 192, 27 Sup. Ct. 111), and it was expressly so decided in the former case. The question of his identity seems to be in fact the only material one. See *Ex parte Moebus* (C. C.) 148 Fed. 39. But "his refusal to litigate the question of his identity is an admission that he is Shinborn, and it follows that he is legally confined in the state prison, unless his term of imprisonment has expired." Petition of Moebus, 73 N. H. 350, 352, 62 Atl. 170. The petitioner is bound by that decision, which is followed and reaffirmed, with the suggestion that repeated applications for a writ of habeas corpus, introducing no new facts material to the issue, will ordinarily be summarily disposed of.

Petition denied. All concurred.

(102 Me. 293)

STATE v. BREWER.

(Supreme Judicial Court of Maine. Dec. 18, 1906.)

FISH—SHORT LOBSTERS—INDICTMENT—SUFFICIENCY.

In an indictment under Rev. St. c. 41, § 17, it was charged that the respondent, at the time and place named therein, "did have in her possession sixty-seven live lobsters and fifty-three cooked lobsters, each less than ten and one-half inches in length, then and there measured in manner as follows." Then followed the language of the statute as to the method by which the lobsters were measured. To this indictment the respondent filed a general demurrer.

Held, (1) that the indictment does not charge two offenses; (2) that, as the statute now reads, it is not necessary to allege that the lobsters were not liberated alive, and, if such lobsters were liberated alive, that fact may be shown in defense; (3) that it was not necessary to allege that the live lobsters were less than 10½ inches in length when caught, but that it was necessary to make this allegation with reference to the cooked lobsters; (4) that the indictment must be regarded as charging the defendant as having in her possession the 67 live lobsters only, and to that extent the indictment is good.

(Official.)

Exception from Supreme Judicial Court, Lincoln County.

Alwilda Brewer was indicted for violation of the short lobster statute. Demurrer to the indictment overruled, and she excepts. Exceptions overruled.

Indictment against the defendant for violation of the "short lobster statute." Rev. St. c. 41, § 17. The indictment, omitting formal parts, is as follows:

"The grand jurors for said state upon their oath present that Alwilda Brewer, of Boothbay Harbor, in the county of Lincoln, at Boothbay Harbor, in said county of Lincoln, on the thirty-first day of January, in the year of our Lord one thousand nine hundred and six, did have in her possession sixty-seven live lobsters and fifty-three cooked lobsters, each less than ten and one-half inches in length, then and there measured in manner as follows: By taking the length of the back

of each lobster, measured from the bone of the nose to the end of the bone of the middle flipper of the tail, said length being then and there taken in a gauge with a cleat upon each end of the same, measuring ten and one-half inches between said cleats, with the lobster laid and extended upon its back its natural length upon the gauge, without stretching or pulling, against the peace of the state and contrary to the form of the statute in such case made and provided."

Argued before WISWELL, C. J., and EMERY, WHITEHOUSE, SAVAGE, and PEABODY, JJ.

Weston M. Hilton, Co. Atty., for the State.
C. R. Tupper, for defendant.

WISWELL, C. J. In an indictment under Rev. St. c. 41, § 17, it was charged that the respondent, at the time and place named therein, "did have in her possession sixty-seven live lobsters and fifty-three cooked lobsters, each less than ten and one-half inches in length, then and there measured in manner as follows." Then followed the language of the statute as to the method by which the lobsters were measured.

The respondent filed a general demurrer to this indictment, which was overruled, and the case comes here upon exceptions thereto. It is argued that the indictment is bad in three respects: (1) Because of duplicity; two distinct offenses, it is claimed, being charged in one count of the indictment. (2) Because of the want of an allegation that the lobsters were not liberated alive at the risk and cost of the parties taking them. (3) Because it is not alleged that the lobsters were less than 10½ inches in length when caught.

We do not think that two offenses are charged in the same indictment. It is simply an allegation that the respondent had in her possession a certain number of short lobsters, a part of them alive and a part of them cooked. It is one offense only. Under this indictment, so far as this point is concerned, the respondent might be found guilty of illegally having in her possession any number of short lobsters less than the whole number alleged. *Thompson v. Smith*, 79 Me. 160, 8 Atl. 687. The indictment is not bad for duplicity.

Under chapter 275, p. 225, § 3, Pub. Laws 1885, in force when the indictment in *State v. Bennett*, 79 Me. 55, 7 Atl. 903, was drawn, the omission to allege that the lobsters were not liberated alive would have been fatal. It was so decided in that case, and affirmed in *State v. Dunning*, 83 Me. 178, 22 Atl. 109. The statute then was: "It is unlawful to catch * * * or possess for any purpose" between the dates named "any lobsters less than ten and one-half inches in length, alive or dead, * * * and any lobsters shorter than the prescribed length when caught shall be liberated alive at the risk and cost of the parties taking them, under a penalty of one

dollar for each lobster so caught * * * or in possession—not so liberated." In both of these cases it was decided that the statutory offense, and the penalty prescribed therefor was for not liberating such lobsters alive. But by chapter 284, p. 305, § 21, Pub. Laws 1901, the words at the end of the clause "not so liberated" were omitted. As the statute now reads the offense, and the penalty therefor, is, among other things, having in possession short lobsters for any purpose. The fact that such lobsters were liberated alive by the person having them in possession may be shown in defense, but it is not now necessary to allege in the indictment that they were not so liberated alive.

It was unnecessary to allege that the live lobsters mentioned in the indictment were less than 10½ inches in length when caught. But it was necessary to make this allegation with reference to the cooked lobsters. This was decided in *Thompson v. Smith*, 79 Me. 160, 8 Atl. 687, wherein the court, in construing the statute then in force, said: "It must mean this: That it is illegal for any person to have in his possession a live lobster less than nine inches long, or a dead lobster, no matter what the length which was less than nine inches long when alive; that is, when taken from the sea. No person can have a lobster in his possession which, when alive, was less than nine inches long. But if a person has in his possession a boiled lobster less than nine inches long, and the same lobster was nine inches long when alive, in such case no offense is committed by the possession." No change has been made which would affect the meaning of the statute, in this respect, since this construction by the court of a prior act in 1887. The result is that the indictment must be regarded as charging the respondent as having in her possession the 67 live lobsters only. To that extent the indictment is good. By stipulation made at the time the demurrer was filed the respondent has a right to plead over.

Exceptions overruled.

Indictment adjudged good.

(102 Me. 310)

STATE v. HERLIHY.

(Supreme Judicial Court of Maine. Dec. 18, 1906.)

1. CRIMINAL LAW—DEATH OF WITNESS—SECOND TRIAL—ADMISSION OF EVIDENCE.

At the trial of the respondent before the Ellsworth municipal court, upon the charge of keeping intoxicating liquors intended for unlawful sale, one J. M. McFarland testified as a witness called by the state. The respondent was found guilty in that court and sentenced, and the case was then brought to the Supreme Judicial Court for Hancock county upon the respondent's appeal. Prior to the trial in the appellate court, McFarland died. At that trial, the death of McFarland having been shown, the state offered to prove his testimony at the first trial of the case, before the municipal court, by the judge of that court who pre-

sided at the trial. This testimony was admitted subject to the respondent's exception.

The rule is so general as to have become practically universal that the testimony of a witness, since deceased, given at a trial in which he was cross-examined by the opposite party, or where there was an opportunity for cross-examination, is admissible in evidence at a subsequent trial of the same action or proceeding.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1231-1234.]

2. SAME.

The testimony of a deceased witness, on a former trial of the same action, may be given in evidence, if the substance of it can be proved, although the exact language cannot be. That it is sufficient to prove the substance of the testimony of a deceased witness, as held by the court of Maine, is now the almost universal doctrine.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1236-1246.]

3. SAME.

Held, that the testimony of the judge of the Ellsworth municipal court, who did not pretend to be able to recollect the precise words of the deceased witness, but who testified that he could give the substance of the whole of his testimony at the former trial of the case, that testimony having been given in the presence of the accused, where he had an opportunity to cross-examine the witness, was properly admitted in evidence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1236-1246.]

4. SAME—PLEA OF NOLU CONTENDERE.

At the trial in the appellate court the respondent took the stand and testified in his own behalf. Thereupon the state, for the purpose of affecting the credibility of the respondent as a witness, offered the records of this court, which, it was claimed, showed the respondent's conviction of criminal offenses upon two occasions. The record offered in each case contained a summary of the indictment against the respondent, certain statements as to the apprehension of the respondent, and a continuance of the case, and concluded as follows: "And now at this term, the respondent is set at the bar of the court and the reading of the indictment waived, and the respondent says that he is not willing to contend against the state. Whereupon, the court orders and sentences that the said Daniel H. Herlihy pay a fine of \$100 and no costs. Fine paid April 18, 1904." These records were admitted in evidence for the purpose stated, subject to the respondent's exceptions.

The plea of *nolo contendere* is an implied confession of the offense charged, and the judgment of conviction follows that plea as well as the plea of guilty. It is not necessary that the court should adjudge that the respondent was guilty, for that follows by necessary legal inference from the implied confession.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 635; vol. 15, Criminal Law, §§ 2493-2496.]

5. WITNESSES—IMPEACHMENT—EVIDENCE.

Held, that the records offered and admitted in the case at bar were admissible for the purpose of affecting the credibility of the respondent, who had become a witness in his own behalf.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, §§ 1126-1128.]

(Official).

Exceptions from Supreme Judicial Court, Hancock County.

Daniel H. Herlihy was convicted of a vio-

lation of the liquor law, and excepta. Exceptions overruled.

Search and seizure process on a complaint and warrant under Rev. St. c. 29, § 49, issued out of the Ellsworth municipal court. On this warrant search was made, and certain liquors were seized in a certain building at Bar Harbor, and the defendant was arrested and arraigned before the Ellsworth municipal court, where he was tried and found guilty and sentenced to pay a fine of \$100 and costs, and to be imprisoned 60 days. The defendant then appealed to the Supreme Judicial Court.

During the trial in the Ellsworth municipal court, one J. M. McFarland testified against the defendant in behalf of the state, but before the case came on for trial in the Supreme Judicial Court on the defendant's appeal, the witness McFarland had died, which fact was duly shown. Thereupon at the trial in the Supreme Judicial Court, the judge of the Ellsworth municipal court, before whom the case was first tried, was allowed to testify against the defendant's objection, for the purpose of proving the testimony of the deceased witness, McFarland, at the former trial. Also at the trial in the Supreme Judicial Court, the defendant took the stand and testified in his own behalf. After his testimony was in, the state, for the purpose of affecting the credibility of the defendant, and against the defendant's objection, was allowed to introduce certain records of the Supreme Judicial Court, which, it was claimed, showed the defendant's conviction of criminal offenses upon two occasions. These records show that the defendant had previously been indicted for being a common seller of intoxicating liquors, and also for keeping and maintaining a drinking house and tipping shop, and that upon his arraignment on these indictments he had plead "*nolo contendere*" in each case, and had been duly sentenced in each case.

To the aforesaid rulings admitting the testimony of the judge of the Ellsworth municipal court and the aforesaid records, the defendant took exceptions.

At the trial in the Supreme Judicial Court, the defendant was found guilty, and was sentenced to pay a fine of \$100 and costs, and to be imprisoned 60 days.

Argued before WISWELL, C. J., and EMERY, SAVAGE, POWERS, and SPEAR, JJ.

Charles H. Wood, Co. Atty., for the state.
E. S. Clark, for defendant.

WISWELL, C. J. This case comes to the law court upon two exceptions by the respondent.

1. At the trial of the respondent before the Ellsworth municipal court, upon the charge of keeping intoxicating liquors intended for unlawful sale, one J. M. McFarland testified as a witness called by the state. The respondent was found guilty in that

court and sentenced, and the case was then brought to the Supreme Judicial Court for Hancock county upon the respondent's appeal. Prior to the trial in the appellate court, McFarland died. At that trial, the death of McFarland having been shown, the state offered to prove his testimony at the first trial of the case before the municipal court, by the judge of that court who presided at the trial. This testimony was admitted subject to the respondent's exception.

The rule is so general as to have become practically universal that the testimony of a witness, since deceased, given at a trial in which he was cross-examined by the opposite party, or where there was an opportunity for cross-examination, is admissible in evidence at a subsequent trial of the same action or proceeding. This rule is supported by so many authorities throughout the country that it would be impracticable to make any attempt to enumerate them. They may be found in the notes in 11 A. & E. Encycl. of L. (2d Ed.) 523, 526, and in 12 Cyc. 544. It was early held to be the rule in Massachusetts in *Melvin v. Whiting*, 7 Pick. 79, and in *Commonwealth v. Richards*, 18 Pick. 434, 29 Am. Dec. 608. In this state the doctrine was first established in *Watson v. Proprietors of Lisbon Bridge*, 14 Me. 201, 31 Am. Dec. 49, wherein the court says: "We doubt not it was competent for the plaintiff to prove what a deceased witness had testified to at a former trial of this cause. It is liable to no legal objection, and is well sustained by authority and the practice of our courts." This case was followed by *Emery v. Fowler*, 39 Me. 326, 63 Am. Dec. 627, and *Lime Rock Bank v. Hewett*, 52 Me. 531.

It is true that in some jurisdictions it has been thought that the rule was not applicable in criminal trials because of the right of confrontation, so called, secured to respondents in most states by a constitutional provision similar to that contained in our Constitution, as follows: "In all criminal prosecutions the accused shall have a right * * * to be confronted by the witnesses against him." This whole subject, including the effect of such a constitutional provision, is very philosophically considered in *Wigmore on Evidence* (volume 2, § 1395 et seq.), wherein it is shown that the main and essential purpose of confrontation is to secure the opportunity of cross-examination; that although there is a secondary purpose, that of having a witness present before the tribunal which is engaged in the trial of the case, this is merely desirable, and, where it cannot be obtained, need not be required. In section 1396, it is said: "If there has been a cross-examination, there has been a confrontation. The satisfaction of the right of cross-examination disposes of any objection based on the so-called right of confrontation." In section 1398, after referring to a contrary decision in an early Virginia case, which served for awhile to keep a doubt alive, and of a few

cases in other jurisdictions in which the Virginia case was followed, it is said: "Apart from these rulings, it is well and properly settled that such evidence—assuming always that there has been a due cross-examination—is admissible for the state in a criminal prosecution, without infringing the Constitution." And see the cases therein cited. In the Massachusetts case above referred to of *Commonwealth v. Richards*, it was held that testimony of this character was admissible in a criminal trial against the accused.

But the principal contention of counsel for the respondent in regard to this exception is that, where it is sought to prove the testimony of a witness at a former trial since deceased, it must be proved by some witness who can remember not only the substance of the whole testimony, even to his precise words. In support of this contention he relies upon the case of *Commonwealth, supra*, where that doctrine was laid down, and upon certain other Massachusetts cases in which it was followed. This has never been the rule in this state. Upon the contrary, in *Emery v. Fowler, supra*, and in *Lime Rock Bank v. Hewett, supra*, the opposite doctrine was distinctly held. In the latter case, the court said: "The testimony of a deceased witness, on a former trial of the same action, may be given in evidence, if the substance of it can be proved, although the exact language of the witness cannot be."

The almost utter uselessness of a rule which permits the testimony of a deceased witness at a former trial to be given at a subsequent trial of the same cause, but which requires it to be repeated in the precise language of such witness, is so apparent that this qualification of the rule has never been generally adopted. That it is sufficient to prove the substance of the whole testimony of the deceased witness, as held by the Maine cases, is now the almost universal doctrine. See the cases cited in an extensive note to *Atchison, etc., R. R. Co. v. Osborn* (Kan.) in 91 Am. St. Rep. 189. See, also, 2 Greenl. on Evidence, § 169, cited and adopted in *Lime Rock Bank v. Hewett, supra*. The testimony of the judge of the Ellsworth municipal court, who did not pretend to be able to recollect the precise words of the deceased witness, but who testified that he could give the substance of the whole of his testimony at the former trial of the case, that testimony having been given in the presence of the accused, where he had an opportunity to cross-examine the witness, was properly admitted in evidence.

2. At the trial in the appellate court, the respondent took the stand and testified in his own behalf. Thereupon the state, for the purpose of affecting the credibility of the respondent as a witness, offered the records of this court, which, it was claimed, showed the respondent's conviction of criminal offenses upon two occasions. The record offered in each case contained a summary of the indictment against the respondent, certain state-

ments as to the apprehension of the respondent, and a continuance of the case, and concluded as follows: "And now at this term, the respondent is set at the bar of the court, and the reading of the indictment waived, and the respondent says that he is not willing to contend against the state. Whereupon, the court orders and sentences that the said Daniel H. Herlihy pay a fine of \$100 and no costs. Fine paid April 18, 1904." These records were admitted in evidence for the purpose stated, subject to the respondent's exceptions. The contention of counsel for the respondent is that the records do not show the conviction of the respondent, because there was no adjudication of guilt by the court, and because the plea was that of *nolo contendere*, rather than of guilty.

By Rev. St. c. 84, § 119: "No person is incompetent to testify in any court or legal proceeding, in consequence of having been convicted of an offense; but such conviction may be shown to affect his credibility." The question, then, is: What must the record contain in order to make it admissible for the purpose of proving the conviction of a witness and as affecting his credibility? This question has been recently settled in this state, with reference to the admissibility of the record of a conviction, for this precise purpose, in the case of *State v. Knowles*, 98 Me. 429, 57 Atl. 588, wherein it is said: "It matters not whether the guilt of the accused has been established by plea or by verdict of guilty. When no issue either of law or of fact remains to be determined, and there is nothing to be done except to pass sentence, the respondent has been convicted, and the record of that conviction, or the docket entries where no extended record has been made, are admissible against him to prove such conviction."

The records of these convictions show that there was no issue of law or of fact to be determined, both cases were ready for sentence, and sentence was in fact imposed in both cases. The plea of *nolo contendere* is an implied confession of the offense charged. The judgment of conviction follows that plea, as well as the plea of guilty. "And it is not necessary that the court should adjudge that the party was guilty, for that follows by necessary legal inference from the implied confession." *Commonwealth v. Horton*, 9 Pick. (Mass.) 206. "A plea of *nolo contendere*, when accepted by the court, is, in its effect upon the case, equivalent to a plea of guilty. * * * If the plea is accepted, it is not necessary or proper that the court should adjudge the party to be guilty, for that follows as a legal inference from the implied confession." *Commonwealth v. Ingersoll*, 145 Mass. 381, 14 N. E. 449. In the case of *State v. Knowles*, supra, the docket entries, the record not having been extended, did not show an adjudication of guilt by the court, or sentence, each case having been contained for sentence, but these docket en-

tries were held admissible for this purpose.

We have no doubt of the admissibility of the records offered and admitted in the case at bar, for the purpose of affecting the credibility of the respondent, who had become a witness in his own behalf.

Exceptions overruled.

(103 Me. 317)

INHABITANTS OF PALMYRA v. WAVERLY WOOLEN CO.

(Supreme Judicial Court of Maine. Dec. 18, 1906.)

WATERS AND WATER COURSES—DAMS—FRESHETS—INJURIES—LIABILITY—EVIDENCE.

This is an action originally brought for the recovery of damages for the loss of a bridge erected and maintained by the plaintiffs across Sebasticook river, in the town of Palmyra, alleged to have been destroyed by reason of a dam built by the defendant across the river, below the bridge. By amendment it was converted into an action for the recovery of the money expended in erecting a new bridge to take the place of the one carried away. After the plaintiffs had presented all their evidence, the presiding justice ordered a nonsuit, to which the plaintiffs excepted.

The case has once been before the law court, and is reported in 99 Me. 134, 58 Atl. 674. In the first trial the plaintiffs recovered a verdict, and upon motion by the defendant the court set the verdict aside. The ground upon which the court proceeded in concluding to set the verdict aside was that the freshet which carried the bridge away was very unusual, although not unprecedented. In the opinion in that case the court said: "In freshet in 1901, the water of the river rose suddenly and so high that at the bridge it reached the bottom of the structure, and the cakes of ice floating down struck the bridge and threw it down into the river. There was no evidence that the defendant company did not exercise all due diligence to give the freshet free vent through the gates and waste ways of the dam. The only complaint was that the dam was too high. * * * The bridge was not injured by the highest water of any freshet for a decade. The freshet, in which it was carried away by the ice brought down by the current, was a very extraordinary one, caused by unusually heavy rains at the season of melting snows. This was to human ken a fortuitous and very infrequent combination of powerful natural causes, unusual and unexpected. The resulting loss must, therefore, remain where it fell."

Held, that the court is unable to discover in the testimony in the second trial any new evidence which sufficiently changes the aspect of the case with reference to the duty of the defendant or the severity of the freshet which carried away the bridge, so as to warrant the court in sustaining the exceptions to the ruling of the presiding justice ordering a nonsuit.

See 58 Atl. 674, 99 Me. 134.

(Official.)

Exceptions from Supreme Judicial Court, Somerset County.

Action by the inhabitants of Palmyra against the Waverly Woollen Company. Judgment of nonsuit, and both parties except. Plaintiffs' exceptions overruled.

Action on the case originally brought for the recovery of damages for the loss of a bridge erected and maintained by the plaintiffs across the Sebasticook river, in the town

of Palmyra, alleged to have been destroyed by reason of a dam built by the defendant across said river, below the bridge. By amendment the action was converted into an action for the recovery of money expended by the plaintiffs in erecting a new bridge to take the place of the one carried away. To the allowance of said amendment the defendant took exceptions, but the same were not considered by the law court. At the conclusion of the plaintiffs' evidence, in the second trial, the presiding justice ordered a nonsuit, and thereupon the plaintiffs took exceptions.

This case has once been before the law court, and the same is reported in 99 Me. 134, 58 Atl. 674.

Argued before WISWELL, C. J., and EMERY, WHITEHOUSE, SAVAGE, PEABODY, and SPEAR, JJ.

Forrest Goodwin, for plaintiffs. Moore & Anderson and Manson & Coolidge, for defendant.

SPEAR, J. This is an action originally brought for the recovery of damages for the loss of a bridge erected and maintained by the plaintiffs across Sebasticook river, in the town of Palmyra, alleged to have been destroyed by reason of a dam built by the defendant across the river, below the bridge. By amendment it was converted into an action for the recovery of the money expended in erecting a new bridge to take the place of the one carried away. After the plaintiffs had presented all their evidence, the presiding justice ordered a nonsuit, to which the plaintiffs excepted. To the allowance of the amendment the defendant also excepted. Therefore the case comes up on exceptions by both parties. As the plaintiffs' exceptions are decisive of the case, we need not consider those of the defendant.

The case has once been before the law court, and is reported in 99 Me. 134, 58 Atl. 674. In the first trial the plaintiffs recovered a verdict and upon motion by the defendant, the court set the verdict aside. The ground upon which the court proceeded in concluding to set the verdict aside was that the freshet which carried the bridge away was very unusual, although not unprecedented. The court say: "In the freshet in 1901, the water of the river rose suddenly, and so high that at the bridge it reached the bottom of the structure, and the cakes of ice floating down struck the bridge and threw it down into the river. There was no evidence that the defendant company did not exercise all due diligence to give the freshet free vent through the gates and waste ways of the dam. The only complaint was that the dam was too high." Again, they say upon this same point: "The bridge was not injured by the highest water of any freshet for a decade. The freshet in which it was carried away by the ice brought down by the current was a very

extraordinary one, caused by unusually heavy rains at the season of melting snows. This was to human ken a fortuitous and very infrequent combination of powerful natural causes, unusual and unexpected. The resulting loss must, therefore, remain where it fell."

If this was a correct basis for setting the first verdict aside, we are unable to discover in the testimony in the second trial any new evidence which sufficiently changes the aspect of the case, with reference to duty of the defendant or the severity of the freshet which carried away the bridge, to warrant us in sustaining the exceptions to the ruling of the justice ordering a nonsuit.

The plaintiffs, however, claim that they have produced such new and material evidence, both upon the frequency and degree of the freshets occurring upon this river previous to 1901, that the question of fact whether the defendant should not have been held to anticipate the occurrence of just such a freshet as took away the bridge, and to have provided measures to prevent it, should have been submitted to the jury.

Practically all the new evidence that bears upon these points is obtained from witnesses who lived many miles below the locus of the bridge, at a point where the witnesses themselves admit the status of recurring freshets may be influenced by conditions that do not obtain at all at the locus in question. Most of these witnesses live in the vicinity of Winslow and Benton and have observed the freshets at these points below the dam at Benton Falls and upon the course of the Sebasticook river almost at its junction with the Kennebec. These witnesses admit that the height of the freshets at Winslow and vicinity may be to a greater or less degree controlled by the condition of the water in Kennebec river. Consequently, it appears that the height of the freshet in April, 1901, upon the Sebasticook, near the Kennebec, cannot be safely taken as a criterion from which to determine the nature of the freshet existing at Palmyra.

It may be said, however, that the testimony of the witnesses from the vicinity of Winslow shows that the freshet at this point was one which, if not unusual and unexpected, so excited the interest of the town officers that they initiated preparations for the protection and safeguarding of their property upon the river. The testimony of these witnesses, or one of them at least, also establishes the fact that above Benton Falls at one time an ice gorge existed occasioning a rise of water so high as to overflow the electric road and intervals. This class of evidence, if submitted to the jury, should not have the effect in the mind of the court, if it did in that of the jury, of overcoming the testimony of numerous witnesses who lived in the vicinity of, and many in close proximity to, the bridge that was carried away, the exact point of inquiry, whose evidence certainly tends to show that the freshet at this

point, taken in connection with floating mass of ice, was, under the rule of law already laid down in 99 Me. 134, 58 Atl. 674, unprecedented and of such character that the defendant should not be legally held to have anticipated its occurrence.

It is not our purpose to review all this testimony. It is from the plaintiffs' own witnesses, and we think a fair conclusion from the summary of all of it brings the decision of the case within the rule above stated. The defendant is certainly entitled to have its rights tested upon inferences drawn from the plaintiffs' witnesses, who had the best opportunity to know and the intelligence to comprehend the situation and conditions surrounding the negligence with which it is charged.

We have read the testimony of all the witnesses, and we find that Thomas F. French is a good representative of this class. He was a resident of Palmyra and lived about 50 rods west of the bridge at the time of the freshet. His testimony satisfies us that the freshet of April 10, 1901, was the highest since 1887. While he testifies that he has seen the water run over the road at the ends of the bridge two or three times, yet he says it would not come within a foot or 15 inches of the bridge. In answer to direct questions, he says: "Q. The highest water you ever saw at the bridge was when? A. In 1901. Q. April? A. April; yes, sir." With respect to the height of the water in April, 1901, this witness testified: "Q. And did the water come up to the bridge? A. It did." He also said it remained there for a period of three or four days. He further testifies that the water alone did not take the bridge away, and would not have done so if it had flowed over the bridge at a height of five feet, but that a large field of ice, formed in a cove like the one he and others were trying to fasten to prevent them from escaping and striking the bridge, was raised and carried by an extraordinary height of water and the course of the winds into the channel and down the river to the destruction of the bridge; also that this river is a warm stream, that the ice melts away, and the flowage of ice is uncommon.

J. F. Rand, of the town of Palmyra, another witness who had opportunity to know, says that in this freshet of 1901 the water was the highest he ever knew, and that it was the "biggest freshet" he had ever seen. While other witnesses testify to the existence of very high water at several times between 1887 and 1901, we are unable to discover that the testimony of any one of them, when fairly analyzed and compared with the monuments by which they seek to determine the height of the water, is in serious conflict with that of the two witnesses above quoted. They speak of the water running over the road at the ends of the bridge; but, as before suggested, when the height of the water over the road to which they testified is com-

pared to the height of the bridge, it will be seen that at these times the water was considerably below the bottom of the bridge, while at this time it was almost up to it, within an inch or two of it. Under certain conditions a six-inch rise of water may change an ordinary freshet to an extraordinary and damaging one. In the case at bar, we are inclined to think that this was the case. Mr. French, in speaking of the ice in this river, says: "There never is any ice comes down that river. It is a warm river, and we never see any ice in it in the spring coming down. It always thaws before the ice breaks up. There is never any ice any way up in that river, for it thaws out and comes down, and that is all we see in the river." In speaking of the flowage of the ice, this witness says: "We went up upon this piece of ice that came out of the cove. The river was clear; but there was a cove up above there, perhaps an acre or two, and the wind was to the eastward then; but we went up there to that piece of ice, and I thought I would stick down poles through it to fasten it, and if we could fasten that cake of ice the bridge would stay where it was; but the wind swung around into the northwest and took this on the Billy Moore and Mike Dyer place, and it moved that out into the river, while we were up on the right of the river fastening this other piece. Q. Was that a large cake of ice? A. It was; yes, sir. Q. And thick? A. It was some 12 or 15 inches thick, I should think."

No witness in the case testifies to any previous occasion when any menace or injury was threatened to structures upon this river from fields of floating ice. We think that the combination of the elements which produced this floating mass of ice should relieve the defendant from the charge of negligence in not anticipating and providing against it. While they should be held as a matter of common knowledge to anticipate and forestall the ordinary or even the unusual flow of ice, in the ordinary or even the unusual freshets, yet we do not think the rule of law governing this class of cases required them to anticipate the unprecedented raising and loosening of a great square of ice and its passage down the river in one solid mass.

The case falls fairly within the principles laid down in *China v. Southwick et al.*, 12 Me. 238. The two cases are somewhat similar. In both cases the dam was legally erected and maintained, and not calculated to cause any damage to the plaintiffs' bridge at the usual and ordinary stages of the water throughout the year, including the usual recurring, and to be expected, freshets at the different seasons as they occurred in the series of years. In the *Southwick* Case, the loss was occasioned by great rains and by the violence of the wind, and the court say in this case: "If the dam had not raised the water to a certain height, the rain and wind superadded might not have done the damage."

* * * Their connection, however, was fortuitous, and resulted from the extraordinary and unusual state of things." So, in the case at bar, while the dam may have contributed to the causes which produced the loss of the bridge, it was not, however, responsible for the combination of wind, water, and ice that swept it away.

Exceptions overruled.

(102 Me. 335)

THOMPSON v. RICHMOND.

(Supreme Judicial Court of Maine. Dec. 18, 1906.)

1. COVENANTS—ACTION FOR BREACH—WHO MAY BRING.

When land conveyed with covenants of warranty has passed by subsequent conveyances, with like covenants of warranty, through the hands of various covenantees, the last covenantor or assignee in whose possession the land was when the covenant was broken can alone sue for the breach, and he has a right of action against any or all of the prior warrantors. No intermediate covenantor can sue his covenantor until he himself has been compelled to pay damages on his own covenant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Covenants, §§ 78-82.]

2. SAME—COVENANTS RUNNING WITH LAND.

General covenants of warranty in a deed of land are prospective and run with the estate, and consequently vest in assignees and descend to heirs. But covenants of seisin and those against incumbrances are personal covenants in present, which do not run with the land and are not assignable by the general law.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Covenants, §§ 59-64.]

(Official.)

Report from Supreme Judicial Court, Franklin County.

Action by Roscoe H. Thompson against Frederick S. Richmond, trustee. Case reported. Judgment for plaintiff.

Action of covenant broken to recover damages for a breach of the covenant against incumbrances brought by the original covenantor against the original covenantor after conveyance of the land by the former. The land to which this action relates is situate in the town of Jay.

Plea, the general issue, and a brief statement alleging as follows:

"(1) That the defendant has fulfilled, performed, and kept all and singular the covenants, grants, and agreements on his part to be fulfilled and performed.

"(2) That the plaintiff has never been disturbed in the quiet enjoyment of the premises described in his said declaration, or in his right to use said premises according to the true intent and meaning of said grant.

"(3) That at the time of the commencement of the plaintiff's said action he had no right, title, or interest in and to the premises described in his said declaration."

This action came on for trial at the May term, 1906, of the Supreme Judicial Court,

Franklin county. An agreed statement of facts was filed and the case was withdrawn from the jury and reported to the law court, with the stipulation that the law court should "render judgment in accordance with the law and the facts of the case."

All the material facts are stated in the opinion.

Argued before WHITEHOUSE, SAVAGE, POWERS, PEABODY, and SPEAR, JJ.

E. E. Richards and R. H. Thompson, for plaintiff. Joseph C. Holman, for defendant.

WHITEHOUSE, J. This is an action of covenant broken to recover damages for a breach of the covenant against incumbrances brought by the original covenantor against the original covenantor after conveyance of the land by the former.

December 26, 1887, the defendant, Richmond, conveyed the premises in question to the plaintiff, Thompson, by warranty deed containing the usual covenant against incumbrances. At that time the premises were subject to a mortgage given by the defendant to Adeline B. Crafts, dated May 20, 1882.

June 27, 1901, the plaintiff conveyed the premises by warranty deed to Helen C. Thompson, who, in like manner, by warranty deed of November 20, 1895, conveyed to Augusta M. Bean. The latter by warranty deed of June 21, 1897, conveyed the premises to Israel Bean, who died intestate in May, 1905, leaving two sons, George H. and Perley Bean, to whom the title descended and who now have title and possession. They had no notice of the incumbrance on the premises until after the commencement of this action.

The mortgage constituting the incumbrance was foreclosed and by assignment came to Herbert C. Whittemore July 28, 1898. Whittemore quitclaimed his interest in the premises to the plaintiff, Thompson, by deed dated December 1, 1904, for which it is claimed the plaintiff gave him a note for \$250.

December 28, 1887, the defendant, Richmond, conveyed to Alvin Record the real estate covered by the Crafts mortgage given by him excepting the lot in question which he had previously conveyed to the plaintiff, Thompson. By this deed Richmond conveys the land to Record subject to the Crafts mortgage, but, in the language of the agreed statement, "Richmond says that Record was to pay the Crafts mortgage as a part of the consideration of the deed to Record." The following statement also appears among the facts reported: "Roscoe H. Thompson says that he gave his note for \$250 to Herbert C. Whittemore for the quitclaim deed of the premises at the time of the conveyance to him of December 1, 1904."

The plaintiff, Thompson, has never been sued on his covenants in his deed of the premises to Helen C. Thompson, nor was he ever threatened with suit or claim on account of

such covenants by any person except Whittemore.

The plaintiff was first notified of the incumbrance in question on the real estate described in the writ, by H. C. Whittemore, a few weeks before the date of the writ and payment demanded. The defendant refused to do anything to satisfy Whittemore before the plaintiff made the settlement with him. It is agreed that the sum paid is a fair and reasonable amount to free the real estate from the incumbrance named.

The case is reported to the law court upon an agreed statement of facts.

When land conveyed with covenants of warranty has passed by subsequent conveyances, with like covenants of warranty, through the hands of various covenantees, the last covenantor or assignee in whose possession the land was when the covenant was broken can alone sue for the breach, and he has a right of action against any and all of the prior warrantors. No intermediate covenantor can sue his covenantor until he himself has been compelled to pay damages on his own covenant. 2 Chitty on Cont. 1388; Crooker v. Jewell, 29 Me. 527.

General covenants of warranty in a deed of land are prospective and run with the estate, and consequently vest in assignees and descend to heirs; but covenants of seisin and those against incumbrances are personal covenants in present, which do not run with the land, and are not assignable by the general law. Allen v. Little, 36 Me. 170. The provisions of section 30, c. 84, Rev. St., only authorize the assignee of a grantee to maintain an action for the breach of such covenants after eviction by an older and better title, and are therefore not applicable to the case at bar where there has been no eviction of the owners of the premises in question.

In the intermediate conveyances from the plaintiff to the Beans, who are the present owners, the deeds have all contained covenants of warranty. If the present owners, who are in possession of the estate, had been evicted by the enforcement of Whittemore's mortgage claim, they could have availed themselves of the covenants in the deeds of the prior warrantors, and thus the defendant, Richmond, the first covenantor, might ultimately have been vouched in to defend.

It appears, however, that the Beans, the present owners, have never been disturbed in their quiet possession of the premises by any one claiming any right or title thereto by virtue of the Crafts mortgage, and never knew there was such a mortgage until the commencement of this suit. It further appears that the plaintiff has never been sued on his covenants in his deed of the premises to Helen C. Thompson, and was never threatened with any suit or claim on account of such covenants by any person, except Whittemore.

According to the agreed statement of facts

reported, the plaintiff Thompson "says" that he gave his note for \$250 to Whittemore for the quitclaim deed of the premises in 1904.

If this statement ascribed to Thompson is presented for the consideration of the court as one of the "facts agreed" by the parties, it must be assumed that the plaintiff paid \$250 to purchase the outstanding title from Whittemore. But prior to his conveyance of all his interest in the estate to Helen C. Thompson, by deed with covenants of warranty, the plaintiff had sustained no damage on account of the Crafts mortgage; and after a grantee of land has conveyed his estate he can maintain no suit upon such covenants unless prior to his conveyance he had been damaged. Allen v. Little, 36 Me. 170; Griffin v. Fairbrother, 10 Me. 91. A covenantor who has conveyed his estate to a second grantee with warranty cannot maintain an action against his covenantor for a breach of the warranty subsequently occurring, unless he is compelled to pay damages upon his own covenant of warranty, so that the first covenantor may not be liable to be twice charged. Wheeler v. Sohler, 3 Cush. (Mass.) 219. Prior to his purchase of the outstanding interest claimed by Whittemore the plaintiff had not suffered any damage, and might never have sustained any. His voluntary act in purchasing the outstanding title without the request or the consent of the present owner of the estate does not entitle him to recover in this suit the amount thus expended. But, as there was a breach of the covenant against incumbrances at the time the plaintiff received his deed from the defendant, he is entitled to recover nominal damages in this action.

Judgment for plaintiff for \$1.

(102 Me. 200)

STATE v. MORIN.

(Supreme Judicial Court of Maine. Dec. 18, 1906.)

INTOXICATING LIQUORS—MAINTAINING NUISANCE—EVIDENCE—UNITED STATES LICENSE.

The defendant was tried upon an indictment charging him with keeping and maintaining a liquor nuisance. The state proved that during the period covered by the indictment the defendant had paid a United States special tax as a retail liquor dealer. The defendant offered to show the circumstances in relation to his taking out this license, and why the tax had been paid by him, which evidence was excluded. The fact of the payment of this special tax is equivalent to an admission claimed to have been made; but it is always competent, not only to deny the fact of an admission, but, as well, to explain its significance by showing other facts which may have that effect. The real question as to the importance and weight of the fact of the payment of this tax is as to the intent of the person who made the payment at the time, and, whenever the intent of a person is relevant to the issue, that person may testify as to what his intention was, although the value of such testimony is always for the jury. Held, that the defendant was entitled to make an explanation of the fact relied upon by the state, and to have the jury consider it in connection with that fact.

(Official.)

Exceptions from Supreme Judicial Court, York County.

John B. Morin was convicted of keeping and maintaining a liquor nuisance, and excepts. Exceptions sustained.

The state proved that in January, 1905, during the period covered by the indictment, the defendant paid a United States special tax as a retail liquor dealer. See Rev. St. c. 29, § 49. The defendant then "offered to explain why and how he came to pay the tax," which evidence was excluded by the presiding justice. To this ruling the defendant took exceptions.

Argued before WISWELL, C. J., and EMERY, WHITEHOUSE, SAVAGE, and SPEAR, JJ.

George L. Emery, Co. Atty., for the State. George F. & Leroy Haley and John P. Deering, for defendant.

WISWELL, C. J. The defendant was tried upon an indictment charging him with maintaining a liquor nuisance between July 1, 1904, and the day of the finding of the indictment, at the May term, 1905, of the court. The state proved that in January, 1905, during the period covered by the indictment, the defendant paid a United States special tax as a retail liquor dealer. Thereupon counsel for the defendant sought by various questions asked of the defendant to show the circumstances in relation to his taking out this license, and why the tax had been paid by him; one question being: "Why did you pay this special tax?" The question and others of a similar character asked for the same general purpose were excluded. We think that this was erroneous.

It is provided by one of the clauses of the Revised Statutes (chapter 29, § 49) that "the payment of the United States special tax as a liquor seller * * * shall be held to be prima facie evidence that the person or persons paying said tax, * * * are common sellers of intoxicating liquors, and the premises so kept by them common nuisances." This provision was construed in *State v. Intoxicating Liquors*, 80 Me. 57, wherein it was declared by the court that the meaning of this clause was that "such evidence is competent and sufficient to satisfy a jury in finding the defendant guilty, provided it does, in fact, satisfy them of his guilt beyond a reasonable doubt, and not otherwise." This was affirmed in *State v. O'Connell*, 82 Me. 30, 19 Atl. 86.

That is, the weight to be given to the fact of the payment of this special tax, upon the question of the guilt of the person paying the tax, is entirely for the jury. The process of reasoning, by which guilt may be inferred from this fact, is that it is probable, or, at least, more probable than otherwise, that a person would not pay a tax as a liquor dealer unless he intended to engage in that business, and that consequently it is a prop-

er inference by induction from the fact of such payment that he is engaged in such business. But it is not impossible that the fact of the payment of this tax may be consistent with some other hypothesis. For instance, suppose a duly appointed liquor agent should be informed by an official connected with the internal revenue department of the United States that it was necessary for him as a liquor agent to pay this special tax, and, believing that this was necessary, and solely for the purpose of complying with the requirements of the United States laws, he pays the special tax, would it not be admissible for him to explain the circumstances of the payment and the reasons why he made the payment? It is equally true that the payment of the tax may be consistent with some other hypothesis besides that of an intention to engage in the business of unlawfully selling liquor.

As said by Prof. Wigmore in his work on Evidence (volume 1, § 31): "The peculiar danger, then, of inductive proof, is that there may be other explanations than the desired one for the fact taken as the basis of proof." For this reason, whenever a fact is relied upon as tending to prove a proposition, it must be competent and proper to offer an explanation of that fact for the purpose of showing that, whatever inference may be ordinarily drawn therefrom, that the fact relied upon is consistent with some other hypothesis, or to show, by the explanation offered, that the probable inference, or the inference desired to be drawn from the fact, is not the true one. "On the general logical principle of explanation, the opponent may always introduce such facts as serve to explain away on some other hypothesis the apparent significance of the fraudulent conduct." Wigmore on Evidence, § 281. The rule is, of course the same when the explanation offered is to explain away on some other hypothesis the apparent significance of some fact relied upon.

The fact of the payment of this special tax is equivalent to an admission claimed to have been made. But it is always competent, not only to deny the fact of the admission, but, as well, to explain its significance by showing other facts which may have that effect. The real question as to the importance and weight of the fact of the payment of this tax is as to the intent of the person who made the payment at the time. It is well settled that, whenever, the intent of a person is relevant to the issue, that person may testify as to what his intention was. The value of such testimony is, of course, always for the jury. The explanation offered in any case may be valueless and unsatisfactory, but the defendant in this case was entitled to make an explanation of the fact relied upon by the state, and to have the jury consider it in connection with that fact.

Exceptions sustained.

(28 R. I. 246)

GAUTIERI v. ROMANO.

(Supreme Court of Rhode Island. April 16, 1906.)

1. PLEADING—AMENDMENT—DECLARATION—TIME OF AMENDMENT—TRESPASS.

A defect in a declaration in an action of trespass consisting of the omission of the words "vi et armis" may be cured by amendment at any stage of the case.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, §§ 653-675.]

2. TRIAL—EXCEPTIONS TO TESTIMONY—WAIVER.

A party's exceptions to the introduction of testimony are waived by subsequent cross-examination on the same subjects.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 181, 974, 975.]

Action by John C. Gautieri against Frank Romano. Judgment for plaintiff, and defendant petitions for new trial. Petition denied, and cause remitted for judgment on the verdict.

Page & Page & Cushing, for plaintiff.
John C. Quinn, for defendant.

PER CURIAM. The motion in arrest of judgment must be denied. The defect in the declaration is the omission of the words "vi et armis," which may be cured by amendment at any stage of the case. *Barlow v. Tierney*, 28 R. I. 557, 59 Atl. 980. The defendant's exceptions to the introduction of testimony were all waived by subsequent cross-examination upon the same subjects. The greater part of the testimony was superfluous, and much of it impertinent. Both parties seem to have endeavored to waste as much time as the court would permit, and extraordinary latitude was allowed. We find the verdict fairly supported by the evidence, and the amount of the verdict is not grossly excessive.

The petition for a new trial is denied, and the cause is remitted to the Superior Court for judgment on the verdict.

(117 Pa. 399)

PRESBYTERIAN CHURCH v. PHILADELPHIA, B. & T. ST. RY. CO.

(Supreme Court of Pennsylvania. April 1, 1907.)

APPEAL—REVIEW—QUESTIONS OF FACT—VENUE—APPLICATION FOR CHANGE—DISCRETION OF COURT.

It is a question of fact to be determined by the trial court whether an application for change of venue, under Act March 30, 1875 (P. L. 35) § 1, par. 5, on the ground that a large number of inhabitants in the county have an interest in the question involved adverse to the applicant, justifies a change.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3836.]

Appeal from Court of Common Pleas, Bucks County.

Action by the Presbyterian Church at Bristol against the Philadelphia, Bristol & Trenton Street Railway Company. From an order

refusing a change of venue, defendant appeals. Affirmed.

Argued before MITCHELL, C. J., and FELL, MESTREZAT, POTTER, and ELKIN, JJ.

George Quintard Horwitz, Howard I. James, and Layton M. Schoch, for appellant. Yerkes, Ross & Ross and John C. Stuckert, for appellee.

PER CURIAM. An application for a change of venue under paragraph 5 of section 1 of the Act of March 30, 1875 (P. L. 35), on the ground that "a large number of inhabitants of the county in which the cause is pending have an interest in the question involved therein, adverse to the applicant," raises a question of fact for the decision of the judge. *Everson v. Sun Co.*, 215 Pa. 231, 64 Atl. 335. What is a large number of inhabitants is a relative question depending on the circumstances. A few hundred might be a large number in some communities, while as many thousands might not be in others. So, in regard to the interest which is averred to be adverse to the petitioner in the application. Its intensity, its particular or general character, its diffusion throughout the county, or confinement to one or more localities, are all elements bearing on its reaching the requirements of the statute. All of them, both as to number and interest, are addressed to the judicial discretion of the judge. In the present case the learned judge below went fully and carefully into the inquiry. It would not be desirable to incur the report with the details, but the result may be summed up substantially in his finding that the interest in the matter in its widest aspect was confined to a portion of the borough of Bristol, and the population of the borough is less than one-tenth that of the county. He was, therefore, "quite satisfied that there will be no difficulty in obtaining a disinterested and impartial jury, jurors who have never even heard of the case." With his local knowledge of the places and the people, the judge's opinion is much more likely to be correct than ours could be, and we certainly have not been shown any reason to interfere with it.

Order affirmed.

(217 Pa. 425)

COMMONWEALTH ex rel. PRICE v. GARVEY.

(Supreme Court of Pennsylvania. April 1, 1907.)

MUNICIPAL CORPORATIONS—CITY TREASURER—ELECTION.

Where four members of a borough council, before any organization is effected, and while the other four members of the council are in the same room, go through the form of election for a borough treasurer, the person so elected has no title to the office.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Municipal Corporations, § 201.]

Appeal from Court of Common Pleas, Lackawanna County.

Action by the commonwealth, on the relation of I. F. Price, against M. J. Garvey. Judgment for defendant, and plaintiff appeals. Affirmed.

Argued before FELL, BROWN, MESTREZAT, POTTER, and STEWART, JJ.

A. A. Vosburg and C. W. Dawson, for appellant. John H. Bonner, for appellee.

PER CURIAM. This case was tried in the common pleas with the case of another claimant to the office of treasurer of the borough of Moosic. In the opinion filed in that case, but covering both cases, it was said in relation to the relator in this: "As far as Mr. Price's claim is concerned, it is sufficient to say that he never was elected by either a de jure or a de facto borough council. He does not claim by virtue of his election at the meeting of the so-called Price council held on March 5, 1906, but claims under an election held on July 2, 1906. As we have stated in our seventh finding of fact, there was no valid meeting held on that date at which he was elected. Only four members of the council participated in any degree in any proceedings of the meeting in which he was chosen, viz., Anthony, Woodbine, Broadhead, and Scanyter. Sheehan, Moran, Cotter, and Decker, the other four legal members of the council, took no part in it whatever. They were not even present at the meeting, legally speaking, but were merely physically present in the same room while part of it was being held. They were, under the uncontradicted evidence, engaged in holding a council meeting with Sanderson and one Martin present and participating when the other four councilmen came into the hall and attempted to take charge and effect an organization, by counting them as present, and thus getting a quorum. They immediately adjourned and left the hall when the members of the Price council began to hold a meeting. The situation of affairs during the first few moments was that both parties were trying to do business at the same time. Under such circumstances, there was no warrant or authority of law to note the presence of Sheehan and his associates at the alleged meeting of council which elected Mr. Price as treasurer. It was an undignified scramble to effect an organization, but it was not successful."

For the reasons stated in the opinion of the learned judge of the common pleas, the decree is affirmed, at the cost of the appellant.

(217 Pa. 423)

COMMONWEALTH v. DENSTEN.

(Supreme Court of Pennsylvania. April 1, 1907.)

1. PHYSICIANS AND SURGEONS—PRACTICING WITHOUT LICENSE.

Under Act May 18, 1893 (P. L. 94), prohibiting the practice of medicine without a

license, and providing that registration under Act June 8, 1881 (P. L. 72), in order to be a sufficient warrant to practice medicine, shall be made prior to March 1, 1894, registration as a physician after March 1st was no defense.

2. SAME—CONSTITUTIONAL LAW.

Act May 18, 1893 (P. L. 94), providing for the licensing of physicians and surgeons, violates neither the federal nor the state Constitutions.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Physicians and Surgeons, § 2.]

Appeal from Court of Quarter Sessions, Lackawanna County.

Joseph C. Densten was convicted of practicing medicine without a license, and, from a judgment of the Superior Court affirming a conviction, he appeals. Affirmed.

The following is the opinion of Orlady, J., in the court below: "The defendant was tried and convicted of 'entering upon the practice of medicine and surgery and practice of the same without having obtained from the medical council of Pennsylvania a license to practice medicine and surgery,' in violation of the requirements of Act May 18, 1893 (P. L. 94). The facts were undisputed and the court assumed the duty of instructing the jury that the defendant should be found guilty on the second count in the indictment, and not guilty on the first and third ones. The whole question was reviewed on a motion in arrest of judgment, which was refused, and on a rule for a new trial, which was discharged. The defendant admitted that he was engaged in the practice of medicine, as charged, and did not pretend to have ever obtained any certificate or license to do so from the state authorities; his sole defense being that he was within the exceptions enumerated in the act of 1893, in that he had registered under the provisions of the act of June 8, 1881, at Montrose, Susquehanna county, Pa., on September 24, 1897, and that he had been continuously practicing medicine since 1869, under a certificate of sufficiency given to him by his preceptor which qualified him, under the law as it was then declared, to engage in the practice of that profession. It was contended that being thus qualified the subsequent legislation on the subject by Acts March 24, 1877 (P. L. 42), the registration act of June 8, 1881 (P. L. 72), and the registration and license or certificate provisions of the act of 1893 did not apply to him. The registration in Susquehanna county in 1897 was of no avail, inasmuch as the act of 1893 specially provides, in the fifteenth section, that such registration under the acts of 1881, to be a sufficient warrant to practice medicine and surgery, shall be made prior to March 1, 1894. Registration after that date was outside the limitation of the act, and was fruitless as a defense. The propriety as well as the necessity for such restrictive legislation has been fully considered by our courts. In regard to this particular act, in *Re Registration of Campbell*, 197 Pa. 581, 47 Atl. 860, it is said: 'The act of May 18, 1893 (P. L. 94), is a valid

and constitutional exercise of the police power of the state upon a subject plainly within that power and urgently in need of control by it.' So far as any federal question is supposed to be involved, it is set at rest by *Dent v. West Virginia*, 129 U. S. 114, 9 Sup. Ct. 231, 32 L. Ed. 623, in which the Supreme Court of the United States pronounced an almost identical statute of West Virginia to be free from repugnancy to the Constitution of the United States or the fourteenth amendment. In regard to the questions raised under the Constitution of Pennsylvania, it would be sufficient to refer to *Com. v. Finn*, 11 Pa. Super. Ct. 620. The present Chief Justice reviews the previous legislation on the subject and conclusively settles the necessity for a proper registration by all who ask the protection of our laws in the practice of medicine and surgery in this state. See, also, *Com. v. Campbell*, 22 Pa. Super. Ct. 98; *State v. Currens*, 111 Wis. 431, 87 N. W. 561, 56 L. R. A. 252. Not having complied with the requirements of any of our laws regulating the practice of medicine and surgery, there can be no question of his being guilty on the second count in manner and form as he was indicted. The judgment is affirmed."

Argued before FELL, BROWN, MESTREZAT, POTTER, and STEWART, JJ.

A. A. Vosburg, Charles W. Dawson, and James Mahon, for appellant. Joseph O'Brien, Dist. Atty., and W. S. Diehl, for appellee.

PER CURIAM. This judgment is affirmed on the opinion of the Superior Court.

(217 Pa. 402)

CITY OF CHESTER v. BALTIMORE & O. R. CO. et al.

(Supreme Court of Pennsylvania. April 1, 1907.)

1. RAILROADS—USE OF CITY STREETS.

A railroad company has no power to enter upon, occupy, or cross the streets of a municipality without its consent.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, § 185.]

2. SAME—ALTERATION OF TRACKS IN CITY.

A railroad company, under Act May 31, 1887 (P. L. 275), cannot elevate or depress its tracks within the limits of a city without the consent of said city.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, §§ 195-203.]

Appeal from Court of Common Pleas, Delaware County.

Action by the city of Chester against the Baltimore & Ohio Railroad Company and the Baltimore & Philadelphia Railroad Company. From a decree granting a preliminary injunction, defendants appeal. Affirmed.

The following is the opinion of Johnson, P. J., in the court below: "The plaintiff is a city of the third class. The defendant is a railroad company. Its line runs through the city of Chester, crossing the streets at grade, except Ridley. Among them

are Potter, Walnut, Chestnut, Fourteenth street, and Melrose avenue. Potter is an opened and paved street. Walnut is an opened and paved street. Chestnut is an opened street not paved. Ridley is not an opened street. Fourteenth street is an opened and paved street. Melrose avenue is an opened street not paved. The defendant, in pursuance of a general plan, began the elevation of its tracks at the crossings of the above-named streets, on some of them above the official grade, and on some above the existing physical grade, and in such way as necessitated a change in all the street grades, except Ridley, from a few inches to three or four feet, respectively. To prevent this the city filed the present bill. A preliminary injunction was granted restraining the defendant from elevating its tracks at all the above-named streets, except Ridley. The court entered a decree continuing the preliminary injunction."

Argued before MITCHELL, C. J., and FELL, MESTREZAT, POTTER, and ELKIN, JJ.

W. B. Broomall, for appellants. A. A. Cochran, for appellee.

POTTER, J. The appellant here complains of the court below that it has, by means of a preliminary injunction, prevented the defendant company from elevating its tracks at the crossings of several streets without the consent of the municipal authorities of the city of Chester. The action of the court below in this matter was fully justified by the principles laid down in *Pittsburg v. Pittsburg, etc., Railroad Company*, 205 Pa. 13, 54 Atl. 468, holding that in this commonwealth a railroad company has no power to enter upon, occupy, or cross the streets of a municipality without the consent of the municipality. If a railroad cannot be originally constructed upon or across a city street without municipal consent, it necessarily follows that, after it has once been constructed, in a form and manner approved by the municipal authorities, before any material change can be made in the construction of the road, the municipal consent must be obtained for the desired change.

An elevation of the grade would certainly be a material change. The conclusion that municipal consent must be obtained before making any such change is not only reasonable in itself, but it has legislative sanction. The act of May 31, 1887 (P. L. 275), provides that railroad companies whose route extends through or into any city of this commonwealth may elevate or depress their tracks within the limits of such city, provided that the consent of said city, through councils, to such elevation or depression, be first had or obtained. There is no merit in the contention of appellant.

The assignment of error is overruled, and this appeal is dismissed, at the cost of appellant.

(217 Pa. 404)

HEBLICH v. SLATER.

(Supreme Court of Pennsylvania. April 1, 1907.)

1. EVIDENCE—SIMILAR SERVICES—VALUE—ATTORNEY AND CLIENT—COMPENSATION.

In an action to recover for legal services rendered, evidence of the amount paid another attorney for services in the same case is inadmissible.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 422.]

2. ATTORNEY AND CLIENT—COMPENSATION—VALUE OF SERVICES—EVIDENCE.

In an action to recover for legal services rendered, evidence of the importance of the controversy, the results which depended upon it, and how it was affected by other serious matters was proper on the question of value.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 5, Attorney and Client, § 370.]

Appeal from Court of Common Pleas, Schuylkill County.

Action by Rosa Hebllich, executrix of N. Hebllich, against Harry P. Slater. Judgment for plaintiff, and defendant appeals. Reversed.

At the trial the court admitted, under objection and exception, testimony to the effect that John F. Whalen, Esq., an attorney at law, charged and received a fee of \$4,000 in the will contest in which plaintiff's decedent was engaged as an attorney. When A. W. Schalck, a witness for plaintiff, was called he was asked this question: "Q. You know the labor performed by Mr. Hebllich in the hearings before the register, the hearings in the orphans' court, and also know the fact that Mr. Whalen was employed to take Mr. Kyon's place after the case had gotten through the orphans' court and into the common pleas, and the fact that Mr. Whalen had charge of the paper book and argued the case in the Supreme Court after Mr. Hebllich's death. Having knowledge of those facts, and knowing that Mr. Whalen charged and received as his compensation \$4,000 for the value of his services that he rendered, what would you say the value of the services rendered by Mr. Hebllich were? Mr. Roads: Objected to as not a proper way of establishing the value of the services of the plaintiff in this case by Mr. Hebllich. The Court: Overrule the objection. (Defendant excepts. Bill sealed.) A. At least \$4,000. That is to say, that Mr. Hebllich rendered services continuously for five years, and his services were not limited to the trial of the case in court, but during that time we had various motions, rules, arguments of various kinds, while we were pending in the orphans' court and while we were pending in the common pleas, which had to be argued and disposed of, and the papers are on the record. Considering not only the days actually spent in the trial of the case, but the amount of labor that was required in the preparation of those papers and of the arguments and all briefs, there was quite a number of them during those

five years outside of what the record shows of actual trial and hearings in court. Q. You place a great deal of emphasis on the words, at least. State whether or not you do not consider that would be a small compensation for Mr. Hebllich? A. Moderate."

Defendant presented these points: "(2) Evidence of what services were rendered and fees charged by other attorneys employed upon the same side with the plaintiff is irrelevant and incompetent. Therefore the jury should disregard all testimony in the case relative to the services rendered or charges made by other counsel in the litigation known as the Slater Will Case. Answer: We instruct you, as we have instructed you in our general charge, that we did not admit the testimony of Mr. Whalen's compensation as a criterion to base the charges upon or as evidence of what Mr. Hebllich's services were worth. We only admitted it as some evidence to be taken by the jury, along with all the other evidence in the case, in arriving at a conclusion of what Mr. Hebllich's services were worth. (3) The testimony as to the compensation charged by John F. Whalen, Esq., one of the defendant's counsel in the litigation known as the Slater Will Case, is incompetent and immaterial for the purpose of fixing the value of the services of N. Hebllich, Esq., the decedent, and the jury should not consider it. Answer: We refer to our answer to the second point for an answer to this. (4) Under the evidence in this case Anna S. Slater, the mother of the defendant, Harry P. Slater, and testatrix in the wills in controversy framed by direction of the orphans' court, did not die seised of the real estate known as the 'Centennial Hall' and the homestead known as the 'Slater home'; she having conveyed the said real estate to her son, the defendant in this case, by deeds executed, delivered, and duly recorded, bearing dates, respectively, May 9 and July 9, 1894, and therefore the title to the said Centennial Hall and homestead was not directly or indirectly involved in the contest concerning said wills. Answer: We say to you in answer to this point, under the evidence in this case, Anna S. Slater, the mother of the defendant, Harry P. Slater, and testatrix in the wills in controversy framed by direction of the orphans' court, did not die seised of the real estate known as the 'Centennial Hall' and the homestead known as the 'Slater home'; she having conveyed the said real estate to her son, the defendant in this case, by deeds executed, delivered, and duly recorded, bearing dates, respectively, May 9 and July 9, 1894, and therefore the title to the said Centennial Hall and homestead was not directly involved in the contest concerning said wills, but, as we have explained to you in our general charge, that property was indirectly concerned in this contest."

Verdict and judgment for plaintiff for \$8,013.48. Defendant appealed.

Argued before MITCHELL, C. J., and FELL, BROWN, POTTER, and STEWART, JJ.

J. W. Moyer and Geo. M. Roads, for appellant. H. O. Bechtel and W. L. Kramer, for appellee.

POTTER, J. This was an action of assumpsit brought by Rosa Hebllich, executrix of N. Hebllich, deceased, against Harry P. Slater, to recover for professional services rendered in his lifetime by Mr. Hebllich, who was a member of the Schuylkill county bar, to the defendant. There was no dispute as to the employment of Hebllich by defendant or the services rendered. The single question tried was the value of the services. Five of the assignments of error raise the question whether in a suit by an attorney at law to recover for services rendered evidence is admissible of the amount paid to another attorney, who rendered service in the same case.

The cause in which the services were rendered, for which recovery was sought, was the contest of the will of Mrs. Anna Slater, mother of the defendant, dated May 22, 1894, by which she had devised and bequeathed her entire estate to defendant. Certain beneficiaries under a prior will, dated March 23, 1894, filed a caveat to the will on the ground of want of testamentary capacity by the testatrix, and undue influence. The contest was carried into the orphans' court, where an issue *devistavit vel non* was awarded. That issue was tried in the common pleas court, resulting in a verdict for the will, and judgment thereon was affirmed by this court. Slater v. Slater, 209 Pa. 194, 58 Atl. 287. Mr. Hebllich took part in the litigation from the outset until his death, which occurred after the trial, and before the appeal was argued in the Supreme Court. In the early stages of the litigation John W. Ryon was associated with him as counsel for defendant. Mr. Ryon died before the issue in the common pleas came to trial, and John F. Whalen was then associated with Hebllich in Ryon's place. Mr. Whalen remained counsel up to the time of Hebllich's death, and afterwards until the final decision by the Supreme Court. He testified that he charged and received from defendant \$4,000 as fees for his services. Other witnesses were permitted to take this fact into consideration in fixing the value of Hebllich's services, and the jury were instructed that they might consider it in arriving at their verdict. We think this evidence should have been excluded. The value of Mr. Hebllich's services was in issue; and not that of the witness. It was apparent that they were not each performing the same class of service. One was largely engaged in preparing the case for trial, in searching for evidence, and in producing it, and the authorities for use during the trial. The other seems to have confined his efforts principally

to discharging the duties of what is ordinarily known as a trial lawyer. The services of one seem to have been confined to preparation for and attendance upon the hearings in the lower courts, while the other was responsible for the preparation and conduct of the case also in the appellate court. Not only did the nature of the services rendered seem to differ, but the professional ability and standing of the two men were not shown to be the same. What would be a reasonable fee for one might be wholly inadequate for the other.

In Playford v. Hutchinson, 135 Pa. 426, 19 Atl. 1019, this court held that in an action by an attorney at law to recover for professional services, rendered in the preparation and trial of a cause, evidence of what services were rendered, and fees charged by other attorneys employed upon the same side with plaintiff, is irrelevant and incompetent. In that case the testimony was offered to show that the claim was for more than the services were reasonably worth. But, if such testimony is inadmissible as against the attorney, it must also be excluded when it is in his favor. The true ground upon which its exclusion is based is that it would raise collateral issues. In Calvert v. Cox, 1 Gill (Md.) 95, this question arose, and the court held "that what was paid to or demanded by one attorney was not evidence in the cause. We cannot judicially know the standing of any one member of the bar, or the circumstances under which he was paid, or demanded, a given sum for his services. What is the usual and customary compensation for services of a like kind is admissible testimony, but what was paid to any particular individual, standing per se, is in our opinion inadmissible." Under the authorities the professional standing of an attorney seems to be a proper element to be taken into account as affecting the value of his services. If this be so, how could the amount paid to one attorney be evidence of the value of the services of another? In certain routine matters one competent lawyer may serve as well as another. But in other phases of litigation requiring the exercise of keen judgment and delicate perception there may be no comparison between the relative abilities of two men. It has been held that, in an action by an attorney to recover for professional services, it is incompetent to prove the value of his services in another suit. Hart v. Vidal, 6 Cal. 56. To determine the value of the testimony as to the compensation paid to Mr. Whalen would require a comparison of the nature of the service he rendered with that bestowed by Mr. Hebllich, and their relative professional standing and ability; and also an inquiry into the reasonableness of the charge made by Mr. Whalen. This would raise collateral matters, and involve issues not concerned in this case. The first, second, third, fourth and fifth assignments of error are sustained.

Another question is raised by the sixth and seventh assignments. Subsequently to making her will, which was the subject of the litigation, defendant's mother conveyed to him by deeds dated May 9 and July 9, 1894, certain valuable real estate for a consideration of \$1 and natural love and affection. This fact appeared in evidence, and the court instructed the jury that the property thus conveyed was indirectly concerned in the will contest, which settled all dispute as to its title. In his general charge, the trial judge said: "Had the other side won, in all human probability, as testified to by counsel, who represented that side, they would have brought another suit to set aside those deeds that have been offered in evidence, so that indirectly as a matter of law the real estate was indirectly involved in this transaction. As you have heard from the testimony in the case, the value of that real estate was anywhere from fifty to seventy thousand dollars." The question raised by these assignments was whether the court erred in instructing the jury that the title to the property so conveyed was indirectly settled by the trial of the issue *d. v. n.* and in allowing them to take that fact into consideration in fixing the amount of their verdict.

As a general principle, the magnitude of the interests involved and the responsibility assumed are properly to be taken into consideration in fixing compensation. "Evidence to show the nature and importance of the controversy in which the services were rendered, what results depended upon it in other matters, and how other matters affected it and increased its gravity is proper upon the question of the value of the services." *Weeks on Attorneys at Law* (2d Ed. 1892) 681. And yet, in the present case, the attack which the counsel for defendants in the will case were called upon to meet does not seem to have been very formidable. It can hardly be said to have been at any time a doubtful case. As this court said before: "The burden of appellant's contest against the will was that it was procured by undue influence, and a number of matters were presented in evidence which might have tended to corroborate the inference had there been any basis of fact to corroborate. But there was not a scintilla of evidence that tended directly and explicitly to establish the fundamental fact." *Slater v. Slater*, 209 Pa. 194, 58 Atl. 287.

It is possible that the decision of the issue on the will, in favor of defendant, prevented additional litigation, and that aspect might perhaps be presented to the jury as something to be considered in fixing the value of the service. But, if this was done, the jury should at the same time have been cautioned against attaching much weight to this feature, because, as the result showed, there never was any material fact upon which to base the attack made upon the will. De-

fending a practically impregnable position is not so difficult as the leading of a forlorn hope. The burden in the litigation concerned was decidedly upon the other side, who sought to invalidate the will. The attack had so little apparent justification that the suggestion that the title to valuable real estate was indirectly involved in this case was of doubtful propriety.

We do not feel, however, that the qualification of defendant's fourth point for charge, or the answer to plaintiff's fifth point, present sufficient cause for reversal.

But, by reason of the errors set forth in the first, second, third, fourth, and fifth specifications, the judgment is reversed with a *venire facias de novo*.

(217 Pa. 435)

COMMONWEALTH *ex rel.* LEWIS, Dist. Atty., *v.* PARSONS.

(Supreme Court of Pennsylvania. April 1, 1907.)

SCHOOLS AND SCHOOL DISTRICTS—SCHOOL CONTROLLER—VALIDITY OF ELECTION.

Where there was no ward in a city which a person claiming to be a school controller could represent, and there was no election district in which votes could be cast for him for the office, a judgment of ouster against him was properly rendered.

Appeal from Court of Common Pleas, Lackawanna County.

Quo warranto to the commonwealth, on the relation of W. R. Lewis, district attorney, against William Parsons. From the judgment, defendant appeals. Affirmed.

The following is the opinion of Edwards, P. J., in the court below:

"Did the councils have the right to designate the annexed territory as the Twenty-Second Ward? This is a question somewhat difficult of solution. The city of Scranton became a second-class city in 1901. At that time it had 21 wards. As a third-class city it could not have more wards under any circumstances. Counsel for relator claims that this limitation as to the number of wards is still the law for Scranton, and that Scranton as a city of the second class can never have more wards, however much it might grow in size and population, unless by means of some legislation not yet enacted when the decree of annexation was made in this case, or when the councils undertook to create the Twenty-Second Ward. I incline to the other view. I think the limitation to 21 wards disappeared, in a legislative sense, when Scranton became a city of the second class. It therefore seems that there may be a Twenty-Second Ward if created by the proper authority. This leads to the next question.

"If Scranton can have more than 21 wards, how can a new ward be created? The relator contends that there is only one way, to wit, by the method pointed out by Act May 23, 1874 (P. L. 230), § 2. This section applies

to all cities, and it provides that 'wards in cities may be divided, or new wards therein created, by the court of quarter sessions of the proper county.' When I first read the section, I was disposed to agree with relator's counsel, but a closer examination thereof will show that it does not cover annexed territory; or, in other words, the creation of a new ward out of a new territory. It provides that upon petition of 100 qualified electors, or of councils, praying for 'a division of a ward, or for the erection of a new ward out of parts of two or more wards,' the court shall appoint five commissioners to make report thereon. If the report is favorable 'to such division or creation,' an election shall be held in the 'ward or wards proposed to be divided' and 'if it appear that a majority of the votes * * * are for a division the said court shall thereupon order and decree a division of the said ward or wards * * * and shall number the new wards.' Evidently this section does not contemplate the creation of a ward except by the division of other wards already in existence. It therefore follows that section 2 of the act of 1874 does not apply to the case at bar.

"Is there any other general legislation applicable? Any legislation applying to all cities? I can find none except the annexation act of April 28, 1903 (P. L. 332), the constitutionality of which we have discussed in this opinion. The only reference in this act to the question of wards is to be found in the sixth section (page 333), and is in these words: 'The territory annexed shall, as soon as practicable, be arranged into wards of the city to which it is annexed.' By whom shall the territory be arranged into wards? By the city councils? The act does not say so, nor can that power be inferred from the words of the act.

"The next question is: Is there any second class city legislation under which annexed territory can be created into a ward? The only legislation of this character is the recent act of April 24, 1905 (P. L. 307), authorizing the creation, division, and consolidation of wards in cities of the second class. It would be premature now to discuss this act, as no action has been taken under it looking to the creation of a ward out of the annexed territory. It is useless also to examine any third-class city legislation which may apply and which may have been preserved for cities of the second class by article 20, § 1, of the Act of March 7, 1901 (P. L. 47), wherein it is provided that laws relating to cities of the third class shall continue to apply to cities of that class which have passed or may pass into a city of the second class by reason of increase in population, except so far as such laws are supplied by, or are in conflict with, laws relating to cities

of the second class. Nobody has invoked the benefit of such legislation in this case, and I cannot therefore discuss the question.

"The conclusion is plain that the annexed territory known in this case as "Lincoln Heights" can have no ward representation until it becomes a ward. It is not a ward yet. The city councils had no authority to make it into a ward.

"The question of an election district. 'Lincoln Heights' has not yet been constituted into an election district. The Constitution provides (article 8, § 2) that 'townships and wards of cities or boroughs shall form or be divided into election districts * * * in such manner as the court of quarter sessions may direct.' There is no other way in which an election district can be created, and the Legislature cannot take away this power from the court. There is no order of the court of quarter sessions of Lackawanna county constituting the annexed territory into an election district. It follows, therefore, that no legal election has yet been held in the so-called Twenty-Second Ward of Scranton. There is no ward which the respondent can at present represent and no legal election district in which votes could be cast for him for school controller or for any other office. On both grounds the respondent is out of court. It may be a hardship for the voters residing on Lincoln Heights that they cannot have ward representation although the annexed territory is a part of the city; but the hardship was not created by the court. At no time has the court been applied to for any action except to decree the annexation. Whatever might have been said about the creation of a ward I have no doubt that the annexed territory can be made into an election district.

"It is clear, therefore, that judgment must be entered for the commonwealth upon the demurrer."

Argued before FELL, BROWN, MESTREZAT, POTTER, and STEWART, JJ.

Edward W. Thayer and David J. Davis, for appellant. M. J. Donahoe, T. A. Donahoe, and James J. Powell, for appellee.

PER CURIAM. It is conceded that judgment of ouster was properly entered against the defendant for the reasons that there was no properly constituted ward of the city of Scranton that he could represent as a school controller, and that there was no election district in which votes could be cast for him for this office. Whether the additional reason given by a majority of the court that the act of April 28, 1903 (P. L. 332), is both unconstitutional and void for uncertainty can be sustained, is a question not requiring decision at this time.

The judgment is affirmed.

(217 Pa. 338)

VITO v. WEST CHESTER, KENNETT & WILMINGTON ELECTRIC RY. CO.

(Supreme Court of Pennsylvania. April 1, 1907.)

MASTER AND SERVANT—INJURY TO SERVANT—NEGLIGENCE OF FELLOW SERVANT.

Where a workman excavating the roadbed of a railway was injured by the explosion of dynamite caused by the negligence of a co-employee who was helping plaintiff in lighting the fuses, he cannot recover from the railway company employing him.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 486-514.]

Appeal from Court of Common Pleas, Chester County.

Action by Felice Vito against the West Chester, Kennett & Wilmington Electric Railway Company. Judgment of nonsuit, and plaintiff appeals. Affirmed.

At the trial it appeared that at the time of the accident the plaintiff was engaged in excavating the roadbed of defendants' railway. While so engaged, he was injured by an explosion of dynamite. The testimony showed that the accident was caused by the negligent act of one Big Mike in prematurely lighting a short fuse. The court entered a nonsuit, saying: "I cannot see that there is any liability here on the part of the defendant for this accident in any way. If anybody was responsible for it other than the plaintiff himself, it was Big Mike, who was not a vice principal, nor a principal. At most, he was foreman, or 'boss,' as he was called, but in this accident he was a co-employee at the time the accident happened, for which the company would not be liable. We therefore direct a nonsuit."

Argued before MITCHELL, C. J., and FELL, MESTREZAT, POTTER, and STEWART, JJ.

W. S. Harris, for appellant.

PER CURIAM. Judgment affirmed on the opinion of the learned judge below on entering the nonsuit.

(217 Pa. 427)

STOUT et al. v. YOUNG.

(Supreme Court of Pennsylvania. April 1, 1907.)

1. WILLS—PROBATE—CONCLUSIVENESS.

Where no appeal has been taken from the probate of a will for over five years, a devise of realty thereunder cannot be impeached on the ground that testator was not of age when he made the will.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, §§ 828, 916.]

2. SAME.

Under Act April 22, 1856 (P. L. 523), § 7, after five years from the probate of a will, without caveat or action at law, the probate of the will on appeal therefrom is conclusive of the fact that it is the will of the alleged testator.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, §§ 828, 916.]

Appeal from Court of Common Pleas, Lackawanna County.

Action by John Stout and others against Ann Patterson Young. Judgment for defendant, and plaintiffs appeal. On a question of law reserved. Affirmed.

At the trial the jury returned a verdict for defendant, subject to the question of law reserved, as follows: "That as the will of Daniel Stout was duly probated in the office of the register of wills of Luzerne county in conformity with law, in 1876, and, as no caveat was filed or proceedings of any kind instituted to have the probate set aside, it became conclusive as to the real estate of said Daniel Stout after five years, and cannot now be attacked in this proceeding."

Argued before FELL, BROWN, MESTREZAT, POTTER, and STEWART, JJ.

H. W. Mumford, Clarence Ballentine, and W. A. Wilcox, for appellants. A. A. Vosburg, W. I. Hibbs, and Charles W. Dawson, for appellee.

PER CURIAM. The learned trial judge was of opinion that error had been committed in submitting to the jury the question of adverse possession in the defendants and their predecessors in title. Since this was one of two questions of fact submitted, and the verdict may have been based on a finding for the defendants as to it, he entered judgment for the defendants on the question reserved, which was whether after five years the probate of the will became conclusive as to real estate, notwithstanding the want of age of the testator, no proceedings having been instituted to contest it. The conclusion reached by the court on this question, in which we concur, would have warranted a peremptory direction for the defendants. A right verdict had, therefore, been reached irrespective of the finding as to adverse possession, and judgment should have been entered on the verdict instead of on the reserved question.

The action was ejectment, brought in 1905, in which the validity of a will probated in 1876 was attacked on the ground that the testator was not of the age of 21 years at the time of making it. The construction of section 7 of the act of April 22, 1856 (P. L. 533), has been definitively settled. It is not merely a statute of limitations affecting a remedy. It is a provision "for the greater certainty of titles," and establishes a rule of evidence which makes conclusive as to land after the lapse of five years, without caveat or action at law duly pursued, what was before prima facie only. The probate of a will is a judicial act which cannot be collaterally impeached in an action of ejectment. It is conclusive on all persons whether under disabilities or not, unless contested in the manner provided by the act. *Wilson v. Gaston*, 92 Pa. 207; *Cochran v. Young*, 104 Pa. 333; *McCay v. Clayton*, 119 Pa. 133.

12 Atl. 860. The probate is, of course, conclusive only as to matters within the jurisdiction of the register, and not as to the effect of testamentary provisions which depend on matters dehors the record, as the validity of a gift to charities (Hegarty's Appeal, 75 Pa. 503), or the effect of a subsequent marriage of a testatrix (Craft's Estate, 164 Pa. 520, 30 Atl. 493), or the rights of after-born children (Owens v. Haines, 199 Pa. 137, 48 Atl. 859). But the probate of a will unappealed from is conclusive of the fact that it is the will of the alleged testator. To establish this fact the necessary findings were that the will was duly executed, that the testator had sufficient mental capacity, and that he had reached the age of 21 years. Testamentary age is as essential to the establishment of a will as proper execution of the writing and the possession of testamentary capacity. It was involved in the adjudication and was settled by it.

The judgment is affirmed.

(217 Pa. 401)

PETERSON v. PHILADELPHIA, B. & W. R. CO.

(Supreme Court of Pennsylvania. April 1, 1907.)

1. MASTER AND SERVANT—INJURY TO SERVANT—ASSUMPTION OF RISK.

Where plaintiff was employed on a repair train, he assumed the risks involved in stopping at irregular times and places and getting on and off without the facilities expected at regular stations.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 547-554.]

2. SAME—FELLOW SERVANT.

The boss of a repair train is not a vice principal.

Appeal from Court of Common Pleas, Delaware County.

Action by John R. Peterson against the Philadelphia, Baltimore & Washington Railroad Company. From an order refusing to take off a nonsuit, plaintiff appeals. Affirmed.

Plaintiff was employed on a repair train unloading telegraph poles. Hettle, the boss or foreman of the train, gave a signal to the engineer to start it. The engineer in starting the train did so in such a manner that the plaintiff was thrown and injured. The court entered a compulsory nonsuit, which it subsequently refused to take off.

Argued before MITCHELL, C. J., and FELL, MESTREZAT, POTTER, and ELKIN, JJ.

A. B. Geary and Albert Dutton MacDade, for appellant. J. B. Hannum, for appellee.

PER CURIAM. The very much over-invoked principle of the duty of employers to provide a safe place for employes to work in has no application to this case. Some occupations involve risks and dangers that are inherent, and an employer is not an insurer

against these. The appellant was employed on a repair train, and the very nature of his employment involved the risks of stopping at irregular times and places, getting on and off without the facilities expected at regular stations and the corresponding duty of special care in so doing. There was nothing in the case to show that the place furnished plaintiff to work in was not as safe as the nature of the work permitted. The "boss" or foreman was not a vice principal, but, even if he had been, he was entitled to assume, when he gave the signal to start the train, that the engineer would do so in the proper manner. The case is squarely within *Cunningham v. Railroad Co.*, 66 Atl. 236 (opinion filed at the present term).

Judgment affirmed.

(217 Pa. 445)

DRAKE v. PENNSYLVANIA COAL CO.

(Supreme Court of Pennsylvania. April 1, 1907.)

1. MINES AND MINERALS—COAL LEASE—PAYMENT OF ROYALTIES.

Where a coal lease provides no place for payment of royalties, they must be demanded on the premises before forfeiture can be declared for nonpayment.

2. SAME—FORFEITURE—AMICABLE EJECTMENT—NOTICE.

A coal lease provided for an amicable ejectment in case of forfeiture, and that judgment might be confessed to the plaintiff by an attorney without a writ of error, appeal, or stay of execution, provided that 30 days' notice of an intent to enter should be first given to the lessee, within which time the rent due and unpaid might be paid. *Held*, that the 30 days' notice applied only to a judgment by confession, and not to ordinary ejectment by summons.

Appeal from Court of Common Pleas, Lackawanna County.

Action by George K. Drake against the Pennsylvania Coal Company. From an order dismissing exceptions to report of referee, plaintiff appeals. Affirmed.

The following is the opinion of Newcomb, J., of the court below:

"The plaintiff joined with his co-tenants in a lease of certain coal lands to E. A. Coray. The defendant afterwards succeeded to Coray's rights and this action of ejectment was brought by the plaintiff to enforce a forfeiture as to his undivided purpart of the demised premises. The referee found upon sufficient evidence that a cause of forfeiture had occurred, but on the undisputed facts held there could be no recovery, and therefore directed judgment for the defendant. This conclusion was based on three reasons, either of which, if sound, is fatal to the plaintiff's case. They are as follows: (1) No notice was given to defendant of plaintiff's election to declare the lease forfeited; (2) that, even though that notice had been given, plaintiff was bound to give defendant at least 30 days' notice of his intention to sue; and for want of such notice the action could not be maintained; (3) that the unpaid

royalties which give rise to the claim of forfeiture must first be demanded on the premises before a forfeiture can be declared, and for want of such demand the action fails. Upon the first and third propositions we think the learned referee was right, and that is decisive in favor of the judgment rendered. We can add nothing profitably to what is said by him in support of those conclusions.

"While it makes no difference to the disposition of the case, we do not agree with him that 30 days' notice of his intention to sue must be given by the plaintiff. This conclusion of the referee rests upon his construction of a certain clause in the lease which provided a special and summary remedy at plaintiff's option for recovery of possession in case of forfeiture. The remedy so provided was not exclusive, nor was it so considered by the learned referee. It was merely additional to any other remedy which the plaintiff might have. It was stipulated in the lease that in case of forfeiture incurred an amicable action of ejectment for the lands could be filed and judgment therein forthwith confessed to the plaintiffs by any attorney without a writ of error, appeal, or stay of execution, provided that before entering such judgment at least 30 days' notice of the intention to enter it should be given to the lessee, 'within which time the rent due and unpaid may be paid, and the forfeiture avoided.' Giving special weight to this last clause of the stipulation for judgment, the referee says that, unless the plaintiff is held to the same notice of intention to bring ejectment, the object of this notice is defeated. This, he says, is to give an opportunity to pay the rent and avoid the forfeiture. 'It seems to me,' says the referee, 'that the spirit of the agreement requires this notice to be given before any adverse legal proceeding is commenced.' To this it might be answered that the parties did not say so. We are not called upon to resort to the supposed spirit of the agreement to determine its meaning so long as the terms in which the parties expressed themselves are neither obscure nor ambiguous. The opportunity to pay the rent here provided for was to prevent a judgment which once entered would be final and subject to no review except for fraud. An adverse action of ejectment is, and doubtless in the contemplation of the parties was, quite a different thing. The whole ground of controversy, if any there were, would in that case be open to contest. The defendant would have its day in court. If the summary remedy were chosen, the plaintiff himself would dispose of the controversy by a stroke of the pen. It was to prevent such summary and irretrievable dispossession as this that the notice relied upon by the referee was provided. To accomplish the object which the referee had in mind, it was unnecessary to give the lease his construction; for, by the preceding stipulation which prescribed the

terms on which a forfeiture could be declared, a corresponding notice had to be given to the lessee, his agent, or superintendent, or posted on the premises. This was a notice that an installment of rent was due. Thirty days had to elapse after giving this notice before any right to forfeit would accrue. By its terms, then, if the rent were paid in the meantime after such notice, the right to assert a forfeiture would be effectually defeated; or, more accurately, the right would never come into existence. The referee found that this notice was given. The notice on which the learned referee relied concerns only the right to enter judgment under the power of attorney.

"The defendant filed some exceptions, but under the view which we take of the case it is unnecessary to pass upon them.

"Exceptions overruled."

Argued before FELL, BROWN, MESTREZAT, POTTER, and STEWART, JJ.

Samuel B. Price, for appellant. Everett Warren, for appellee.

PER CURIAM. The order overruling the exceptions and confirming the report of the referee is affirmed for the reasons stated in the opinion of the learned judge of the common pleas.

(106 Md. 104)

FISHER v. STATE.

(Court of Appeals of Maryland. May 1, 1907.)

TAXATION—INHERITANCE TAX—STATUTORY PROVISIONS.

Code Pub. Gen. Laws, art. 81, § 117, provides that all estates passing from any person who may die seized and possessed thereof, being in this state, to any person in trust or otherwise, other than to or for the use of the father, mother, husband, wife, children, and lineal descendants of the grantor, testator, or donor, shall be subject to a certain tax. Testator devised the residue of his estate to trustees in trust for his widow during her natural life, and thereafter in trust to the use of such person as she might appoint by her will. Testator's widow, having died, left a will devising the entire residuary estate to her executors in trust to allow her brother-in-law a life estate therein, and thereafter to a home for invalid children. *Held*, in an action after the death of the widow to recover the collateral inheritance tax on the residuary estate of testator, that it was subject to the collateral inheritance tax to be reckoned on its value as of the death of testator's widow, and not of his own death.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Taxation, § 1718.]

Appeal from Superior Court of Baltimore City; Alfred S. Niles, Judge.

Suit by the state against D. K. Este Fisher, surviving trustee under the will of Henry E. Johnston, deceased. From a judgment for plaintiff, defendant appeals. Affirmed.

Argued before BRISCOE, BOYD, PEARCE, SOHMUCKER, and BURKE, JJ.

Bernard Carter, for appellant. Wm. S. Bryan, Jr., Atty. Gen., for the State.

BRISCOE, J. This is a suit by the state of Maryland to recover the collateral inheritance tax, alleged to be due from the estate of the late Henry E. Johnston. The facts are undisputed, and the question for determination rests upon the construction to be given to section 117, art. 81, of the Code of Public General Laws. The substance of the statute is as follows: "All estates * * * passing from any person who may die seized and possessed thereof, being in this state, or any part of such estate * * * or interest therein transferred by deed, will, grant, bargain, gift or sale, made or intended to take effect in possession after the death of the grantor, * * * devisor or donor, to any person or persons, bodies politic, * * * in trust or otherwise, other than to or for the use of the father, mother, husband, wife, children and lineal descendants of the grantor, * * * testator, donor, * * * shall be subject to a tax of two and a half per centum on every hundred dollars, of the clear value of such estates, money or securities." Mr. Johnston died on the 5th of May, 1884, leaving a large and valuable estate, consisting of real and personal estate. The will was duly admitted to probate in the orphans' court of Baltimore City, and the trustees under the will duly qualified as such. By his will, he gave and devised the entire rest and residue of his estate, real and personal, to certain trustees (Messrs. Josiah L. Johnston, Wm. A. Fisher, W. Graham Bowdoin), in trust for his wife, Harriet Lane Johnston, for and during the term of her natural life, and after the death of his wife "in trust to hold the entire corpus of the residuum of the estate to the use of such person and persons, whether natural or corporations, to whom my wife may give and appoint, by any instrument in the nature of her last will and testament," and "if she should fail to execute a last will and to make such appointment, then, in trust, to hold the corpus of the residuum of the estate, to the use of the Harriet Lane Home for Invalid Children of Baltimore City." On the 11th of May, 1885, upon the settlement of the estate, his executors transferred to the trustees under the will the rest and residue of the personal estate, amounting to \$188,395.44. The real property comprising a part of the estate, amounting to \$43,000, also passed to the trustees, thus making the total value of the residuum of the estate transferred to the trustees, under the will, the sum of \$231,395.44. Mrs. Johnston died on July 3, 1903, leaving a last will and testament, which was duly admitted to probate in the city of Washington, on November 3, 1903. By her will, she executed the power of appointment vested in her by the will of her husband by devising and bequeathing the entire rest and residue of the estate, real and personal, of her husband, to her executors, in trust, to allow her brother-in-law to enjoy a life estate therein, if he so desired, and, as to the rest and residue, to the Harriet Lane Home for In-

valid Children of Baltimore City. On the 14th of March, 1904, Mr. Fisher, the surviving trustee, transferred all the residuum of the estate to Mrs. Johnston's executors except the sum of \$25,000, retained by him to meet any claim of the state for the collateral inheritance tax, here in controversy. It is admitted, by the record, and charged in the declaration, that the residuum of Mr. Johnston's estate had increased, until at the time of the death of Mrs. Johnston it amounted to \$734,439.36; that Josiah L. Johnston and W. Graham Bowdoin are dead, and the defendant, D. K. Este Fisher, is the surviving trustee; and that no collateral inheritance tax has been paid to the state by the trustees of the estate. The case was tried before the court, without a jury, and, the judgment being in favor of the state, the defendant has appealed.

The declaration in the case contains two counts. The first count charges that the state is entitled to recover a tax, on the value of the rest and residue of the estate, transferred by the executors of Mr. Johnston to the trustees, on the 11th of May, 1885. The second count claims the tax on the rest and residue of the estate, at the date of the death of Mrs. Johnston, on July 3, 1903. It is contended on the part of the appellant: (1) That upon a proper construction of the Maryland statutes, relating to the payment of collateral inheritance tax, in connection with the facts of this case, the state cannot recover any part of the amount claimed in either count in the declaration; (2) that, if the state can recover at all, it can only recover $2\frac{1}{2}$ per cent. on the value of the reversionary interest in the rest and residue of the estate, at the time of the death of the testator, Henry E. Johnston, and upon the value of the estate, as then ascertained.

In the case of *Tyson et al. v. State*, 28 Md. 577, and *State v. Dalrymple, Adm'rs*, 70 Md. 298, 17 Atl. 82, 3 L. R. A. 372, this court held that such a tax was free from all constitutional objection. In the latter case, it was said, in permitting property within the state, upon the death of its owner, to pass by devise or descent or distribution, the Legislature has seen fit, where strangers or collateral kindred receive it, to exact, as the condition upon which that privilege is granted, the tax in question. And upon the question of the collection of the tax, the court said that ample provision is made for every possible contingency that may arise, whether the decedent be a resident of this state or not, provided the property be located here, if he be a nonresident, or be actually or constructively here, if he be a resident. No estate can escape administration if the law be enforced and when the property passes into the hands of the executor his obligation to pay the tax is fixed, and his bond at once becomes liable therefor.

There can be no doubt, it seems to us, that under section 117 of article 81, above quoted,

the Johnston estate is liable for the collateral inheritance tax claimed by the state. The language of the statute is plain and direct that "all estates passing from any person who may die seized and possessed thereof * * * transferred, by deed, will, * * * to take effect in possession after the death of the grantor, deviser or donor," not within the excepted classes, shall be subject to this tax. The manifest intention of the Legislature was to tax the transmission of all property to collaterals situate in the state, as provided by the statute, and to require the payment of the tax as a premium for the enjoyment of the benefit thereby secured. In *State v. Dalrymple*, 70 Md. 298, 17 Atl. 82, 3 L. R. A. 372, it is said that one of the conditions upon which strangers and collateral kindred may acquire a decedent's property, which is subject to the dominion of our laws, is that there shall be paid out of such property a tax of 2½ per cent. into the treasury of the state. This, therefore, is not a tax upon the property itself, but is merely the price exacted by the state, for the privilege accorded, in permitting property so situate to be transmitted by will or by descent, or distribution. Because the statute does not contain a special provision for the ascertainment and collection of the tax cannot defeat the state's right to a recovery. It was distinctly held, in *Montague v. State*, 54 Md. 487, that, if an administrator or executor actually pays over money of his decedent to a collateral distributee or legatee without retaining therefrom this tax, it becomes, to the extent of the tax, money had and received by him for the use of the state, and an action may be maintained against such distributee or legatee therefor. *Dashlell v. Baltimore*, 45 Md. 621, *Bonaparte v. State*, 63 Md. 475. In the case at bar, we think it is plain that, upon probate of the will of Mrs. Johnston, she having executed the power vested in her by her husband's will, the estate thereupon became subject to the collateral inheritance tax imposed by the act.

It is urged, however, by the appellant, that upon whatever estate the collateral inheritance tax is imposed by the statute, it is imposed as of the death of the testator (Mr. Johnston), from whom the estate comes, and not upon the value of the estate at the time of the death of Mrs. Johnston. This contention, we think, is answered by the statute itself. The tax is imposed upon the clear value of all estates passing by will or otherwise, at the time it is transferred and received by

the collateral beneficiary. The tax is on the transmission of the property, and upon the estate the beneficiary is to receive and enjoy. There could be no transfer or enjoyment of the property, by the beneficiary in this case, until the death of Mrs. Johnston, and, this being so, the collateral inheritance tax was payable, upon the clear value of the estate, at her death, and at the time the collateral beneficiary received the benefit of the bequest and devise under the will. In other words, the tax is imposed upon the clear value of the estate, at the "passing and transferring" of the estate, to the collateral beneficiary. In *Dalrymple's Case*, supra, this court said, the amount of the tax will depend upon the sum in the hands of the administrators payable to the legatee.

It seems to be clear, therefore, without further discussion of the other questions raised on the record, that the court properly sustained the demurrer to the appellant's second plea, and committed no error in granting the state's first and sixth prayers, and in rejecting the defendant's prayer. It will be seen that the plaintiff's first prayer properly announced the law of the case. It is as follows: "The state prays the court to rule, as matter of law, that as it is admitted that the trustees holding the residuary devise and legacy under the will of Henry E. Johnston, of whom D. K. Este Fisher is the surviving trustee, have received from the executors of Henry E. Johnston, the said residuary devise and legacy, under the said will, and as it appears from the wills of Henry E. Johnston and Harriet Lane Johnston, admitting in these proceedings, that the said residuary devise and legacy in the said will of the said Henry E. Johnston, after the termination of the life estate of Harriet Lane Johnston (which life estate has terminated) is subject, under the laws of the state of Maryland to a collateral inheritance tax, the verdict in this case must be for the plaintiff." The sixth prayer relates to the amount to be recovered, with interest from the date of the probate of the will of Harriet Lane Johnston, and there can be no question as to its correctness under the construction we have given the statute. The defendant's prayer was properly refused. It denied a recovery on any part of the amount claimed in either of the counts in the declaration.

For the reasons given, the judgment will be affirmed, with costs.

Judgment affirmed, with costs.

(106 Md. 43)

FRY et al. v. TALBOTT.

(Court of Appeals of Maryland. April 28, 1907.)

1. COVENANT, ACTION OF—BREACH OF AGREEMENT UNDER SEAL—SCOPE OF REMEDY.

The action of covenant is the appropriate remedy to recover damages for the breach of an agreement under seal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Covenant, Action of, §§ 1-6.]

2. ASSUMPSIT, ACTION OF—GROUNDS—SCOPE OF REMEDY.

An action of assumpsit does not lie for the recovery of damages on an instrument under seal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 5, Assumpsit, Action of, §§ 1, 29.]

3. MONEY PAID—EVIDENCE—ADMISSIBILITY—SEALED CONTRACT.

Plaintiff sued in assumpsit for money alleged to have been paid by him for defendants at their request, consisting of certain taxes and an amount paid on a lien on defendants' property. By agreement under seal defendants agreed to convey to plaintiff certain property, all taxes, interest, and rents to be adjusted to day of closing transaction, and, in consideration thereof, plaintiff was to convey to one of defendants other property, there being a similar provision as to taxes, interest, and rents in reference thereto. *Held*, that the agreement, though under seal, was properly admitted in evidence to show upon whom the obligation to pay the amount sued for rested.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 35, Money Paid, § 28; vol. 5, Assumpsit, Action of, § 154.]

4. SAME—INSTRUCTIONS—QUESTION FOR JURY.

It should have been left to the jury to determine whether the amount paid by plaintiff was the correct amount, and it should not have been required to allow it simply because he paid it.

5. SAME—GROUNDS—TIME OF PAYMENT.

Where, in assumpsit, plaintiff alleged that, at defendant's request, he had paid certain taxes on property which defendants were to convey to him in consideration of his conveying other property to them, the agreement providing that all taxes were to be adjusted to the time of closing the transaction, it was not necessary for him to show that the payments were made by him before the deeds passed, since, if the payments were made at the request of the defendants, the mere fact that the deeds had been delivered before the payment was immaterial.

Appeal from Circuit Court, Prince George's County; Geo. O. Merrick and J. Parran Crane, Judges.

Action by Henry Maurice Talbott against James H. Fry and another. Judgment for plaintiff, and defendants appeal. Reversed.

Argued before BOYD, PEARCE, BURKE, SCHMUCKER, and ROGERS, JJ.

Gittings & Chamberlin and T. Van Olagett, for appellants.

BOYD, J. The appellee sued the appellants in assumpsit for money which he alleged he had paid for them at their request. There are seven counts in the declaration; the first being a special one and the others common counts. The first alleges that he paid the sum of \$187.63 for taxes due on

some property in the city of Washington and the sum of \$321.97 to reduce a lien on that property. There was an agreement under seal by which the appellants agreed to convey to the appellee three lots in Washington, "subject only to a trust of \$2,700 now of record," and that part of the agreement concluded by saying: "All taxes, interest and rents to be adjusted to day of closing transaction, possession to be delivered at the same time." In consideration of that the appellee agreed to convey to James H. Fry, one of the appellants, a farm in Prince George's county, Md., subject to a mortgage or deed of trust for \$3,000, and there was a provision as to taxes, interest, and rents, in reference to that property, similar to that above quoted. During the trial that agreement was offered in evidence by the appellee, and the appellants objected to it on the ground that it was not admissible under the pleadings, and upon the further ground that any rights under the agreement were merged in deeds, which had been executed and delivered. The court overruled the objection and admitted the agreement; and its ruling is presented to us for review by the first bill of exceptions.

There can, of course, be no question that the action of covenant is the appropriate remedy to recover damages for the breach of an agreement under seal, and, when there is a contract under seal for the payment of a definite sum of money, it can only be recovered at law in an action of debt or covenant. It is likewise true that an action of assumpsit does not lie for the recovery of damages on an instrument under seal, but it is confined to the recovery of those for breaches of parol contracts, which may be oral or in writing, not under seal. As the contract before us is under seal, it follows from what we have said that a suit in assumpsit could not be maintained on it to recover damages for the breach of any covenant or agreement therein contained; but is this a suit on that contract, or was the appellee required to sue on it, to recover the taxes and other amounts claimed to have been paid by him? We confess that these questions were not altogether free from difficulty when we entered upon the consideration of this case, which was submitted on brief by the appellants, and there was no argument or brief for the appellee, but upon reflection we have reached the conclusion that the agreement was admissible in evidence, although the suit was in assumpsit. As we have seen above, the provision in the agreement is "all taxes, interest, and rents to be adjusted to day of closing transaction, possession to be delivered at the same time." There is no express covenant or agreement to pay the taxes and interest, and, even if it be conceded that there was an implied covenant that the taxes, interest, and rents be adjusted to the day of closing the transaction, and that the balance be paid to whosoever due, yet according to the theory

of the plaintiff they were not adjusted; that is to say, the taxes and interest "to day of closing transaction" were not paid, and, so far as disclosed by the record, no rent was then collected or deducted by the appellants, if there was any which had not been previously paid. As no purchase money was to pass between these parties, according to the written agreement, it might well be that the appellants requested the appellee to pay the taxes and interest and agreed to repay him. Indeed, after the agreement was admitted, the appellee offered evidence tending to show that the appellants had agreed to pay the sum agreed upon, if he would loan them \$400 and take a second mortgage on the farm, that he agreed to do so, prepared the mortgage, and it was sent to the appellants, but they did not execute it. They denied that, and testified that the original undertaking was that each of the properties was to be subject to a lien of \$2,700, and, when they called the attention of the broker to the provision in the agreement that there was to be \$3,000 on the farm, he said that he was to pay for Mr. Talbott the taxes, interest, etc. We refer to these matters only to show that it was not only possible, but there was evidence of at least attempts to arrange for Mr. Talbott to pay the taxes and interest for the appellants.

The special count in the *nar.* alleges that the plaintiff paid the amount sued for at the request of the defendants. If that be true, and the defendants were under obligations to pay them, there could be no valid reason why money so paid, at their request, could not be recovered in *assumpsit*. From what we have stated above, it can be seen that there was a dispute between the parties as to who should pay them, and it must be remembered that the written agreement only provided that they were "to be adjusted to day of closing transaction." Therefore, as reflecting upon the question thus at issue between them, the agreement, although under seal, was properly admitted in evidence to show upon whom the obligation rested to pay them. It was not offered as the basis of the action, but as evidence of a material fact involved in it. The case of *Curtis v. Flint & Pere Marquette Ry. Co.*, 32 Mich. 291, presented a very similar question. That was an action of *assumpsit* on the common money counts to recover the amount of taxes paid by the plaintiff for the use of the defendant. The duty of the defendant to pay the taxes arose upon his contract under seal for the sale of some land to the plaintiff. In Michigan there was a statute providing that in suits upon contracts under seal, or upon judgments, where an action of covenant or debt could be maintained, an action of *assumpsit* could be in the same manner in all respects as upon contracts without seal. It had been decided in *Gooding v. Hingston*, 20 Mich. 439, that the statute did not dispense with any special averments in the declaration which were before essential,

and recovery could not be had on the common counts. Judge Cooley in delivering the opinion of the court in the *Curtis Case*, said: "The distinction between that case and this is obvious. This action, as has been stated, is brought to recover moneys paid for defendant's use; and all that is necessary to maintain such an action is to show the duty of the defendant to pay, and the payment by the plaintiff to protect itself against injurious consequences. The duty may as well be established by a contract under seal as by any other. The action is not based upon it, but is a matter of evidence only." That court, through one of its judges who so greatly helped to give it such a high standing throughout the country, thus announced the law in a case involving practically the same question that is before us, and was not in any way, as we understand the opinion, governed by the statute above referred to. Indeed, it was not a suit on a contract under seal, to which the statute alone applied. If it be true that the plaintiff did pay at their request money which the defendants were under obligation to pay, then there was an implied *assumpsit* to repay it to him, and there can be no substantial reason assigned why he should not be permitted to recover it in an action of *assumpsit*, notwithstanding the agreement offered in evidence was under seal. Indeed, it might well be questioned whether he could have sued on that agreement (even assuming there was an implied covenant to pay the party to whom the interest and taxes were due), if, after breach of the covenant, he had agreed to pay the amounts; but, regardless of that, we are of the opinion that he could, under the circumstances, sue in *assumpsit* and that the agreement under seal was admissible, for the reasons given.

The agreement was also objected to because it was merged in the deeds. When it was admitted, there had been no evidence that the deeds had been executed and delivered; but, if there had been, they are not in the record, and hence their contents are not known to us. They may have left the question undisposed of, and hence it is unnecessary to discuss the effect of deeds upon previous agreements when they are offered merely as evidence in a case such as this.

The exceptions in reference to the action of the court on the prayers offered are not presented in accordance with the well-established practice in this state, which can easily be ascertained by reference to the records of this court and should be followed; but, although irregular, they are sufficient. The court granted the first and second prayers of the plaintiff and the second of the defendants, and rejected the first of the defendants; their third being conceded. The defendants excepted to the granting of those of the plaintiff and to the rejection of their first.

The first of the plaintiff is "that, unless the

jury find from the evidence that Galen H. Green was in fact the agent of the plaintiff, then they are not to consider any evidence relating to the transaction embraced in contract of March 30th, unless the same happened after the date of said contract." It is not clear just what is meant by that. It perhaps might have done the plaintiff more harm than the defendants, but such a prayer might be very misleading, not to speak of other objections. The effect of it was that, if the jury found that Green was the agent of the plaintiff, they could consider "any evidence relating to the transaction embraced in contract of March 30th," but, if they found he was not, they could consider any of such evidence, regardless of who gave it. The prayer is otherwise defective, but we need not discuss it further, and it was doubtless inadvertently granted.

The plaintiff's second prayer ought also to have been rejected by reason of the conclusion, even if there had been no other objection to it. If the jury found that the defendants had agreed to pay the taxes and to reduce the trust to \$2,700, or authorized the plaintiff to pay the same, and further found that the plaintiff did pay them, they were instructed to find a verdict for the plaintiff "for such an amount as they should find was paid by him accounting to the date of transfer of the respective properties." It should have been left to the jury to determine whether what he paid was the correct amount, and not require them to allow it simply because he paid it. There is nothing to show whether the rent was adjusted, or whether the plaintiff received any which had been running before the transaction was closed. As the agreement offered in evidence by the plaintiff expressly provided that taxes, interest, and rents were to be adjusted, it may be that the plaintiff afterwards collected some of the rent, which was to be taken into consideration. But neither the court nor the jury could assume, in the absence of some admission by the defendants, that the amount paid by the plaintiff was correct. The record shows the taxes were not paid until August 15th, while the plaintiff testified that the deed to him was recorded in May, 1905. The nar. alleges he paid \$167.63, and his testimony was that he paid \$169. The nar. also alleges he paid \$321.97 to reduce the lien, while his testimony is that he paid \$183.27. Of course, the allegations in the nar. are only referred to as showing that there might well have been some question as to whether what he did pay was the correct amount due. The first part of the prayer is not altogether in accord with the special count in the nar.

The first prayer of the defendants was

properly rejected. We do not understand why it was necessary to show that the payments were made by the plaintiff before the deeds passed, as the prayer required to be done. If they were made at the request of the defendants, the mere fact that the deeds had been delivered before the payment would be immaterial. In the case of *Keator v. Colorado Coal, etc., Co.*, 32 Pac. 857, 3 Colo. App. 188, relied on by the defendants, the vendor sued the vendee for taxes on the property conveyed after it had delivered the deed. The court said that there was no individual liability on the part of the coal company under the statute, and the taxes were a lien on the property conveyed, and hence payment at that time by the coal company "was precisely analogous to the payment of a debt of one person by a stranger, and it is uniformly held that such a voluntary payment gives to the payor no cause of action against the person whose debt he may have liquidated." But in this case the property on which the taxes and trusts were liens was conveyed to the appellee as a consideration for the property conveyed by him to the appellants. They were to be adjusted as of the day the transaction was to be closed, and, if they were paid at the request of the appellants, there was an implied assumpsit to pay them to the plaintiff. The Washington property subject to a lien of \$2,700 stood in the place of purchase money for the Prince George's property, and a recovery of any excess over the lien agreed to be left on the property, paid by the appellee, was very analogous to the recovery of unpaid purchase money. It was decided in *Wolfe v. Hauver*, 1 Gill, 84 (which has frequently been since affirmed), that the receipt in a deed for the conveyance of land is only a prima facie evidence of the payment of the purchase money, and that the vendor may maintain an action of assumpsit for the purchase money agreed to be paid after the conveyance of the land and delivery of possession in pursuance to the deed. So, although this is not strictly speaking purchase money, it is in effect very much like it; for, if the agreement was that the trust to be left on the Washington property was to be \$2,700, and not \$2,883.27, payment of the difference by the appellants would have made the property conveyed by them, as payment for the other property, that much more valuable.

No other questions are presented by the record, and we are not called upon to pass on the prayer of the defendants which was granted, or the one that was conceded. For error in granting the two prayers of the plaintiff, the judgment must be reversed.

Judgment reversed, and new trial awarded, the appellee to pay the costs.

(106 Md. 585)

STATE v. MARYLAND CLUB.

(Court of Appeals of Maryland. April 26, 1907.)

1. INTOXICATING LIQUORS—INDICTMENT—OFFENSES.

The allegations of an indictment, averring that a club incorporated as a social club, and licensed by the city of Baltimore to sell by retail intoxicating liquors, and, not being a hotel keeper, did sell and furnish on Sunday intoxicating liquors to a person unknown, and averring that it sold, furnished, and disposed of on Sunday certain spirituous and fermented liquors, lager beer, etc., to a person unknown, are broad enough to support a conviction either under Code Pub. Gen. Laws, art. 27, § 385, prohibiting a person from selling on Sunday intoxicating liquors or other goods, wares, or merchandise, or under Baltimore City Charter (Laws 1898, p. 501, c. 123) § 682, declaring that no licensee to sell intoxicating liquors shall sell intoxicating liquors on Sunday unless the licensee is a hotel keeper.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 29, Intoxicating Liquors, §§ 219, 220, 228.]

2. SAME—NATURE OF LICENSE.

A license for the sale of intoxicating liquors is granted by the state in the exercise of its police power, and may be modified or annulled by the state at pleasure, and the source from which a liquor license is derived, whether from the city or elsewhere, is the authority of the state.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 29, Intoxicating Liquors, § 103.]

3. SAME—STATUTES—VIOLATION.

A club incorporated by Acts 1858, p. 121, c. 95, as amended by Acts 1892, p. 19, c. 22, as a social club, and maintaining a clubhouse in the city of Baltimore, and there furnishing to its members refreshment, including intoxicating liquors, and holding a license to sell liquors in the city of Baltimore, is a licensee under Pub. Loc. Laws Baltimore City, art. 4, relating to intoxicating liquors, and by virtue of Acts 1898, p. 778, c. 246, and Acts 1906, p. 474, c. 278, is liable to the penalty prescribed by Baltimore City Charter (Laws 1898, p. 502, c. 123) § 685, for selling liquor on Sunday, though the sale is made to its members.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 29, Intoxicating Liquors, § 186.]

Appeal from Criminal Court of Baltimore City; Henry D. Harlan, Judge.

The Maryland Club was indicted for selling intoxicating liquors on Sunday. From a judgment dismissing the prosecution, rendered on the overruling of a demurrer, interposed by the state to special pleas, the state appeals. Reversed and remanded.

Argued before BOYD, PEARCE, BURKE, SCHMUCKER, and ROGERS, JJ.

Albert S. J. Owens and William S. Bryan, Jr., Atty. Gen., for the State. Morris A. Soper and Bernard Carter, for appellee.

BURKE, J. The Maryland Club, a bona fide social organization, incorporated under the laws of Maryland, was indicted in the criminal court of Baltimore on the 12th day of December, 1906, for the offense of selling and furnishing intoxicating liquors on Sunday, November 25, 1906, in the city of Baltimore, to a certain person whose name was unknown to the grand jurors. The indictment contained four counts. The first count

charged that the Maryland Club, "a body corporate, duly incorporated, late of said city, on the 25th day of November, in the year one thousand nine hundred and six, at the city aforesaid, the said day in the said year being the Lord's Day, commonly called 'Sunday,' and being then and there a body corporate, duly incorporated, in said state of Maryland, and being then and there a club, and being then and there a licensee of the said state under the name of the 'Maryland Club,' then and there licensed, as aforesaid, to sell, offer for sale, and keep for sale intoxicating liquors by retail by the drink in said city, and, not being then and there a hotel keeper, unlawfully did then and there sell and furnish intoxicating liquors to a certain person to the jurors aforesaid unknown, contrary to the form of the act of assembly in such case made and provided, and against the peace, government, and dignity of the state." The second count alleges that the Maryland Club was incorporated by an act of the General Assembly of Maryland passed in the year 1858, and sets out in full the act of incorporation. It then sets out an act of the General Assembly of Maryland, known as chapter 22, p. 19, Acts 1892, by which the original charter of the Maryland Club was amended. It then alleges that the said Maryland Club "during all of the time aforesaid was, and still is, such corporation and body corporate as aforesaid, and that on the 25th day of November, in the year nineteen hundred and six, at the city of Baltimore, in the state of Maryland, said Maryland Club was, and still is, such corporation and body corporate duly incorporated as aforesaid, and was on the said last-mentioned day, and still is, at the city aforesaid, a club and licensee of said state licensed to sell, offer for sale, and keep for sale intoxicating liquors by retail by the drink in said city of Baltimore, and, not being then and there on said 25th day of November in said year, nineteen hundred and six, at the city aforesaid, a hotel keeper, unlawfully at the city aforesaid, did on the said last-mentioned date, to wit, November 25th, nineteen hundred and six, the last-mentioned day being the Lord's Day, commonly called 'Sunday,' sell and furnish at the city aforesaid intoxicating liquors to a certain person whose name is to the jurors aforesaid unknown, contrary to the form of the act of Assembly in such case made and provided, and against the peace, government, and dignity of the state." The third count alleges that the said Maryland Club, "a body corporate, duly incorporated, on the said 25th day of November, in the year of our Lord nineteen hundred and six, at the city aforesaid, the said day in the said year, being the Lord's Day and Sabbath Day, commonly called 'Sunday,' and being then and there a body corporate, duly incorporated, and being then and there

a club, society, and association, and a licensee of the said state, under the name of the Maryland Club, then and there licensed to sell, offer for sale, and keep for sale intoxicating liquors by retail by the drink in said city, and not being then and there a hotel keeper, unlawfully did sell and furnish on the said last-mentioned day in the said year, at the city aforesaid, intoxicating liquors to a certain person whose name is to the jurors aforesaid unknown, contrary to the form of the act of Assembly in such case made and provided, and against the peace, government, and dignity of the state." The fourth count charges that said Maryland Club, "a body corporate, duly incorporated, on the said 25th day of November, in the year nineteen hundred and six, at the city aforesaid, the said last-mentioned day in the said year being the Lord's Day, commonly called 'Sunday,' and being the Sabbath Day, and the said Maryland Club being then and there a corporation, duly incorporated, and being then and there a club, society, and association, and then and there a licensee of the said state, under the name Maryland Club, then and there licensed to sell, offer for sale, and keep for sale intoxicating liquors by retail by the drink in said city, and not being then and there a hotel keeper, unlawfully did then and there sell, furnish, and dispose of certain spirituous and fermented liquors, cordials, lager beer, wine, cider, and intoxicating liquors to a certain person whose name is to the jurors aforesaid unknown, contrary to the form of the act of Assembly in such case made and provided, and against the peace, government, and dignity of the state." To this indictment the defendant filed two special pleas, to each of which the state demurred. The demurrer of the state to each of said special pleas was overruled by the court, and, the state declining to traverse the pleas, judgment was entered that the traverser, the Maryland Club, be dismissed and discharged from said indictment. From this judgment the appeal now before us was taken.

The special pleas filed by the Maryland Club are quite lengthy; and only the substance of the first plea need be stated, as the identical defense presented by the first plea is relied on under the second. It sets out Acts 1858, p. 121, c. 96, by which it was incorporated, and by which it appears that "an association of citizens has been formed in the City of Baltimore, under the title of the Maryland Club, having for its object the promotion of regulated social intercourse among its members, and the extension of hospitable courtesies to strangers"; that upon the passage of said act of incorporation the corporation thereby created, and as thereby authorized, organized itself as a social club for the accomplishment of the objects set forth in its said charter, committing the administration of said club to a board of

25 governors, and began to exercise the rights and privileges granted to it thereby, and continued in the exercise of the same up to and including the year 1892, in which year its charter was amended by an act of the General Assembly of Maryland, being chapter 22, p. 19, of the Acts of the General Assembly of Maryland of 1892. The amended charter is then set forth, and it is then alleged that, "after the passage of said last-mentioned Act of Assembly, the said corporation, the Maryland Club, continued in the exercise of the rights and privileges granted to it by its original charter and the aforesaid amendment thereof, and was in the exercise thereof at the times mentioned in the several counts of the indictment, and after the passage of the said act of assembly of Maryland of 1892 (Acts 1892, p. 19, c. 22), the said Maryland Club for the better accomplishment of the purposes of a social club, for the accomplishment of which it has been created and organized, did, at great cost and expense, erect and provide for the use of its members a large building situated at the southeast corner of Charles and Eager streets in the city of Baltimore, containing parlors, sitting rooms, sleeping rooms, reading rooms, library, billiard rooms, dining rooms, a café and restaurant, a large and commodious kitchen, storerooms for articles of food, wines, liquors, beers, and cigars, and other rooms adapted to the proper use of a first-class social club; and furnished and equipped said house and rooms with articles suitable and adapted to the use of its members as a place where they may meet from day to day and have the conveniences and advantages of a first-class social club; that a large number of the members of the club from time to time, as well on week days as on Sundays, get their meals in the said club building, including breakfast, lunch, and dinner; that the membership of said club is divided into two classes, designated as 'resident members' and 'nonresident members,' the resident members being those who reside in the city of Baltimore, and the nonresident members being those who reside elsewhere; that at the times mentioned in said indictment the number of its resident members was approximately 482, and its nonresidents 176; that the initiation fees of each resident member is \$150, and of each nonresident member \$50, and the annual dues paid by each of the resident members is \$75, and by each of the nonresident members \$36; that from the said fees and dues the said Maryland Club derives an annual revenue each year of more than \$40,000; that in the conduct of its affairs, and for the purpose of carrying out the objects for which it was incorporated, the said Maryland Club serves and furnishes articles of food, meals, wines, liquors, beers, and cigars, which liquors, wines, and beers are known as intoxicating liquors, wines, and beers, to those of its members who from time

to time ask to be served and furnished therewith, at times furnishing said intoxicating liquors to members with meals and at times without meals, as well on Sundays as on week days; that, to enable it to furnish the same to its said members, it purchases and keeps on hand the said articles, and furnishes the same to its members at prices fixed by a committee of its board of governors, and paid by the member or members ordering said articles; that the prices so fixed for said meals, articles of food, cigars, wines, liquors, and beers, and the prices fixed for each of them, are not fixed with the view of making by the said Club any profit in the furnishing of the same, but the prices are fixed with the view of furnishing the said articles at a minimum cost to its members, and such an amount only is charged as will compensate for the cost of the said articles, and a reasonable portion of the expenses of serving the same, taking into consideration the cost of the service, including the wear and tear of the articles used in connection therewith, the lighting, heating, use of the premises in which the said articles are furnished; that the revenues derived from the furnishing of the said articles are not equal to the cost of furnishing the same, the difference between said cost and said revenues differing from year to year, and large in amount in each and every year, and most years running into thousands of dollars, up to and including the year 1906; that said deficit is paid out of the revenues received as aforesaid by the Club from the fees and dues of its members; that no person other than resident and non-resident members are admitted to the privileges of said club except a limited number of persons not residing in the state of Maryland, but who are visitors to the city of Baltimore, and upon invitation of members, with the sanction of the executive committee of the board of governors, are admitted to the privileges of the club for a limited number of days, and that said persons while so enjoying said privileges are members of said club." It then alleges that for the purpose of complying with the laws of the state of Maryland, and in order to be able to furnish its members with liquors, wines, and beers in the manner hereinbefore set forth in the plea, the Maryland Club did on the 6th day of April, 1906, file through its secretary, George May, with the board of liquor license commissioners of Baltimore city a petition for the grant of a liquor license. This petition is then set forth, and states that it is made by George May, of Baltimore city, as president, or secretary of the club, society, or association hereinafter named, for and on behalf of the said club, society, or association in accordance with the provision of section 81a and section 81b of article 56 of the Code of Public General Laws of Maryland (Laws 1898, p. 779, c. 246). The petition states that the name of said club, society, or association

is the Maryland Club; that R. C. Hoffman is the president, and that said club, society, or association desires to sell, barter, furnish, or dispense liquors, wines, and beers to its members; that the name of the owner of said premises for which the license is applied for is the Maryland Club; that the petitioner, "on behalf and in the name and by the authority of the said organization, hereby agrees to furnish to the board of liquor license commissioners, whenever requested to do so, such facts and information as may be necessary or proper to satisfy the board that the club, society, or association hereby making application for license is in fact such legitimate and bona fide organization as it purports to be, and that such organization would not be a nuisance to the neighborhood where it is located or proposes to locate"; that the organization has not been indicted for any alleged violation of the law. And the petition states that the said organization is legitimate and bona fide organization for the purposes named in its certificate or incorporation or charter, that it is composed of reputable and law-abiding citizens, and that this license is not intended to be and will not be used for any purpose or in any manner contrary to law or subversive of peace and good order. To this petition was annexed a sworn list of bona fide members of said organization, as required by section 81a of article 56 of the Code of Public General Laws. This petition was verified by the oath of Mr. May, as secretary of the Maryland Club. It is then averred that the said "board of liquor license commissioners decided to grant the license prayed for, and notified in writing the defendant that such decision had been made, and thereupon, on the 1st day of May in said year, the defendant produced to the clerk of the court of common pleas the said notification in writing and paid to the said clerk the sum of \$250, and the said clerk thereupon issued to the defendant the license granted to the defendant by the said board, which said license was of the tenor, purport, and effect following, to wit: '\$250 for 12 months. License for the Sale of Liquor by Retail at a Club, Society, or Association. Baltimore City—to wit: This is to certify that a license had this day been granted to the Maryland Club, No. 1 E. Eager street, to sell by retail distilled liquors of any mixture of distilled liquors containing more than fifteen per cent. alcohol, or fermented liquors containing less than fifteen per cent. alcohol, under and by virtue of the provisions of Article 4 of the Code of Public Local Laws, title "City of Baltimore" subtitle "Liquors and Intoxicating Drinks," as amended by the acts of the General Assembly of Maryland of 1890, 1892, and 1894, and chapter 246 of the act of 1898.'" The plea then concludes as follows: "And the Maryland Club further saith that at all times from the time of its organization up to and including

the time of the finding of said indictment it has been, and it is now, a legitimate and bona fide social club, a legitimate and bona fide organization for the purposes named in its original charter—that is to say, for the promotion of regulated social intercourse among its members and the extension of hospitable courtesies to strangers—that it is composed of reputable and law-abiding citizens, and that, in pursuance of its said object, it places upon its own members and all strangers admitted to its privileges the obligation of preserving order, and decorum of language and behavior in the clubhouse; and that said Maryland Club is not in any sense of the word a trading corporation or engaged in the sale of liquor for making a profit therefrom. And the Maryland Club says that the intoxicating liquors charged in each of said counts to have been sold on the day therein mentioned to a person to the jurors unknown were by the said Maryland Club furnished to a member or members of said club without meals, and were so furnished in the manner hereinbefore set forth, and in no other manner."

The averments of the pleadings which have been stated present the conflicting theories of the state and the Maryland Club with respect to this case. Section 385 of article 27 of the Code of Public General Laws provides "that no person in this state shall sell, dispose of, barter, or, if a dealer in any one or more of the articles of merchandise in this section mentioned, shall give away on the Sabbath Day, commonly called Sunday, any tobacco, cigars, candy, soda, or mineral waters, spirituous or fermented liquors, cordials, lager beer, wine, cider, or any other goods, wares, or merchandise whatsoever; and any person violating any of the provisions of this section shall be liable to indictment in any Court in this State having criminal jurisdiction." Section 682 of the city charter declares that "no licensee under this subdivision of this article shall sell, or furnish to any person intoxicating liquors on any days upon which elections now, or hereafter may be required by law to be held; nor on the Lord's Day, commonly called Sunday, except that if the licensee is a hotel keeper he may supply such liquors, to be drunk in their rooms or with their meals, to bona fide guests; nor between the hours of twelve o'clock midnight and five o'clock a. m., at any time; nor, except in hotels, shall conduct the business in any place in which an entrance shall be allowed other than directly from a public traveled way; provided, however, that a licensed dealer may, with the permission of the board of police commissioners at bona fide entertainments of any society, club, or corporation, sell intoxicating liquors between such hours as the Board aforesaid may designate in said permit."

It will be observed that the allegations contained in the indictment are broad enough

to support a conviction either under the general law or under the section of the charter we have quoted. The first, second, and third counts, as we have seen, aver that the defendant did sell and furnish on the Sunday mentioned intoxicating liquors, while the fourth count charges the defendant with having sold, furnished, and disposed of on the Sunday named certain spirituous and fermented liquors, cordials, lager beer, wine, cider, and intoxicating liquors. The position taken by the Maryland Club, as shown by its pleas, is that it is not a licensee under the subdivision of the city charter mentioned, but that it is a licensee under the provisions of the public general law of the state, to wit, Acts 1898, p. 778, c. 246, and that under the facts alleged in its special pleas it is not unlawful for it to sell or furnish to its members intoxicating liquors on Sunday. The facts averred in the pleas, it is contended, bring the Maryland Club fully within the decision of this court in the case of *Selm v. State*, 55 Md. 566, 39 Am. Rep. 419, and constitute an effectual bar to the prosecution. The state, while denying the authority of the *Selm* Case, takes this further position that it is unlawful for any licensee under the subdivision of article 4 of the Public Local Laws of Baltimore City, relating to liquors and intoxicating drinks to sell or furnish to any person intoxicating liquors on Sunday, except as provided in section 682 of said article, but that the Maryland Club is such a licensee, and is not embraced within any of the exceptions expressed in section 682 of that article—therefore it is unlawful for it to sell or furnish intoxicating liquors to its members on Sunday. The major premise of this syllogism must be admitted, and, if the propositions asserted in the minor premise be true, the judgment in this case must be reversed. We think the determination of the conflicting contentions of the parties depends upon the proper construction of Acts 1898, p. 778, c. 246, and Acts 1906, p. 474, c. 278. It must be borne in mind that all licenses for the sale of liquor are granted by the state in the exercise of its police powers. It is a mere permit, which may be granted or withheld at the pleasure of the state, and which may be modified or annulled by the state at any time. The state has a right to prescribe the conditions upon which license may be granted. It may, therefore, be taken for granted that the source from which all licenses for the sale of intoxicating liquors is derived, whether in the city of Baltimore or elsewhere, is the authority of the state. The subdivision of the city charter (Acts 1898, p. 241, c. 123) relating to intoxicating liquors prescribes the conditions upon which all liquor licenses should be issued in the city of Baltimore. Licenses to sell, or furnish intoxicating liquors in said city were required to be taken out in the mode and manner therein prescribed, and the exclusive power to grant li-

censes to sell intoxicating liquor in that city was committed by the law to the board of liquor license commissioners for Baltimore city. The provisions of the city charter which deal with the sale of liquor and the granting of liquor licenses are merely a reenactment of Acts 1890, p. 380, c. 343, known as the high license law for Baltimore city. The section of the charter relating to these subjects, as originally enacted, have been amended by Acts 1900, pp. 418, 720, 1119, cc. 278, 442, 704, Acts 1902, p. 829, c. 228, and Acts 1906, p. 474, c. 278. There are several other acts of assembly defining certain territory in Baltimore city within which no license shall be granted, but these need not be noticed, as they have no bearing upon the question before us. By the original charter, as thus amended, most careful and elaborate provisions have been made as to the sale of liquors in Baltimore city. This court in the case of *Trageser v. Gray*, 73 Md. 250, 20 Atl. 905, 9 L. R. A. 780, 25 Am. St. Rep. 587, speaking through Judge Bryan of the Acts 1890, p. 380, c. 343, which, as we have said, was made a part of the city charter by Acts 1898, p. 241, c. 128, said: "The Act of 1890, p. 380, c. 343, prescribed a new system for the regulation of the sale of liquors in the city of Baltimore. A board was established, consisting of three commissioners, invested with a power of granting licenses to sell these liquors by retail. Every one applying for such license was obliged to file his petition with the board, setting forth a number of statements tending to show that he was a fit person to be licensed. It was required to be verified by his own affidavit, and also to be sustained by a certificate of at least 10 respectable persons declaring that they were acquainted with the petitioner, and that they had good reasons to believe that all the statements of the petition were true, and that they, therefore, prayed that the license should be issued to him. Provision was also made for giving intended notification of the petition by advertisement in two newspapers of general circulation in the city, and also for the public hearing of this petition, and the petition of other persons in favor of granting the license, and also remonstrances against granting it. It was further provided that licenses to sell by retail should be granted only to citizens of the United States of temperate habits and good moral character. A number of other regulations were made, which it is not now necessary to state, but they all show extreme and anxious solicitude on the part of the Legislature to diminish the evils arising from the excessive use of ardent spirits. If the commissioners should grant the license, the applicant was required to pay to the clerk of the court of common pleas \$250, and thereupon it became the duty of the said clerk to issue it." As originally enacted, and until the 1st day of May, 1898, at which time Acts

1898, p. 778, c. 246, became effective, bona fide social clubs of the character of the Maryland Club were not required to take out a liquor license in Baltimore City, and under the authority of the *Selm Case*, supra, could neither be indicted for the sale of intoxicating liquors without license nor for selling or disposing of liquors to its members on Sunday, first, because as decided in that case, the liquor license laws did not apply to such a club, and secondly, because the members of such a corporation who obtained liquors at the club, by paying into the common fund the price fixed by the regulation of the society, could not be said in any sense to buy them from the corporation, nor could the corporation be said to sell them to the members within the meaning of the law prohibiting the sale, or disposing of spirituous or fermented liquors on Sunday. Such was the state of the law in Baltimore city at the time of the passage of Acts 1898, p. 778, c. 246. The learned judge who passed upon the demurrers in the lower court has correctly stated the evils intended to be corrected by the passage of this act. "The evil," he said, "which I think the Legislature intended to reach by the passage of Acts 1898, p. 778, c. 246, grew out of the condition of the law between 1890 and 1898. During this period in Baltimore city saloons were required to pay a license fee of \$250, and there were so-called 'high-license' laws in force in other parts of the state; as, for example, in Havre de Grace, where the license fee under Acts 1890, p. 182, c. 180, § 192, was \$350. It was easy to evade the payment of these fees and commit a fraud upon the revenue of the state. A saloon keeper taking the advantage of the general incorporation law could get four friends to join him in executing and acknowledging a certificate of incorporation for a social club, which certificate, when approved by a judge as being in proper form and duly recorded, would constitute the incorporators a body corporate; and this body could carry on a retail liquor business without license by the simple expedient of requiring any person who wanted a drink to sign a constitution as a condition precedent to getting it. In point of fact, the number of such clubs formed during this period was so great, and their purpose was so well known that they were familiarly spoken of as 'beer clubs.'" Acts 1898, p. 778, c. 246, made it unlawful for any club, society, or association whatever, whether incorporated or not, now in existence, or hereafter to be formed, to sell, give, barter, or in any manner furnish, or dispense to its members, or any other person or persons, any intoxicating liquors without first having obtained a license as therein provided. After making it unlawful for clubs, societies, etc., to sell, give, barter, furnish, or dispense to their members intoxicating liquors without license, it provided by whom

and under what conditions the license should be granted. The act did not grant the license, but it conferred authority upon certain well-known agencies to grant it, when the applicant had first complied with the requirements of the act, and when the person or tribunal authorized to grant the license "shall be satisfied that the club making application for license is in fact such legitimate and bona fide organization as it purports to be, and such organization would not be a menace where it proposes to locate." The act did not apply to Baltimore and Washington counties, because in those counties there were local laws covering this subject. Acts 1906, p. 474, c. 278, amended the subtitle of the city charter relating to liquors, and, among other things, provided what the application for the license should contain. If the applicant desired a club license, it was made necessary to state that fact in the application. It seems to us to have been the evident intention of the Legislature by Acts 1898, p. 778, c. 246, and of Acts 1906, p. 474, c. 278, to bring a social club applying for a license in Baltimore city fully and completely within all the provisions of the subtitle of the city charter relating to intoxicating drinks which in their nature are properly applica-

ble thereto, and that a club to which a license has been granted by the board of liquor license commissioners is as much a licensee under that subdivision of the charter as is an individual to whom it may have granted a license. It by no means follows that because Acts 1898, p. 778, c. 246, was intended to remedy the evils mentioned, a licensed club in Baltimore city is not to be held subject to such provisions of the charter as may be properly applied to it, or that it is not liable, upon conviction, to the penalty prescribed by section 685, p. 502, of the charter, for the sale of liquors on Sunday. The conclusion that it is not so liable, it appears to us, can only be reached by a forced and overstrict construction of the acts of Assembly referred to. We therefore decide that the Maryland Club is a licensee under the subdivision of the city charter relating to the sale of liquors and intoxicating drinks, and, if the allegations of the indictment be true, it has committed the offense of selling, or furnishing intoxicating liquors on Sunday within the meaning of section 682 of the city charter. It follows that the judgment appealed against must be reversed.

Judgment reversed, and the case remanded, with costs to the appellant.

(106 Md. 204)

COGGINS & OWENS v. CAREY et al.

(Court of Appeals of Maryland. May 17, 1907.)

1. REFORMATION OF INSTRUMENTS—EVIDENCE—SUFFICIENCY.

In a suit to reform a mistake in a deed on a showing by parol evidence, only such full and strict evidence is required as will be sufficient to satisfy the mind of the court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Reformation of Instruments, § 160.]

2. PARTY WALLS—INJUNCTION TO PROTECT.

A mandatory injunction will lie to compel one of the owners of a party wall to close windows opened by him in the wall, though he stands ready to fill up the openings when plaintiff desires to use the wall as a party wall, and though there is no showing that complainant ever intends to use the wall.

Appeal from Circuit Court of Baltimore City; Alfred S. Niles, Judge.

Suit by Susan B. Carey and others against Coggins & Owens. From a decree in favor of plaintiffs, defendants appeal. Affirmed.

Argued before BRISCOE, BOYD, PEARCE, SCHMUCKER, BURKE, and ROGERS, JJ.

James McEvoy, Jr., and Francis T. Homer, for appellants. J. Bannister Hall, Jr., and James Piper, for appellees.

ROGERS, J. This is an appeal from the circuit court of Baltimore City. The subject-matter of the appeal is a deed and agreement entered into between the parties to this suit on May 2, 1905. The deed in question conveyed to the appellants, Coggins & Owens, a strip of land $10\frac{1}{2}$ inches wide, and $168\frac{1}{2}$ feet long on the east side of Charles street, 93 feet 5 inches south of German street, in the city of Baltimore. The deed contained certain covenants and conditions relating to the use of a wall standing one-half on the land of the appellees, and one-half on the land conveyed to the appellants, and to the respective rights of the parties in subsequent extensions upward and eastward of this wall. The appellees (plaintiffs below) contended that the whole of this wall, that already erected and that part erected subsequently to the making of the deed of May 2, 1905, was a party wall, and that the appellants (defendants below) had no right to open and maintain windows in this party wall; and, further, that there was a typographical error in the deed which should be corrected in order to express the understanding and agreement of the parties. After testimony taken in open court, and argument by counsel, the full relief prayed was granted, with costs, to the appellees, and it is from this decree that the present appeal is taken.

The testimony shows that the appellees had erected, some time prior to April, 1905, on a lot in Baltimore City, known as 21 South Charles street, a three-story warehouse. That the appellants, who owned the vacant lot adjoining that of the appellees, approached Mr. James Carey, some time in April, 1905, with a proposition to buy a strip of land $10\frac{1}{2}$ inches wide on the north side

of appellees' property, which strip of land ran to the center line of the north wall of the warehouse then standing, and therewith acquire one-half of the north wall of the appellees' warehouse. After some short delay, the appellees offered to sell for \$2,500, but the appellants only offered \$1,500. The appellants then, by letter of April 1, 1905, offered to buy for \$1,800 the land. The appellees made a counter proposition of April 4, 1905, to sell the $10\frac{1}{2}$ inches of land for the sum of \$1,800, provided certain conditions and covenants were inserted in the deed. Let us look at these letters:

"April 1, 1905. Mr. Francis K. Carey, City—Dear Sir: In regard to the use of the north wall of No. 21 South Charles street, in the construction of our warehouse on lot No. 19, with reference to which the writer called upon you yesterday morning, would say, we have talked the matter over between ourselves, and have conferred with several builders. Without exception they all state that the usual custom in circumstances of this kind, is for the buyer to pay one-half of the cost of building the wall and to buy half of the ground, at the price per front foot that ground in the vicinity is bringing. The offer of \$1,500 made you about conforms to this custom. After due consideration we have concluded that the use of the wall, and the purchase of ten and one-half twelfths ($10\frac{1}{2}/12$) front feet of your ground, would be worth \$1,800.00 to us. And we hereby offer you this amount for the concessions we ask. We request that you take immediate action and give us your decision as early as convenient. Yours truly, Coggins & Owens. F. V. Coggins."

To which appellees replied as follows: "21 S. Charles St. Partition Wall. Messrs. Coggins & Owens, 102 North Frederick street, Baltimore, Md.—Gentlemen: I acknowledge receipt of your letter of April 1, 1905, in above matter. I am authorized by the owners of the lot adjoining your lot on the south to say [here follows description of the land], including the right to that part of brick wall which is now erected on said strip, upon the following conditions which are to be made part of the transfer and to run with the land: First. That the brick wall, part of which will be located on said strip, and the balance on the remaining land of the sellers, shall be used as a partition wall between the warehouse now erected on the lot belonging to the sellers and the warehouse to be erected on your adjoining lot. If purchasers desire wall to run to a greater depth than the north wall now standing, said wall is to be erected entirely at their expense, and in the same line and of the same thickness as the wall now standing, with the privilege to the sellers to use this new part of said wall at any time as a party wall, without any additional cost or charge therefor. Second. That in case you elect to build your wall higher than the north wall of the ware-

house belonging to the sellers, the right is reserved to the sellers, if they hereafter add to the height of their warehouse, to use said additional wall as a party wall, without any additional cost to them. Third. That in case either the warehouse belonging to the sellers or the warehouse to be erected by you is so far destroyed by fire as to either cause the destruction of said partition wall or necessitate its being taken down, it shall be immediately rebuilt at the joint cost of the owners of the lot now owned by the sellers and the owners of the lot now owned by you, and in case either has to build at his expense, the other shall not use said wall until he shall pay his proportionate part of the cost of same, which proportionate part of said cost shall be due and payable within thirty days (30) after the completion of said wall. Fourth. If, in the erection of your warehouse, any injury is done to the said wall or to the warehouse owned by the sellers, or its contents, the cost of such injury is to be paid by you, and you are to guaranty the sellers against all loss or injury which may happen to them, by reason of the use by you of the said wall as a partition wall. Fifth. You are to pay to the sellers the sum of eighteen hundred dollars (\$1,800) in cash, upon the execution and delivery of the deed which is to be prepared by you in a manner satisfactory to me, for the purpose of carrying out the above conditions. The title to the land to be in fee simple and marketable, subject to the easement on the twenty (20) feet in the rear of Wine Alley, which easement prevents the erection of party wall on this part of the lot; and, if the title is not satisfactory to your attorney, the transaction will be declared off, and all parties released from any obligation. In reference to the price of eighteen hundred dollars (\$1,800), the sellers did not think they would consider a lower figure than two thousand dollars (\$2,000), but have now decided to accept this figure, with the conditions contained in this letter. Sixth. The transaction is to be completed within thirty (30) days from the date of this letter. You will observe, of course, that the hesitation we feel about the matter is due to the fact that we have already narrowed our lot by building our north wall entirely on our land. If the wall is at any time destroyed, and you or the then owners of your lot should take the same position with us that was taken by the Diamond Match Company, and should refuse to unite in the erection of a partition wall, we would have to build the wall again entirely upon our own property and would narrow our lot by nearly a foot more, which would be out of the question. We therefore wish the transaction to take such shape as to give permanency to the partition wall without regards to the plans of either party. In other words, we wish to have an absolute guaranty running with the land that, in case the wall is destroyed, a similar wall will at once be erected on the same ground, at the joint

cost of the owners of the two lots. Very truly yours, Francis K. Carey."

Answer of Coggins & Owens: "Baltimore, April 7, 1905. Mr. Francis K. Carey, Calvert Building, City—Dear Sir: We beg to acknowledge receipt of your proposition. We have turned your letter over to our attorney, Mr. Horton S. Smith, who will investigate the title and arrange the transfer. We wish to thank you for having given this matter your prompt attention, and we appreciate your efforts in our behalf. Again thanking you, we are, Yours truly, Coggins & Owens."

In October, of 1905, Francis K. Carey addressed the following letter to appellants: "Oct. 30, 1905. Estate of James Carey. Party Wall 21 S. Charles Street. Messrs. Coggins & Owens, Baltimore, Maryland—Gentlemen: My brother calls my attention to the fact that in building your warehouse adjoining the warehouse owned by the estate of James Carey, you have opened windows in the party wall overlooking the rear of our lot adjoining you on the south. Under the agreement of May 2, 1905, between your firm and the estate of James Carey, no such right was reserved to you, and it is necessary that the matter should be given your immediate attention. I will be glad to have a talk with you at my offices if you will make an engagement with me by telephone. There are serious practical reasons why it is out of the question for these windows to remain, which I will be glad to explain to you when we meet. Very truly yours, Francis K. Carey."

Then followed several letters between Mr. Willis, counsel for Coggins & Owens, and Mr. Carey, which resulted in a declination on the part of Messrs. Coggins & Owens to close the windows.

On the 21st of December, 1905, the appellees filed their first bill of complaint, in which, after setting forth substantially the facts above recited and complaining of the 30 windows inserted in the extended wall and the injury resulting therefrom to them, and that they are deprived of so much of their land as is used for one-half of said wall as extended easterly from the northwest corner of their warehouse without any benefit to them, the said appellees, and that the opening of the windows seriously depreciates the commercial value of their (appellees') property and its salability, and they pray for a mandatory injunction and general relief, and file as an exhibit a deed between the parties, dated May 2, 1905, which is in these words:

"This deed, made this second day of May nineteen hundred and five by and between Susan B. Carey under and by virtue of the powers conferred upon her by the last will and testament of James Carey, deceased, which is recorded in the office of the register of wills of Baltimore county, in T. W. M. No. 72, folio 466, etc., Susan B. Carey, life tenant, Thomas K. Carey, John H. Carey,

James Carey, Jr., A. Morris Carey, Francis K. Carey, and Susanne C. Allison, remaindermen, being all of the devisees under the will of James Carey aforesaid, as parties of the first part, and Frank V. Coggins and William A. Owens, copartners trading as Coggins & Owens, as parties of the second part, witnesseth: That whereas, the parties of the first part are the owners of lot No. 21 on the east side of South Charles street in the city of Baltimore, and the parties of the second part are the owners of the lot adjoining on the north and known as No. 19 South Charles street, the dividing line being seventy-one feet eleven and one-half inches southerly from the southeast corner of South Charles street and German street, and running thence easterly to Wine Alley; and whereas, to enable the parties hereto to use a wall now standing in the northernmost outline of lot No. 21 as a party wall, and to insure its use forever as a party wall between the warehouse now standing in lot No. 21 and the warehouse to be erected upon lot No. 19, these are executed: Now, therefore, in consideration of the foregoing, and of the further consideration of the sum of eighteen hundred dollars (\$1,800) paid by the parties of the second part to the parties of the first part prior to the delivery hereof and the performance of the covenants and agreements hereinafter set out to be performed by the parties hereto, the said Susan B. Carey, under and by virtue of the powers conferred upon her by the will of James Carey, deceased, Susan B. Carey, life tenant, Thomas K. Carey, John E. Carey, James Carey, Jr., A. Morris Carey, Francis K. Carey and Susanne C. Allison, the devisees under the said will, do grant and convey subject to the said covenants and agreements unto Frank V. Coggins and William A. Owens, copartners trading as Coggins & Owens, their heirs and assigns, in fee simple all that lot of ground lying and being in Baltimore City, and more particularly described as follows: [Here follows a description of the property as heretofore mentioned.] Together with the buildings and improvements thereon erected and all and every the rights, alleyways, water privileges, and appurtenances to the same belonging or in any way appertaining, to have and to hold the above described and mentioned lot of ground, together with the portion of the said wall standing and the rights and privileges and appurtenances thereto belonging, unto and to the use of the said Frank V. Coggins and William A. Owens, copartners trading as Coggins & Owens, their heirs and assigns, in fee simple, subject, however, to the operation and effect of the following conditions and covenants (which is intended and expressly agreed shall run with and bind the land hereby conveyed, and shall be kept by each and all the persons owning or occupying the two adjoining lots aforesaid), whereby the said parties of the first part, for themselves, their heirs,

executors, administrators or assigns, covenant by, to and with the parties of the second part, their heirs, executors, administrators or assigns, and the said parties hereto of the second part, for themselves, their heirs, executors, administrators and assigns, covenant by, to and with the parties hereto of the first part, their heirs, executors, administrators or assigns, in manner following; that is to say:

"(1) That the brick wall, part of which will be erected and located on the strip of land hereby conveyed, and the balance on the land of the parties of the first part, shall be used as a partition wall between the warehouse now erected on the lot No. 21, belonging to the parties of the first part, and the warehouse to be erected on the lot No. 19, belonging to the parties of the second part, and if the parties of the second part desire to erect their wall to a greater depth eastwardly from Charles street than the present wall now standing on lot No. 21, the said wall is to be erected entirely at the expense of the parties of the second part and in the same line and of the same thickness as the north wall now standing on lot No. 21, with the privilege to the parties of the second part, their heirs, executors, administrators and assigns, to use this new wall without any additional costs or charges therefor.

"(2) In case the parties of the second part elect to build a wall higher than the north wall now standing on lot No. 21, the right is reserved to the parties of the first part, their heirs, executors, administrators and assigns, if they hereafter desire to add to the height of their warehouse, to use the additional wall without further cost to them.

"(3) That in case either the warehouse belonging to the parties of the first part on lot No. 21, or that belonging to the parties of the second part on lot No. 19, shall be destroyed by fire so as to cause the destruction of the party wall, or to necessitate its being taken down, it shall be immediately rebuilt at the joint cost of the owners of the lot now owned by the parties of the first part and the owners of the lot now owned by the parties of the second part, and in case either has to rebuild at his expense the other shall not use the said wall until he has paid his proportionate amount of the cost of the same, which proportionate part of the cost shall be due and payable within thirty (30) days after the completion of the said wall.

"(4) That if in the erection of the warehouse on lot No. 19 any injury is done to the wall or warehouse of the parties of the first part or its contents, the cost of such injury shall be paid by the parties of the second part, and also any loss or injury sustained by the parties of the first part by reason of the use of the said wall as a partition wall, and the said parties of the first part hereby covenant that they will warrant specially the property hereby conveyed, and that they will execute such other and further assurances of the

same as may be requisite. Witness the hands and seals of the parties hereto."

Which is duly signed by all the parties, witnessed, acknowledged, and recorded.

The appellants answered this bill and admit the allegations contained in paragraphs 1, 2, 3, and 4, and, as to 5, 6, and 7, admit placing of the windows, but deny that they project through and over the center line of said wall, or that any damage occurs to the plaintiffs; and further allege that plaintiffs were advised of their intention to so place said windows, and that plaintiffs did not object. The defendants filed an amended answer, denying the allegations of the plaintiffs' third paragraph, and stating that the wall was to be in the nature of a party wall, and also deny that plaintiffs have any right to use any part of the wall to be erected as a party wall. On June 9, 1906, the complainants filed an amended bill, praying that the deed of May 2, 1905, may be altered and reformed by the striking out of the word "second" and inserting "first" for the purpose of making the said deed conform to the true agreement which was entered into between the parties hereto, and that it may be decreed that the complainants, their heirs, executors, administrators, and assigns, shall have the privilege to use the new wall erected without any additional cost or charge therefor. For a mandatory injunction and general relief, to this amended bill the defendants made answer, denying specifically the several allegations of the amended bill.

It will be observed, from a careful reading, that this controversy has arisen from the fact that, in preparing the deed from the letter of April 4, 1905, the words parties of the "first part" and parties of "the second part" have been substituted for the words "sellers" and "purchasers" used in that agreement. There is no doubt in our minds that the decree signed by the learned judge below, which granted the relief prayed, should be affirmed. We have been able to reach no other conclusion from the letter of April 4, 1905, the testimony in the record, and the situation of the respective properties, that the deed should be reformed and corrected so that the first paragraph thereof, containing the covenants and conditions, shall read as follows: "That the back wall, part of which will be erected and located on the strip of land hereby conveyed, and the balance on the land of the parties of the first part, shall be used as a partition wall between the warehouse now erected on the lot No. 21, belonging to the parties of the first part, and the warehouse to be erected on the lot No. 19, belonging to the parties of the second part; and if the parties of the second part desire to erect their wall to a greater depth easterly from Charles street than the present wall now standing on lot No. 21, the said wall is to be erected entirely at the expense of the parties of the second part, and on the same line and of the same thickness as the north wall

now standing on lot No. 21, with the privilege to the parties of the first part, their heirs, executors, administrators and assigns, to use this new wall without any additional costs or charge therefor."

In *Barry v. Edlavitch*, 84 Md. 111, 35 Atl. 171, 33 L. R. A. 294, Judge Page, delivering the opinion of this court, says: "The term 'party wall' is usually applied to such walls as are built on the land of another, for the common benefit of both, in supporting timbers, used in the construction of contiguous buildings. And a division wall may become a party wall by agreement, either actual or presumed." In *Graves v. Smith*, 87 Ala. 451, 6 South. 308, 5 L. R. A. 298, 13 Am. St. Rep. 60, there was an agreement, which in terms created a party wall, with the right to the appellant to use the same, "in the erection of any buildings which he may wish to build on his lot." The court held, under these circumstances, that the cross-easement of appellee was "violated by the attempt of the defendant to create openings for the windows." So, in *Brooks v. Curtis*, 50 N. Y. 642, 10 Am. Rep. 545, the language of the deeds and the acts of the parties show that it was their intention that the wall, which stood one-half on each lot, should be a party wall for the common use of both lots, and that such an easement included the right to increase the height of the wall, provided it be done without detriment to the strength of the wall or to the property of the adjacent owner. So, in *Brown v. Werner*, 40 Md. 20, Judge Robinson says: "Without attempting a precise definition of the term 'party wall,' it is sufficient to say that ordinarily it means a wall built partly on the land of one and partly on the land of another, for the common benefit of both, in supporting timbers used in the construction of contiguous buildings." 22 Amer. & Eng. Ency. of Law, 237; *Dorsey v. Habersack*, 84 Md. 117. In *Dorsey v. Habersack*, 84 Md. 128, 35 Atl. 97, this court said: "A division wall may become a party wall by agreement, either actual or presumed, and although such wall might have been built exclusively upon the land of one." *Brown v. Werner*, 40 Md. 20.

In this case the land and a wall already erected, and the right to build an extension of wall, was purchased as a party or division wall, and the consideration agreed upon by the parties paid. Ascertaining the intention of the parties from the written instrument, as we must do, it is perfectly manifest the appellees intended to sell, and the appellants intended to buy, the standing wall of appellees' warehouse as a party wall. If there could be any doubt about it, the recital in the agreement would seem to settle it, as it says: "That the brick wall, part of which will be located on said strip and the balance on the remaining land of the sellers, shall be used as a partition wall between the warehouse now erected on the lot belonging to the sellers and the warehouse to be erected on your ad-

joining lot. If purchasers desire wall to run to a greater depth than the north wall now standing, said wall is to be erected entirely at their expense, and in the same line and of the same thickness as the wall now standing, with the privilege to the sellers to use this new part of said wall at any time as a party wall, without any additional cost or charge therefor." Again: "That in case you elect to build your wall higher than the north wall of the warehouse belonging to the sellers, the right is reserved to the sellers, if they hereafter add to the height of their warehouse, to use said additional wall as a party wall, without any additional cost to them." And, again, if said wall shall be destroyed, "It shall be immediately rebuilt at the joint cost of the owners of the lot now owned by the sellers and the owners of the lot now owned by you." So we think there can be no reasonable doubt as to the fact that these parties intended that this should be a party wall.

But the appellants claim, because the deed says, "with the privilege to the parties of the second part, their heirs, executors, administrators and assigns, to use this new wall without any additional costs or charges therefor," was inserted in the deed, instead of the "first" part, the appellees are bound by the same, having signed and delivered the same to the grantees, after ample opportunity had to examine the same. Why or how the mistake was made we know not, but we are clearly of opinion, after reading the agreement of April 4th, the testimony in the record, and considering the relation in which the parties stood to each other, the subject-matter, and the objects to be attained, by the sale and purchase, that the decree of the court below should be affirmed. Unless we correct the mistake made in the deed by changing "second" to "first," the deed is very confusing and meaningless. If the wall is erected entirely at the expense of the parties of the second part, why should the deed then say with privilege for them to use it without additional cost or charge therefor? What other cost or charge, except the cost of the wall, could the privilege of using the wall impose? It is apparent on the face of the deed that the privilege of using the wall was clearly meant to be given to the sellers without cost, in order to make it plain that they were not expected to contribute anything towards the cost of the erection of the wall in return for the use of it. The third paragraph, we think, throws some light on this view, which says: "In case of its [the wall's] destruction by fire, each party is to pay one-half of the costs." If the reconstructed wall is to be a party wall, certainly the wall it is to replace must have been a party wall. No right to place windows is reserved.

Assuming the deed should be corrected, and we think there is ample proof in the record to support the assumption, will equity grant the relief asked? The powers of courts of

equity to reform upon parol evidence mistakes in deeds is so well settled that it may be assumed as a concession in this case. The only difficulty in questions of this character is the certainty and extent of the proof required to establish the mistakes. While there is found much conflict in the cases upon this point outside of our own state, the rule here is that only such full and strict evidence is required as will be sufficient to satisfy the mind of the court. *Coale v. Merryman*, 35 Md. 382. It is conceded, indeed it could not be denied, that courts of equity have jurisdiction in cases of mistakes, and it is equally well settled that if parties come to a settlement upon terms mutually agreed upon, and error or mistake occur in the settlement, a court of equity will entertain a bill to rectify the settlement, and make it conform to the intention of the parties; and it was also decided that "It was competent for a plaintiff, who sought the specific performance of an agreement in writing, to vary it by parol proof upon the ground of mistake, and then, after having it thus corrected, to insist upon its execution." And this is so, even "when the answer of the defendant denied the mistake." *Gill v. Clagett*, 4 Md. Ch. 470; *Cooke v. Husbands*, 11 Md. 510.

The amended bill alleges clearly and fully that a mistake was made by the insertion of the words "party of the second part," instead of party of the "first part," in the deed of May 2, 1905. That this was a mutual mistake we think is borne out by the testimony. The plaintiffs certainly claim it ought to be a party of the "first part." The written agreement of April 4th most conclusively bears it out, and Mr. Owens in his testimony says he called Mr. Smith's attention to the fact that the insertion of party of the "second part" seemed to him to be meaningless, but was told it was for his protection. The general rule is thus stated in *Bispham's Equity*, § 469: "A person who seeks to rectify a deed on the ground of mistake must establish, in the clearest and most satisfactory manner, that the alleged intention to which he desires it to be made conformable continued concurrently, in the minds of all parties, down to the time of its execution and must be able to show exactly and precisely the form to which the deed ought to be brought." Here we have the agreement of April 4th and the testimony of Mr. Owens and the declarations of Mr. Carey. And in *Adams' Equity*, pp. 109, 170, it is said: "It seems, however, that the instrument may be corrected, if it is admitted or proved that it has been made in pursuance of a prior agreement, by the terms of which both parties meant to abide, but with which it is in fact inconsistent; or if it is admitted or proved that an instrument intended by both parties to be prepared in one form has by reason of some undesigned insertion or omission been prepared and executed in another. So, again, when a solicitor, being instructed to prepare

a settlement of a particular sum, inserted by mistake double the amount, and the settlement was executed without discovery of the mistake, a bill was sustained to rectify it." These general principles have been frequently announced by this court and elsewhere. *Keedy v. Nally*, 63 Md. 311; *Bank v. Wrightson*, 63 Md. 81; *Wood v. Patterson*, 4 Md. Ch. 335; *Boulden v. Wood*, 96 Md. 336, 53 Atl. 911.

Assuming this to be a party wall throughout its entire length and height, and that the appellees have the right to use all or any part of this wall at any time without expense, it is well established in law that the wall should have been a solid or blank wall. Apart from the legal aspect of a party wall, the deed, speaking of the wall, says it must be erected "in the same line and the same thickness as the north wall now standing on lot No. 21." The maintenance of windows by the owner of a party wall against the objection of the other is inconsistent with the title and right of the latter. By usage the words "party wall" and "partition wall" have come to mean a solid wall. *Jones on Easements*, § 687. One may be enjoined from making openings for doors or windows in a party wall, though there is neither allegations nor proof that the other owner intends ever to use the wall. Whether the other party intends to use the wall or not is quite immaterial, since he has acquired a valuable right in the wall which might be the subject of a sale or transfer, and he should be protected in this right. *Id.*, § 688. One of the uses of a party wall is to afford a complete division between adjoining buildings, and the opening of windows in such a wall is an injury with redress by injunction. *Id.*, § 690.

In the next place, it (a party wall) is intended to serve the purpose of a complete division between adjoining houses. This forbids the construction of spaces in it which do not divide. It is no answer to say that the dominant owner stands ready to fill up the openings wherever the servient owner desires to use the wall as a party wall. That very statement admits that it had not been maintained as a party wall, and the servitude only renders lawful occupation an actual party wall. *Jones on Easements*, § 691. In *Graves v. Smith*, 87 Ala. 450, 6 South. 306, 5 L. R. A. 298, 13 Am. St. Rep. 60, it is said: "A 'party wall' must ordinarily be construed to mean a solid wall without windows or openings"—quoted in *Barry v. Edlavitch*, 84 Md. 95, 35 Atl. 170, 33 L. R. A. 294; *Cutting v. Stokes*, 72 Hun, 376, 25 N. Y. Supp. 365.

As to the propriety of asking for a mandatory injunction, in this case it seems to be well settled that it is the proper remedy. *High on Injunction* says: "But the rule is well established that an injunction is the appropriate remedy to prevent an adjacent owner of real property from opening or using windows through a party wall between

the premises." And a mandatory injunction may properly be granted requiring the closing up of the windows already opened. And in such case the injunction will be broad enough to compel the defendant not merely to patch up the openings, but to make the wall solid as a party wall should be. *High on Injunction*, § 332; *Jones on Easements*, 724.

It follows from what we have said the decree of the circuit court of Baltimore City passed in this case must be affirmed.

Decree affirmed, with costs to the appellees above and below.

(106 Md. 39)

SMITH et al. v. STATE.

MATTHEWS et al. v. SAME.

(Court of Appeals of Maryland. April 24, 1907.)

1. CRIMINAL LAW—TRIAL—PRELIMINARY PROCEEDINGS—SEPARATE TRIAL OF CODEFENDANTS.

The granting or refusing of motions to sever lies entirely within the discretion of the trial court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 1380.]

2. BURGLARY—INDICTMENT.

In a prosecution for "burglary with explosives," under Acts 1906, p. 946, c. 476, defining the offense, an indictment charging that accused feloniously and burglariously did break and enter a depot, and did attempt to open and did open a certain vault, safe, and other secure place in the depot, by the use of nitroglycerin, dynamite, gunpowder, and other explosives, with intent certain moneys, goods, and chattels in said vault, safe, and other secure place in said depot then and there being, then and there feloniously to steal, take, and carry away, substantially charged the offense in the words of the statute and was sufficient.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Burglary, § 31.]

Appeal from Circuit Court, Wicomico County; Chas. F. Holland, Judge.

Frank Smith and others were indicted for burglary with explosives and appeal. Affirmed.

Argued before BRISCOE, BOYD, PEARCE, SCHMUCKER, BURKE, and ROGERS, JJ.

Ellegood, Freeny & Waller, for appellants Smith and Taylor. Elmer H. Walton, for appellants Matthews and Hawkins. Attorney General Bryan, for the State.

BRISCOE, J. The appellants in this case were indicted, with one John Avery, on the 25th day of September, 1906, in the circuit court for Wicomico county, for a violation of Acts 1906, p. 946, c. 476. This act provides "that any person who breaks and enters, either by day or night, any building, whether inhabited or not, and opens or attempts to open any vault, safe, or other secure place, by use of nitroglycerin, dynamite, gunpowder, or any other explosive, shall be deemed guilty of burglary with explosives. And any person duly convicted of burglary with explosives shall be sentenced to the penitentiary in the

discretion of the court for a period of not more than 20 years." The indictment consisted of two counts. A demurrer was interposed to each count, and was overruled by the court below. The appellants then moved to sever, and this was also overruled. A motion was then made to quash each count of the indictment, and was overruled as to the first count, but granted as to the second, and the second count was quashed. The first count, upon which the appellants were tried, charged that on the 17th day of May, in the year 1906, in the nighttime of the same day, at Wicomico county, a certain building, to wit, the depot in the town of Salisbury of the Baltimore, Chesapeake & Atlantic Railway Company, a body corporate of the state of Maryland, feloniously and burglariously did break and enter, and did attempt to open and did open a certain vault, safe, and other secure place in the depot by the use of nitroglycerin, dynamite, gunpowder and other explosives, with intent certain moneys, goods, and chattels in the vault, safe, and other secure place in the depot, then and there being, then and there feloniously to steal, take, and carry away, etc. According to the record, John Avery, upon arraignment, pleaded guilty, and the four appellants pleaded not guilty. Upon trial, they were convicted upon the first count of the indictment, and each sentenced to be confined in the penitentiary for 15 years. And this appeal is from the judgment so rendered against the appellants.

It will be unnecessary for us to consider the second count of the indictment, as this count was quashed, and the appellants were tried on the first count. As to the motions to sever we need only say that the granting or refusing such motions is entirely within the discretion of the trial court, under all the circumstances of the case. Arch. Crim. Prac. & Pleading, 304; 1 Chitty Crim. Law, 268; United States v. Marchant, 12 Wheat. (U. S.) 479, 6 L. Ed. 700; St. Clair v. United States, 154 U. S. 134, 14 Sup. Ct. 1002, 38 L. Ed. 936. It is, however, contended upon the part of the appellants that the court below committed an error in overruling the demurrer and in refusing to grant the motion to quash the first count of the indictment. The objection consists, as alleged by the appellants, first, because the indictment does not charge the offense in the language of the statute; and, second, because Acts 1906, p. 946, c. 476, is void, in that it neither creates a new offense, nor modifies an offense at common law. It is well settled as a general rule that in an indictment for an offense created by statute it is sufficient to describe the offense in the words of the statute. *Mincher v. State*, 86 Md. 227, 7 Atl. 451. The indictment in this case, we think, follows this rule, and the objection urged by the appellants is not a valid one, and cannot be sustained. The offense set out in Acts 1906, p. 946, c. 476, is "burglary with explosives," and the indictment charges that the "traversers on the 17th

day of May, in the year of our Lord, 1906, in the nighttime of the same day, at Wicomico county, a certain building, to wit, the depot in the town of Salisbury of the Baltimore, Chesapeake & Atlantic Railway Company, a body corporate of the state of Maryland, feloniously and burglariously did break and enter, and did attempt to open and did open a certain vault, safe, and other secure place in said depot by the use of nitroglycerin, dynamite, gunpowder, and other explosives, with intent certain moneys, goods, and chattels in said vault, safe, and other secure place in said depot then and there being, then and there feloniously to steal, take, and carry away, contrary to the form of the Act of Assembly in such case made and provided and against the peace, government, and dignity of the state." This count of the indictment substantially charged the offense in the words of the statute, and must be held to be sufficient.

As to the second objection, viz., that the act of 1906 is void and defective, little need be said. The language of the act is too plain to admit of any serious difficulty as to its meaning and is free from all constitutional objection. The crime of burglary being a felony, it was necessary to charge in the indictment that the appellants feloniously and burglariously broke and entered, etc. The legislative intent in passing Acts 1906, p. 946, c. 476, was not to create an entirely new offense, but it was to impose a maximum penalty of 20 years in the penitentiary, if convicted of "burglary with explosives," as provided by the statute, instead of 10 years, as prescribed by existing statute, for the crime of burglary. In other words, the object and purpose of the act of 1906 was to impose a fixed and larger penalty "for burglary with explosives," than 10 years in the penitentiary. So construed, the statute is reasonable, and the legislative intent made clear.

Finding no error in the rulings of the court, the judgment will be affirmed on both appeals. Judgment affirmed, with costs.

(106 Md. 69)

CANTON CO. OF BALTIMORE v. MAYOR, ETC., OF CITY OF BALTIMORE.

(Court of Appeals of Maryland. April 4, 1907.)

1. DEDICATION—EVIDENCE—WEIGHT AND SUFFICIENCY.

Evidence that deeds, containing no reference to a park dedicated to the public, described lots conveyed by reference to an unrecorded plat, purported copies of which showed a tract reserved as a public square near the lots, none of the copies of the plat introduced in evidence being identified as the one to which the reference was made, or as having been in the possession of the grantor, was insufficient to show an offer to dedicate to the public the tract reserved as a park.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Dedication, §§ 85-87.]

2. ADVERSE POSSESSION—HOSTILE CHARACTER—PERSON DEDICATING LAND.

Where the owner of land offers to dedicate it to the public as a park, but continues in pos-

session excluding the public for a period of over 20 years, he acquires good prescriptive title to the tract.

3. SAME—CONTINUITY OF POSSESSION—EFFECT OF MORTGAGE.

Where the dedication of a park is claimed, the fact that the original owner gave a mortgage on its property, excepting that portion theretofore laid out as a public park and dedicated to public use, does not interfere with the owner's claim by adverse possession, where it occupied for over 30 years after the date of the mortgage, and there was no evidence of acceptance of the dedication on the part of the public.

4. EJECTMENT—RIGHT OF ACTION—PROPERTY SUBJECT OF ACTION.

An action of ejectment by a city will not lie for land in which it claims an easement for park purposes, but does not claim the legal title.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Ejectment, §§ 16-62.]

Appeal from Superior Court of Baltimore City; George M. Sharp, Judge.

Action by the mayor and city council of the city of Baltimore against the Canton Company of Baltimore. From a judgment in favor of plaintiffs, defendant appeals. Reversed, without new trial.

Argued before BRISCOE, BOYD, PEARCE, SCHMUCKER, BURKE, and ROGERS, JJ.

Edgar H. Gans and Arthur George Brown, for appellant. Joseph S. Goldsmith and Albert C. Ritchie, for appellee.

SCHMUCKER, J. The appeal in this case is from a judgment in ejectment rendered by the superior court of Baltimore City in favor of that city against the Canton Company. The land described in the declaration is a lot or square of ground in Baltimore City forming a part of what is known as the "Canton Company's" land, and bounded by Canton avenue, Lancaster, Patuxent, and Canton streets. The judgment is not for the property described in the declaration, but is "for an easement in the property described in the declaration, with exclusive right to the possession of the same for use as a public park." The city does not claim title to the square under any conveyance. It sues for the protection of an alleged incorporeal right or easement of the public to use the square as a park, upon the theory that there had been a dedication of it by the Canton Company to public use for that purpose.

Two bills of exception appear in the record; one to rulings on the admissibility of evidence, and the other to the court's action on the prayers. The two cardinal questions presented by the appeal are: First, whether there was an unrevoked dedication of or offer to dedicate the square to public use as a park at the time the city undertook to accept it; and, secondly, whether the present action of ejectment will lie at the suit of the city to secure to the public the enjoyment of the square as a park. We have come to the conclusion that the case must be reversed upon both of these propositions, and, as important

public interests are involved in the issue, and the question of dedication was fully and ably discussed upon the briefs and in the argument before us, we will express our views upon both propositions in the order in which we have stated them.

The dedication of land to any public use is essentially a matter of intention. Certain dealings with property by its owner have been held to afford conclusive evidence of his purpose to make the dedication, but it is essential to establish the intention in every case. The principle of dedication rests largely upon the doctrine of estoppel in pais, and, while there are general rules applicable to certain lines of conduct on the part of the owner of the land, each individual case must, after all, be decided upon its own facts and circumstances. *Baltimore v. Frick*, 82 Md. 83, 33 Atl. 435. All of the facts in each case tending to show the intentions of the owner must receive due consideration, for, as was said in *McCormick v. Baltimore*, 45 Md. 524: "The evidence of such intention is furnished in various ways, but, as dedication will be presumed where the facts and circumstances of the case clearly warrant it, so that presumption may be rebutted and altogether prevented from arising by circumstances incompatible with the supposition that any dedication was intended." It is now universally held that an intention to dedicate land lying in the beds of streets to public use will be presumed, where its owner makes a plat of the land on which the streets are laid down, and then conveys it in lots described as bounding on the streets or by reference to their numbers on the plat, from which it appears that they do in fact bound on the street. In such cases there is, in the absence of language showing that no dedication was intended, an implied covenant that the purchaser shall have the use of the streets on which his lots bound, from which a dedication of the streets to public use is held to arise. *White v. Flannigan*, 1 Md. 540, 54 Am. Dec. 668; *Moale v. Baltimore*, 5 Md. 321, 61 Am. Dec. 276; *Hawley's Case*, 33 Md. 280; *McCormick's Case*, 45 Md. 523; *Tinge's Case*, 51 Md. 600; *Pitts' Case*, 73 Md. 326, 21 Atl. 52; *Baltimore v. Frick*, 82 Md. 83, 33 Atl. 435. But the dedication of such streets to public use resulting from their conveyance in the manner mentioned does not become final and irrevocable until there has been an acceptance of it on the part of the public authorities. *Baltimore v. Broumel*, 86 Md. 153, 37 Atl. 648; *Valentine v. Hagerstown*, 86 Md. 486, 38 Atl. 931; *New Windsor v. Stocksdale*, 95 Md. 212, 52 Atl. 596. In the last-mentioned case, we said that the acceptance of a dedication "may be evidenced in one of three ways, viz., by deed or other record, by acts in pais, such as opening, grading, or keeping the road in repair, or by long continued user on the part of the public."

While the authorities are agreed that streets or highways may be thus dedicated

by their owners to public use, they do not agree as to the physical limits of the dedication. Some authorities hold that the streets mentioned in the deed or laid out on the plat are embraced in the dedication to the full extent that they are owned by the grantor. Other cases, among which are the decisions of this court, confine the dedication to a limited and restricted area. In *Hawley v. Baltimore*, 33 Md. 270, which may be regarded as the leading case upon that subject, it is said: "The law is now too well settled to admit of any doubt that, if the owner of a piece of land lays it out in lots and streets and sells lots calling to bind on such streets, he thereby dedicates the streets so laid out to public use. The rule is founded on the doctrine of implied covenants, and the dedication will be held to be coextensive with the right of way acquired as an easement by the purchaser. It is upon the implied covenant in the grant to him that the dedication to public use rests, and such dedication must necessarily be measured by the limits of the right he has acquired by virtue of his grant. In the case before us, the right of way or easement in Mosher street acquired by the purchasers of the lots mentioned in the proof is the precise limit of the dedication by Hiss. Over what portion of Mosher street, then, did their right of way exist? We think they acquired by their several purchasers the right of way only from Madison avenue to McCulloh street, as it is between those streets that their lots lie and bind on Mosher. The doctrine of implied covenants will not be held to create a right of way over all of the lands of a vendor which may lie, however remote, in the bed of a street. The lands must be contiguous to the lot sold, and there must be some point of limitation. The true doctrine is, as we understand it, that the purchaser of a lot calling to bind on a street not yet opened by the public authorities is entitled to a right of way over it, if it is of the lands of his vendor, to its full extent and dimensions only until it reaches some other street or public way. To this extent will the vendor be held by the implied covenant of his deed, and no further." In *Hawley's Case* the owner of the lot sold exhibited to the purchaser at the time of the sale a plat of his land, on which the streets were laid down, but the plat was not called for in the deed of the lot to the purchaser. In *Baltimore v. Frick*, 82 Md. 86, 33 Atl. 435, we cited and followed *Hawley's Case* as to the extent of the dedication of a street by the grant of a lot bounding thereon, and still more accurately defined the limits of the dedication by saying: "The contention that the street which limits the extent of the dedication must be an open public street is not supported by the cases heretofore decided by this court. In *Hawley's Case*, supra, the land over which the right of way is given it is said must not be remote, but contiguous to the lot sold; but if the contention of the

city that in all cases we must presume a dedication of a right of way over the grantor's land, until the next or nearest open street is reached, be correct, such right of way would in many cases extend over land not only not contiguous to but very remote from the lot sold." It may therefore be said that under the decisions of this court the sale of a lot of land calling to bind on an unopened street works a dedication to public use of that street, if it is of the land of the grantor, only until it reaches the next open or unopened street.

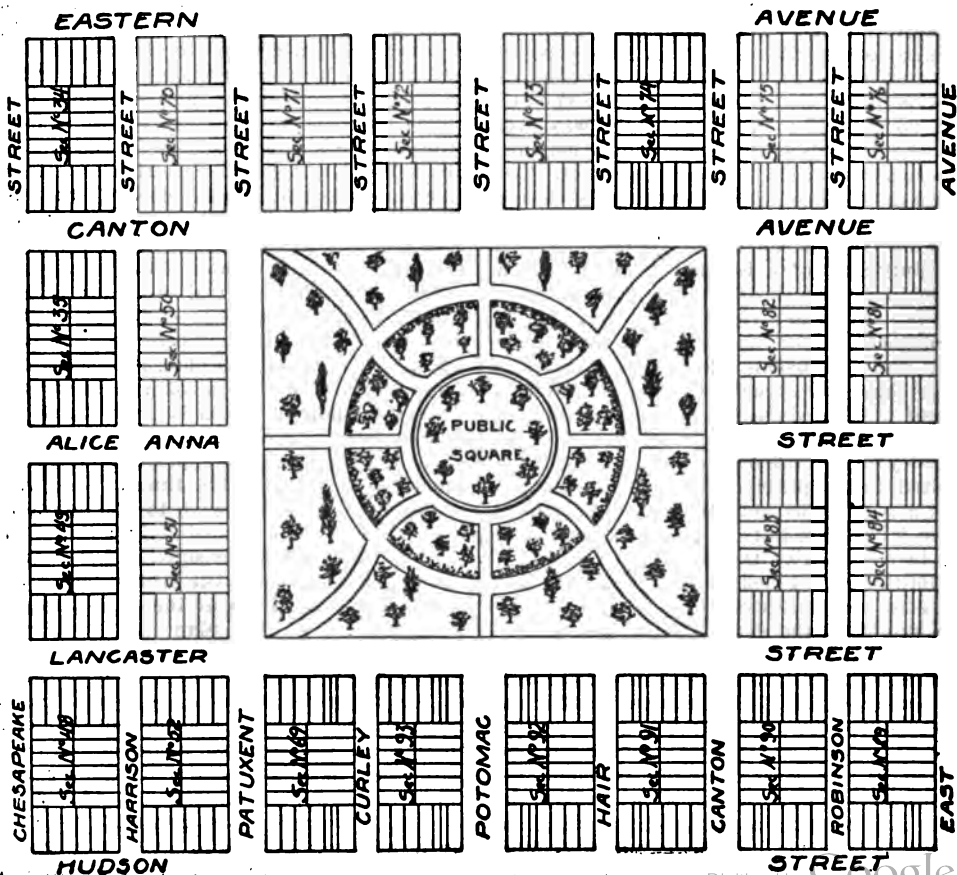
Although the law relating to the dedication to public use of streets has been settled by numerous decisions of this court, we have seldom been called upon to consider the nature and extent of the dedication of a park to such use when it is so designated on a plat of the grantor's land, and reference is made to the plat in deeds conveying portions of the land. Most of the text-books and many cases assert broadly that the rules and principles controlling the dedication of streets to public use by the use of or reference to plats in the manner mentioned by us apply with equal force to the dedication of parks and other public places designated on such plats. 2 Dillon on Mun. Corps. § 644; 13 Cyc. p. 448; 9 Am. & Eng. Encyc. of Law, p. 25. Other cases plainly distinguish between the principles applicable to the dedication of "streets affording easements directly profitable and necessary to the use of lots" and parks which are intended for public recreation and enjoyment, and are only indirectly beneficial to the lots. *Baker v. Johnston*, 21 Mich. 319; *Coolidge v. Dexter*, 129 Mass. 167; *Light v. Goddard*, 11 Allen (Mass.) 5, where it is said, by Bigelow, C. J.: "An attempt is made in the present case to extend this rule of interpretation much further than is warranted by any of the adjudicated cases. The plaintiff claims under a deed which describes the lots conveyed as laid down on a plan to which reference is made. Upon inspection of this plan, it appears that these lots are carved out of a large tract of land, the whole of which is divided into numerous lots or parcels, and is fully laid down on said plan. It also appears that certain other land, which at the time of the grant in question also belonged to the grantors, and which is not immediately adjacent to the lots conveyed, but is separated therefrom by a contemplated street which forms one of the boundary lines of the lots conveyed, is designated on the plan as 'Ornamental Grounds' and as 'Play Ground.' The contention of the plaintiff is that such designation on the plan referred to in the deed of lands lying in the vicinity of, but not adjacent thereto, the land granted, amounts to a covenant that those grounds shall forever continue to be appropriated and used for the uses and purposes so designated." "We are by no means prepared to adopt as a sound rule of exposition the general proposition on

which the argument for the plaintiff rests. We do not think that a mere reference to a plan in the descriptive part of a deed carries with it by necessary implication an agreement or stipulation that the condition of land, not adjacent to, but lying in the vicinity of, that granted, as shown on the plan, or the use to which it is represented on the plan to be appropriated, shall forever continue the same so far as it may be indirectly beneficial to the land included in the deed, and was within the power or control of the grantor at the time of the grant."

We will now consider the facts of the case before us in the light of principles to which we have referred. The Canton Company is a well-known owner of a large tract of land in the eastern section of Baltimore, which it acquired about ——— years ago, and from which it has from time to time sold lots. These lots were described in the deeds conveying them as bounding upon various streets, and in many of the deeds made between the years 1846 and 1882 the lots conveyed were further described as being "Nos. ———, ———, and ——— on the Canton Company's plat." A number of the lots thus conveyed were situated upon the streets facing the square in question, but in none of the deeds for any of the lots was any public park men-

tioned or referred to, or was there even any allusion to this square. From the references in these deeds to the Canton Company's plat, it is apparent that the company had a plat of its property, but there is no evidence in the case that the company ever recorded its plat, or in any form made an issue or publication of it to the community at large, or made any representations in reference to it, other than those contained in the deeds, appearing in the record. Portions of several different plats were offered in evidence by the city, and were admitted over the objection of the Canton Company, and the court's action in that respect forms the subject of bills of exception.

These plats agree in the location upon them of the respective streets. Two of them, which are alleged to be copies of Canton Company plats of about the years 1845 and 1853, respectively, and one, which is alleged to be a copy of part of Poppleton's plat of Baltimore as enlarged in 1851, so as to include Canton, also show the alleged park designated as a public square. We here insert, for purposes of illustration, a copy of a sufficient portion of the plat of 1845 to show the location thereon of the alleged park and the blocks of ground immediately surrounding it:



J. Howard Sutton, a surveyor and civil engineer, testified for the defendant that he had been connected as employé and partner with the firm of Simon J. Martenet & Co. since the year 1878; that Simon J. Martenet had been the surveyor of the Canton Company from prior to 1870 down to his death, in 1893, and the firm had continued to be its surveyors since that time; that, about 1870 to 1872, Mr. Martenet had prepared for the company an elaborate atlas of all of its property, upon which were located all conveyances theretofore made by the company and all of the property still owned by it at that time; that it had been the continuous custom of the company ever since then to enter upon the atlas at intervals of about three months all deeds, leases, or changes that might have occurred in that interval, and also to add to the map any purchases of additional land made by the company; and that the atlas had always been kept at the company's office and used by it in connection with all transfers, sales, leases or other transactions appertaining to its real estate. The atlas was put in evidence and identified by the witness. Upon the section of the atlas covering the portion of the company's land embracing the square in question, the location of the streets and the square is the same as upon the plat of which a copy appears in this opinion, but the square is entirely blank, like the other vacant lots appearing on the map, and has no suggestion upon it either in letters or decoration indicating that it is or was intended to be a public park. Furthermore, it is marked on two of its sides with red lines, which are uniformly used on the atlas to designate the portions of the entire property still owned in fee simple by the company.

In addition to the deeds mentioned, the Canton Company, in December, 1873, executed a mortgage of its entire property to George S. Brown and others, to secure an issue of bonds made by it, excepting therefrom, in addition to the streets laid down on the plat of its property, a public park, in the following language: "Saving and excepting from this conveyance that portion of the said property of said company which has heretofore been by it laid out as a public park and dedicated to public use as such and which park is likewise marked and located on the said plat of said company's property." It appears from the record that this mortgage was released on April 23, 1887. There is no evidence in the case that the alleged park ever was used as such by the public, or by any person, except that on several occasions church or school picnics were held in it for which in each instance special permission was procured from the company. On the contrary, the uncontradicted evidence shows that since 1856 the square has been fenced in and used or rented out by the company, and the public have been strictly excluded from it. It has been assessed to the Canton Company for city

and state taxes ever since 1876, the present assessment being \$34,604, and the city has regularly demanded, and the Canton Company has paid, the taxes on the assessment. On April 11, 1906, an ordinance was introduced in the city council of Baltimore accepting, on the part of the city, the dedication of the alleged park, but, before the ordinance was passed, the Canton Company executed and put on record a sealed instrument, declaring that it had never dedicated or offered to dedicate the park to public use, and asserting, if there ever had been any dedication, it had been revoked, annulled, and withdrawn by the published maps of the company, and further declaring by the instrument itself a revocation, annulment, and withdrawal of any dedication or offer to dedicate the park which may have been theretofore made by the company.

The state of facts thus sworn by the record does not in our opinion furnish legally sufficient evidence of a dedication by the Canton Company of the square to public use as a park. The deeds offered in evidence do not any of them on their face profess to convey to the grantees any title to, interest in, or use of the square; nor is it described or referred to or mentioned in any of them; nor do any of the lots conveyed by the deeds touch or bound on the square itself. A deed of a lot described as bounding on a street will dedicate the street, if of the lands of the grantor, to the next cross-street; but it will not, in the absence of apt expressions for that purpose, give to the grantee any interest in land lying on the opposite side of the street. In *Howard v. Rogers*, 4 Har. & J. 278, John Eager Howard conveyed to Rogers a lot of ground, part of Lunn's lot, bounding on the south side of German street, and in describing the lot used this language: "Which street bounds on the south the square intended for public uses, and thence east, binding on said street and fronting the square, to the place of beginning." On a bill filed in chancery by Rogers to restrain Howard from applying the square to private uses, it was held that the deed conveyed to the grantee "no right, interest, or privilege in the square." "There is not anything mentioned in the granting part of the deed but a lot of ground on the said Lunn's lot. These words 'beginning,' etc., are a description of the lot, and designate the location of it, and show in a plain manner where it lies. The words, 'which street bounds on the south the square intended for public uses,' were inserted to render the description more certain, and identify more plainly the said lot. These words convey no right, interest, or privilege in the square. The words 'binding on the said street, and fronting the said square, to the beginning,' are also words of description, and are susceptible of the same answer. * * * It was the plain intention of the parties, to be collected from the words of the deed, that the lot therein described should

pass, and all Col. Howard's right and interest therein, and nothing else."

The only manner, therefore, in which any interest or privilege in the square can be claimed by the grantees under the deeds appearing in the present record is upon the theory of an implied covenant, for its use as a park, arising from the references contained in them to the plat. Before the Canton Company could be deprived of the beneficial use of the valuable property in controversy upon any such theory, the fact would have to be established by the clearest and most convincing evidence that the plat referred to in the deeds had that square designated upon it as a public park. The city attempted to prove that fact by the production and putting in evidence of copies of portions of the three different plats upon which the square was so designated; but it failed to produce any direct testimony tracing these plats to the possession of the Canton Company, or identifying any of them as the one referred to in the deeds. In *Harbor Co. v. Smith*, 85 Md. 542, 37 Atl. 27, where this court refused to uphold an alleged dedication of a square of ground to public use as a park, we said: "The rule that the strongest, clearest, and most convincing proof of intention will be required to establish a dedication has been announced again and again by this court." The originals of the three plats were not produced; the defendant agreeing that the copies might be used subject to the objection to the admissibility of the originals. The copies offered in evidence had the following memoranda indorsed on them: On the first was the memorandum made in 1904 by Martenet & Co.: "Copy of a part of plan of a part of Canton Company's ground indorsed 'copy of printed map in possession of Title Guaranty & Trust Company.' The original is not dated, but we believe same to have been published about 1845." The next copy has indorsed upon it: "Copy of part of the plan of the Harbor of Baltimore in connection with the Canton Company's lands compiled by William Dawson, Jr., 1853." The memorandum appearing on the third copy, saying that it was from Poppleton's enlarged plat of Baltimore, has already been substantially stated. The fact that the description of the lots conveyed by the deeds answers to the location and dimensions of the lots of corresponding numbers on the plat of 1845 might have been admissible, if followed up by other evidence of identity, as tending to show that it was the plat referred to in the deeds; but no such other evidence appears in the record. It is further to be observed that, although the memorandum on that plat said that it was a copy of a copy in the possession of the title company, none of the officers or employes of that company were put upon the stand to show the source from which it came. Even if the record had contained such evidence as the law requires to show a tender by the Canton Company of a dedication of

the square to the public for a park, the uninterrupted, open, and adverse possession by inclosures of the square by that company from 1866 down to the institution of this suit would have formed an effectual bar to its maintenance. Even if we assume that the company, by the execution of deeds referring to a plat of its lands on which the square was designated as a public park, made an implied covenant with the purchasers to allow its use as a park from which an intent to make a dedication to public use was to be inferred, it remained in possession of the land as vendor. Under these circumstances, by repudiating the right of the public to use the square as a park, and excluding them from it by fencing it in and openly asserting the ownership of and title to the land and paying the taxes thereon, as the evidence shows the company did in this case, its possession became adverse, and at the expiration of 20 years ripened into a good prescriptive title. 1 Cyc. 1040; *Waltmeyer v. Baughman*, 63 Md. 200. Nor was the defense of adverse possession defeated by the execution of the mortgage to George S. Brown and others in 1873, first, because the adverse possession continued for more than 30 years after that date, and, secondly, because the covenants express and implied of that instrument ceased to be operative after its release, and there was prior to that time no acceptance on the part of the public of any dedication, which could have been inferred from the statements contained in the mortgage. As, for the several reasons mentioned, the record shows a good defense to the suit, we deem it unnecessary to pass upon the effect of the instrument in the nature of a disclaimer and revocation placed upon record in 1906 by the Canton Company.

Turning now to the second issue presented by the appeal, the present action is not maintainable because an ejectment will not lie in this state for an incorporeal right or easement in land such as that claimed in the present case. The counsel for the appellee have cited upon their brief some decisions and text-writers holding that, where lands have been dedicated to public use, the municipality may maintain an ejectment therefor; but this court has uniformly held that the action will not lie, at the suit of one who has no legal title to the land, to recover a right of way or other easement. 1 *Poe Pleading & Practice*, § 261, and cases there cited. The law upon this proposition has been fully stated by us in the recent case of *Nicolai v. Baltimore*, 100 Md. 579, 60 Atl. 627, and no good purpose would be served by repeating here what we have there said.

The court below should, in our opinion, have taken the case from himself as a jury, by granting the defendant's first, second, and third prayers, and for his failure to do so the judgment must be reversed. Inasmuch as we have held that the present action cannot lie, we will not remand the case.

For the same reason we abstain from passing in detail upon the other thirteen prayers, nine of which were offered by the plaintiff, and four by the defendant.

Judgment reversed, with costs, without a new trial.

(105 Md. 396)

BALTIMORE & O. R. CO. v. WATERS.

(Court of Appeals of Maryland. April 3, 1907.)

1. RAILROADS—LATERAL ROADS—RIGHT TO CONSTRUCT.

The right given by Acts 1826, c. 123, § 14, to the railroad company, chartered by such chapter to construct a railroad from the city of Baltimore to the Ohio river, to construct lateral railroads, in any direction whatever, in connection with such railroad, is not, in the absence of anything in the charter to that effect, limited to construction of branches which will be feeders for the port of Baltimore; but authorizes the construction of a branch from the main line to connect with another branch, so as to take around the city of Baltimore freight going in either direction, and not intended for that city.

2. CONSTITUTIONAL LAW—IMPAIRING OBLIGATION OF CONTRACT.

Acts 1906, p. 838, c. 457, prohibiting the construction of a steam railroad within certain territory, in so far as it applies to the Baltimore & Ohio Railroad, the charter of which (Acts 1826, c. 123, § 14) authorizes it to construct lateral railroads, in any direction whatever, impairs the obligation of a contract.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Constitutional Law, § 292.]

3. RAILROADS—POLICE POWERS.

Acts 1906, p. 838, c. 457, prohibiting the construction of a steam railroad within a certain territory, not being required by the interests of the public generally, but being enacted in the interest of the persons whose property near the road will be damaged by the construction, is not within the police power.

Appeal from Circuit Court, Baltimore County; Frank I. Duncan, Judge.

Suit by John Waters against the Baltimore & Ohio Railroad Company. Decree for complainant. Defendant appeals. Reversed and bill dismissed.

Argued before BRISCOE, BOYD, PEARCE, SCHMUCKER, BURKE, and ROGERS, JJ.

John G. Wilson and W. Irvine Cross, for appellant. W. Calvin Chestnut and Edgar H. Gans, for appellee.

PEARCE, J. The Baltimore & Ohio Railroad Company was chartered by chapter 123 of the Acts of Assembly in the year 1826, and by the fourteenth section of that act the president and directors of said company were "invested with all the rights and powers necessary to the construction and repair of a railroad from the city of Baltimore, to some suitable point on the Ohio river, to be by them determined, not exceeding sixty-six feet wide, and with as many set of tracks as the said president and directors, or a majority of them may deem necessary"; and in the same section it was enacted "that they, or a majority of them, may make or cause to be made, lateral railroads, in any direction

whatsoever, in connection with said railroad from the city of Baltimore to the Ohio river, and in the construction of the same, or their works, shall have, possess, and may exercise, all the rights and powers hereby given them in order to the construction or repair of the said railroad from the city of Baltimore to the Ohio river." Section 15 of the charter conferred upon the corporation ample powers of condemnation to be exercised "for the construction or repair of any of said roads, or of any of their works"; and in section 23, the concluding section of the charter, it was provided "that full right and privilege is hereby reserved to the citizens of this state, or any company hereafter to be incorporated under the authority of this state, to connect with the road hereby provided for, any other railroad leading from the main route to any part or parts of this state, provided, that in forming such connection, no injury shall be done to the works of the company hereby incorporated." The terminus upon the Ohio river was subsequently fixed at Wheeling, then in Virginia, and the road was completed to that point and opened for business January, 1853. In April, 1906, the president and directors of this company, in pursuance of the authority conferred in section 14 of its charter, determined to build a lateral railroad in connection with its railroad from the city of Baltimore to the Ohio river, from a point on its main line at or near Gorsuch Station, in Carroll county, Md., through Baltimore county, and a portion of Harford county, to a connection with the Philadelphia Branch of the Baltimore & Ohio Railroad, between Van Bibber and Sewells Stations, to be known as the "Patapsco & Susquehannah Branch of the Baltimore & Ohio Railroad Company," and have surveyed, located, and adopted the route or line of the same which is approximately 40 miles in length, and passes several miles to the north of the city of Baltimore, effecting a saving of 13½ miles over the present line through the city of Baltimore, and relieving the congestion of freight and passenger traffic now passing through the tunnel from Camden Station to Mount Royal Station, and the tunnel beyond Mount Royal Station. The descent over the main line from Gorsuch to the city of Baltimore and the ascent over the Philadelphia Branch to Sewells are by grades of about eight-tenths of 1 per cent., while by the proposed lateral line the grades will be much lower and more even, being about three-tenths of 1 per cent. for east-bound traffic and five-tenths of 1 per cent. for west-bound traffic; the latter grade being higher, because the west-bound freight is lighter and many cars returning are empty. This proposed lateral road runs through a tract of land in Baltimore county near Pikesville belonging to the appellee, and, the appellant having taken the necessary steps to condemn the strip of land required for passage through said tract, the appellee filed a bill to enjoin the condemnation proceedings, alleging that

the defendant cannot exercise the power of condemnation "for constructing a steam railroad on the property of the appellee, not only because it is expressly prohibited from so doing by the Act of 1906, c. 457, but also because the defendant has no such power under its charter, the said proposed road not being a lateral road within the meaning of the charter when properly construed." The defendant answered fully, averring that the proposed road is a lateral road within the meaning of its charter, and denying that Act 1906, p. 838, c. 457, is effectual to forbid the construction of the road. Testimony was taken, and after argument the circuit court for Baltimore county perpetually enjoined the further prosecution of the condemnation proceedings, and from that decree this appeal is taken.

In the opinion filed with the decree the learned judge of the circuit court reached the conclusion that the proposed road was not a lateral railroad authorized by the charter to be built, and therefore did not find it necessary to consider the other question raised in the case, and we shall follow this order of inquiry.

The considerations which controlled the view of the court below may be best stated in extracts from his brief, but clear, opinion. He found from the testimony of the president and general manager of the company that the proposed line "was intended to relieve the congestion in the freightyards and at the tunnels in the city of Baltimore by running freight trains from the west over it, intended for the east, and running freight trains over it from the east, intended for the west, so that western and eastern freight, now passing through the city, will pass around it. * * * The charter of the Baltimore & Ohio Railroad (Act 1826, c. 123) was very liberal to the railroad, but it was intended to be, and was, a Maryland and Baltimore railroad. Baltimore was then, as now, the great metropolis of the state, and it was intended by the Legislature that this road should make Baltimore greater. It was the one shipping port of the state of any importance, and the lawmakers at that time guarded with great caution its commerce, and a suggestion at that time that the freight to be carried over the Baltimore & Ohio Railroad for export would be shipped via Philadelphia or New York would no doubt have been regarded as treasonable. The lawmakers at that time were not afraid that the freight over its line from the Ohio river to Baltimore would be diverted to some other port for export, for the reason that there were no other railroads to carry it. So that the power to build lateral railroads was a power to build branches to carry out the purpose for which the main line was built, to wit, to develop the state, and make of Baltimore a great commercial city. In other words, a lateral road as then understood was, in the definition given by Bouvier, a branch road running from some point on a main line, intended as a connect-

ing line or feeder. There seems to be no legal straight edge to lay upon a railroad charter granting the right to build lateral lines (between its termini) to determine just what branches may be built under it. Every such charter must be considered alone, and what might be regarded in one as a lateral branch, might not be interpreted as such in another. So that if the intention of the Legislature granting the charter can be fairly gathered from the grant itself, or from the history of the corporation from its beginning, that intention should control the court in deciding upon what is a lateral branch that may be built under the charter. Any branch, therefore, from the main line that is not a feeder of the port of Baltimore is not a lateral railroad as contemplated in the charter of 1826. * * * I do not believe from the evidence that the proposed branch will be a feeder of the main line between Baltimore and the Ohio river, as was intended by the Legislature at the time of the grant, a feeder for the commercial development of the port of Baltimore. Being of the opinion, therefore, it is not a lateral railroad authorized by the charter to be built, it is unnecessary for me to go into the second question raised by the pleadings."

Turning now to the charter itself, with a view to determine how far its language sustains the meaning and purpose attributed to it by the court below, a controlling, if not an exclusive, purpose to develop the port of Baltimore, we should naturally expect to find some clear and emphatic expression of the supposed legislative intent. On the contrary, however, we have been able to discover no indication whatever in the language of such intent. The title of the act is: "An act to incorporate the Baltimore & Ohio Railroad Company." The first section names the commissioners to receive subscriptions to the capital stock, and defines their duties and powers. The second section declares the capital stock shall be \$3,000,000, in shares of \$100 each, of which 10,000 shares shall be reserved for subscription by the state of Maryland, and 5,000 for the city of Baltimore, for 12 months after the passage of the act, and the remaining 15,000 shares to be open to any other subscribers. This section also declares the corporate name and confers the usual corporate powers. Section 3 provides a method of reduction of subscriptions in case the shares are oversubscribed. Section 4 regulates the payment of subscriptions. Section 5 provides that, if within 12 months after opening the subscription books 10,000 shares have not been subscribed, all subscriptions should be void, and the amounts paid in, less proper expenses, should be returned to the subscribers pro rata. Section 6 provides for the election of the first board of directors. Section 7 provides for annual election of directors to continue the succession, and gives to the state of Mary-

land and the city of Baltimore, respectively, one additional director for every 2,500 shares of stock held by them, respectively. Sections 8, 9, and 10 deal with stockholders' meetings, statements of the company's affairs, and the oath of directors. Section 11 provides that, if any of the stock reserved for the state or city shall not be subscribed for at the expiration of 12 months, such stock may be disposed of to any other person. Section 12 defines the powers and duties of the president and directors. Section 13 provides for an increase of capital stock, if found to be necessary. Sections 14 and 15 provide for power to contract for construction of the railroad from the city of Baltimore to some point on the Ohio river to be determined by them, and for the exercise of the power of condemnation for that purpose; and section 14 also contains the power, already quoted in full, to build lateral railroads. Section 16 relates to the crossing of roads and ways. Section 17 makes some further provisions as to the use and occupation of any lands or materials necessary to the construction or repair of any of said roads. Section 18 relates to the purchase of machines and carriages for purposes of transportation on said road, and regulates the tolls to be charged for such transportation. Section 19 relates to dividends. Section 20 relates to penalties for injuries done to the said railroads or any of their works, machines, or vehicles. Section 21 provides that, when organized as before provided, the company shall have all the powers and privileges granted by that act. Section 22 provides the act should be null and void if the road should not be commenced within two years from the passage of the act, and should not be finished in the state of Maryland within 10 years from its commencement. The twenty-third, and last, section, makes the provision already noticed for connections to be made with any other railroad incorporated under the authority of this state. It will be seen from this summary of the charter provisions that the city of Baltimore is not mentioned in the charter, except where it appears in the name of the corporation in the title and in the body of the act, and in sections 2, 3, and 11, referring to the reservation of stock for the city of Baltimore; in section 7, providing for directors on the part of the city, in section 14, fixing the terminus a quo at the city of Baltimore, and in section 18, regulating tolls to be charged on transportation "along said railway from the city of Baltimore to the Ohio river"; and nowhere in the charter is the city of Baltimore mentioned as a port, nor is any mention made in the charter of any traffic destined for export, so that it is difficult for us to understand how from the language of the charter there can be gathered any legislative intent "that no branch from the main line that is not a feeder of the port of Balti-

more is not a lateral railroad as contemplated in the charter." All great railroads penetrating the interior of the country naturally are built from or to some seaport, with a view of sharing in the export trade, and certainly this must have been one of the considerations which led the Legislature to fix the city of Baltimore, the chief commercial city and the only seaport of any real importance in the state, as its eastern terminus. But this consideration falls far short of warranting the assumption that the development of the export trade of Baltimore, rather than the development of all the material and commercial interests of the state and city, was the controlling consideration in the grant of the charter, and so conclusively controlling as to exclude from the broad and unrestricted designation of "lateral railroads" any road which was not a feeder to the city of Baltimore in its character of a seaport.

As was well said in the appellant's brief: "The main line was to carry traffic both east and west, but [in the view of the court below] a lateral must furnish traffic to be carried eastward, and to Baltimore, or it is not a lateral. Though it pour a tide of traffic [by means of lateral roads] into Cumberland, Hagerstown, or Frederick [whether from the east or the west], it would not be carrying out the purposes of its charter. The most common purpose in building a lateral is to reach another road. Any such road, however, is capable of carrying traffic around a terminus, and therefore not a lateral." The testimony taken in this case shows that the proposed road will run through a territory without east and west railroad facilities; but that it will cross and connect with the Western Maryland, the Northern Central, and the Maryland & Pennsylvania Railroads, thereby interchanging traffic with all these roads, both giving and receiving it, and directly tending to develop the trade and transportation of the region it traverses. Yet, upon the theory adopted below, these connections cannot be made under the charter. But that this was not the policy of the state in granting this charter appears to us to be conclusively shown by section 23, which in express terms reserves "full right to the citizens of this state, or any company hereafter to be incorporated under the authority of this state, to connect with the road hereby provided for, or any other railroad leading from the main route to any part or parts of this state." Surely it would be a strange legislative policy which would forbid this road to build any lateral which was not a feeder to the port of Baltimore, while permitting any other railroad thereafter to be built, to force upon it a connection designed to divert trade from any point on its line, even from its terminus at the city of Baltimore. No court has been more explicit than our own in laying down the rules for construction of statutes.

In *Allen v. Mutual Fire Ins. Co.*, 2 Md. 111, the defendant's charter authorized it "to make insurances on any kind of property," and the court was asked to restrict its meaning to real estate only. The court refused to do this, saying that to do so "would be to violate one of the plainest, well-settled rules of construction"; citing 6 Bacon's Abridgment, 380, in which it is said: "Where words in a statute are express, plain, and clear, the words ought to be understood according to their genuine and natural signification and import, unless by such exposition a contradiction or inconsistency would arise in the statute, by reason of some subsequent clause from whence it might be inferred that the intent of Parliament was otherwise." In *Alexander v. Worthington*, 5 Md. 471, Judge Legrand said: "The language of a statute is its most natural expositor, and, when the language is susceptible of a sensible interpretation, it is not to be controlled by extraneous considerations. * * * We are not to be at liberty to imagine an intent, and bind the letter of the act to that intent, * * * with the view of making the letter express an intent which the statute in its native form does not evidence." And in *Smith v. State*, 66 Md. 217, 7 Atl. 49, the court said: "Even when a court is convinced that the Legislature really meant and intended something not expressed by the phraseology of the act, it will not deem itself authorized to depart from the plain meaning of the language which is free from ambiguity." So in *Hawbecker v. Hawbecker*, 43 Md. 519, Judge Miller said: "It would be dangerous or unwarrantable for a court to grope for an intent, or to make one from their own ideas of policy or morals, and on that ground say that a particular case is withdrawn from the operation of the plain and unambiguous language of a statute." In the very recent case of *Agricultural College v. Atkinson*, 102 Md. 561, 62 Atl. 1035, Judge Burke said: "Beyond the words employed, if the meaning be plain and intelligible, neither officer nor court is to go in search of legislative intent; but the Legislature must be understood to intend what is plainly expressed, and nothing then remains but to give the intent effect." We cannot, therefore, agree with the learned judge below in restricting as he did the broad and unqualified language of this charter.

But we have yet to inquire what is the true meaning of the term "lateral railroad." In the view taken by the circuit court, it was not necessary for it to make this inquiry; but it is necessary for us, and we are not without ample recourse to cases in other courts of high authority. Before referring to these it may be well to observe that there is nothing peculiar about the charter of the Baltimore & Ohio Railroad which would discriminate it in respect to branch roads from the charters considered in those cases. The charter of the Baltimore & Ohio Railroad

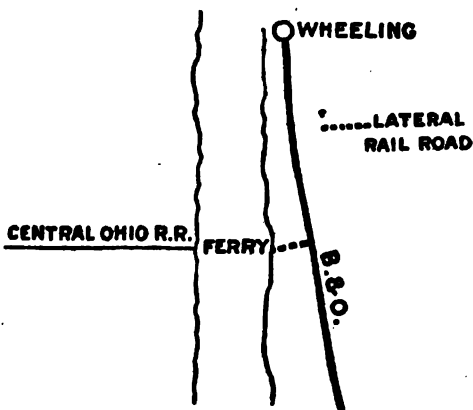
was one of the earliest granted in this country, and is believed to have been the model of many of the later organized roads. In most of them the same general power is given to construct lateral roads, and in many the language used is very nearly the same. In almost all an important city of the state granting the charter is made one of the termini, so that the views expressed by the courts of those states in which the meaning of this term has been considered should be especially worthy of our consideration. In *Newhall v. Galena & Chicago Union R. R. Co.*, 14 Ill. 273, the plaintiff sought to enjoin the defendant from connecting a lateral road from the main line towards Dixon, on the ground of want of power. The language of the charter was: "And they may also construct, maintain, and use such other lateral routes as may be deemed advantageous, and expedient and necessary, under the same rights and privileges as by this act is provided for the construction of the main route." The proposed road contemplated a connection at Dixon with the Rockford & Rock Island Railroad, then in course of construction, and the court said: "The question is: Is this a lateral road within the provision of the charter above quoted? We think it is. A lateral road is one proceeding from some point on the main trunk between its termini. This is a road lateral to, and proceeding from, the main road. This is a simple fact. Ingenuity cannot remove or disprove it. * * * We were asked in argument, if the defendants may build a road 40 miles in length, and terminating or connecting with another road, at a distant point from the main trunk of this road, of what length, or to what point, may they not build a lateral road? We do not feel called upon to answer the question. The Legislature has not seen fit to fix limit, and we do not feel called upon in this case at least to do so. * * * I fully recognize the propriety, and even necessity, of applying the rule of strict construction to the powers granted in these railroad charters; but the rule can only be applied in cases of ambiguity, or where a power is claimed by inference or implication, and is not expressly given by the charter. Where a power is expressly given, a strict construction maintains it. There must be ambiguity to give room for construction. The Legislature takes the responsibility of granting these charters, and it is for them to see that too much power is not expressly given. * * * The Legislature has no right to give a power without restriction, relying upon the courts to restrain its exercise within judicious limits."

In *Pa. R. R. v. Canal Commissioners*, 21 Pa. 9, the effort was to extend by construction the corporate powers of the railroad company, and in refusing this Judge Black, in the strong sententious language which marked his opinions, said: "The privileges of the Pennsylvania Railroad Company may

be too rigidly restricted. If the usefulness of the company would be increased by extending them, let the Legislature see to it. But let it be remembered that nothing but plain English words will do it, and, when called on by counsel to enlarge corporate powers by construction, we can only repeat again and again that our duty imperatively forbids it." To this we may properly add that, when powers have been granted in plain English words, our duty imperatively forbids us to curtail them by attempted construction. In *B. & O. R. R. v. Wheeling*, 13 Grat. (Va.) 40, the same question now before us arose under the Virginia charter of the Baltimore & Ohio Railroad, which was contained in the act of March 6, 1847. Laws 1846-47, p. 86, c. 99. This act authorized the company to complete their road through the territory of the state to a depot to be established on the northern side of Wheeling creek in the city of Wheeling. The second section (page 87) provided "that to secure to the said city of Wheeling the benefit of the western terminus, all parts of said railroad between the Monongahela river and said terminus shall be opened simultaneously for the transportation of freight and passengers"; and then made certain regulations as to tolls to be charged. The sixth section (page 88) subjected the company to the provisions of the general railroad laws of 1837 (Acts 1836-37, p. 101, c. 118), by which authority was given to any railroad, subject to that law, to make lateral railroads in any direction whatever, not exceeding 10 miles in length, and the court said that provision was as much a part of the act of March 6, 1847, as if embodied therein in totidem verbis.

The Central Ohio Railroad established its terminus at Belair on the west side of the Ohio river, opposite Benwood, a few miles south of Wheeling, and the Baltimore & Ohio Railroad, desiring to connect directly with that road, began the construction of a branch from a point before reaching Wheeling, to Benwood, where the connection would be made by a ferry. After the passage of the act of March 6, 1847, in order to induce the Baltimore & Ohio Railroad to accept said act, an agreement was made between the railroad and the city of Wheeling by which said city engaged to do certain things, and the agreement set forth "the intention of the parties to the agreement, among other things, to secure to the city of Wheeling the practical benefits of the terminus of the Baltimore & Ohio Railroad according to the provisions of said law." The city of Wheeling claimed that the construction of this branch would deprive her of the practical benefits of the terminus, and prayed an injunction to restrain its construction. Two great roads were at that time in course of construction in Ohio and approaching the Ohio river. The Central Ohio passing through the center of the state, and the Cincinnati & Marietta passing

through the southern part, and the Baltimore & Ohio desired to connect with both. The court said: "In this state of things it was important that the act should plainly express the intention of the Legislature, that nothing should be intended which was not expressed, and nothing expressed which was not intended, in order that there might be no mistake on either side. When, therefore, the Legislature by that act gave to the company the branching power without any express restriction, it cannot fairly be presumed that they intended to restrict it. If they had so intended, they ought and would have said so expressly." The court, therefore, held the provision applicable, and that it authorized the connection in question. The physical situation will appear from the plat annexed hereto.



It was urged in argument that the city of Wheeling was not only entitled to the benefit of a direct and continuous railway to one of the largest and most important Atlantic cities, and all the local benefit incident to the terminus of a great railroad, but also to the benefit of connection between that and other roads within her limits, and the court answered this by saying: "She expected to obtain these by the advantages of her position, her wealth, trade, population, and importance; which she hoped and expected would be sufficient to attract to her limits all connections which might otherwise have been made at some other point of the road within its limited river front of 10 or 20 miles. For these expected benefits the company did not stipulate by the acceptance of the act, except to the extent of a compliance with its terms." In *Blanton v. Richmond, F. & P. R. R.*, 86 Va. 618, 10 S. E. 925, the charter gave power to construct branch or lateral roads, and it was held that this power gave authority to construct a branch line running in the same general direction as the main line, and the fact that the new line will connect the main line with another railroad makes it none the less a branch road. The language of the charter was: "They may make or cause to be made, branches or lateral railroads, in any

direction whatsoever, in connection with said railroad, not exceeding ten miles in length." Richmond was the southern terminus of the Richmond, Fredericksburg & Potomac Railroad, and it was proposed to build a lateral road around the city connecting with the Richmond & Petersburg Railroad as shown in the annexed plat.



The court said the charter placed it entirely in the power of the president and directors to say how many and in what directions branches or lateral roads should be run; "that a lateral railroad is nothing more or less than an off-shoot from the main line or stem. And this is the meaning attributed to it by the Supreme Court of Pennsylvania in *McAbey's Appeal*, 107 Pa. 558." It was contended in that case that the proposed road would change the terminus of the Richmond, Fredericksburg & Potomac Railroad from Richmond where it was fixed by the charter, but the court denied this result, saying: "It simply proposes to build this branch for the purpose of carrying through business outside of the limits of the city, leaving the passengers and freight destined for Richmond to be delivered there. * * * As it does not change the terminus, serves as a feeder to the main stem, assists the company to develop the country through which it passes, and tends to promote the public convenience both as to trade and travel, it cannot be regarded as obnoxious to any of the objections that have been raised against it." The same views have been held and expressed in a number of other cases, among which may be cited *Pittsburgh v. Pennsylvania*, 48 Pa. 355; *Price v. Pa. R. R.*, 209 Pa. 81, 58 Atl. 187; *Biles v. Tacoma R. R.*, 5 Wash. 514, 32 Pac. 211; *Howard Co. v. Booneville Bank*, 108 U. S. 316, 2 Sup. Ct. 689, 27 L. Ed. 738. We have been referred to *Akers v. Union N. J. R. R.*, 48 N. J. Law, 110, as furnishing the best test of what is a lateral road, in which the court said: "It denotes a road connected, indeed, with the main line, but not a mere incident of it, not constructed simply to facilitate the business of the chief railway, but designed to have a business of its own, for the transportation of persons or property to and from

places not reached by the principal route." This language was used in reference to what were shown to be mere side tracks leading to freighthouses on or near the line of the road. In *Grey v. Greenville & Hudson R. W. Co.*, 59 N. J. Eq. 385, 46 Atl. 638, Vice Chancellor Emery, following that case, and speaking of a road, which he said "begins and ends on the main line, and, so far as yet appears, reaches no other points for railroad service than those on the main line as located, and distant throughout its whole length only about 225 feet from the main line," held this was not a lateral line, and granted a preliminary injunction. Subsequently an answer was filed, and the case came up on appeal in 62 N. J. Eq. 763, 48 Atl. 568, and the court, while approving the opinion of the vice chancellor as the case was presented to him, reversed the decision, because the answer averred, and the proof showed, that the purpose of the branch was to connect with the Jersey City Belt Line, and in so deciding used this language, which is most pertinent to the case before us: "It is no objection to the legality of the proposed branch railroad that it will leave the main line on one side of the connection and return to it on the other. To compel traffic to be inconveniently carried past a natural point of departure on one side or the other and then be sent backward to the connecting point, with the alternative of laying out two branches, one from each direction, would be an unreasonable construction of the act. The authority is to construct a branch railroad or railroads so as to effect such connection and a connecting loop is within the authority." This language is directly in point, in view of the connection to be made by this loop with the three railroads which it crosses. The learned judge below concedes in his opinion that the Court of Appeals in this state has never specifically decided what are lateral railroads under the charter of this defendant, though he refers to the case of *State v. B. & O. R. R.*, 48 Md. 79, as throwing some light upon the subject. The distinguished counsel for the appellee, however, in their brief, and in the argument, contended that almost the identical question has already been decided in that case; and in support of their contention refer to the language of Judge Robinson on page 78 of 48 Md. The question under consideration in that portion of the opinion was whether the gross receipts of the Metropolitan Road were exempt from taxation, and it was held that they were not. In so holding, Judge Robinson said: "The original charter, it is true, authorized the appellee to build lateral roads, and this power is not limited to the construction of roads leading to lime kilns, factories, and distilleries, as was urged in argument by the Attorney General, but authorizes the appellee to build such roads for the transportation of freight and passengers. The Metropolitan Road was not built, however, under this pro-

vision in the original charter, but under Act 1865, p. 106, c. 70, which authorized the appellee to construct a road between Knoxville and the Monocacy Junction to the boundary of the District of Columbia, and for the purpose, as the act expressly declares, of providing a more direct communication from the west and northwest with the city of Washington. At this latter place it forms a junction with the Washington Branch, thus making a route distinct from and independent of the main line of the appellee. In no just sense can this road be considered a lateral road within the meaning of the original charter." But this language must be read in the light of, and with reference to, the particular question under consideration, as well as with reference to the act under which the company elected to build the road. There is a clear intimation that it might have been built under the broad provision of the original charter, which the court there says "authorized the appellee to build such roads for the transportation of freight and passengers"; and there is a strong presumption that the gross receipts were held taxable because it was not built under that provision, but under a special act, both the title and body of which indicate that the branching power was not invoked in its construction, and that the road was deliberately built as a new and independent line. This view of the language above cited is confirmed by reference to the case of the Mayor and City Council of Balt. v. B. & O. R. R., 21 Md. 50, in which it was held that the Baltimore & Ohio Railroad had the right under Act 1836, c. 276, to subscribe towards any lateral or connecting road not exceeding two-fifths of its estimated cost, and that the Central Ohio Railroad, which connects with the Baltimore & Ohio at Benwood by means of a ferry and the lateral road mentioned in the case of B. & O. R. R. v. Wheeling, supra, was a connecting road within the meaning of Act 1836, c. 276. This conclusion could not have been reached unless our own Court of Appeals had agreed with the Virginia Court of Appeals that the short link from the Baltimore & Ohio to Benwood was a lateral road within the meaning of the Virginia act of 1847, which we have seen was, in that respect, identical with the Baltimore & Ohio Maryland charter of 1826.

The conclusions we have drawn above cannot be fairly weakened by the fact that the Washington Branch and the Metropolitan Branch were built under special acts. The Washington Branch was built under Act 1832, c. 175, and the Metropolitan Branch under Act 1865, p. 106, c. 70. The financing of new railroad lines often compels resort to the Legislature, where there is lack of money to justify the undertaking, though there may be no lack of power, and a reference to the legislation under which the Washington Branch was built shows that in that case the financial questions

involved were ample reasons for proceeding under a special act granting express power, and avoiding the question of pre-existing power, which when raised, however needlessly, must injuriously affect the credit of the securities offered the public for the prosecution of the undertaking. The Philadelphia Branch was begun without any special legislation therefor—in reliance upon the power in the original charter. Whether, since the building of the Washington and Metropolitan Branches, the company had grown bolder or wiser as to the extent of this power, we do not know, but the question is not what they thought they had, but what they had in fact. The appellee argues that they secured subsequently a legislative recognition of the fact that it was being built as a lateral. Chapter 223, p. 349, Act 1882, both in its title and in the body of the act, does recognize that fact, but it also contains a number of provisions for which legislation was necessary. Corporations are not often lacking in worldly wisdom, and it is sometimes wise to "make assurance doubly sure"; but it would be an unwarrantable reflection upon the legislative body to assume that this recognition was given without due consideration and advice from its judiciary committee as to its propriety. Moreover, the courts were open during the construction of this branch to any challenge of its right, and we are not advised that any such was made.

For the reasons we have given at so great length, we cannot doubt that the proposed road is a lateral road within the meaning of the charter of 1826. Notwithstanding this be so, the appellee contends that its construction is effectively forbidden by Act 1906, p. 838, c. 457, which declares it to be unlawful for any person or corporation to lay any track for a steam railway within certain described portions of Howard county and of Baltimore county, the property of the appellee proposed to be taken under these condemnation proceedings being within the described area of Baltimore county. The plaintiff's bill avers that the defendant proposes to lay four parallel tracks along said line, which, when laid, may be used for freight and passenger traffic, not only by the Baltimore & Ohio Railroad, but also under trackage agreements by any other company. It avers that "the section of country through which said tracks are to be laid is a highly developed part of the suburbs of Baltimore City, in which are many beautiful and costly homes, the value of most of which would be largely diminished, if not destroyed, by the building of said railroad without any possibility of recovering any damages in any condemnation proceeding." It further alleges that the Pennsylvania Railroad had intended building a somewhat similar line near the line of the now proposed road, and that upon the representation of many citizens of Baltimore City and county

that it would be destructive of the suburban development of Baltimore and its vicinity, and that the railroad could just as well accomplish its purpose by building a line further away from the city, the Legislature passed the act above mentioned, and that said act was passed in the bona fide exercise of the police power with which it is constitutionally clothed. The defendant in its answer alleges that it located and adopted the line mentioned before the passage of the act mentioned; that its estimated cost of construction will be approximately \$9,000,000; that the reasons for its construction are the necessity of relieving the obstruction of the tunnels in Baltimore City of the volume of through freights, now passing through them, and the need of lower and more uniform grades than those now used in approaching and leaving the city, as set forth in the first part of this opinion, and the need of connection with the Maryland & Pennsylvania Railroad which can be effected by the new line, but which does not exist and cannot be secured under the present arrangement. It further alleges that the section traversed by the proposed line is, except at Pikesville, a rural district of farms and woodland sparsely settled, and in no sense a highly developed part of the suburbs of Baltimore City, but is distinctly separated from the city and its suburbs by large tracts of land, of low price, used for farming, and sold by the acre, and that said road is at its nearest point three miles from the legal limits of the city, and more than five miles from the built up part of the city. It denies that said act was passed in the exercise of the police power, or that it bears any real relation to the preservation of the public health, safety, morals, or welfare of the people, and that its only purpose is to relieve the property of a few large landowners from liability to be taken for public use, though such use is necessary to enable property owners on both sides of the favored few to enjoy railroad facilities, and that it will operate, if allowed to stand, as a grant of special and unusual privileges to a few individuals at the expense of the rest of the public. It denies that it is practicable to build anywhere outside of the prescribed area, except at a cost nearly, if not quite, double the cost of the proposed line, which would be absolutely prohibitive. It alleges that, by virtue of the location and adoption of the line laid down, it has acquired under its charter vested rights of which it cannot be deprived by the subsequent act of the Legislature, the effect of which would be to impair the obligations of a charter contract; and, further, that said act is invalid because it violates section 29 of article 3 of the Constitution of Maryland, (1) because the act embraces more than one subject; (2) because the criminal provisions of the act are not described in its title; (3) be-

cause it is not enacted in articles and sections to conform to the Code.

The testimony taken has been carefully examined, and shows quite clearly that, except in the immediate vicinity of the village of Pikesville and Sherwood, the territory traversed is almost wholly, in the language of the answer, "a rural district of farms and tracts of woodland sparsely settled, and in no sense a highly developed part of the suburbs of Baltimore City." This appears not only from the testimony of the defendant's engineers who surveyed and located the line, but from the testimony of the real estate brokers produced by the defendant, whose evidence was not attempted to be rebutted, except by Mr. Preston, inspector of buildings of Baltimore City, whose testimony was confined to the sale in October, 1906, of a single piece of property of 6½ acres on Park Heights avenue (which is crossed at right angles by the proposed line) about half a mile from the plaintiff's property and which sold for \$2,000 per acre. Upon cross-examination it appeared that the property on Park Heights avenue below Mr. Preston's property in the direction of the city is not laid off for building purposes. The only witnesses for the plaintiff were the plaintiff himself, and Mr. Samuel M. Shoemaker, who resides in Green Spring Valley, near the Reistertown turnpike. The plaintiff owns a tract of 540 acres. From this tract he sold 20 acres six years ago to the suburban club, which is now occupied by it, and he has platted for sale in lots two parcels, one of 14 acres and another of 18 acres, for the latter of which he has had an offer of \$1,500 an acre. Mr. Shoemaker's property is used for farming and dairy purposes, and is occupied as his own residence, but is not stated to be platted or designed for sale for suburban homes. The testimony of these gentlemen make it abundantly appear that the property of the plaintiff will be damaged by the construction of the proposed road, and it appears from all the testimony on both sides that there are some others, comparatively few in number, and almost exclusively in the vicinity of Pikesville, Sherwood, and perhaps Ruxton, whose property will also be damaged thereby. Wherever any property is actually taken for such purposes, compensatory damages are allowed, and it is common experience that juries rarely fail to exercise a wise and just liberality in awarding these damages, not only upon the basis of value of the land actually condemned, but with a view to the injurious effect upon that which is not actually taken. The repugnance of those who own and occupy attractive homes to have them actually invaded, or their comfort and attractiveness diminished by railroad construction, is so natural and rational as to compel the sympathy of courts and juries, but it is just because this natural feeling, which extends

to all classes of property holders, cannot be permitted to stand in the way of public improvements, and especially in the path of facilities for transportation, that the doctrine of eminent domain has been able to maintain its place in the law. The evidence is conclusive, and, indeed, undisputed, that the cost of constructing a line outside of the prescribed area would be double that of the proposed line, or about \$18,000,000, and that this cost would be prohibitive.

All crossings of public or private roads will be overhead or underneath, as testified to by Mr. Jenkins, the locating engineer of the line. The evidence is clear that the territory traversed by this line is without any railroad facilities east or west; that it will develop and build up all this territory, and will afford the only practicable connection of the Baltimore & Ohio Railroad with the Maryland & Pennsylvania Railroad, with which there is now no connection, and that it will relieve the congestion of the tunnels in the city which are now taxed beyond their capacity. The anticipated diversion of commerce from the city of Baltimore does not appear to rest upon any substantial foundation. If there were such, the chamber of commerce of that city should be prompt to discover and proclaim it, but in the last annual report of the president and directors of that body made in January, 1907, it is declared that "the movement of merchandise in which there could be no local interest has been the cause of serious loss and detriment to local merchants," and that the business of the city "has been greatly hampered by local tracks and facilities being used to handle freight traffic from points beyond. Therefore the wisdom of the speedy arrangement by which all foreign traffic can be diverted, and our insufficient facilities relieved, is so apparent that there should be but one opinion upon the subject." A careful consideration of all the testimony has convinced us that there is no such suburban development along the line of the proposed road as is claimed in the plaintiff's bill and in the argument of his counsel, and which is made the legal basis of the legislation upon which the plaintiff relies to defeat the construction of the road.

The defendant contends that the act of 1906 is invalid because it impairs the obligation of the contract embodied in the charter of the Baltimore & Ohio Railroad. This argument is based upon the fact, admitted by the plaintiff, that the charter of the Baltimore & Ohio Railroad is irrevocable. It is also based upon the assumption (which we have herein decided to be correct) that the railroad, under its charter, by a proper construction thereof, has the right to build this cut-off as a lateral road. Quoting now from the brief of the appellee: "Assuming these two things, the argument of the railroad company is that it can build this lateral road wherever it pleases, and any interference with the building of it, wherever it may

please so to place it, is an impairment of the obligation of the contract contained in its charter. The appellee, on the contrary, maintains, also upon the assumptions already made, that this is not any interference with the essential right of the railroad company to build a lateral road, if they have any such right under their charter, but is simply a regulation of that right, which it is entirely competent to make under its powers." The question, therefore, which we have to decide is whether the act of 1906 is such a regulation of the defendant's charter right as, under all the circumstances of this case, brings us within the police power of the state.

Judge Cooley, in his work on Constitutional Limitations (6th Ed.) p. 710, says: "The limit to the exercise of the police power in these cases [the impairment of the obligation of contracts] must be this: The regulations must have reference to the comfort, safety, or welfare of society, they must not be in conflict with any of the provisions of the charter, and they must not, under pretense of regulation, take from the corporation any of the essential rights and privileges which the charter confers. In short, they must be police regulations in fact, and not amendments of the charter in curtailment of the corporate franchise." In *Thorpe v. Rutland & Burlington R. R. Co.*, 27 Vt. 151, 62 Am. Dec. 625, a leading and much quoted case, Judge Redfield said: "All the cases agree that the indispensable franchises of a corporation cannot be destroyed or essentially modified. But, when it is attempted upon this basis to deny the power of regulating the internal police of the railroads and their mode of transacting their general business, so far as it intends unreasonably to infringe the rights or interest of others, it is putting the whole subject of railway control quite above the legislation of the country." With this careful and well-considered language, both as to the main proposition and the qualification, we fully agree. The general proposition is also well understood that "the constitutional prohibition upon state laws impairing the obligation of contracts does not restrict the power of the state to protect the public health, the public morals, or the public safety, as the one or the other may be involved in the execution of such contracts." *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 672, 6 Sup. Ct. 252, 29 L. Ed. 516. But this general proposition is not universal in its application, and has its own well-recognized exceptions. The first and a fundamental exception, in cases involving corporate rights conferred by a charter, is that stated by Judge Cooley, *supra*, that a police regulation "must not be an amendment of the charter in curtailment of the corporate franchise."

In the case before us the original charter gave the defendant two distinct corporate franchises of equal dignity and rank, both conferred in the same section and in substantially the same language; the first being the

right to construct and maintain a railroad from the city of Baltimore to some suitable points on the Ohio river, and the second to make, or cause to be made, lateral railroads, in any direction whatsoever, in connection with the said railroad from the city of Baltimore to the Ohio river. The only restriction upon the route of the main road was that the eastern terminus should be at the city of Baltimore, and the western terminus at some point on the Ohio river. As to the lateral roads, there was absolutely no restriction whatever. As to both these essential rights and privileges the faith of the state is pledged by the act of 1826, and as Judge Redfield has said in *Thorpe v. Rutland & Burlington R. R. Co.*, supra: "All the cases agree that they cannot be destroyed or essentially modified." The Legislature could have said in the charter of 1826, "Provided that no such lateral road shall be built" within the limits of the territory defined in the act of 1906, or any other territory from which it might have been thought proper to exclude the defendant. But it made no such exclusion, and reserved no future right to make such. The act of 1906, in so far as it is sought to be applied to the Baltimore & Ohio Railroad, is as substantially an amendment of the charter in curtailment of its corporate franchise, as if its title were "An act to repeal section 14 of chapter 123 of the Acts of 1826, and to re-enact the same with amendments," and as if the body of such act had repealed and re-enacted section 14, with a proviso excluding the defendant from the territory described in the act. Such legislation, cast in the form of an amendment, would be void, and is none the less void because denominated a police regulation. The third section of that act repeals all laws and parts of laws inconsistent with the provisions of that act, thus indicating its purpose to amend the charter of 1826 in so far as it may be in conflict with that act. But, apart from that consideration, we are of opinion that this act cannot be availed of to defeat the proposed road.

In *Dobbins v. Los Angeles*, 195 U. S. 223, 25 Sup. Ct. 18, 49 L. Ed. 169, it was contended upon the supposed authority of *Munn v. Illinois*, 94 U. S. 113, 24 L. Ed. 77, that the Legislature is the exclusive judge of the propriety of police regulation when the matter is within the scope of its power, but the court there said: "The observations of Mr. Chief Justice Waite in that connection had reference to the facts of the particular case, and were certainly not intended to declare the right of either the Legislature or a city council to arbitrarily deprive the citizen of rights protected by the Constitution under the guise of exercising the police powers reserved to the state. It may be admitted that every intendment is to be made in favor of the lawfulness of regulations to promote the public health and safety, and that it is

not the province of the courts, except in clear cases, to interfere with the exercise of the power for the protection of local rights and welfare of the people in the community. But, notwithstanding this general rule of the law, it is now thoroughly well settled by decisions of this court that municipal by-laws and ordinances, and even legislative enactments, undertaking to regulate useful business enterprises, are subject to investigation in the courts with a view to determining whether the law or ordinances are a lawful exercise of the police power, or whether under the guise of enforcing police regulations there has been an unwarranted and arbitrary interference with the constitutional right to carry on a lawful business, to make contracts, or to use and enjoy property." So in *Lawton v. Steele*, 152 U. S. 133, 14 Sup. Ct. 499, 38 L. Ed. 385, the Supreme Court said: "To justify the state in thus interposing its authority in behalf of the public, it must appear, first, that the interests of the public generally, as distinguished from those of a particular class, require such reference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals. The Legislature may not under the guise of protecting the public interests arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations. In other words, its determination as to what is a proper exercise of its police powers is not final or conclusive, but is subject to the supervision of the courts." Once more, in *Lochner v. New York*, 198 U. S. 45, 25 Sup. Ct. 539, 49 L. Ed. 937, the court said: "It is impossible for us to shut our eyes to the fact that many of the laws of this character, while passed under what is claimed to be the police power for the purpose of protecting the public health or welfare, are in reality passed from other motives. We are justified in saying so when, from the character of the law and the subject upon which it legislates, it is apparent that the public health or welfare bears but the most remote relation to the law. The purpose of a statute must be determined from the natural and legal effect of the language employed; and whether it is or is not repugnant to the Constitution of the United States must be determined from the natural effect of such statutes, and not from their proclaimed purpose."

The evidence in this case not only wholly fails to show that the interests of the public generally require the enactment of this law, but it satisfies us that it has been enacted in the interest of a particular class, viz., the property owners nearest the line of the road, whose property will undoubtedly be rendered less desirable by the construction and operation of the road. If the public welfare, and the general advancement and prosperity of the territory described in the act were really

at stake, it would have been an easy matter to bring a cloud of witnesses in proof of this fact, in addition to the plaintiff himself and the two gentlemen whom he produced. It is not denied that there is a limit to the valid exercise of the police power by the state. If there were not such a limit, the claim of the power "would become another and delusive name for the supreme sovereignty of the state to be exercised free from constitutional restraint"; and we are forced to the conclusion that "the limit has been reached and passed in this case."

The counsel for the appellee lay much stress upon the case of *C. B. & Q. R. Co. v. Drainage Commissioners*, 200 U. S. 561, 28 Sup. Ct. 341, 50 L. Ed. 596, in which the court said that the police power embraced regulations designed to promote the public convenience or the general prosperity, as well as regulations designed to promote the public health, the public morals or the public safety. In that case a public corporation, charged by law with the duty of causing a large body of swamp lands to be drained and made capable of cultivation, adopted a plan which required the enlarging and deepening of the channel of a natural water course running through the district, the best and only practicable mode of effecting the drainage. This plan also required the removal of the foundations of a bridge erected by the defendant railway over this water course, which the railway company refused to do, or permit to be done, until it was paid such a sum as would compensate it for the cost of removal and of constructing a new bridge over the widened and deepened stream. It was held by the court that the drainage of so large a body of lands "so as to make them fit for human habitation is a public purpose; to accomplish which the state may, by appropriate agencies, exert the general powers it possesses for the common good. The character of that law being as it was a general law operating upon all swamp lands throughout the state, and the subject upon which it operated, not, as here, the exclusion of transportation facilities from a large region, but merely the question of who should bear the cost of removing and restoring the bridge, are so widely different from the one before us as to deprive the case of any real application to the present. The great and unusual privilege enjoyed by the Baltimore & Ohio Railroad in the exemptions from taxation secured by its charter under our decisions may have been unwisely granted and certainly should not be extended by construction, but the fact that they have been unwisely granted cannot justify courts of justice in denying the exercise of a right clearly conferred and beyond the power of withdrawal by repeal.

For the reasons stated, the decree appealed from must be reversed.

Decree reversed, injunction dissolved, and bill dismissed, with costs to the appellant above and below.

(106 Md. 197)

ADAMS v. COMMISSIONERS OF SOMERSET COUNTY.

(Court of Appeals of Maryland. May 17, 1907.)

BRIDGES—INJURIES FROM DEFECTS—ACTION—INSTRUCTIONS.

In an action for injuries caused by a defective bridge, an instruction that, before the jury "can find a verdict for the plaintiff, they must find that the defendant knew, or by ordinary care could have known, the bad condition of the bridge, in time to repair the same before the accident, and if the * * * defendant or its agent, the road supervisor, could not by the use of reasonable or ordinary care and diligence * * * have discovered the defect in said bridge, then their verdict should be for the defendant," was erroneous, as tending to convey the idea that actual notice of the defect by the defendant was necessary to render it liable, and as ignoring evidence of the road supervisor's knowledge of the dangerous condition of the bridge.

Appeal from Circuit Court, Dorchester County; Chas. F. Holland and Henry Lloyd, Judges.

Action by Samuel J. Adams against the county commissioners of Somerset county. From a judgment for defendant, plaintiff appeals. Reversed and remanded.

Argued before BRISCOE, BOYD, PEARCE, SCHMUCKER, BURKE, and ROGERS, JJ.

James E. Ellegood, for appellant. Joshua Miles, for appellee.

BURKE, J. This case was instituted in the circuit court for Somerset county by the appellant against the county commissioners of that county, and was tried in the circuit court for Dorchester county, to which it had been removed. The trial resulted in a verdict and judgment for the defendant, and the plaintiff has brought this appeal.

The suit was brought for personal injuries to the plaintiff, and for injuries to his horse, wagon, and harness alleged to have been caused by a defect in a bridge on one of the public roads of Somerset county. The declaration contained three counts. The first count described the personal injuries which the plaintiff suffered and the pecuniary losses he thereby sustained, and avers that his injuries and losses were due to the negligence of the defendant in permitting a county road and bridge, within said county, leading from Hall's corner to Marlon post office, in Somerset county, at a point near the dwelling house of Edward Hall, to be and remain out of repair, and in an unsafe and dangerous condition. The second count relates to injuries to his horse, and the third to damage to his wagon and harness. The same act of negligence, as charged in the first count, is averred in the second and third counts. In each count it is alleged that the defect in the bridge was known to the defendant prior to the accident which caused the injuries and damage. This bridge was a very small affair. It was located on the county road described in the declaration, and was constructed over a ditch about 6 feet wide. Timbers, de-

scribed in the evidence as "sleepers," were placed across the ditch, and covered by oak slabs about 17 feet long, nailed to the sleepers. About a week or ten days before the accident, the ditch had been cleaned, and in order to do this work three of the planks had been taken up, and replaced after the cleaning had been done; but the boards had not been nailed to the sleepers. The surface of the boards appeared to be sound, and showed no decay, or defect of any kind. The workman who took up the planks to clean the ditch saw no defect in the boards, and, so far as he could see, the boards of the bridge were sound, and they were replaced by him after the ditch was finished. For the week previous, and up to the morning of the accident, the hauling over the bridge was very heavy. On the morning of the accident, Mr. Isaac H. Whittington, the road supervisor, had passed over the bridge. He was walking, and had charge of a team of two mules with a load of wood. He stopped and examined the bridge, and saw that a plank had been pushed out of its place, so that its end was not even with the other boards, and he pushed it back in its place, so as to make the ends more even. He testified that he saw nothing further the matter with the bridge, and that the boards seemed sound, and not decayed, and showed no break. This evidence as to the apparent soundness of the bridge was corroborated by other witnesses. The evidence shows that on the day of the accident, and for a number of days prior thereto, heavily laden wagons had passed over the bridge, and no defect therein was noticed by those in charge of the teams. Four witnesses on behalf of the plaintiff testified that, a short time before the accident, while driving across the bridge, one of its planks showed weakness, but that it showed no defect on the outward surface. It is clear from all the evidence that the defect in the bridge was a latent, or hidden, defect, not readily or easily discoverable without a careful examination, or without the existence of some special circumstance calling attention to it. The plaintiff offered evidence tending to prove the following facts: That on the morning of September 15, 1905, he was riding in his wagon from his home to Marion Station, in Somerset county, over the public road upon which the bridge spoken of is located, and while driving over the bridge his horse stumbled and fell, and he was thereby thrown from his wagon; that his head struck the ground, rendering him almost senseless; that when he recovered himself he was standing in the road; that his horse's right leg was fastened in the bridge; that the shafts and other parts of his wagon were broken; that he repaired the wagon temporarily, and then drove to Marion Station, and afterwards to his home. He further offered evidence tending to show that he was seriously and permanently injured; that he suffered intense pain, incurred expense, and is incapable to

perform his accustomed work; and that his injuries may result in paralysis and death. He testified that in riding over the bridge he had no knowledge of any weak or defective plank in it, and that there was nothing on the surface of the bridge to indicate that there was a weak or defective plank therein. After the accident, it was found that one of the boards was broken, and was shivered on the underneath side, although this defect was not visible on the surface; that this shiver weakened the plank, but the board was otherwise sound. When the plaintiff's horse stepped upon this weak spot, the board split lengthwise, and the horse's foot was caught, and in this way the accident occurred.

Because of the concealed character of the defect in the bridge, the testimony of Lee Carver and Isaac H. Whittington, the road supervisor, who had charge of this road and bridge, becomes most important. Lee Carver testified that he had driven over this bridge nearly every evening during the week previous of August 13, or August 20, 1905, and that either on August 13th or 20th, in driving over the bridge, he discovered a defective plank by noticing that it bent down when his horse stepped on it, and that he passed over it without difficulty, or injury, but got out of his carriage and examined it. He found that the weak plank was a board showing no defect on the upward surface, not decayed at all, nor broken, but shivered on the underneath side, and that he pushed the plank so as to make the shivered or weak place come over the sleeper, which made it project beyond the other planks at one end and short at the other. That during the week following the 13th or 20th of August he saw Mr. Whittington, the road supervisor in charge of this road and bridge, and told him that there was a bridge near Will Hall's place which had a weak or defective board in it, and that he pushed the board as described above, and that Mr. Whittington said that he would attend to it. On cross-examination this witness said that he did not know whether he told the supervisor that there was a bridge, or that the bridge near Will Hall's residence was defective, and farther testified that there was a big bridge nearer Will Hall's residence than the bridge where the accident occurred; that this big bridge was about 150 yards above the bridge where the accident occurred, but that he did not tell the supervisor that it was the big bridge near Will Hall's residence, but did tell him that the bridge had a plank in it short at one end. Mr. Whittington testified that Lee Carver told him that the bridge with a defective or weak plank in it was the big bridge down by Will Hall's, and that he went and examined the big bridge, and had it repaired, although he found little, if anything, the matter with it. He had, however, previously testified, as we have seen, that, in passing over the bridge where the accident occurred on the morning the plaintiff was injured, he saw that there

was a plank pushed out of its place, so that its end was not even with the other boards.

The record presents three bills of exceptions, two of which relate to questions of evidence, and one to the rulings of the court on the prayers. As the main question in the case arises under the last exception, that will be first considered. The plaintiff offered four prayers, and the defendant three. The court granted all the prayers offered on each side. To the granting of the defendant's prayers, the plaintiff excepted; but the defendant took no exception to the granting of the plaintiff's prayers. The purpose of instruction is to inform the jury clearly and pointedly as to the law of the case, so as to leave no reasonable ground of misapprehension or mistake. They should not be equivocal, or ignore evidence tending to prove a fact having an important bearing upon the law of the case, although the evidence as to that fact may be contradicted by the testimony of other witnesses. The principles of law by which the responsibility of county commissioners for accidents occurring on public roads and bridges, in cases where that responsibility has not been modified, or changed by local statutes, are well settled by decisions of this court, and are well understood. In the case of *County Commissioners of Baltimore County v. Hattie E. Wilson*, 97 Md. 207, 54 Atl. 71, 56 Atl. 596, Judge Schmucker, who delivered the opinion of the court, after quoting sections 1 and 2 of article 25 of the Code of Public General Laws, said: "It has been repeatedly held by this court that these sections of the general law not only conferred the power, but also imposed the duty, upon the county commissioners to keep the public roads in a safe condition; and that, as the law provided them with proper agents for the discharge of these duties and the power to levy the requisite taxes for the repair of the roads, it made them liable for injuries resulting from the nonrepair of such roads, or the existence of dangerous obstructions upon them." In the case of *County Commissioners of Anne Arundel County v. Duvall*, 54 Md. 355, 39 Am. Rep. 393, the court referred to the cases of *Duckett*, 20 Md. 468, 83 Am. Rep. 557, *Gibson*, 36 Md. 229, and *Baker*, 44 Md. 1, and said: "In all of those cases the injuries for which the county commissioners were held liable resulted directly from the bad condition of the public roads or bridges. The county commissioners are specially charged by law with the duty of keeping these in good repair and safe for the travel of the public. *Tyson's Case*, 28 Md. 510; *Walter's Case*, 35 Md. 394; and cases above cited. If they fail to do so, and injury results, they are liable in an action at law, not by virtue of any liability at common law, but because they are made so by statute. They are not permitted to excuse themselves by the fact that the road supervisor is also required by law to keep the public road in repair, and may be made

liable in a penalty or in damages for a failure to do so. Their obligation is a paramount and pre-existing one, and cannot be discharged by the failure of another to do that which they (the commissioners) are required by law to do."

The instructions granted at the instance of the defendant will now be examined in the light of these principles. The defendant's first prayer, after instructing the jury that the county commissioners are not insurers against accidents occurring on the public roads and bridges, nor are they required by law to make and keep them in perfect condition and repair, but only that they should use reasonable care and diligence in the exercise of the powers vested in them in regards to the public roads and bridges, asserted the proposition that, even if the jury should find that the bridge was out of repair, and not in perfect condition, "yet, before they can find a verdict for the plaintiff, they must find that the defendant knew, or by ordinary care could have known, the bad condition of the bridge, in time to repair the same before the accident; and if the jury find from the evidence that the defendant, or its agent, the road supervisor, could not, by the use of reasonable or ordinary care and diligence in the exercise of the powers vested in them, have discovered the defect in said bridge, then their verdict must be for the defendant." There was not a particle of evidence in the case that the county commissioners had any actual or personal knowledge of the defect in the bridge, and in view of the character of the defect it might well have been argued that neither the commissioners, nor the road supervisor, by the exercise of ordinary care, could have known of the unsafe condition of the bridge. The plaintiff had alleged that the defendant knew, prior to the accident, that the bridge was unsafe; but, in order to charge the defendant with knowledge, it was not necessary for him to show actual or personal knowledge by the commissioners. Notice communicated to, or knowledge acquired by, Mr. Whittington, the road supervisor, as to the unsafe condition of the bridge, was notice to the commissioners, and gratified the allegations as to the knowledge on their part set out in the narr. The plaintiff offered evidence tending to prove that prior to the accident Mr. Whittington had this knowledge, although he denied that evidence, but that was a question for the jury. This prayer, no doubt, announced a sound general proposition of law; but, as applied to the facts of this case, it is perfectly obvious that it was most misleading and objectionable. It was vague, indefinite, and equivocal as to the question of notice, and ignored all reference to the testimony as to the knowledge of the road supervisor of the dangerous condition of the bridge, which was, perhaps, the crucial and controlling question in the case. As framed, the jury might have readily concluded that, because the commissioners did

not have personal knowledge of the defect in the bridge, they were not liable, and it might have been so argued under this instruction. In addition to the other facts stated in the prayer, had it stated that, before the jury could find for the plaintiff, they must find that the defendant, or its agent, the road supervisor, in charge of the road and bridge, knew of the bad condition of the bridge, the instruction would have been free from objection. The defendant's second prayer is open to the same objection; but we find no error in its third prayer. The question asked Dr. Guy Steele, and the answer of the witnesses thereto, which constitute the first and second exceptions, were properly allowed, in view of the testimony given by the physicians, who testified on the part of the plaintiff, as this evidence tended to lessen the value of their testimony as to the exact nature of the plaintiff's injury.

For the error committed in granting the defendant's first and second prayers, the judgment must be reversed.

Judgment reversed, and case remanded for a new trial, with costs to the appellant above and below.

(106 Md. 128)

RUSSELL v. STOOPS.

(Court of Appeals of Maryland. May 17, 1907.)

1. FRAUD—PETITION—SUFFICIENCY.

In an action of deceit, the declaration alleged that plaintiff was induced to exchange her house and lot in town for defendant's farm, subject to a mortgage, by the false and fraudulent representations of defendant as to when the interest was due on the mortgage, and that because of this plaintiff was unprepared and unable to pay the interest when demanded, and in consequence thereof the farm was sold to pay the mortgage, and plaintiff was deprived of the ownership and possession of her house and lot, and suffered damage thereby. *Held*, that the petition is insufficient, since the damages claimed are for the loss of the house and lot, while the fraud alleged is in reference to the farm.

2. SAME—DAMAGES.

In an action of deceit for damages resulting to plaintiff because of fraudulent representations made by defendant in regard to the interest due on a mortgage on his farm which he traded to plaintiff subject to the mortgage, and because of which plaintiff could not pay the interest so that the farm was sold under the mortgage, where it was not alleged or attempted to be proven that the defendant made the false representations in order to mislead the plaintiff, and thereby cause a default in the entire mortgage so that the property would be sold and he might purchase it, as he did, at a sacrifice, it was error to charge that plaintiff was entitled to recover such damages as she had sustained as the direct consequence of the false representations, providing she could not have prevented the loss by the exercise of ordinary care and prudence, since this allowed her to recover special damages resulting from the sale of the farm, a circumstance which could not reasonably be supposed, according to the usual course of business, to flow from defendant's act.

3. SAME.

Under these circumstances, plaintiff ought to have been limited in her recovery to the interest on the mortgage which she became ob-

ligated to pay and which defendant represented was not due.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Fraud, §§ 60-65.]

4. SAME—TRIAL—INSTRUCTIONS.

In an action of deceit for damages alleged to be due to fraudulent representations, where plaintiff testified that defendant made certain statements and defendant denied that he did, the question was whether he did or not, and the court was not warranted in instructing that; where a transaction which is challenged admits equally of an honest or dishonest construction, the jury should accept the construction in favor of honesty.

Appeal from Circuit Court, Kent County; Austin L. Crothers and Wm. H. Adkins, Judges.

Action by Hester V. Stoops against L. Bates Russell. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Argued before BOYD, PEARCE, BURKE, SCHMUCKER, and ROGERS, JJ.

John D. Urie, for appellant. Lewin W. Wickes and Wm. W. Beck, for appellee.

BOYD, J. This is an appeal from a judgment rendered against the appellant in favor of the appellee in an action of deceit. On May 12, 1905, the appellant and the appellee, together with her husband, entered into an agreement for exchange of properties; that of the former being a farm containing about 131 acres of land, which was subject to a mortgage of \$2,000 due to J. B. Hurlock, and that of Mrs. Stoops being a house and lot in Chestertown. The appellant also agreed to pay Mrs. Stoops \$250 "for the landlord's interest in the farm for the year 1905," and to give her possession on January 1, 1906. She had agreed to give him possession of the house and lot on July 1, 1905. The deeds were duly executed and delivered; that of the appellant and his wife to the appellee containing this covenant: "And it is furthermore understood that said farm is subject to a mortgage to J. Edward Hurlock for two thousand (\$2,000) dollars, which the said Hester V. Stoops agrees to assume and pay, and the said L. Bates Russell and Iola K. Russell covenant that they will warrant specially, except as to said mortgage, the above described lands and premises." The appellee gave the appellant possession of the house and lot in June, 1905, and she took possession of a tenant house on the farm that month; the main house being occupied by a tenant who was entitled to possession until January 1st. The mortgage was dated August 3, 1901, and was payable one year after date, with interest from date, payable semi-annually, but it was still held by Mr. Hurlock, who had agreed with the appellant to accept the interest annually. It contained the usual provision in case of default in payment of the principal, interest, or any part thereof, or in any covenant or condition in the mortgage, and required an insurance of \$1,200 to be kept on the improvements for

the benefit of the mortgagee. At the time the agreement was made, and when the deeds were delivered, interest was unpaid on the mortgage from August 3, 1904, and on August 30, 1905, the insurance policy, which had been taken out for three years, expired. The foundation of this suit is that the appellee contends that the appellant falsely and fraudulently represented to her that all arrears of interest had been paid to the date of the contract; that the mortgage debt bore interest only from that date, and that no interest would be demanded or required to be paid by her until after wheat harvest in 1906; that defendant knew the representations to be false, and made them with the intent to induce her to enter into the contract and exchange the properties, which she did, relying upon the representations. Shortly after the year's interest became due (in August, 1906) it was demanded of the appellee, but she did not pay it, and the mortgagee assigned the mortgage to John G. Urie on November 15, 1906. On the next day, which was Thursday, he wrote to the appellee to make some arrangement by the following Saturday. That not being done, Mr. Urie filed a bond on the next Monday and again notified the appellee "that her farm would be advertised unless she fixed up the mortgage." The mortgage provided for one-half commissions if paid after the bond was filed, and \$25 for preparing and furnishing the bond. The appellee failed to arrange for the mortgage, and Mr. Urie, as assignee, advertised the property, and sold it the latter part of December, 1906, to the appellant for \$2,450. The appellant had sold the property he had received from the appellee for \$2,000 a few days after the transfer to him in May, 1905. He denied the statement about the interest, and claimed he had purchased and paid for the crops with the \$250 in part to enable her to pay the interest, \$120 of which would be due about August 1, 1906. He also testified that after he had purchased the farm at the mortgagee's sale he offered it to the plaintiff at what he gave for it and offered to let half of the purchase money remain on the farm. Whichever version was in fact true, the net result was that the appellant had sold the property he had received from the appellee for \$2,000 a few days after the transfer to him. He then obtained his farm (which he valued at \$4,000 in the sale to the appellee) for \$2,450, which paid off the mortgage given by him, and he had only paid \$250 in cash to the appellee. His total loss could not exceed the \$250, plus the difference between the amount of the mortgage with interest hereon, and such taxes as were then due on the farm, and the \$2,450. The appellee had received the \$250, out of which she had to pay the expenses of seeding the wheat in the fall of 1905 (for which she received no return) and such other expenses as she incurred, and never did get possession of the entire farm which she had purchased. Mr.

Urie, the appellant's attorney, who drew the agreement but made no reference to the interest on the mortgage, sold the property under the mortgage within six weeks of the time it was assigned to him, and will receive the difference between what he paid for the mortgage (\$2,154), plus expenses of sale, and the purchase price (\$2,450). Without further comment on the facts, it is not surprising that a jury rendered a verdict for a substantial sum; but, whatever we may think of such transactions, it is, of course, our duty to determine the case according to the established principles of law without regard to results, if not within the protection of those principles. The questions before us are presented by a demurrer to the narr. and exceptions to granting the plaintiff's prayer and rejecting the first and fourth prayers offered by the defendant.

The declaration alleges the exchange of the properties, the false and fraudulent representations as to the interest, the demand of the interest from the plaintiff, her inability to pay it, and the sale in consequence thereof at a sum sufficient to pay the mortgage debt, interest, and costs, that the defendant made such false and fraudulent representations well knowing them to be false and with intent to induce the plaintiff thereby to enter into said written contract and to exchange said properties, and that the plaintiff, relying upon said representations of the defendant, entered into the contract and did exchange the properties. It also alleges that the plaintiff was induced to believe that no interest was due and none would be demanded on the mortgage until after the wheat harvest in 1906, and hence she made no provision for it, and could not pay it. It concludes: "And that, by reason of the said false and fraudulent representations of the defendant, the plaintiff was deprived of the ownership and possession of said house and lot of land, and that the plaintiff suffered damage thereby. And the plaintiff claims \$4,000." It will thus be seen that the damages claimed in the narr. are not for the loss of the farm, but for the loss of the house and lot, while the fraud alleged was in reference to the farm. If the allegations in the narr. are true, the plaintiff was not deprived of the house and lot by the alleged fraud, but she was, at most, only deprived of the equity in the farm. It may be that the house and lot were worth more than the latter, even if there was only due the principal of the mortgage, and it is difficult to understand upon what principle, under the allegations made in the narr., she could have been entitled to recover for the loss of the house and lot, regardless of the question whether that could under proper allegations be the measure of damages, which we will refer to later. "The declaration or complaint must allege that plaintiff sustained damage by reason of the fraud, and should show that the relation of cause and effect exists between the fraud

and the damage alleged." 20 Cyc. 103, and cases cited in notes. It cannot properly be said that the loss of the house and lot was caused by the alleged fraud in reference to the interest on the mortgage, and the demurrer ought to have been sustained.

The plaintiff's first prayer, which was granted, is defective by reason of its failure to instruct the jury as to the proper measure of damages. After reciting a number of facts which the plaintiff alleged in the narr. and undertook to establish by proof, it concludes: "Then the plaintiff is entitled to recover in this action such damages as the jury may find the plaintiff has sustained, as the direct consequence of such false representations, if, in fact, the plaintiff has sustained any loss, provided the plaintiff could not have prevented said loss by the exercise of ordinary care and prudence." There is nothing in the case to have authorized the jury to find exemplary, or punitive damages. "In ordinary cases the recovery of exemplary, punitive, or vindictive damages will not be allowed in an action of deceit; but such damages may be allowed where the wrong involves some violation of duty springing from a relation of trust or confidence, or where the fraud is gross, or the case presents other extraordinary or exceptional circumstances clearly indicating malice and willfulness and calling for an extension of the doctrine." 20 Cyc. 142. This case as presented does not come within any of the exceptions named. It is not alleged or attempted to be proven that the defendant made the false representations in order to mislead the plaintiff, and thereby cause a default in the entire mortgage in order that he might purchase the property at a sacrifice, or anything to that effect. If such facts had been alleged and proven, a different question might have arisen, but the mortgage was overdue for several years before the exchange of the properties, and the plaintiff did not claim that the defendant misrepresented that fact to her. So far as the record discloses, there were no representations excepting as to the interest, and, even if the defendant and the mortgagee had some understanding about the payment of the interest, it is not shown that it was of record or would have been binding on the assignee.

The prayer wholly failed to instruct the jury as to the true measure of damages. There was no limit to those the jury could assess, under the prayer, excepting of course the amount claimed in the declaration. This court has had occasion in a number of cases to disapprove of such instructions. In *B. & O. R. R. Co. v. Carr*, 71 Md. 135, 17 Atl. 1052, the judgment was reversed because the jury was instructed "that, if they found for the plaintiff for the refusal to pass him through the gate, then he was entitled to such damages as they might find would, under all the circumstances, compensate him for such refusal." The court said: "The rule by which

damages are to be estimated is, as a general principle, a question of law to be decided by the court; that is to say, the court must decide, and instruct the jury, in respect to what elements, and within what limits, damages may be estimated in the particular action." In *Belt R. R. Co. v. Sattler*, 102 Md. 595, 62 Atl. 1125, 64 Atl. 507, the same principle was announced as it was in the late case of *West. Union Tel. Co. v. Lehman & Bro.* (not yet officially reported) 66 Atl. 208, and in other cases in this court. In *Webster v. Woolford*, 81 Md. 329, 32 Atl. 319, which was an action of deceit alleged to have been practiced by the defendant in respect to his authority to sell certain property, this court said: "The action, it is true, is in the nature of an action for tort, but it is a tort founded on a breach of contract, and, there being no question as to exemplary damages, the rule as to the measure of damages is the same as in cases for breach of contract in regard to the sale of property. * * * We take the rule to be that, when two parties make a contract for the sale of property which one of the parties has broken, the other party may recover such damages as may fairly and reasonably be considered; i. e., according to the usual course of business, to flow from the breach itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it." The court then quoted at some length from *Hadley v. Baxendale*, 9 Exch. 341. There is nothing in the evidence in this case to show that the defendant et al. had in contemplation, as the result of interest being due before the harvest of 1906, that the plaintiff would be unable to pay it, and the mortgagee would assign the mortgage to some one who would demand payment of the principal and interest, and thereby cause a sacrifice of the property or loss to the plaintiff. There was at most only \$93.33 more interest due than the plaintiff knew would be due, and, as the record shows that the jury rendered a verdict for \$1,400, it can readily be seen how injurious such an indefinite instruction as this was may be.

It is true the prayer concluded by saying, "Provided the plaintiff could not have prevented said loss by the exercise of ordinary care and prudence"; but the established facts were that, although notice of the interest being due was given by the mortgagee on or before September 14, 1905, and the mortgage was not assigned until November 15th, 1905, neither the plaintiff nor her husband called upon the mortgagee to endeavor to arrange the interest or procure an extension of time, and, what is even more remarkable, neither of them called upon the defendant to pay it or even inquired of him whether it was due until Mr. Urie was about to foreclose the mortgage. The plaintiff's husband worked for the defendant, yet he never mentioned to him the interest or the fact that they had

received notice that the interest was due. These facts were proven by the plaintiff's own witnesses (mainly by her and her husband), and it cannot be conceived how the jury could have disregarded the qualification of the prayer above quoted unless they supposed it only referred to her care and prudence after the mortgage had been assigned, and believed she was then unable to meet the principal and interest demanded. But, in the absence of some reason for not informing the appellant that interest had been demanded of her during the two months the mortgagee held the mortgage, and demanding it of him, and in absence of all efforts to pay the interest in that time, she should not have been permitted to recover more than the interest that the defendant ought to have paid, even if she could have otherwise done so. Under the facts presented by the record she ought to have been limited in her recovery to the \$93.88—that being the interest on the mortgage from August 3, 1904, to the date of the transfer—as there was nothing alleged or proven to justify the recovery of any greater sum. The prayers granted for the defendant did not protect him from the injurious effects of this prayer, and it should not have been granted.

There was no reversible error in rejecting the defendant's first prayer. The defendant's fifth in *McAleer v. Horsey*, 35 Md. 439, and the defendant's sixth in *Robertson v. Parks*, 76 Md. 118, 24 Atl. 411, went as far in stating the legal presumption as to fraud, and upon whom the burden is in overcoming that presumption, as is ordinarily safe in this class of cases. As was said in *Lynn v. B. & O. R. Co.*, 60 Md. 417, 45 Am. Rep. 741: "Courts ought not to give mere legal abstractions as instructions to juries, but should state the law applicable to the pleadings and facts of each case." This prayer not only embodies the substance of the one granted in *McAleer v. Horsey* and *Robertson v. Parks*, above referred to, but it concludes: "And, where a transaction which is challenged admits equally of an honest or dishonest construction, it is the duty of the jury to accept and adopt the construction in favor of honesty and fair dealings." The plaintiff's testimony tended to show that the appellant did make the statement in reference to the interest on the mortgage, while the appellant positively denied that he did. It was not a question of construction of what he meant by what he did say, but simply whether he did say what the plaintiff claims he said; for, if he did, there being no attempted explanation of its meaning, there was no question as to whether it admitted "of an honest or dishonest construction," and hence that part of the prayer did not apply to the facts.

The theory of the defendant's fourth prayer, as we understand it, was correct, but the facts were not stated with sufficient

fullness and might have misled the jury as to her right to recover even the \$93.83.

It follows from what we have said that the judgment must be reversed for error in not sustaining the demurrer to the declaration and in granting the plaintiff's first prayer.

Judgment reversed and new trial awarded, the appellee to pay the costs.

(106 Md. 147)

HOME OF THE AGED OF THE METHODIST EPISCOPAL CHURCH v. BANTZ.

(Court of Appeals of Maryland. May 15, 1907.)

1. WILLS — PROBATE — REVOCATION — JURISDICTION.

Where a will altered by lines drawn through clauses disposing of property to specified beneficiaries was admitted to probate without contest in the form in which it appeared as altered, one who had an interest in the estate of the testator on the probate being revoked and a new one granted of the will in its original condition was entitled to file, under Code Pub. Gen. Laws 1904, art. 93, §§ 318, 341, authorizing the filing of a petition praying for the re-examination of the probate of a will without contest, etc., a caveat praying for the revocation of the probate and for the granting of the probate of the will in its original condition, though letters of administration have been issued on the personal estate.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, §§ 532, 550, 551, 616.]

2. SAME.

One entitled to property passing under the residuary clause of a will altered by lines drawn through it, if admitted to probate in its original condition, has such an interest in the estate of the testator as authorizes him to file a caveat for the revocation of the probate of the will as altered and for the granting of a probate of the will in its original condition.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, §§ 532, 550, 551, 616.]

3. SAME—REVOCATION—INTENTION.

Where a testator drew lines through clauses making a disposition of his property, such portions of the will were not revoked unless the testator intended so to do.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, § 441.]

4. SAME—ISSUES.

Where the allegations of a caveat praying for the revocation of the probate of a will as altered by lines drawn through clauses making dispositions of testator's property and for the granting of a probate of the will in its original condition present for determination the inquiry whether the lines were put on the will by the testator, and whether he thereby intended to revoke such portions of it, and whether he possessed at the time testamentary capacity, the caveat presented questions relating to the making of the will within the jurisdiction of the orphans' court, having exclusive jurisdiction of granting or refusing the probate of wills.

5. SAME.

A will was admitted to probate as altered by lines drawn through clauses making disposition of property to a residuary legatee. The residuary legatee appeared and answered in a suit in the circuit court for the appointment of a new trustee and the administration of the trusts of the will under the supervision of that court. The trusts of the will related to the life estate of testator's widow, and the portions of the will creating such trusts were not assailed

by the caveat filed by the residuary legatee praying for the revocation of the probate of the will and for the granting of a probate of the will in its original condition. *Held*, that the appearance and answer of the residuary legatee in the circuit court did not estop it from prosecuting the caveat.

6. SAME—JUDGMENT.

Where proceedings on a caveat for the revocation of the probate of the will as altered and for the granting of a probate of the will in its original condition resulted in a revocation of the probate and the granting of a new one, the courts should protect the acts of the administrator done in due course under the letters of administration c. t. a. granted on the will as originally probated.

Appeal from Orphans' Court of Baltimore City.

Caveat by the Home of the Aged of the Methodist Episcopal Church against Sallie C. Bantz, administratrix c. t. a. of Theodore S. Bantz, deceased, to revoke the probate of a will as altered, and for its admission to probate as originally executed. From an order dismissing the caveat, plaintiff appeals. Reversed and remanded.

Argued before BRISCOE, BOYD, PEARCE, SCHMUCKER, BURKE, and ROGERS, JJ.

John Philip Hill, for appellant. Wm. Pinkney Whyte, for appellee.

SCHMUCKER, J. This appeal is from an order of the orphans' court of Baltimore city dismissing a caveat filed by the appellant to the last will of Theodore S. Bantz. The will was admitted to probate in common form without contest on June 15, 1904, and the caveat was filed on September 21, 1906, within the three years allowed by section 33 of article 93 of the Code of 1904 for filing caveats to wills. Upon the face of the will, as admitted to probate, there appear lines drawn through and across certain words, but in such manner as not to obliterate them or render them illegible. The caveat, after alleging the death of the testator, leaving surviving him a widow, but no children or descendants, states who constitute his heirs at law and next of kin. It then avers the probate of the will in common form with the lines above mentioned appearing upon its face, and asserts that at the time of its execution on September 22, 1892, it did not contain those lines, and that they are not part of the will, and should be eliminated in its probate. The caveat further avers that the will at the time of its execution was placed in the hands of Frederick Leist, Esq., who was the testator's counsel and was named as one of the executors in the will, and that he retained custody of it until his death in 1901, when it came into the possession of the testator for the first time after its execution. The caveat then alleges that, although the testator was in the full possession of testamentary capacity when he made his will on September 22, 1892, he began about November, 1898, to show symptoms of insanity, which developed to such an extent that it became necessary on November 23, 1902, to con-

fine him in an asylum, and that for many years before his confinement in the asylum he was not capable of making or revoking a will, and that, if the lines drawn through and across certain words of the will were put there by him or by his direction, they can have no effect as a revocation of any of the provisions of the will. The prayer of the caveat was for a revocation of the order admitting the will to probate in common form and for its admission to probate without the lines already referred to as appearing upon its face.

The will in question, omitting its formal opening and conclusion, is as follows: "After the payment of all my just debts and funeral expenses I give, devise and bequeath all my estate and property real and personal wherever the same may be unto Joshua T. Young my brother Edward Bantz M. D. and Frederick Leist and the survivors or survivor of them in trust and confidence to hold the same for the term of my wife's Sallie C. Bantz life, and after paying the taxes and necessary expenses thereon, to pay her out of the net income of my estate the sum of one thousand and ninety-five dollars per year during her natural life in quarterly instalments of two hundred and seventy-three dollars and seventy-five cents each, and the remainder of the income to be invested by them and held for the purpose of making good any deficiency of the income to my wife Sallie C. Bantz so that she will receive one thousand and ninety-five dollars for every year during her natural life; and at the death of my wife Sallie C. Bantz said trust shall cease, and the property No. 721. West Lexington street and No. 202 Myrtle avenue shall go to my brother Edward Bantz absolutely, five thousand dollars shall go to Charles O. Bowman nephew of my first wife Cecelia Bantz, and four thousand dollars shall go to, in equal shares to Thomas Bowman Smith and Cecelia Bantz Smith children of George P. Smith and his wife Mary C. Smith, and the rest and residue and remainder of my estate shall go to the Home for the Aged of the Methodist Episcopal Church, located at the southwest corner of Fulton avenue and Franklin street for the purpose of a dormitory to be known as Cecelia Bantz dormitory." A clause follows granting to the trustees certain powers for the management of the estate, after which the will proceeds to say: "I constitute and appoint Joshua T. Young, Edward Bantz and Frederick Leist to be the executors of this my last will and testament (my brother Edward Bantz not to receive commissions as trustee and executor as the provision made for him is to be in lieu thereof) hereby revoking all other wills and codicils by me heretofore made." The words here appearing in italics are the ones over which the lines referred to were drawn in the will.

All of the persons named as trustees and executors in the will having died during the

lifetime of the testator, letters of administration c. t. a. upon his estate were granted to his widow, Sallie C. Bantz, the present appellee, by the orphans' court when the will was admitted to probate in common form. The administratrix c. t. a. filed an answer to the caveat setting up a want of jurisdiction in the orphans' court to determine the questions presented by it, and further averring that, when it was filed, she had already completed the administration of the personal estate of the testator in the orphans' court and passed over the net balance thereof to Hon. Wm. Pinkney Whyte, who had been appointed trustee, in lieu of those named in the will to execute the trusts thereof by the circuit court of Baltimore city in a suit instituted for that purpose, to which all persons interested in the estate, including the appellant, were made parties, and that the appellant had by its answer filed in that suit neither admitted nor denied the allegations of the bill, but submitted its rights to the determination of the circuit court. To this answer the appellant demurred.

The orphans' court, after hearing the case, filed the order appealed from dismissing the caveat, "for the reason that at the time of admitting the will to probate the court did establish the text of the will as it appeared then, and as to the determining and establishing any rights that might arise under said will it is beyond the court's jurisdiction." That order was signed by two of the three judges of the orphans' court. The other judge filed a dissenting opinion, holding that the matters alleged in the caveat related to the factum of the will, and were therefore within the jurisdiction of the court, and that the administratrix should be required to answer the caveat. We think the orphans' court erred in passing the order appealed from. The will having been admitted to probate without contest in the form in which it then appeared, any one who would have an interest in the estate if that probate were revoked and a new one granted of the will in its original condition was entitled to file a caveat to it within three years thereafter, even though letters of administration had been issued upon the personal estate. Code 1904, art. 93, §§ 318, 341; *Levy v. Levy*, 28 Md. 25. The appellant had such an interest in the estate as to authorize it to file its caveat for it will be entitled to all of the property passing under the residuary clause of the will if it be admitted to probate in its original form. The allegations of the caveat present for determination the inquiry whether the lines referred to were put upon the will by the testator or under his direction, and, if so, whether he thereby intended to revoke the portions of it over which they were drawn. Even the cancellation of the signature to a will is an equivocal act, and does not amount to a revocation unless done *animo revocandi*. *Semmes v. Semmes*, 7 Har. & J. 388; *Rhodes v. Vinson*, 9 Gill,

169, 52 Am. Dec. 685; *Colvin v. Warford*, 20 Md. 393. If the foregoing inquiries be answered in the affirmative, the further question of the testamentary capacity of the testator at the time the lines were drawn is raised by the caveat. All of these questions relate to the factum of the will—i. e., the making of the instrument—and therefore concern its probate, and not its construction, and fall within the jurisdiction of the orphans' court, which, under our testamentary system, has exclusive jurisdiction in granting or refusing the probate of wills. *Johns v. Hodges*, 62 Md. 525.

The question here presented is whether the lines do or do not constitute part of the will; and it is entirely distinct from that of the force and effect of erasures, interlineations, or alterations confessedly made by the testator appearing in a will whose text has been established, as was the case in *Eschbach v. Collins*, 61 Md. 478, 48 Am. Rep. 123, and *Ramsay v. Welby*, 63 Md. 584. The last-mentioned case, which was much relied upon by the appellee, resembles the present case in some respects, but upon close examination is plainly distinguishable from it. In *Ramsay's Case* the interlineations and erasures, some in ink and others in lead pencil, appearing upon the will, which had been admitted to probate in common form, were confessedly made by the testatrix, whose testamentary capacity at the time of making them was not challenged. No caveat was filed to the will in that case, but certain parties interested in the estate filed a petition in the orphans' court averring that the changes in the will made in lead pencil were not to be considered as operative, and setting forth certain constructions of particular provisions of the will as the true and legal effect of the same, and praying that the true text of the will might be ascertained and declared, and the bequest in their favor secured to them. The respondent there in her answer set up the want of jurisdiction in the orphans' court to adjudicate the questions raised by the petition. The orphans' court adopted the respondent's view, and dismissed the petition, and this court, upon an appeal affirmed the order of dismissal. This court affirmed that case solely upon the ground that the questions there raised by the petition did not relate to the mere factum of the will, or whether the changes in it had been inserted by the testator, but related to the legal construction of its provisions, over which the orphans' court clearly had no jurisdiction. Our predecessors in that case said (at page 586 of 63 Md.): "In the probate nothing is to be determined but what relates to the mere factum of the will. What is the legal effect of its provisions is not involved in that proceeding. Undoubtedly any clause or portion of the paper writing propounded as a will may be rejected if it appears it was not inserted by the testator, or that he had revoked it, or that it was not embraced by the

execution. Such facts go to the actual making of the instrument; but all that is embodied in the paper writing executed by a testator as an integral part of his intended testamentary disposition is to be accepted by the orphans' court as entering into his will. The validity and legal construction of the provisions are matters for subsequent determination by the appropriate tribunals. What was in fact admitted to probate as constituting the last will of Susan M. Shield, as set out in the order of probate, and as declared by the orphans' court when dismissing the petition was the paper writing propounded, as made and left by her as her will, with all the additions, alterations, and erasures appearing therein whether made in ink or pencil. To the extent any of these changes were involved in the mere question of the factum of the will they were open to contest by the parties interested, and might have been raised by appellants in plenary proceedings. But the prayer of the petition is confined to no such simple issue. It calls on the orphans' court to declare the true text of the will not in the sense of merely reciting or setting out what words are actually or legibly apparent and unerased in the will (that the court had already in effect done), but to determine the operation of the will in a legal sense as derivable from construction; such construction embracing the effect to be given the alterations, additions, and erasures with reference to the original text, and to be given to the fact of part of the substituted or added writing being in pencil and the question of how far such changes were contingent or absolute, and from such construction to ascertain and declare the rights and interests of the appellant to certain bequests as operative in law. It is well settled the orphans' courts are clothed with no such jurisdiction. Questions of the nature described can only be determined in the courts of law or equity."

It is obvious from what was there said that the views expressed by the court in that case are in entire harmony with the conclusion at which we have arrived in the present one. Nor do we think that the appearance and answer of the appellant to the case instituted in the circuit court, for the appointment of a new trustee and the administration of the trusts of the will under the supervision of that court, estopped it from filing or prosecuting the present caveat. The trusts of the will relate only to the life estate of the testator's widow. The portions of the will creating the equitable life estate of the widow and appointing trustees to hold and manage the estate for her benefit during her life are not assailed by the caveat which asserts the validity of the entire instrument when restored to its alleged original condition with the lines referred to removed from its face. The orphans' court, instead of dismissing the caveat, should have required the appellee to answer it and allowed the case to proceed in the usual manner. If the proceedings up-

on the caveat result in a revocation of the former probate and the granting of a new one, she will be protected for acts done in due course under the letters of administration c. t. a. heretofore granted to her upon the will as admitted to probate in common form.

The order appealed from must be reversed, and the case remanded for further proceedings in accordance with the views herein expressed.

Order reversed, with costs to be paid out of the estate, and cause remanded.

(106 Md. 54)

COYNE et al. v. SUPREME CONCLAVE OF IMPROVED ORDER OF HEPTASOPHS et al.

(Court of Appeals of Maryland. May 15, 1907.)

TRUSTS—ORAL TRUSTS—VALIDITY.

Where a member of a mutual benefit association has a new certificate issued in favor of M., under a parol agreement that the latter shall pay the proceeds to B., for the support and maintenance of the member's minor children, a trust was created in favor of the minor children which attached to the proceeds of the death benefit certificate when paid to M.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 47, Trusts, §§ 15-24.]

Appeal from Circuit Court No. 2 of Baltimore City; Pere L. Wickes, Judge.

Suit by Richard M. Coyne and others against the Supreme Conclave of the Improved Order of Heptasophs and others. From an order sustaining a demurrer to the bill of complaint and dismissing the bill, complainants appeal. Reversed and remanded.

Argued before BOYD, PEARCE, BURKE, SCHMUCKER, and ROGERS, JJ.

Emil Budnitz and J. Cookman Boyd, for appellants. W. Browne Hammond (Olin Bryan, on the brief), for appellees.

BURKE, J. This record brings up for review the propriety of an order of the circuit court No. 2 of Baltimore City, by which a demurrer to the bill of complaint in this case was sustained, and the bill dismissed. The facts are: That Edward Coyne, the father of Richard M. Coyne, Raymond W. Coyne, and Robert H. Coyne, infants, was a member of the J. F. Wiessner Conclave No. 458 of the Improved Order of Heptasophs. That, by reason of his membership in that conclave, he was entitled to a death benefit certificate in the Supreme Conclave of the Improved Order of Heptasophs, which certificate was duly issued to and accepted by him on June 25, 1900. That the certificate was payable to Annie M. Coyne, his wife, who was designated as beneficiary, and by which certificate the defendant, the Supreme Conclave of the Improved Order of Heptasophs, promised and bound itself to pay out of its benefit fund to Annie M. Coyne the sum of \$1,000 within 60 days from the receipt of satisfactory proof of the death of the said Edward Coyne. Annie M. Coyne died in the lifetime of her husband, and he, in accord-

ance with the constitution and by-laws of the Supreme Conclave of the Improved Order of Heptasophs, created a change in the beneficiary under the certificate by surrendering the same, and having a new certificate issued, in which the defendant, Margaret Coyne, was named as beneficiary. Although Margaret Coyne was designated as the beneficiary under the new certificate without any qualification upon the face thereof, it was understood and agreed between Edward Coyne and the said Margaret Coyne that the death benefit of \$1,000, upon its receipt by the said Margaret, should be paid to Henrietta Buck, for the support and maintenance of Richard M. Coyne, Raymond W. Coyne, and Robert H. Coyne. That Margaret Coyne agreed with and promised the said Edward Coyne that she would pay the proceeds of the benefit certificate to Henrietta Buck for the uses and purposes above mentioned. That Edward Coyne at first desired to designate the said Henrietta Buck as beneficiary in the certificate, but was informed that under the constitution and by-laws of the Supreme Conclave of the Improved Order of Heptasophs he was not permitted to do so, because she was not within the degree of relationship required by its constitution and by-laws. Edward Coyne departed this life on the 2d of September, 1906, and satisfactory proof of his death has been transmitted to the Supreme Conclave of the Improved Order of Heptasophs, in which proof of death the infant children of said Edward Coyne, whose names have been mentioned, were designated as claimants, but Margaret Coyne, notwithstanding the agreement between herself and Edward Coyne, hereinbefore stated, now claims the fund in her own right.

If these facts be true, it cannot be doubted that the proceeds of the death benefit certificate when paid to Margaret Coyne should be charged with a trust in her hands in favor of the infant children of Edward Coyne. The facts are fully sufficient to raise a valid trust, which a court of equity should enforce. "No precise form of words is necessary to create a trust, but the intention must be clear. The fact that a trust in lands is created must be not only manifested and proved by a writing properly executed, but it must also be manifested and proved by such a writing what the trust is. The declaration of trust, whether written or oral, must be reasonably certain in its material terms; and this requisite of certainty includes the subject-matter or property embraced within the trust, the beneficiaries or persons in whose behalf it is created, the nature and quantity of interest which they are to have, and the manner in which the trust is to be performed. If the language is so vague, general, or equivocal that any of these necessary elements of the trust is left in real uncertainty, then the trust must fail. No particular technical words need be used. Even the words 'trust' or 'trustee' are not

essential. Any other words which unequivocally show an intention that the legal estate was vested in one person, but to be held in some manner, or for some purpose on behalf of another, if certain as to all other requisites, are sufficient." 2 Pom. Eq. Juris. § 1009. This court, in the *Casualty Ins. Company's Case*, 82 Md. 560, 34 Atl. 780, said: "In determining whether or not a trust has been created, courts will take into consideration the situation and relations of the parties, the character of the property, and the purpose which the settlor had in view in making the declaration. No technical terms or expressions are needed. It is sufficient if the language used shows that the settlor intended to create a trust, and clearly points out the property, the beneficiary, and the disposition to be made of the property." The allegations of the bill, which we have in substance stated, are sufficiently certain and definite as to the subject-matter of the trust, the persons to enjoy it, and the manner of its dispositions, to gratify the requirement of law as to the creation of a valid trust. The subject of the trust being personal property, it may be created by parol, and established by parol evidence. The authorities appear to be uniform in holding that the statute of frauds does not extend to trusts of personal property, and that such trusts may be created and proved by parol. It has been so held by this court in a number of cases, among which are the cases of *Smith v. Darby*, 39 Md. 277; *Reiff v. Horst*, 52 Md. 268; *Snader v. Slingluff*, 95 Md. 366, 52 Atl. 510.

There is also a class of trusts which arise ex maleficio, and equity, in order to reach the possessor of what in conscience belongs to another, turns him into a trustee. "Thus, if a man in confidence of the parol promise of another to perform an intended act, should omit to make certain provisions, gifts, or arrangements, by will, or otherwise, such a promise would be specifically enforced in equity, although founded on a parol declaration creating a trust contrary to the statute of frauds, for it would be a fraud upon all other parties to permit him to derive a benefit from his own breach of duty and obligation." Story, Eq. Juris. (13th Ed.) § 781. The cases of *Catland v. Hoyt*, 78 Me. 355, 5 Atl. 775, and *Hirsh et al. v. Auer*, 146 N. Y. 16, 40 N. E. 397, are very similar in their facts to the case at bar. In the former case, David B. Catland held a certificate in the United Order of the Golden Cross, by the terms of which the money that should become due upon it was to be paid to the defendant, who, after the death of the insured, received the sum of \$1,959.60. The plaintiff, Catland's executor, claimed and offered evidence tending to prove an oral agreement between the defendant and the deceased, by the terms of which the defendant promised that, after deducting what should be due from the deceased to him, he would pay the balance to the heirs of the deceased. The

defendant objected to this evidence, upon the ground that it tended to vary the terms of the written agreement between the deceased and the insurance company, and further, if admitted, would show a promise by the defendant to pay, not to the deceased, but to his heirs, and that such a promise would not support an action by the executor. The objections were overruled, and the plaintiff obtained a verdict. In disposing of these objections, the court said: "The oral evidence was not in conflict with the written contract. It was offered, not to vary or control the contract between the deceased and the insurance company, but to show another and an independent contract between the deceased and the defendant. It was offered, not to show that the defendant was not to receive the money, but to show what he was to do with it after receiving it." In the latter case, John Hirsh, at the time of his death, held a death benefit certificate in the Ancient Order of United Workmen, the proceeds of which were payable at his death to his wife. Mrs. Hirsh having died in the lifetime of her husband, he surrendered the certificate, and received a new one, in which his sister, Clara Auer, was designated as the beneficiary. Clara Auer collected \$2,000 from the order in full settlement, and surrendered the certificate. At the time the second certificate was taken out, there was an agreement between John Hirsh and Clara Auer, the beneficiary, that when she received the money from the order on the certificate she would expend a sum of money, not exceeding \$500, for funeral expenses and a monument, and would divide \$1,500 equally between his children. In dealing with this state of facts, the court said: "We see no legal objections to the agreement made by the insured and the beneficiary in this case. It in no way interfered with the contract rights of the society issuing the insurance; nor did it vary the certificate in any manner. The insurance was paid to the beneficiary named, and the agreement was in harmony with the objects of the society. The original certificate was payable to the wife of John Hirsh, and when she died John Hirsh selected his sister to act as beneficiary and disburse the money in the manner indicated for the benefit of his infant children. It was competent for Clara Auer to agree with her brother to receive the proceeds of his life insurance, subject to such trust as he might create. The fact that the insured could have at any time changed the beneficiary named in his certificate has no bearing upon the question as now presented; but he did not, as a matter of fact, exercise that right, and his sister collected the insurance impressed with the trust created by the agreement, which the trial court has found was made by the parties in interest."

In view of the recent decision of this court in the case of *Agnes Dooley Clark v. Edith B. Callahan and husband*, 104 Md. —, 66

Atl. 618, wherein the precise question presented by the demurrer in this case was thoroughly considered and settled adversely to the contentions of the appellees, further discussion of this case is unnecessary.

For the reasons stated, the order appealed against must be reversed.

Order reversed, and cause remanded, with costs to the appellants above and below.

(106 Md. 122)

BENNETT v. BENNETT.

(Court of Appeals of Maryland. May 17, 1907.)

WILLS—CONTEST—DISMISSAL.

Where a caveat alleging undue influence, etc., was filed in proceedings for the probate of a will and issues were framed and sent to the circuit court, and after various delays, covering a period of nearly three years, and when the issues had been specially set for trial on a particular day, the attorney for the caveator filed in the clerk's office an order to dismiss, and before the will could be again presented to the orphans' court for probate he gave notice to that court of his intention to file another caveat, and admitted to the caveatee's attorney that he intended to ask for issues on the new caveat to be sent to a court of law, and in the meantime the creditors of the testator had filed a bill in equity for the sale of his real estate for the payment of his debts and receivers had been appointed in that suit who were in charge of the property, it was error to dismiss the issues.

Appeal from Court of Common Pleas.

Judicial proceedings on the probate of the will of Henry C. Bennett, deceased, in which William A. Bennett filed a caveat, and Nellie K. Bennett, as caveator, appeals from an order of the circuit court dismissing the case after the framing of issues in the orphans' court. Reversed and remanded.

Argued before BRISCOE, SCHMUCKER, BOYD, and PEARCE, JJ.

Wm. M. Maloy and William J. O'Brien, Jr., for appellant. E. L. Painter, for appellee.

SCHMUCKER, J. It appears from the record in this case that Henry C. Bennett, late of Baltimore county, died on December 28, 1903, leaving the appellant as his widow, but no children. One week thereafter a paper purporting to be his last will, and on its face duly executed and attested as such, was offered for probate in the orphans' court for Baltimore county. On the same day, but before the offer of the will for probate, the appellee, who is a nephew of the testator, filed a caveat to it, which was answered by the appellant on March 1, 1904. On petition of the caveator issues were framed and sent for trial to the circuit court for Baltimore county on March 1, 1905; the caveator being designated by the orphans' court as plaintiff. The proceedings were removed to the circuit court for Howard county on August 1, 1905, on the suggestion of the caveator that he could not have a fair trial in Baltimore county, and on the 2d of February, 1906, they were removed to the court

of common pleas of Baltimore city upon the suggestion of the caveatee that she could not have a fair trial in Howard county. On January 23, 1907, the caveator's attorney filed in the office of the clerk of the court of common pleas an order entitled in this case to "enter the above-entitled case dismissed." On the same day the caveator filed in the case a petition and motion of reciplatur as to the order of dismissal. This petition was answered by the caveator, and upon a hearing of the matter the court passed an order overruling the motion and dismissing the petition, and the caveatee appealed from the order. Before the passing of the order appealed from the caveator gave notice to the orphans' court of Baltimore county of his intention to file another caveat to the will.

The single issue raised by the appeal is whether the caveator was entitled to dismiss the caveat at the stage of the proceedings at which he filed the order for that purpose, without the consent of the caveatee. The precise question of the extent of a caveator's right to dismiss the entire proceedings upon a caveat filed by him against the objection of the caveatee, after an answer has been filed to the caveat and issues sent to a court of law for trial, has not we believe been passed upon by this court. There have been, however, a number of cases decided by us sufficiently similar to the one at bar to throw much light upon the principles involved in its determination. The right of the plaintiff as a general rule in an action at law to dismiss the case or suffer a nonsuit at any time before verdict has long been recognized, but in suits in equity this court, in the case of *Riley v. First Nat. Bank*, 81 Md. 26, 31 Atl. 585, held after careful consideration that the plaintiff had no such unrestricted right of dismissal. It was said in that case: "After a bill has been filed and proceedings had under it, when counsel have appeared and costs have been incurred, it would be an unfair advantage to allow the plaintiff's attorney the right to dismiss his client's complaint as to parties, either plaintiff or defendant, without the previous sanction of the court." In support of the views thus expressed the court cited, *Daniell's Chy. Pldg. & Prac.* 790, *Wiswell v. Starr*, 50 Me. 384, and *Camden & Amboy R. R. Co. v. Stewart*, 19 N. J. Eq. 69.

In *Price v. Taylor*, 21 Md. 356, where issues upon a caveat to a will were dismissed upon the ex parte order of the caveator, filed in the court of law where they had gone for trial, the court, in discussing his right to discontinue the proceeding, applied to the case the ordinary rule in actions at law that the plaintiff may discontinue the suit at any time by a written order to the clerk to that effect. But in that case the court said, in its opinion, on page 364 of 21 Md.: "We do not intend to say, however, that parties plaintiff

would always have the right to dismiss issues without trial. * * * In *Levy v. Levy*, 28 Md. 21, the court, relying on the decision in *Price v. Taylor*, supra, again applied to issues under a caveat to a will the rule applicable to actions at law, and held that a caveator might dismiss the issues upon the caveat by an order to that effect filed in the case. It is to be observed, however, that neither in *Price v. Taylor* nor *Levy v. Levy* did the caveatee object to or attempt to prevent the dismissal of the issues or show cause why it ought not to have been permitted. In the *Berry Will Case*, 93 Md. 560, 49 Atl. 401, we have for the first time an attempt by a caveator to dismiss issues, over the objection of the caveatee, in the court of law to which they have been sent for trial. The lower court in that case permitted the dismissal, and this court upon appeal reversed the action of the lower court. It is true that *Berry's Case* differs from the one at bar, in that there the effort was to dismiss only certain ones, and not all of the issues, and that the effort was made during the trial of the case after the jury had been sworn; but the reasoning there employed by the court applies with great force to the situation presented by the record now before us. We said in *Berry's Case*: "The right of a plaintiff to discontinue a case after it has been instituted is not absolute. *Riley v. First Nat. Bk. Grafton*, 81 Md. 14, 31 Atl. 585. 'We don't intend, however,' observed this court in *Price v. Taylor*, 21 Md. 365, 'to say that parties plaintiff could always have the right to dismiss issues without trial.' In *Pegg v. Warford*, 4 Md. 385, it was held that the orphans' court, had no power to revoke an issue which had been sent to the superior court for trial, but, 'that by consent of the parties to the proceedings' the issues may 'be abandoned in the court of law where they are pending for trial,' and others may be framed by the orphans' court." After observing that it would be subversive of sound policy in the administration of justice to permit the caveators to dismiss a portion of the issues during the trial of the case, as was there attempted to be done, it is further said in the opinion in *Berry's Case*: "The issues having been made up by the orphans' court and having been sent to a court of law for trial, neither side to the contest has control of them, and, unless they are disposed of by consent or are all dismissed, they must be tried and part of them cannot be withdrawn by either contestant."

All that we decided or were called upon to decide in that case, in reference to the power of a caveator to dismiss issues after they had been sent to a court of law, was that he had no right to make the partial dismissal of them which he there attempted. But the conclusions to which expression was given in the opinion, that the right of a plaintiff to dismiss issues without trial is not absolute, and that after issues have been made

up by the orphans' court and sent to a court of law for trial neither side to the contest has control of them, embody propositions conducive to the orderly and efficient administration of justice which apply with special propriety to the regulation of proceedings founded on caveats to wills under our testamentary system. Although issues framed on caveats are triable in courts of law, their trial differs from the ordinary action at law between opposing suitors, in that it is in the nature of a proceeding in rem, and each side bears a part of the burden of proof. *Cecil v. Cecil*, 19 Md. 80, 81 Am. Dec. 626; *Levy v. Levy*, 28 Md. 81. Furthermore, other persons than the parties to the proceeding, such as creditors, heirs at law, next of kin, legatees, or devisees, may be and usually are directly interested in the result of the caveat. For these reasons and because a sound public policy requires that the settlement of the estates of deceased persons be made without unreasonable expense or delay, we are of opinion that, after issues have been framed, covering all of the grounds relied on in a caveat to a will and sent to a court of law for trial, the caveator should not be permitted to dismiss them for the purpose of filing a new caveat without the consent of the caveatee.

In the present case the caveat, alleging undue influence, want of testamentary capacity, and other grounds, was filed on January 4, 1904, and issues fully covering all of the reasons alleged in the caveat for refusing probate of the alleged will were sent by the orphans' court to a court of law on March 1st of the same year. After various delays covering a period of nearly three years, and when the issues had been specially set for trial on a particular day, the attorney for the caveator filed in the clerk's office the order to dismiss, and at once, and before the will could be again presented to the orphans' court for probate, he gave notice to that court of his intention to file another caveat, and admitted to the caveatee's attorney that he intended to ask for issues on the new caveat to be sent to a court of law. By that time the administration of the estate had already been prevented for fully three years from the offer of the will for probate. It appears from the record that in the meantime the creditors of the testator had filed a bill in equity for the sale of his real estate for the payment of his debts, and receivers had been appointed in that suit who were in charge of the property. In these circumstances, as the caveator had not under the decisions of this court an absolute right to dismiss the issues, the court below should have granted the appellant's motion *ne recipiatur* and stricken out the entry of dismissal made by the clerk on the caveator's order, and required the case to proceed to trial in due course. If the appellee were accorded the right to dismiss at will, the issues on his caveat after they

had been in the court of law for nearly two years and at the same moment file another caveat he might by a capricious exercise of that right indefinitely postpone the administration of the estate to the great inconvenience and injury of other persons interested therein who would be without remedy. Such persons, not being parties to the proceedings, would not be entitled to costs against the appellee, and would not even receive that compensation which, though often meager in fact, has in a legal sense been held to be adequate for the inconvenience of double litigation.

At the hearing in this court the appellee insisted that under the sixteenth rule of the court of common pleas, which provides that the court will not hear any motion grounded on facts unless the facts are apparent from the record or verified by oath or agreed upon by the parties, the appellant was not entitled to have her motion *ne recipiatur* considered. The answer to that objection is twofold. In the first place, a copy of the rule does not appear in the record; and, in the second place, in passing upon the motion we have considered only facts appearing from the record or the written agreement of the parties found therein, without reference to the reasons *de hors* the record set forth in the motion.

For the reasons stated in this opinion, the order appealed from must be reversed and the case remanded for further proceedings in accordance with this opinion.

Order reversed, with costs, and case remanded for further proceedings.

(106 Md. 132)

LOVETT v. CALVERT MORTGAGE & DEPOSIT CO. OF BALTIMORE CITY.

(Court of Appeals of Maryland. May 15, 1907.)

1. USURY—EVIDENCE—SUFFICIENCY.

Evidence *held* to show that the sum sued for was usurious interest paid upon a mortgage loan, which loan had not been renewed, but wholly paid, and that a release thereof had been asked for and received.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 47, Usury, § 329.]

2. SAME—TIME TO SUE.

Code Pub. Gen. Laws 1904, art. 49, § 3, provides that if any person shall exact for a loan money above the value of \$6 for the forbearance of \$100 for one year, he shall be deemed guilty of usury. Section 6 provides that nothing in the preceding sections shall be so construed as to make usury a cause of action in any case where the bond, etc., or other evidence of indebtedness has been redeemed by the obligor, except that of a renewal in whole or in part of the original indebtedness. *Held*, that where a mortgage loan had been fully paid, and a release given, a recovery could not thereafter be had for usurious interest paid on the loan.

Appeal from Superior Court of Baltimore City; Alfred S. Niles, Judge.

Action by William Lovett against the Calvert Mortgage & Deposit Company of Baltimore City to recover usurious interest paid.

From a judgment for defendant, plaintiff appeals. **Affirmed.**

Argued before **BOYD, PEARCE, BURKE, SCHMUCKER, and ROGERS, JJ.**

George E. Robinson and O. Parker Baker, for appellant. Charles W. Field, for appellee.

PEARCE, J. On July 31, 1895, the plaintiff below, now the appellant, borrowed from the defendant, the appellee, a building and loan association, \$500 upon five shares of its stock of the par value of \$100 each, and to secure said loan executed to the association a mortgage upon his house and lot on Falls Road, in Baltimore county, in which mortgage he covenanted to pay said association, during the continuance of said mortgage, a premium of \$2.50 on the first business day of each and every month, being 50 cents premium on each share; also \$2.50 on the first business day of each and every month as interest on said loan, being at the rate of 6 per cent. per annum; and the further sum of \$2.50 on the first business day of each and every month as dues on said five shares of stock—all said payments to be continued until said stock should become fully matured and of the value of \$100 per share, at which time it was provided "said mortgage shall be void." Upon the execution of this mortgage the plaintiff began to make the stipulated payments, and continued thereafter to make them regularly and promptly from July 31, 1895, to December 29, 1904, when he made his last payment, as shown by his pass book, which was put in evidence. The record does not disclose any calculation or statement by the association showing that the stock was fully matured, but both parties treated the payment of December 29, 1904, as a final payment maturing the stock, and making the mortgage void. The only testimony given in the case was that of the plaintiff himself, and of a Mr. Robinson, a member of the bar, who was called merely to prove that no release had been recorded upon the land records for Baltimore county. The plaintiff testified that when he made his final payment on December 29, 1904, the manager was not at the office, and that he made the payment to a young lady in charge, and he admitted that he had previously asked about a release of his mortgage, and that at that time he asked her for it, and that a few days after that his wife received by mail a release of the mortgage.

At the time of the execution of this mortgage the transaction was believed, not only by the parties thereto, but was everywhere believed, to be valid and legal in every respect, and to be free from any taint of usury; but under the decisions in *White v. Williams*, 90 Md. 719, 45 Atl. 1001, made in 1900, and *Washington Nat. Building & Loan Association v. Andrews*, 95 Md. 696, 53 Atl. 573, made in 1902, such premiums were held to

render the mortgage usurious. Being thus usurious, it must, as was said in *Baltimore Permanent Building & Loan Association v. Taylor*, 41 Md. 418, "be regarded in the same light as if it were a mortgage between individuals, and apart from any law relating to building associations," and it is therefore immaterial whether the stock had matured or not; the transaction being in law a simple loan to be repaid with legal interest. It appears from the plaintiff's pass book that he has paid to the association the sum of \$847.50; whereas, according to his calculation as stated in the narr., computing interest at 6 per cent. on \$500, with monthly rests, and crediting the monthly payment of \$7.50 at each rest, his regular monthly payments extinguished the debt on July 28, 1902, and consequently the 29 subsequent monthly payments of \$7.50 each were in fact payments of usurious interest, amounting to \$217.50, to recover which he brought this suit on June 6, 1906. The narr. contained the common counts, and a special seventh count, setting forth the transaction and the 29 payments made after the extinguishment of the debt on July 28, 1902. The defendant filed the general issue pleas and a special plea to the seventh count of the narr., alleging that the \$217.50 sued for was usurious interest paid over and above the legal rate of 6 per cent. per annum upon the loan of \$500 made under the mortgage, and that "upon the payment of said sum the plaintiff paid off, redeemed, and settled said mortgage and the indebtedness secured thereby in cash, and that defendant executed and delivered to the plaintiff a release of said mortgage under its corporate seal, and that no part of said original indebtedness, or said mortgage debt, was renewed in whole or in part at any time whatsoever." The plaintiff replied to this plea that said sum of \$217.50 was a claim for usurious interest and an alleged premium paid on said loan of \$500 secured by said mortgage, "but that the plaintiff only paid defendant on account of said mortgage the sum of \$282.50, which is the amount of dues paid, and is the only amount credited by defendant upon the mortgage, and therefore plaintiff did not pay off, redeem, and settle said mortgage, nor did the defendant execute or deliver to the plaintiff a release of said mortgage under its corporate seal, and said mortgage still remains unreleased on the records of Baltimore county, but admits that no part of said mortgage debt was renewed in whole or in part at any time whatsoever," and upon these pleadings the issues were joined.

The plaintiff testified that, after going home on the day he made his last payment, he counted up his book, and found that by allowing 6 per cent. interest he had overpaid the defendant the sum of \$221.25, and on the same evening wrote and mailed the defendant a letter, a copy of which was admitted in evidence, notifying it of his claim, and

requesting it to send a check for \$221.25 without delay; that he was assisted by his counsel, Mr. Baker, in counting up his book that evening; that he never received any answer to that letter, but that a release of the mortgage was sent to him under the seal of the company, and after he got the release he wrote and mailed a second letter to defendant, dated January 10, 1905, a copy of which was admitted in evidence, in which he said the release of mortgage would not be accepted until the matter was finally settled; that he had ordered the release sent back, and would have nothing to do with it until defendant gave back what it honestly owed him. He said he did not know what became of the release, but did not say he had returned it. He admitted that he was trying to recover the amount he had paid over \$500 and 6 per cent. interest thereon, and that he had waited so long to sue because he had broken his leg in May, 1905, and was laid up for six months, but could not say why he did not sue before he broke his leg. The defendant offered two prayers, as follows: "(1) That there was no evidence in this cause legally sufficient to prove any indebtedness from defendant to plaintiff, and that plaintiff was not entitled to recover. (2) That, under the pleadings and evidence in this case, the sum sued for by the plaintiff is usurious interest, in excess of 6 per cent. per annum, paid by him to the defendant upon a mortgage loan of \$500 from defendant to plaintiff, which said loan has not been renewed in whole or in part, but wholly paid off and extinguished, and therefore the plaintiff is not entitled to recover." The court granted both these prayers, and the only exception is to that ruling.

These instructions are founded upon section 6 of article 49 of the Code of Public General Laws of 1904. Section 3 of that article provides that: "If any person shall exact, directly or indirectly, for loan of any money, goods or chattels to be paid in money, above the value of six dollars for the forbearance of \$100 for one year, and so after that rate for a greater or lesser sum or for a longer or shorter time, he shall be deemed guilty of usury." Section 6 provides: "Nothing in the preceding sections shall be so construed as to make usury a cause of action in any case where the bond, bill obligatory, promissory note, bill of exchange, or other evidence of indebtedness has been redeemed or settled for by the obligor or obligors in money or other valuable consideration, except that of a renewal in whole or in part of the original indebtedness." Both the pleadings and the plaintiff's own testimony conclusively show that every fact stated in the defendant's second prayer is true, for there was no other evidence than that of the plaintiff himself, except the proof that there was no release of the mortgage upon the record, and if the defendant's prayers were improperly granted it could only be because of

the absence of such release. But the purpose and meaning of section 6 is free from any possible doubt or obscurity. Prior to its enactment by chapter 358, p. 601, of Acts 1876, it had been settled by the cases of *Baughner v. Nelson*, 9 Gill, 308, 52 Am. Dec. 694, and *Scott v. Leary*, 34 Md. 389, that in usurious transactions the parties are not regarded as in *pari delicto*, and that in this state a borrower could recover back, in an action for money had and received, usurious interest which he had paid. In *German Building Association v. Newman*, 50 Md. 62, in speaking of section 6 of article 49, Judge Bartol said: "The intent of the act of 1876 was to change the law in this respect, and to take away such right of action in cases in which the transaction has been closed and finally settled by the parties, and the debt has been paid and satisfied." In that case the loan was on mortgage, the principal debt with usurious interest had been paid and satisfied, and the plaintiff had applied for and had received a release of his mortgage, and afterwards sued to recover the usurious interest. The only question argued or considered in that case was the constitutionality of the act of 1876, and the court below held it unconstitutional, on the ground that the subject of the act was not described in its title. This court, however, held the title good and the act valid, and said: "As the settlement took place, and the money was paid after that act went into effect, its provisions afford a complete bar to the suit, unless for some reason the act should be held to be void and inoperative."

In the present case the whole contention of the defendant, in the language of his counsel's brief, is that "the transaction was not closed between the parties, because the mortgage still remains on the record unreleased; there having been no sufficient delivery of the release and no proof that a valid release was sent to the appellant's wife." The proof, however, is clear, from the plaintiff himself, that he asked for and received a release, which remained in his possession, though not produced at the trial, and the presumption is that it was a valid release. There is no evidence that he ever tendered its return. The defendant had neither the right nor the power to record it, and the plaintiff's failure or refusal to record it cannot affect the situation. It is difficult to conceive how the transaction could have been more effectually closed and finally settled by the parties than by the execution and delivery of the release of the mortgage in compliance with the request of the mortgagor.

It was argued by the appellee that, "even if no release had ever been executed, the law would be the same. If the debt were paid in full, the usurious interest can never be recovered back," and there are expressions in some of the cases which may, perhaps, admit of this argument. In *Woods v. Matchett*, 47 Md. 395, where it was held that a party

may except to the confirmation of an award on the ground of usury, though no such defense was made before the arbitrator, the court said, "An action at law would lie prior to the act of 1876 to recover excessive interest actually paid," and this language was repeated in *New York Security Co. v. Davis*, 96 Md. 87, 53 Atl. 669. In *Border State Perpetual Building Association v. Hilleary*, 68 Md. 52, 11 Atl. 505, Judge Robinson said: "Acts of 1876, p. 601, c. 358, provides that no recovery shall be had of usurious interest, after the debt has been fully paid"—where the original debt had not been fully paid, though the mortgage had been released; a part of that debt being embraced in a second mortgage, and a bill having been filed for an account and a release of the second mortgage. But it is sufficient for this case to hold that the transaction was closed by the release of the mortgage, and we intimate no opinion as to the effect of payment of the mortgage without a release.

It follows from what we have said that the ruling of the court was correct, and the judgment must be affirmed. We regret that, in addition to the loss of usurious interest paid, the costs must be imposed upon the appellant, who can only be relieved by the free grace of the appellee.

Judgment affirmed, with costs to the appellee above and below.

(106 Md. 155)

SAMS et al. v. FISHER et al.

(Court of Appeals of Maryland. May 15, 1907.)

1. TAXATION—CLASSIFICATION OF PROPERTY—RIGHT.

Acts 1888, p. 127, c. 98, § 19, provides that from and after 1900 the property, real and personal, located in the Annex to the city of Baltimore shall be liable to taxation in the same manner and form as similar property within the prior limits of the city, provided that after the year 1900 the present Baltimore rate of taxation shall not be increased for city purposes on any landed property within the territory until avenues, streets, or alleys shall have been opened or constructed through the same, nor until there shall be on every block of ground so to be formed at least six dwellings or storehouses ready for occupation. *Held* that, when property within the Annex reached the required standard of development, the appeal tax court had jurisdiction after the year 1900 to relist and classify such property so that it should pay the full Baltimore rate.

2. SAME—NOTICE.

Baltimore City Charter, § 157 (Laws 1898, p. 332, c. 123), providing that the appeal tax court may summon before it any person whose account of taxable property may, in their judgment, require revision and correction, and examine such person on oath touching the same, provides for a sufficient notice to the owners of property located in the Annex to such city of the purpose of the appeal tax court to reclassify such property so that it would pay the full city rate as authorized by Acts 1888, p. 127, c. 98, § 19.

Appeal from Circuit Court of Baltimore City; Henry Stockbridge, Judge.

Suit by James M. Fisher and others against Conway W. Sams and others. From a decree in favor of complainants, defendants appeal. Reversed. Complaint dismissed.

Argued before BRISCOE, BOYD, BURKE, PEARCE, SCHMUCKER, and ROGERS, JJ.

Albert C. Ritchie and Edgar Allan Poe, for appellants. John F. Williams and M. R. Walter, for appellees

BRISCOE, J. This is an appeal from a decree of the circuit court of Baltimore city overruling a demurrer to the plaintiffs' bill of complaint, and directing an injunction to issue as prayed in the bill.

It appears from the bill that the plaintiffs are owners of real estate situate in that part of Baltimore city known as the "Annex," and under the terms and provisions of Act 1888, p. 113, c. 98, as amended by Acts 1902, p. 199, c. 130, taxes had heretofore been levied for municipal purposes upon the property at the rate of 60 cents on the \$100 of the assessed value, including the year 1906. The bill charges that the 60-cent rate continued down to and including the year 1906, but that the appeal tax court of Baltimore city, after notice given, was about to list or classify the property for purposes of taxation at the full city rate for 1907, which rate is \$1.97½ on the \$100 of its assessed value. It then charges that the appeal tax court has no power or authority to classify the property other or differently than the same is now classified on the tax rolls of the city, and that any attempt to reclassify the real estate or to change it from the tax lists on which the same is now listed for purposes of municipal taxation or to put it on any other or different tax list so that the same may be subject to a higher or greater rate of taxation is ultra vires, illegal, and void. The prayer of the bill is that the defendants be restrained by injunction, first, from listing or classifying the property for municipal taxation at a higher rate than the 60-cent rate; and, secondly, that any attempt to so classify or list the property for purposes of taxation or any classification heretofore made be declared ultra vires, illegal, and void, and that the appeal tax court be directed to remove, erase, and strike the same from the list or tax rolls of the city of Baltimore. A demurrer was interposed to the bill, which upon hearing was overruled; the court below holding that the order and classification by the appeal tax court of the property in question at the full city rate of taxation for the year 1907 was ultra vires, illegal, and void, and decreed that an injunction issue as prayed by the bill. From this decree an appeal has been taken.

The question here presented is an important one, both to the city of Baltimore and to the taxpayers owning property situate in that part of Baltimore city, formerly

Baltimore county, which was annexed to the city under Acts 1888, p. 113, c. 98. The question immediately before us is this: Has the appeal tax court of Baltimore city the power and authority under the provisions of the acts of 1888 and 1902 to take property situate in the Annex, and which has become subject to taxation at the full city rate, out of the list of the 60-cent rate, and to list or classify it at what is called the full city rate? The answer to this question must be found in the construction to be placed upon section 19, Acts 1888, p. 127, c. 98, as amended by Acts 1902, p. 199, c. 130, and upon certain sections of the Baltimore city charter conferring powers on the appeal tax court of Baltimore city. By section 19 of the act of 1888 it is provided, in part, that from and after the year 1900 the property, real and personal, in the Annex shall be liable to taxation and assessment in the same manner and form as similar property within the present limits of the city may be liable, provided that after the year 1900 the present Baltimore county rate of taxation shall not be increased for city purposes on any landed property within the territory, until avenues, streets, or alleys shall have been opened and constructed through the same, nor until there shall be upon every block of ground so to be formed at least six dwellings or storehouses ready for occupation. Acts 1902, p. 199, c. 130, subsequently passed, declared what should be considered "landed property" within the terms of section 19 of the act of 1888. In this case the bill does not allege that the property has not reached that stage of development which is required by the statute to subject it to the full city rate for the year 1907, so under the pleadings, and for the purposes of this case, it must be assumed that the condition of the property in controversy is such as to meet the requirements of the act, and to subject it to the full city rate. And this brings us to the vital question in the case, and that is: Has the appeal tax court of Baltimore city the power to list or classify such property, situate in the Annex, so as it will be subject to the tax rate which the Legislature manifestly intended it should be?

There can be no doubt, it seems to us, that the action of the appeal tax court in this case was entirely legal and within their delegated powers. The Legislature has defined the class of Annex property which shall be liable to the full city rate, and, when it reaches the standard of development required by the statute, it becomes the duty of the appeal tax court to so list, classify, or adjust the property upon the taxbooks in order that it may be liable to the proper tax. In other words, the Legislature has said that the property in the Annex should be exempt from the payment of taxes at the full city rate for a definite period, but after the year 1900, and when it has attained a certain stage of development, it should be

taxed at the full city rate. When, therefore, property in the Annex reaches the prescribed development, it falls within the class of property the Legislature clearly meant should pay the city rate. The statute fixes the standard and the class of property, and, this being so, the appeal tax court has the undoubted right and power, under the broad powers conferred upon it by the city charter, to transfer, list, and classify the property on its books so as it will pay the correct tax. Acts 1898, pp. 244, 292, 329, 332, 333, c. 123, §§ 6, 40, 147, 157, 161. The right and power of the appeal tax court to list and classify Annex property has been upheld by a number of cases decided by this court.

In *Balto. City v. Poole & Son*, 97 Md. 67, 54 Atl. 681, this court said: "When, therefore, the appeal tax court may be informed, or have reason to believe, that any property within the territory annexed under the act of 1888 has been brought within those conditions of the annexation act which will warrant the imposition of the regular city rate of taxation, they should give a reasonable notice to the owner of their purpose to impose this rate, fixing a time and place when he can be heard in relation to the matter. We have not been advised of, and have not discovered, any specific provision of law, prescribing how, and by what authority, property in the annexed territory, which has been brought within the conditions of the act of 1888, warranting the imposition of the city rate of taxation, is to be put into that category upon the books of the appeal tax court, but it would seem, in the absence of such specific provision, that that court should have power to make such classification. The correctness of such classification, however, is a question of fact dependent upon proof as to the opening of avenues, streets, and alleys through the property, and the erection of the prescribed number of houses upon a block as provided in the annexation act, and, if no tribunal has been provided for the determination of that question, it follows that relief against such erroneous classification can be had only through the restraining power of a court of equity; and the exercise of that power in cases involving the question of the rate of taxation under the annexation act was sustained in *Sindall's Case*, 93 Md. 526, 49 Atl. 645, *Goebel's Case*, 93 Md. 749, 49 Atl. 649, and *Kuenzel's Case*, 98 Md. 750, 49 Atl. 649, where the injunction was denied only because the amount involved was not sufficient to give a court of equity jurisdiction." *Poole's Case* was cited and approved in the later case of *Joesting v. Baltimore City*, 97 Md. 597, 55 Atl. 436, and there is nothing in that decision in conflict with what was said *Poole's Case*, supra, or in the previous cases on this subject.

To sustain the appellees' contention in this case would practically defeat and annul the clearly expressed intention of the Legislature

in section 19 of the Act of 1888, because it is conceded that, if the appeal tax court has not the power to list and classify Annex property for taxation when it measures up to the development required by the act, then no tribunal is clothed with the authority so to do. It would be impossible to impose more than the 60-cent rate upon any Annex property, notwithstanding the fact it may have reached the condition which renders it under the statute subject to the full city rate.

As to the question of notice, it is only necessary to say that it appears to have been given in this case. Section 157 of the Baltimore city charter expressly provides that the appeal tax court may "summons before them any person, whose account of taxable property may, in their judgment require revision and correction and examine such person on oath touching the same." Laws 1896, p. 332, c. 123. While the provision for notice and hearing may not be contained in the act itself, yet a hearing is amply provided by the section of the charter above cited. *Fowble v. Kemp*, 92 Md. 630, 48 Atl. 379. We therefore hold that the appeal tax court of Baltimore city has ample authority and power to list and classify Annex property, as subject to the full city rate, when the property reaches that condition of development provided by the Acts of 1888 and 1902, and that it has the further power to give the necessary notice and a hearing of the property holders whose property is to be affected thereby. As the view thus taken is decisive of the case, the other questions presented on the record need not be considered by us.

For the reasons given, the decree of the circuit court of Baltimore city will be reversed, and the bill of complaint dismissed.

Decree reversed; bill dismissed, with costs.

(80 Vt. 175)

Ex parte BOWERS.

(Supreme Court of Vermont. General Term. May 22, 1907.)

DRUNKARDS — PROSECUTION — SENTENCES — STATUTES CONSTRUED.

So much of V. S. 5206, 5210, requiring imprisonment in the house of correction for nonpayment of fines, as required imprisonment in the house of correction in cases of conviction for being found intoxicated, is repealed by Acts 1906, p. 210, No. 200, § 8, providing that all imprisonment for such offense shall be in the county jail.

In the matter of the application of Henry A. Bowers for habeas corpus to be discharged from imprisonment. Judgment of lawful imprisonment, and complainant remanded.

Argued before ROWELL, C. J., and TYLER, MUNSON, WATSON, HASELTON, POWERS, and MILES, JJ.

Harvey & Harvey for relator. Clarke O. Fitts, Atty. Gen., and Benj. Gates, State's Atty., for the State.

ROWELL, C. J. The complainant seeks by habeas corpus to be discharged from fur-

ther serving an alternative sentence in Washington county jail, taking effect at the expiration of a term of imprisonment therein, for the nonpayment of a fine, with costs, imposed on a second conviction for being found intoxicated.

He relies upon V. S. 5206. But that section applies only to cases in which a fine is imposed and no other sentence is passed, in which case, if the fine is not paid in 24 hours, it requires imprisonment in the house of correction. But that section and V. S. 5210, taken together, cover the case, if those sections are still in force as to this class of cases. Section 5210 provides that when a person over a certain age is convicted of an offense punishable by fine or imprisonment, or both, and is sentenced to both, the sentence as to the fine shall be the same alternative sentence as where a fine only is imposed, and shall take effect at the expiration of the term of imprisonment. But said sections are not in force as to this class of cases, for section 8, No. 200, p. 210, Acts of 1906, provides that all imprisonments for being found intoxicated shall be in the county jail of the county in which the offense is committed. This is inconsistent with said sections, and, as the act of 1906 repeals all acts and parts of acts inconsistent therewith, so much of said sections as required imprisonment in the house of correction in this class of cases is thereby repealed, and now all imprisonments for being found intoxicated must be, as the statute says, in the county jail of the county in which the offense was committed.

This is not like *Sammon's Case*, decided at the last term, and found in 65 Atl. 577. There the complainant was in the county jail for assault and battery, under a sentence of imprisonment and an alternative sentence for the nonpayment of a fine. It was held that section 8, No. 200, p. 210, of the Acts of 1906, as far as it relates to breaches of the peace, has reference only to imprisonment by direct sentence, and not to imprisonment by an alternative sentence, and consequently that said section is not in conflict with the sections of the Vermont Statutes referred to, and that they are not, in the respects there involved, repealed by said act.

Judgment that the complainant is lawfully imprisoned, and that he be remanded to the custody whence he was taken.

(80 Vt. 144)

COLLINS v. FARLEY.

(Supreme Court of Vermont. Chittenden. May 18, 1907.)

JUSTICES OF THE PEACE—DEFAULT JUDGMENTS — SETTING ASIDE—PETITION—SUFFICIENCY.

A petition to the county court to set aside a default judgment rendered by a justice of the peace, in an action by F. to recover what he paid to satisfy a judgment recovered against him by a third person, for attaching and selling his property, on an execution in favor of petitioner against another, which alleges that petitioner

"claims, and always claimed, that, prior to the sale of said property by said F., he expressly notified said F. that he would not indemnify him against loss by reason of the sale of said property, but that, if he sold it, he must do so at his own risk," sufficiently alleges that the petitioner gave the notice to F., and therefore the petition verified by the petitioner is sufficient as an affidavit of defense on the merits.

Exceptions from Chittenden County Court. Petition under V. S. 1867 et seq., by Albert C. Collins against Joseph W. Farley, to set aside a default judgment rendered by a justice of the peace. There was a judgment for petitioner, and petitionee brings exceptions. Affirmed.

Argued before TYLER, MUNSON, WATSON, HASELTON, POWERS, and MILES, JJ.

J. J. Enright and R. E. Braum, for petitioner. Cowles & Moulton and C. S. Palmer, for petitionee.

ROWELL, C. J. This is a petition to the county court to reverse and set aside the judgment of a justice rendered upon default against the petitioner, as he was unjustly deprived of his day in court by fraud, accident, or mistake, and to hear and determine the action as if it had been brought to said court by appeal. Said action was brought by the petitionee to recover what he paid to satisfy a judgment recovered against him by one Stiles for attaching and selling his property on a writ and an execution in favor of the petitioner against one Murphy. The court found the mistake relied upon on trial, and that "the petitioner claimed before it that he had a good and sufficient defense to said action, for the reason that he expressly notified said Farley that he would not indemnify him against loss by reason of the sale of said property, and that if he proceeded to sell it he must do so at his own risk." Thereupon the prayer of the petition was granted, and judgment accordingly. The petitionee excepted to the judgment generally, and also specially upon the ground that there was no evidence to support it. The only question the petitionee seeks to raise is whether the court could grant the petition without an affidavit, or some other evidence, of a good defense upon the merits of the original action, claiming that that was necessary in order to bring the case within the purview of the statute, as it undoubtedly was, as is abundantly shown by the cases cited in the petitionee's brief. On this point the petitionee seeks to question the sufficiency of the petition, both as a pleading and as an affidavit of merits. The petitioner objects that the exceptions do not reach back to the petition in either respect. But we think that the special exception does reach back to it as an affidavit of merits, and we will treat it as reaching back to it as a pleading, without deciding whether it does or not.

It is manifest that the case must stand upon the petition alone for merits, as there was no other evidence before the court tend-

ing to show merits. The only allegation of merits that the petition contains is, that "the petitioner claims, and always claimed, that, prior to the sale of said property by said Farley, he expressly notified said Farley that he would not indemnify him against loss by reason of the sale of said property, but that, if he sold it, he must do it at his own risk." The petitionee says that this is not an allegation that such notice was given, but only an allegation of a claim that it was given, without saying that it was given; that a mere claim that it was given is not enough; and that the fact claimed cannot be considered, because, not being alleged, it is not sworn to. But, in sessions proceedings, the strict rules of the common law for the construction of pleadings are not applied; but, on the contrary, the pleadings are construed liberally, with a view to substantial justice, and to getting at the real truth of the case when it will not surprise nor harm the other party. Under this rule, if a pleading is capable of two meanings, one of which will defeat it, and the other sustain it, this will be taken, and not that. Even at the common law, if the language of a pleading is capable of different meanings, it is permissible to construe it in the sense in which the pleader must be understood to have used it, supposing him to have intended his pleading to be consistent with itself. *Royce v. Maloney*, 58 Vt. 437, 445, 5 Atl. 395. Now, one meaning of the verb "claim" is, to assert; to maintain; to hold or maintain as a fact or as true. Giving this meaning to the word as used in the petition, as we should under the rule stated, the allegation means that the petitioner asserts as a fact, and maintains as true, that he gave the notice therein claimed. This makes the petition good as a pleading and as an affidavit of defense, and sufficient to bring the case within the purview of the statute, and to sustain the judgment, as it is verified by the oath of the petitioner, who has personal knowledge of the fact of notice.

Judgment affirmed.

(102 Me. 323)

SKOWHEGAN WATER CO. v. SKOWHEGAN VILLAGE CORP.

(Supreme Judicial Court of Maine. December 18, 1906.)

1. CONTRACTS—SUBSTANTIAL PERFORMANCE—EQUITABLE RELIEF.

By the strict rules of the common law in cases where services have been rendered or materials furnished in an honest endeavor to perform a contract, but are found to be at variance with the requirements of its express terms, and yet in some degree beneficial to the party to whom the services have been rendered or for whom the materials have been furnished, full performance was undoubtedly required as a condition precedent to the right of recovery. But in most jurisdictions the rigor of this common-law rule has been relaxed, even in courts of law, especially in building contracts and other like agreements, where the defendant is practically forced to accept the result of the work and re-

lief is granted to the plaintiff by applying the equitable doctrine of substantial performance.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 11, Contracts, §§ 1365-1368.]

2. SAME.

Although a plaintiff cannot recover upon a contract from which he has departed, yet he may recover upon the common counts for the reasonable value of the benefit which upon the whole the defendant has derived from what the plaintiff has done. If a plaintiff endeavors in good faith to perform, and does substantially perform, an agreement, he is entitled to recover the fair value of his services, having regard to and not exceeding the contract price after deducting the damages sustained by the defendant on account of the breach of the stipulations in the contract.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 11, Contracts, § 1366.]

3. SAME—ACTION FOR BREACH—BURDEN OF PROOF.

In some of the decided cases, reference is made to the "deduction," "recoupment," or "set-off" of the defendant's damages for the obvious purpose of indicating a convenient process or method of ascertaining what the services rendered by the plaintiff were reasonably worth, and not with the intention of casting upon the defendant the burden of proving the value of a plaintiff's services. It is incumbent upon the plaintiff in such cases to prove the value of the work done or materials furnished by him. The question of recoupment, properly so termed, is not involved. But, if the plaintiff's breach of contract be such as to subject the defendant to consequential damage, such damage may be the foundation for a legitimate claim in recoupment, and the burden of proving such damage would be upon the defendant.

4. SAME—CONSTRUCTION—GENERAL RULES—INTENT.

Whether a given stipulation is to be deemed a condition precedent, a condition subsequent or an independent agreement is purely a question of intent. And the intention must be determined by considering, not only the words of the particular clause, but also the language of the whole contract, as well as the nature of the act required and the subject-matter to which it relates.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 11, Contracts, § 1015.]

5. WATERS AND WATER COURSES—PUBLIC WATER SUPPLY—PERFORMANCE OF CONTRACT.

In view of the peculiarities which necessarily characterize the sale and delivery of water through a system of water pipes under a contract where a water company has agreed to furnish for a term of years, through its hydrants, to a municipal corporation, a constant and ample supply of potable water, under sufficient pressure for the extinguishment of fires, unavoidable accidents excepted, it is manifest that the mere receipt and consumption of water under such contract would not conclusively show an acceptance of the service as a performance of the contract. Considerable time might be required to determine whether or not an imperfect service was caused by the "unavoidable accidents" excepted in the contract, and under such circumstances a due regard for the necessities of the people would render a discontinuance of the use of the water unreasonable and impracticable.

6. DAMAGES—MEASURE—BREACH OF CONTRACT.

In the case at bar the plaintiff took exceptions to certain instructions given by the presiding justice and which are stated in the opinion. *Held*, that these instructions, as a whole, as applied to the facts in this case, were substantially correct, and not prejudicial to the plaintiff.

(Official.)

Exceptions from Supreme Judicial Court, Somerset County.

Action by the Skowhegan Water Company against the Skowhegan Village Corporation. Heard on exceptions by the plaintiff. Overruled.

Assumpsit to recover \$1,037.50, being the semiannual installment of \$1,000 alleged to be due the plaintiff, under paragraph 8, and \$37.50 for six months' use of five additional hydrants, under paragraph 5, of a written contract between the parties.

Tried at the March term, 1906, of the Supreme Judicial Court, Somerset county. Verdict for plaintiff for \$519.64. The plaintiff requested the presiding justice to give a certain instruction to the jury, which request was refused, and thereupon the plaintiff took exceptions. The plaintiff also took exceptions to certain instructions given by the presiding justice.

The case appears in the opinion.

Memorandum: One of the justices sitting at the term of the law court at which this case was argued did not sit in this case, being disqualified under the statute by reason of having ruled therein at nisi prius.

Argued before WHITEHOUSE, POWERS, PEABODY, and SPEAR, JJ.

Gould & Lawrence, for plaintiff. Walton & Walton, for defendant.

WHITEHOUSE, J. This is an action of assumpsit to recover \$1,037.50, being the semiannual installment of \$1,000 alleged to be due the plaintiff under paragraph 8, and \$37.50 for six months' use of five additional hydrants, under paragraph 5, of the written contract between the parties.

The declaration in the writ contains two counts, one setting out the contract and alleging performance on the part of the plaintiff and a breach on the part of the defendant, and the other on an account annexed specifying the two items of \$1,000 and \$37.50 above mentioned, and making reference to the contract.

The first and eighth paragraphs of this contract are as follows:

"First. The said company hereby agree to maintain within the limits of said corporation, and for the use of said corporation, for fire purposes, seventy-five hydrants, as now located or as hereafter relocated by said corporation, under the provisions of section four of this indenture, and to keep and maintain said hydrants in good repair at all times during said term of twenty years. And during said term said company agrees to furnish at all times, through said hydrants, and through all additional hydrants which may hereafter be put in under the provisions of section five of this indenture, a constant and ample supply of potable water, under sufficient pressure for the extinguishment of fires, unavoidable accidents excepted."

"Eighth. And in consideration of the above

promises and agreements of said company, the said corporation hereby agrees to pay to said company, for the use of the water for the purposes aforesaid, and in the manner and on the conditions aforesaid, the sum of two thousand dollars (\$2,000) per annum for the said period of twenty years, said sum to be paid in equal semiannual payments as follows, viz.: One thousand dollars (\$1,000) on the first day of July, and one thousand dollars (\$1,000) on the first day of January of each and every year during said period of twenty years. The first payment under this agreement to become due and payable on the first day of January, A. D. 1890, and the amount then due to be estimated pro rata from said nineteenth day of August, A. D. 1889, to said first day of January 1890, and thereafter as above."

The plaintiff introduced evidence tending to show a compliance on its part, in general, with the covenants and conditions of the contract, proved nonpayment of the sums sued for, and rested.

The defendant introduced evidence tending to show that during the six months prior to July 1, 1905, the water furnished by the plaintiff through its pipes and hydrants for the use of the defendant was not under sufficient pressure for the extinguishment of fires, several of which occurred during that period; also that it was not potable. The plaintiff in rebuttal offered evidence tending to show that the pressure was sufficient at all times, except when unavoidable accident prevented, and that the water was potable.

There was no evidence of any damage to the defendant corporation from any breach of contract on the part of the plaintiff, except as may be inferred from the foregoing.

It was insisted by the plaintiff's counsel at the trial that evidence tending to show insufficiency of water pressure and impurity of the water was important only as a basis for recouping damages, and that such damages only could be recouped as might have been suffered by the defendant as a corporation.

The defendant's counsel, on the other hand, claimed that it was not limited to proof of damages in set-off, but that it was incumbent upon the plaintiff to satisfy the jury that during the six months prior to July 1, 1905, it had furnished the defendant a constant and ample supply of potable water under sufficient pressure for the extinguishment of fires; that, unless it had so done, it could recover only such a sum as the service was reasonably worth to the corporation.

Among other requests the plaintiff asked that the following instructions be given to the jury:

"It is not a condition precedent to recovery that the plaintiff should have furnished a constant and ample supply of potable water under sufficient pressure for the extinguishment of fires, but insufficiency of pressure can be taken advantage of by the defendant

for the purpose of recouping in damages."

The presiding judge declined to give this instruction, and upon this branch of the case instructed the jury, inter alia, as follows:

"Has the plaintiff performed its contract in this particular during that term? If it has, and if it has supplied potable water, under sufficient pressure, then it is entitled to its contract price. If it has not, then we come to another and very important question. The defendant does not seek, in this case, to recover damages of the plaintiff. The defendant does not seek to have its damages sustained by it through the plaintiff's breach of contract set off, or recouped, as we sometimes say, against the plaintiff's claim. If it did, in order to establish any defense at all, it would be necessary to show that the defendant corporation itself had been damaged—had property injured—by reason of the loss of pressure. The losses which individuals in the corporation—that is, the citizens, individuals in the town, may have sustained—are not to be considered. They are not parties to this suit. This is merely a suit between these two parties, both corporations, upon this contract; and, in order to have any damages allowed or recouped, it would be necessary to show that the corporation, as a corporation, has been injured in its property by the want of pressure which the contract called for. But this is not the defendant's position. The position between these two parties is simply this: The plaintiff sues for the price of an agreed service, and says that it has kept its agreement, and furnished the service called for. The defendant says it has not furnished the service, and therefore is not entitled to the pay. The question of damages does not come in at all. It is merely a question whether the plaintiff has so far performed its service as to be entitled to its pay. And, if it had not performed its service, it is not entitled to its pay, at least in full. * * *

"The general rule is that where a man has agreed to do a service for another, to a certain extent, or in a particular way, and fails to do that service to the extent he agreed to, or does it in a different way, the plaintiff with whom he contracts may do one of two things. He may refuse to accept the service, and say 'Here, this isn't what I ordered, this isn't what I agreed to pay for, and I won't take it,' or he may take it, and say 'This isn't what I agreed to pay for;' but impliedly, by taking it, he agrees to pay what the service is worth. So, to use an illustration somewhat like that used by counsel, supposing a carpenter agrees to build your house upon your land, or to repair it, and agrees to do it in a particular way, but he doesn't do it right—he leaves some rooms unfinished for instance, or puts in different material, cheaper material than he agreed to put in, or does it in some way that is contrary to the contract. The house is upon your land, and you can't very well tear that

house down or refuse to accept it. Practically the man is obliged to accept it, not absolutely obliged to, but practically, and he may take it; but he may say 'I shall not pay you the full contract price, because you have not done what you agreed to do.' In such a case as that, if he takes the work and accepts and uses it, not accepts it as an equivalent of the contract, but accepts it as his own for use, the party performing the work is not debarred from all compensation because he has failed to keep his contract, but he can only recover what the services are reasonably worth.

"Now, I apply that same rule in this case. If the plaintiff agreed to perform the agreed service, either as to quality of water or as to sufficiency of pressure, and the service was accepted, as it practically had to be, not absolutely, because the corporation might have terminated the contract if they saw fit—that is, if they had a reason for doing it—but if they allowed it to go on and the water stood here for their use, so they could use it, and did use it, the plaintiff would not be debarred entirely from recovering merely because the contract had not been fully kept, but would be entitled to recover what the services actually rendered were reasonably worth.

"There are a great many things, especially in a public service like a water service, that enter into the value of that service. It is not merely the number of houses that may burn, or may not burn. That isn't it. But here is a village which the municipal corporation has a right to protect, and was trying to protect by its contract. On the other hand, here was the company which necessarily had to lay out large sums of money in order to be able to furnish the service. That was its investment. The value of the service to the purchaser, of course, does not depend upon the cost of it—the amount of the investment—however, but upon the situation, the length of the pipes, as far as we know anything about them, the size of the village, so far as we know anything about it. All have some bearing as showing what that service which was actually rendered should have been worth. The contract was for \$1,037.50 for every six months. That isn't controlling. It may be considered by you. There may have been elements of profit in the contract. It may have been advantageous to the plaintiff, or it may have been advantageous to the defendant. And whatever advantages they would get out of their contract, of course, they are entitled to. The plaintiff here is entitled not to its contract price, or to any advantage which it might have by its contract, but is entitled to the reasonable worth of the service to the purchaser.

"So far as the potable water problem is concerned, as bearing upon the question, the rule applies to that feature also.

"In estimating the value of the service to the corporation, as I have already said, you

are not to estimate how much less value the service was to the individual water takers by reason of the water not being drinkable, if that was the case. You are simply to answer how much less the service was worth to the corporation, for corporation purposes, by reason of any impurity in the water, and not because it was not worth so much to individuals. It is merely and purely a contract between the two corporations, and I cannot too often, perhaps, or too emphatically, say that the loss to individuals—the embarrassment to individuals—is not to be weighed."

Verdict was for plaintiff in sum of \$519.64, and the case comes to this court on exceptions to the refusal of the presiding judge to give the requested instruction and to the instructions actually given to the jury.

It is contended in argument in behalf of the plaintiff that the exceptions should be sustained for the following reasons: (1) Because the contract is not properly apportionable, and performance of six months' service is not to be held a condition precedent to recovery of a semiannual installment; (2) because, if the first contention be overruled, the condition precedent loses its character as such by acceptance of the service and retention of the benefits; (3) because breach of one portion of a severable contract can be taken advantage of only by recouping in damages; (4) because the rule of damages was uncertain and incorrect.

It is the opinion of the court, however, that upon the facts disclosed by the record in this case these contentions in behalf of the plaintiff cannot be sustained. The rulings and instructions of the presiding judge in regard to the plaintiff's right to recover in case of partial performance were sufficiently favorable to the plaintiff and substantially in accord with the equitable doctrine that has heretofore prevailed in this state in analogous cases. The decisions in other states undoubtedly disclose many different forms of expressions, if not a variety of opinions, in relation to the proper rule to be applied in adjusting the rights of parties where services have been rendered or materials furnished in an honest endeavor to perform a contract, but are found to be at variance with the requirements of its express terms, and yet in some degree beneficial to the other party. By the strict rules of the common law in such a case full performance was undoubtedly required as a condition precedent to the right of recovery, but in most jurisdictions the rigor of this common-law rule has been relaxed, even in courts of law, especially in building contracts and other like agreements, where the defendant is practically forced to accept the result of the work and relief is granted to the plaintiff by applying the equitable doctrine of substantial performance.

Thus in the early case in this state of *Norris v. School District*, 12 Me. 296, 28 Am.

Dec. 182, the court say: "It may now be considered as the settled law that that where one party has entered into a special contract to perform work for another and furnish materials, and the work is done and the materials furnished, but not in the manner stipulated in the contract, yet, if the work and materials are of any value and benefit to the other party, he is answerable to the amount whereby he is benefited"—citing *Hayward v. Leonard*, 7 Pick. 181, 19 Am. Dec. 268.

In accordance with this view, the rule in this class of cases was subsequently stated by Mr. Greenleaf as follows:

"Here, though, the plaintiff cannot recover upon the contract from which he has departed, yet he may recover upon the common counts for the reasonable value of the benefit which upon the whole the defendant has derived from what he has done." 2 Green. Ev. § 108. "If he endeavored in good faith to perform, and did substantially perform the agreement, he was entitled to recover for his services the contract price after deducting so much as they were worth less, on account of such imperfect performance of the contract." *Hattin v. Chase*, 88 Me. 237, 33 Atl. 989, and cases cited. "He is entitled to recover the fair value of his services, having regard to and not exceeding the contract price after deducting the damages sustained by the defendant on account of the breach of the stipulations in the contract." *Blood v. Wilson*, 141 Mass. 25, 6 N. E. 362; *Powell v. Howard*, 109 Mass. 192; *Veazie v. Bangor*, 51 Maine, 509.

In some of these and other similar cases reference is made to the "deduction," "recoupment," or "set-off" of the defendant's damages for the obvious purpose of indicating a convenient process or method of ascertaining what the services rendered by the plaintiff were reasonably worth, and not with the intention of casting upon the defendant the burden of proving the value of the plaintiff's services. It is incumbent upon the plaintiff in such cases to prove the value of the work done or materials furnished by him. The question of recoupment, properly so termed, is not involved. But, if the plaintiff's breach of the contract be such as to subject the defendant to consequential damage, that may be the foundation for a legitimate claim in recoupment, with respect to which the burden of proof would be upon the defendant. *Gillis v. Cobe*, 177 Mass. 584, 59 N. E. 455.

But in the case at bar the plaintiff contends that the contract is not properly apportionable, and that performance of six months' service should not be held a condition precedent to recovery of the semiannual installment of \$1,000, which the defendant agreed to pay for the service specified.

Whether a given stipulation is to be deemed a condition precedent, a condition subsequent, or an independent agreement is purely a question of intent. "And the intention

must be determined by considering, not only the words of the particular clause, but also the language of the whole contract, as well as the nature of the act required and the subject-matter to which it relates." *Bucksport & B. R. R. Co. v. Brewer*, 67 Me. 295, and cases cited.

When the contract in question is examined in the light of these practical considerations, it cannot be doubted that the stipulation for the supply of potable water and the hydrant service specified in paragraph 1 of the contract was intended and understood by the parties as a condition precedent, and that it was to be strictly performed each six months before the defendant could be held liable to pay the \$1,000 installment.

In *Winfield Water Co. v. Winfield*, 51 Kan. 104, 33 Pac. 714, a case strikingly analogous to that at bar, the court say: "Where suit is brought, as in this case, to recover hydrant rentals for six months, if it be shown that the plaintiff has failed to substantially comply with its contract, the burden rests on the plaintiff to show the value of the services actually performed by it for the city, and the defendant would be entitled to show any damages sustained by it by reason of the plaintiff's failure. The plaintiff could not recover more than the value of the services rendered to the city over and above all damages occasioned by plaintiff's failure. It may be that there would be great practical difficulty in showing the actual value to the city of the water furnished. If so, it is not the fault of the city, but of the plaintiff. The rights of the parties are defined by the contract, and the party which violates the contract, and fails to comply with its provisions, must suffer rather than the innocent one." Inasmuch as the defendant corporation made the contract in question for the benefit of the inhabitants of the village, and suffered but slight injury in its corporate capacity, it would be a manifest injustice to compel the defendant to rely upon its claim for damages by way of recoupment and assume the burden of proving the reasonable value of the plaintiff's services. See, also, *Sykes v. St. Cloud*, 60 Minn. 442, 62 N. W. 613.

Again, it is manifest that the stipulation must in any event lose its character as a condition precedent by reason of the acceptance of the service and continued use of the water. But, in view of the peculiarities which necessarily characterize the sale and delivery of water through a system of water-works, it is manifest that the mere receipt and consumption of water under such a contract would not conclusively show an acceptance of the service as a performance of its contract. Considerable time might be required to determine whether or not the imperfect service was caused by the "unavoidable accidents" excepted in the contract, and under such circumstances a due regard for the necessities of the people would render a

discontinuance of the use of the water unreasonable and impracticable.

Finally, the plaintiff complains that the rule of damages given "allowed the jury to disregard the contract altogether, and afforded no tangible basis for fixing the value of the services rendered." Upon this point, as has been noted, the final instruction was as follows:

"The contract was for \$1,037.50 for every six months. That isn't controlling. It may be considered by you. There may have been elements of profit in the contract. It may have been advantageous to the plaintiff, or it may have been advantageous to the defendant. And whatever advantages they would get out of their contract, of course, they are entitled to. The plaintiff here is entitled not to its contract price, or to any advantage which it might have by its contract, but is entitled to the reasonable worth of the service to the purchaser.

"So far as the potable water problem is concerned, as bearing upon the question, the rule applies to that feature also. You are simply to answer how much less the service was worth to the corporation for corporation purposes, by reason of any impurity in the water."

This, considered in connection with other parts of the charge, gave the jury to understand that in adopting a statement of value for the assessment of damages the parties were to be considered as entitled to any advantages they would have derived from the contract as far as the element of profit was concerned; but in case of partial performance the plaintiff was not entitled to the contract price, nor to any advantage from the contract in the maintenance of the suit, but it was entitled to recover the fair value of the service, having regard to the contract price and "considering how much less the service was worth to the corporation" by reason of the plaintiff's breach of the contract.

It is the opinion of the court that the instructions as a whole, as applied to the facts in this case, were substantially correct, and not prejudicial to the plaintiff.

Exceptions overruled.

(102 Me. 157)

CUSHING v. WEBB.

(Supreme Judicial Court of Maine. Nov. 30, 1906.)

1. HIGHWAYS — ESTABLISHMENT — PETITIONS—JURISDICTION OF SELECTMEN.

A petition for a way is necessary to give selectmen jurisdiction to lay out a townway under the statute.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Highways, § 47.]

2. SAME—DEFINITENESS.

The way must be described in the petition, and with such definiteness that, when notice of it is given, the public and property owners will

be apprised with reasonable certainty where the way is sought to be located.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Highways, §§ 53-55.]

3. SAME—EVIDENCE.

The selectmen's return is prima facie evidence of the fact that they gave notice on the petition, and also of such other facts as were required by law to be embraced in the notice, such as that the notice contained a description of the way, and what it was.

4. SAME—PRESUMPTIONS—COLLATERAL ATTACK.

In a case where the original petition is not in existence, and the return of the selectmen states that it was for a townway, "beginning on the north side of West Front street, and running towards the Kennebec river," that they gave notice of their intention to lay out "the same," and that they stated in their notice the "termini thereof," and when it appears that the use of the way has been acquiesced in many years, it is held that there is a prima facie presumption, at least, that the petition was sufficient in form to give the selectmen jurisdiction to act, and it is not open to collateral attack.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Highways, § 168.]

5. SAME.

In such a case it is also to be presumed that the laying out was in accordance with the petition.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Highways, §§ 168-172.]

6. SAME.

In such a case it is no objection that the way as laid out consisted of two streets running at an angle with each other, which were described separately in the return, but connecting and forming one way; it not being shown that the petition with the termini named in it called for only one street substantially in one direction. The presumption as to the petition is otherwise.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Highways, §§ 168-172.]

7. SAME.

The acceptance by the town of a "road" as laid out by the selectmen from "West Front street to Alder street" was sufficient, though it appears that the road consisted of two connecting streets, running at an angle with each other.

(Official.)

Agreed Statement from Supreme Judicial Court, Somerset County.

Action by Walter S. Cushing against George H. Webb. Heard on an agreed statement of facts. Judgment for defendant.

Action of trespass *quare clausum fregit* for breaking and entering the plaintiff's close; the same being a lot on the south side of the Kennebec river, in the village of Skowhegan. The defendant was the duly qualified road commissioner for the town of Skowhegan on the day of the entry. He admitted the entry, but claimed a justification by reason of the fact that the locus was within the limits of Bridge street which he claimed was a duly located townway in Skowhegan. The existence of such a way was denied by the plaintiff. This raised the issue whether or not Bridge street was ever legally laid out as a townway, and so accepted by the town.

At the March term, 1906, of the Supreme Judicial Court, Somerset county, an agreed

statement of facts was filed, and the case sent to the law court for determination with the agreement that, if the entry by the defendant was without authority of law, judgment should be rendered for the plaintiff for nominal damages; otherwise judgment to be for the defendant.

All the material facts are stated in the opinion.

Argued before WISWELL, C. J., and EMERY, SAVAGE, POWERS, PEABODY, and SPEAR, JJ.

Gould & Lawrence, for plaintiff. Butler & Butler, for defendant.

SAVAGE, J. *Trespass quare clausum*. The title of the plaintiff and the entry by the defendant are admitted. The defendant, who was the road commissioner of Skowhegan, claims a justification by reason of the fact that the locus was within the limits of Bridge street, a duly located townway in Skowhegan. The existence of such a townway is denied by the plaintiff. The only question raised is whether Bridge street was ever legally laid out as a townway, and so accepted by the town.

The records of the town show that in 1885 and 1886 proceedings relative to the location of a townway or ways in Skowhegan village were had, as shown by the return of the selectmen, and the warrant for a town meeting and the vote of the town thereon, as follows, so far as necessary to quote:

"The subscribers, selectmen of Skowhegan, upon application of James B. Dascomb and others to lay out a townway in said town, beginning on the north side of West Front street and running towards the Kennebec river, having given seven days' notice of our intentions to lay out the same and stated in said notice the termini thereof by posting said notice in two public places. * * *

"We therefore lay out said way as follows: Beginning in the northerly side of West Front street at the southerly corner of George W. Durrell's lot and 20 feet easterly from said corner; thence north 15 degrees west 12 rods; thence north 19 degrees west 41 rods; all of said distances are over the land of John Turner.

"Said line is the center line and said street is to be forty feet wide.

"Also another street leading easterly from the above street. Beginning at the southwesterly corner of the Morrill lot and one and one half rods southerly from said corner, thence north fifty seven degrees east 15 rods over land of John Turner to line between said Turner and land belonging to the Parker estate to Alder Street; said line is the center line and said street is to be three rods wide. * * *" This return was signed by the selectmen, and was dated February 15, 1886. The road laid out in the second of the above description is Bridge street, and is the locus of the entry complained of.

The warrant for the annual meeting of

1886 contained the following article:

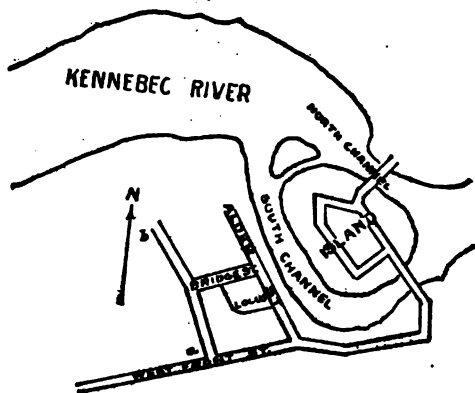
"To see if the town will vote to accept the following roads as laid out by the selectmen. First, a road from West Front street to Alder street."

Under that article the following vote was passed:

"Voted to accept the road as laid out by the selectmen, a road from West Front street to Alder street."

It is admitted that the original petition asking for the laying out of the road from West Front street towards the Kennebec river is not now in existence, having been lost or destroyed.

A reference to the accompanying sketch will show the situation more plainly.



A. B. FIRST DESCRIPTION IN RETURN OF SELECTMEN

The statute (Rev. St. 1883, c. 18, § 14) under which the selectmen acted is as follows: "The municipal officers of a town may personally or by agency lay out, alter or widen town ways and private ways, * * * on petition therefor. They shall give written notice of their intentions to be posted for seven days, in two public places in the town and in the vicinity of the way, describing it in such notice. * * *"

The plaintiff claims that the record is insufficient to show a legal laying out in four particulars: First, that the petition was insufficient for lack of definiteness to confer jurisdiction on the selectmen; again, that the notice given by the selectmen was insufficient because it failed to warn property holders of any specific way which would be ascertained with any reasonable certainty; then that the actual laying out was not justified by the petition; and, finally, that the road was never accepted by the town.

It is evident that a petition for a way is necessary to give selectmen jurisdiction to lay out a way under the statute. And we think, also, that such a petition must be so definite that, when notice of it is given, the public and property owners will be apprised with reasonable certainty where the way is sought to be located. While the statute does not in terms require the petition to describe the way, as it does in cases of petitions to

the county commissioners for the laying out of highways (Rev. St. 1908, c. 23, § 1), it does require the selectmen to describe the way in their notice. And, as their jurisdiction is based upon the petition, it is reasonably to be implied that the way must be described in the petition; for, unless a way is described in the petition, there is no proposed way to be described in the notice, and the selectmen would be without jurisdiction to give notice.

In this case there was a petition, but it is now lost, and the plaintiff seems to rely upon the inability of the defendant to prove affirmatively that the petition did describe the way with sufficient definiteness. But we do not think this difficulty is insurmountable. The selectmen's return is *prima facie* evidence of the fact that they gave notice on the petition, and also, we think, of such other facts as were required by law to be embraced in the notice, such as that the notice contained a description of the way, and what it was. *Cool v. Crommet*, 13 Me. 250; *Inhabitants of Limerick, Petitioners*, 18 Me. 183. This return states that the petition was for a townway "beginning on the north side of West Front street and running towards the Kennebec river," that they gave notice of their intentions to lay out "the same" and that they stated in their notice the "termini thereof"; that is, the termini of the way asked for in the petition, and as asked for. The return, therefore, shows that the selectmen gave notice of their intentions to lay out a way beginning at West Front street and running towards the Kennebec river, and therein stated the termini. That must be held to be sufficient, so far as notice was concerned. *Packard v. County Com'rs*, 80 Me. 44, 12 Atl. 788; *Hayford v. County Com'rs*, 78 Me. 156, 3 Atl. 51. And, while we do not say that the return should be deemed evidence of the contents of the petition unless incorporated therein by reference or otherwise, we think that when it appears by the return of selectmen that they acted upon a petition for a way, in a general course, which they state, and that they stated in their notice "the termini thereof," meaning, as we have stated, the termini of the way as asked for, and when the use of the way has been acquiesced in for many years, there is a *prima facie* presumption at least that the petition was sufficient in form to give the selectmen jurisdiction to act. *Harlow v. Pike*, 3 Me. 438; *Larry v. Lunt*, 87 Me. 69. It is not now open to collateral attack. *Higgins v. Hamor*, 68 Me. 25, 33 Atl. 655. This disposes of the first two objections.

And, if our conclusions so far are sound, there is little difficulty with the remaining ones. To the objection that the actual laying out was not justified by the petition, it is sufficient to say that, for the reasons already given, it is now to be presumed that the laying out was in accordance with the petition. It is no objection that the way as

laid out consists of two streets, which are described separately in the return. They connect and form one way. The argument that the way as laid out had more than two termini—that is, that each street had two termini—and therefore was not the way as petitioned for, would be sound, if it were shown that the petition with the termini named in it called for only one street substantially in one direction. But that is not shown, and the presumption now is otherwise.

Finally, the town accepted the road as laid out, namely, from West Front street to Alder street. This was one way, though it consisted of two connecting streets, one of which was Bridge street, the locus in this action. The only objection, as it seems to us, is that the acceptance in terms did not include so much of the first street laid out as lay northerly of Bridge street. Whatever might be said about this section of the first street, we do not think it can now be properly held that Bridge street was not accepted.

Judgment for the defendant.

(102 Me. 346)

BIDDEFORD NAT. BANK v. HILL et al.

(Supreme Judicial Court of Maine. Jan. 24, 1907.)

1. NOTES — VALIDITY — FORGERY — FRAUD — DECEIT.

Where a person not intending to sign a promissory note, but by fraud and deceit has been tricked into signing an instrument which afterwards proves to be a promissory note, such instrument is a forgery, although the signature affixed thereto is genuine.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 7, Bills and Notes, § 235.]

2. SAME.

A forged paper without negligence imputed to the party affected by the forgery is not a binding contract, whether the forgery was committed by alterations or substitution of the forged contract for the supposed genuine contract.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 7, Bills and Notes, § 235.]

3. SAME — RIGHTS ON INDORSEMENT — BONA FIDE PURCHASERS — FORGERY.

In the absence of negligence or laches on the part of a person not intending to sign a promissory note, but who by fraud and deceit has been induced to sign an instrument which afterwards proves to be a promissory note, such note is not valid although in the hands of an innocent holder for value.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 7, Bills and Notes, §§ 234, 952.]

4. SAME — ACTIONS — QUESTIONS FOR JURY.

Whether or not a person not intending to sign a promissory note, but who by fraud and deceit has been induced to sign an instrument which afterwards proves to be a promissory note, was guilty of negligence or laches in signing such instrument, is a question of fact to be submitted to the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 7, Bills and Notes, § 1864.]

(Official.)

Action by the Biddeford National Bank against Etta O. Hill and others. Verdict for

defendant, and plaintiff moved for a new trial. Motion overruled.

Argued before WHITEHOUSE, STROUT, SAVAGE, PEABODY, and SPEAR, JJ.

Anthony Dwyer, for plaintiff. B. F. Hamilton and Cleaves, Waterhouse & Emery, for defendant Etta O. Hill.

SPEAR, J. This is an action of assumpsit upon a promissory note for \$344.44, dated July 5, 1906, purporting to be signed by Etta O. Hill and D. O'Connor & Co. The undisputed facts show that Etta O. Hill at some time previous to the date of the note had sold and delivered to D. O'Connor & Co. a quantity of pressed hay, the consideration for which amounted to \$344.44. Early in the morning of the date of the note she called upon O'Connor & Co., meeting D. O'Connor himself, for the purpose of obtaining a settlement for the hay. When the object of her call was made known to Mr. O'Connor, he informed her that he desired to settle for the hay by giving her the promissory note of the company for the amount due. This she peremptorily declined, upon the ground that, being left in entire charge of her father's farm, it would be necessary for her to make use of money at once in harvesting the hay upon the farm. Thereupon Mr. O'Connor wrote her a check for \$344.44, the delivery of which she took from him and started to leave his place of business, when he called her back, requesting her to sign a receipt for the money received for the hay. She returned to his desk, where a receipt for \$344.44, all written out, was lying for her signature. Mr. O'Connor stepped along, placed his finger upon the paper, and directed her where to sign. She signed the receipt as requested. It proved, however, that, instead of signing the receipt as she supposed she was doing, she was deceived and tricked by O'Connor into affixing her signature either to a blank with the note in question afterwards written upon it, or upon a blank already filled in with the contents of the note. It is evident from the history of this transaction that the contract manifested by the note in suit was not the contract of the defendant Etta O. Hill. This proposition is too obvious and too well settled to require citation. If the note was not her contract, was she so negligent in placing her name upon the paper upon which the note appears, when she thought she was signing a receipt, that she is estopped from denying her act under the just and well-settled rule that of two innocent parties he whose negligence has occasioned the loss must bear it?

No exceptions were taken either to the ruling of the charge of the presiding justice in presenting the case to the jury, and it is therefore presumed that every element of law in the case was properly given. It therefore follows that the question of negligence imputable to Etta O. Hill in signing the note purporting to be a receipt was properly sub-

mitted to the jury as a question of fact, and their verdict shows that they found this issue in favor of the defendant. The verdict must stand. We are of opinion that it was not only not erroneous, but fairly deducible from the undisputed facts.

This brings us to the proposition of law whether, in the absence of any negligence on the part of Etta O. Hill in affixing her signature to the note, she thereby became liable for its payment. The bank was undoubtedly an innocent holder of the note for value, but, in view of the fact that Etta O. Hill was fraudulently induced to sign the note without laches on her part, makes the note, not only her contract, but a forgery with respect to her signature.

It is contended, however, that the fact that her signature is genuine relieves the note from the character of a forged paper, and instead renders it a paper obtained by fraud and deceit.

But that a paper, obtained like the note in question, partakes of the character of a forged instrument, has long been the doctrine of the law in this and many other states.

State v. Shurtliff, 18 Me. 368, decided in 1841, is a case wherein the grantee agreed with the grantor to purchase an acre of his farm and prepared the draft of a deed correctly describing the land agreed to be conveyed, and exhibited it to the grantor, who examined it and found it to be correct, but the execution of it was delayed and the draft was retained by the grantee. The grantee afterwards fraudulently prepared the draft of another deed, describing the grantor's whole farm, and presented it to the grantor for his signature as the deed before examined, and it was executed and delivered, but the court held this to be a forgery. In the opinion the court say: "Forgery has been defined to be a false making, a making *malis animo*, of any written instrument for the purpose of fraud and deceit. 2 Russell, 317, and the authorities there cited. The evidence fully justifies the conclusion that the defendant falsely made and prepared the instrument set forth in the indictment, with the evil design of defrauding the party whose deed it purports to be. It is not necessary that the act should be done in whole or in part by the hand of the party charged. It is sufficient if he cause or procure it to be done. The instrument was false. * * * If he had employed any other hand, he would have been responsible for the act. In truth the signature of that false instrument, in a merely logical point of view, is as much imputable to him as if he had done it with his own hand, * * * and the opinion of the court is that the crime of forgery has been committed."

It is our opinion that the case at bar falls precisely within the statement of facts and conclusions of law herein laid down. In the case decided the signature of the grantor upon the deed was genuine, and procured by

the fraud of the grantor. In like manner, the signature of Etta O. Hill upon the note was genuine, and procured, without negligence on her part, by the fraud of D. O'Connor.

Commonwealth v. Foster, 114 Mass. 820, 19 Am. Rep. 353, is similar in principle to *State v. Shurtliff*. In this case the court state the rule to be that "it matters not by whom the signature is attached, if it be not attached as his own. If the note is prepared for the purpose of being fraudulently used as the note of another person, it is falsely made. The question of forgery does not depend upon the presence upon the note itself of the indicia of falsity." In a subsequent paragraph it is further declared, "to constitute forgery where there has been no subsequent alteration, the fraudulent intent must attend the making of the instrument. But it is not necessary that it should be in the mind of the one whose hand holds the pen in writing the signature. If that is done at the dictation or request of another, and for his purposes and use, and his designs are fraudulent so as to make it forgery if he had written it himself, then the instrument is a forged one." See, also, *Gregory v. State*, 26 Ohio St. 510, 20 Am. Rep. 774; 19 Cyc. 1374, D, and cases cited; 13 A. & E. Enc. 1087, (3), and cases cited.

It would appear from these citations to be well established that the note in question, under the circumstances attending its execution, was a forgery.

But from the fact that, as between O'Connor and Etta O. Hill, the note was a forgery, it does not necessarily follow that she would be relieved from liability thereon. There are numerous cases in which a party may be held criminally guilty of committing forgery when the parties sought to be charged by the forgery cannot avoid their liability as made apparent upon the face of the forged instrument. *Abbott v. Rose*, 62 Me. 202, 203, 16 Am. Rep. 427. But nearly all these cases involve the negligence of the parties sought to be charged by the forged instrument either by their own failure to properly examine it, or by leaving it with blanks to be filled in by the agency of some other person, or by some other neglect of duty. But we have already determined that the defendant Etta O. Hill was not negligent. Therefore the only remaining question to be determined is whether she is liable upon this forged paper to the making and uttering of which her negligence in no way contributed. The law is well established that she cannot be held. The note taken by the bank with her name upon it was not her contract. It is no more binding upon her than if O'Connor had written her name upon the note with his own hand. It has been held in numerous cases that a forged paper without negligence imputed to the party affected by the forgery is not a binding contract, whether the forgery was

committed by alterations or a substitution of the forged contract for the supposed or genuine contract.

In *Greenfield Savings Bank v. Stowell*, 123 Mass. 196, 25 Am. Rep. 67, Gray, C. J., in an elaborate opinion, reviewing both the common and civil law upon this point, declares that "it is a general rule of our law that a fraudulent and material alteration of a promissory note, without the consent of the party sought to be charged thereon, whether made before or after the delivery of the note, renders the contract wholly void as against him, even in the hands of one who takes it in good faith and without knowledge or reasonable notice of the alteration"; and specifically held that the alteration of a promissory note by one of the makers by increasing the amount for which it is made by the insertion of words and figures in blank spaces left in the printed form on which it is written avoids the note as to such makers who do not consent thereto, even in the hands of a bona fide holder for a valuable consideration. To the same effect is *Draper v. Wood*, 112 Mass. 315, 17 Am. Rep. 92.

Waterman v. Vose et al., 43 Me. 504, is in perfect accord with the rule above laid down, and holds that the alteration of a note by the maker, after it was indorsed, by adding the words "with interest," was material, and if made without the consent of the indorser relieved him of liability, though the alteration was made before delivery. The reason upon which this conclusion was based is that "an alteration afterwards, which is material, without his consent, will make it a contract which he never executed, and which it is manifest he never intended to, and it is a new contract to which he can in no sense be charged as a party, and he cannot be bound by it." See, also, *Abbott v. Rose*, 62 Me. 194, 16 Am. Rep. 427, and *Fay v. Smith*, 1 Allen (Mass.) 477, 79 Am. Dec. 752, which is precisely in point in fact and law.

The ground upon which these cases seem to be decided is that the forgery destroyed the identity of the defendant's contract and presented a different or new contract, which he never made.

Under these well-established rules of law, applicable to the case at bar, our conclusion is that the note signed by Etta O. Hill upon which she is sought to be charged was a forgery with respect to her signature, not her contract, and not binding upon her.

Motion overruled.

(102 Me. 306)

PUBLIC WORKS CO. v. CITY OF OLD TOWN.

(Supreme Judicial Court of Maine. Dec. 18, 1906.)

1. WATERS AND WATER COURSES—PUBLIC WATER SUPPLY—CONTRACTS—CONSTRUCTION.

A contract made in 1890 by the plaintiff's predecessors, to whose right it has succeeded, with the defendant, in relation to furnishing

water for fire protection and other public purposes, and for the compensation to be charged for water for domestic purposes contained in this clause: "Said first party agrees to furnish water at its mains without extra charge, for the following municipal purposes: * * * For eighteen (18) taps or faucets in computing which each orifice beyond the main shall be counted as one tap, except that in the town hall and in schoolhouses one faucet may be connected with all the water-closets and urinals in any one building. But float or spring valves shall be used in all water-closets and urinals and water troughs, and no waste of water shall be allowed." In addition to the water charged in the account annexed, the plaintiff has for many years furnished without charge water for the city hall with 13 separate taps or faucets, for the city farm with 6 faucets, and for the city farm stable with 1 faucet; each building being connected with the main by one service pipe. The plumbing for each water-closet and for the urinal in the town hall is entirely separate and distinct from that of each other.

Held, that each of these faucets was an orifice beyond the main and must be counted as one tap, and that the plaintiff had performed its part of the contract in this respect by furnishing water at its mains for at least 18 faucets in these public buildings.

2. SAME.

The city having failed to notify the company of its election as to what particular faucets the company should furnish without extra charge, *held*, that the company had a right to make such election and to charge for water furnished in addition to that to be supplied free of charge.

3. SAME.

There being no contract to the contrary, *held*, that the company had the right to put on meters and charge for the water at fair and reasonable meter rates.

(Official.)

Report from Supreme Judicial Court, Penobscot County.

Action by the Public Works Company against the city of Old Town. Heard on report. Judgment ordered for plaintiff, and case remanded to nisi prius for computation of interest.

Assumpsit upon account annexed, in which the plaintiff sought to recover for water furnished by it to the defendant for municipal purposes at its schoolhouses and its pesthouse, upon an implied promise.

Tried at the January term, 1906, of the Supreme Judicial Court, Penobscot county. Plea, the general issue. At conclusion of the testimony, the case was "reported to the law court for determination."

The case appears in the opinion.

Argued before WISWELL, C. J., and EMERY, SAVAGE, POWERS, PEABODY, and SPEAR, JJ.

Charles H. Bartlett, for plaintiff. F. J. Whiting, for defendant.

WISWELL, C. J. This is an action of assumpsit upon an account annexed to the writ, in which the plaintiff seeks to recover for water furnished by it to the defendant for municipal purposes at its schoolhouses and its pesthouse, upon an implied promise. The city admits that it has received and used the water charged for, but

claims that this water was to be furnished by the plaintiff to the city free of extra charge under a contract made in the year 1890 between the predecessors of the plaintiff and the then town of Oldtown. Both parties, it is agreed, have succeeded to, and are now bound by, this contract.

In the contract of 1890, in relation to furnishing water for fire protection and other public purposes, and for the compensation to be charged for water for domestic purposes, there was this clause: "Said first party agrees to furnish water at its mains without extra charge, for the following municipal purposes: * * * For eighteen (18) taps or faucets in computing which each orifice beyond the main shall be counted as one tap, except that in the town hall and in schoolhouses one faucet may be connected with all the water-closets and urinals in any one building. But float or spring valves shall be used in all water-closets and urinals and water troughs, and no waste of water shall be allowed."

In addition to the water charged in the account annexed, the plaintiff has furnished for many years water for the city hall with 13 separate taps or faucets, for the city farm with 6 faucets, and the city farm stable with 1 faucet; each building being connected with the main by one service pipe. The contention of the defense is that under this clause for water to be furnished to the municipality without extra charge "for eighteen taps or faucets" the service pipe from the company's main to each public building should only be counted as one tap or faucet, and that consequently the company has not furnished water for all the public buildings and schoolhouses, both that charged in the account annexed, and that not charged, in excess of the requirements of the contract for water without extra charge.

But this contention is answered by the express stipulation of the parties, wherein this language is used: "In computing which each orifice beyond the main shall be counted as one tap." The parties seem to have anticipated that without this language a question might arise as to the meaning of the clause, and to have used the language quoted for the very purpose of making the meaning clear and unmistakable. It was clearly provided that each connection at the main should not be counted as one of the 18 taps for which the company should furnish water without extra charge, but that each opening beyond the main should be so counted. This is made even more unmistakable by the exception immediately following: "Except that in the town hall and in schoolhouses one faucet may be connected with all the water-closets and urinals in any one building."

Again, the defense claims that under the exception above quoted the water company has not furnished water, exclusive of the water charged in the account annexed, for the number of faucets specified in the con-

tract, and that consequently some at least of the water charged should be included in the water which was to be furnished without extra charge. The contract provided, as we have seen, that "one faucet may be connected with all the water-closets and urinals in any one building," in the town hall and school-houses. But the undisputed testimony shows that this has not been done; that, upon the contrary, the plumbing for each water-closet and for the urinal in the town hall is entirely separate and distinct from that of each other, so that each opening in the water pipe for these fixtures must be counted as one tap or faucet.

Under this construction of the contract the plaintiff has performed its part of the contract in this respect by furnishing water at its mains for at least 18 faucets in these public buildings apart from the water sued for in this suit. It is true that the city has never notified the company of its election as to what particular faucets the company should furnish water for without extra charge, but on account of this failure on the part of the city to elect the company have the right to do so, and to charge for water furnished in addition to that to be supplied free of extra charge.

The account sued is made up in part of flat or annual rates and in part of meter rates, which are admitted to be fair and reasonable if the company had the right to put on meters. That it had such a right, there being no contract to the contrary, and the rates being reasonable, cannot be doubted. *Robbins v. Bangor Railway Company*, 100 Me. 498, 62 Atl. 136, 1 L. R. A. (N. S.) 963.

No question is raised by the defense as to the liability of the city upon an implied promise to pay for services rendered for a municipal purpose, where, as in this case, the city received the beneficial use of the services rendered, and where, from the fact that bills for this water furnished were rendered by the company to the city at the end of each six months, the city may be presumed to have known that the water was furnished under an expectation and claim of payment therefor.

Under this construction of the contract of 1890, and the defendant's admissions, the plaintiff is entitled to judgment for the sum of \$1,457.50, and interest upon various portions thereof from the dates of demand therefor to the date of judgment. The case may be remanded to nisi prius for the computation of this interest.

So ordered.

(102 Me. 361)

BENNETT v. DYER.

(Supreme Judicial Court of Maine. January 25, 1907.)

DAMAGES — ELEMENTS OF COMPENSATION — BREACH OF CONTRACT—ANTICIPATED CONSEQUENCES.

In an action to recover damages for breach of contract to purchase the plaintiff's steam

laundry business in Camden, the plaintiff claimed, as an element of damages, that, "after he had made a contract for the sale to the defendant of the laundry business, he sold the house in which he lived in Camden for the sum of \$300 or more less than it was fairly worth at the time of such sale, intending to move away from Camden, because he believed it would be advantageous for the health of one member of his family," and offered to prove "that during the negotiation for the sale of the laundry business, and prior to the completion of the contract, he informed the defendant that his purpose in making the contract for the sale was so that he could move away from the town, which he desired to do for the reasons above stated, and that to do this he would be obliged to sell the house in which he was living, and gave these as the reasons why he should require the payment of \$500 on account of the purchase before the contract was completed—which sum by agreement was afterwards reduced to \$250, and was paid by the defendant to the plaintiff—and that subsequently, and after the contract was made, and before the alleged breach, he did sell the house and land for about \$300 less than its fair market value."

The presiding justice "ruled that, notwithstanding the proof of the above facts, any loss sustained by the plaintiff, under the circumstances, in selling the house and lot—in no way connected with the laundry business—was not approximately caused by the defendant's breach of contract, because such loss was not one that would have been contemplated by the defendant, even if informed of the facts as above stated."

Held, that the ruling was right, and that nothing appears in the evidence offered which naturally should have led the defendant to contemplate a loss to the plaintiff, in the contemplated sale of his house; the presumption being that the sale of the house would produce its market value.

(Official.)

Exceptions from Supreme Judicial Court, Knox County.

Action by E. L. Bennett against Edmund W. Dyer. Verdict for defendant, and plaintiff excepts. Exceptions overruled.

Action of assumpsit to recover damages for an alleged breach of a contract to purchase the plaintiff's steam laundry business in Camden and the property connected therewith.

Tried at the September term, 1906, of the Supreme Judicial Court, Knox county. Plea, the general issue. At the trial, the presiding justice made a certain ruling in relation to the question of damages, to which ruling the plaintiff took exceptions, and the case was sent directly to the law court without further proceedings at nisi prius.

The case appears in the opinion.

Argued before EMERY C. J., and WHITEHOUSE, SAVAGE, POWERS, PEABODY, and SPEAR, JJ.

Arthur S. Littlefield, for plaintiff. J. H. Montgomery, for defendant.

SAVAGE, J. Action to recover damages for breach of contract to purchase the plaintiff's steam laundry business in Camden, and the property connected therewith.

At the trial below, in opening, the plaintiff's counsel stated that one of the principal elements of damage which he claimed to re-

cover was "that the plaintiff, after he had made a contract for the sale to the defendant of the laundry business, sold the house in which he lived in Camden for the sum of \$300 or more less than it was fairly worth at the time of such sale, intending to move away from Camden, because he believed it would be advantageous for the health of one member of his family." The presiding justice then intimated that he did not think such a loss was one which naturally followed from the defendant's breach of the contract, if any, or one that the defendant did contemplate or should have contemplated, and consequently that this loss could not be recovered in this action. Thereupon the plaintiff offered to prove "that during the negotiations for the sale of the laundry business, and prior to the completion of the contract, he informed the defendant that his purpose in making the contract for the sale was so that he would move away from the town, which he desired to do for the reasons above stated, and that to do this he would be obliged to sell the house in which he was then living, and gave these as the reasons why he should require the payment of \$500 on account of the purchase before the contract was completed—which sum by agreement was afterwards reduced to \$250, and was paid by the defendant to the plaintiff—and that subsequently, and after the contract was made, and before the alleged breach, he did sell the house and land for about \$300 less than its fair market value." The counsel also stated that, unless this alleged loss was an element of damage recoverable in this action, he would not care to proceed to trial.

Thereupon the presiding justice "ruled that, notwithstanding the proof of the above facts, any loss sustained by the plaintiff, under the circumstances, in selling the house and lot—in no way connected with the laundry business—was not approximately caused by the defendant's breach of contract, because such loss was not one that would naturally be expected to follow from such alleged breach, nor would have been contemplated by the defendant, even if informed of the facts as above stated." To this ruling the plaintiff excepted, and the case was brought directly to the law court, without further proceeding below; both parties stipulating that, if the ruling was sustained, this action, as well as another action by this defendant against this plaintiff to recover back the \$250 paid on account of the purchase price of the laundry business, shall both be entered, "Neither party, no further action for the same cause," and that, if the exceptions are sustained, both actions are to stand for trial.

We think the exceptions must be overruled. We do not need to inquire, and do not inquire, what would have been the effect if the seller, in connection with the trade, had informed the purchaser of his intention or

purpose in consequence of the trade to do some act which might naturally result in a loss. It is clear that in the case as first stated by counsel there was no connection whatever between the laundry trade and the subsequent sale of the house. Neither the sale of the house nor any loss therefrom could have been contemplated by the defendant. Nor upon the legal theory advanced by the plaintiff is he aided by the proof offered. What mattered it if he did say that he would move away from town, to benefit the health of a member of his family, and that he would be obliged to sell his house, and that he gave these as reasons for requiring an advance payment? Nothing was said about the probability of incurring a loss on the sale, and nothing was reasonably to be inferred. The presumption would be that the sale would produce the market value of the house, for aught that appears here. The fact of the intended sale of the house was brought home to the defendant, but nothing which naturally should have led him to contemplate a loss to the plaintiff.

The defendant therefore is not liable for this loss, even if it should be admitted that there was such a connection between the laundry trade and the sale of the house that he might have been held liable under some circumstances, which question we do not pass upon.

Exceptions overruled.

Action to be entered below:

"Neither party no further action."

(102 Me. 527)

In re RAILROAD TAXATION.

(Supreme Judicial Court of Maine. March 20, 1907.)

1. TAXATION—EXCISE TAX ON RAILROADS—CONSTITUTIONAL LAW.

Questions submitted by the House of Representatives, March 14, 1907, with answers of the justices of the Supreme Judicial Court thereon.

An excise tax prohibiting the assessment of all other taxes upon railroads, their property, or stock according to their just value is not plainly forbidden by any provision in the Constitution, and is therefore constitutional.

2. SAME.

A tax can be lawfully levied upon the franchise of a railroad and also a separate tax upon the roadbed, rolling stock, and fixtures at their cash value.

3. SAME.

The present law whereby railroads operating in this state are taxed upon a percentage of their gross receipts is not repugnant to the provisions of the Constitution of this state relative to taxation. The tax is an excise tax upon the franchise and measured as to amount by the gross earnings of the railroad.

(Official.)

In House of Representatives,

February 7, 1907.

Ordered, that the justices of the Supreme Judicial Court are hereby respectfully requested to give to this house, according to the provisions of the Constitution of this

state in this behalf, their opinion on the following questions:

First. Is an excise tax prohibiting the apportionment and assessment of all other taxes upon railroads, their property or stock according to their just value, constitutional?

Second. Can a tax be lawfully levied upon the franchise of a railroad, and also a separate tax upon the roadbed, rolling stock, and fixtures at their cash value?

Third. Is the present law whereby railroads operating in this state are taxed upon a percentage of their gross receipts repugnant to the provisions of the Constitution of this state relative to taxation?

House of Representatives, March 14, 1907.

Read and passed.

E. M. Thompson, Clerk.

State of Maine.

To the House of Representatives.

In obedience to the Constitution the undersigned justices of the Supreme Judicial Court individually herein give their opinion required by, and upon the questions stated in, the order of the House of Representatives passed March 14, 1907.

It is a fundamental principle of constitutional law that the legislative power over taxation for public purposes, including all questions of what shall be taxed or exempted from taxation and all questions of kinds, forms, and modes of taxation, is limited only by the positive requirements or prohibitions of the Constitution. It is also a fundamental principle that no act of the Legislature shall be adjudged unconstitutional unless it is plainly forbidden by some plain provision of the Constitution.

The only provision in the Constitution of this state relating to the exercise of the legislative power of taxation is that in section 8 of article 9 as follows: "All taxes upon real and personal estate assessed by authority of this state shall be apportioned and assessed equally according to the just value thereof." This provision simply requires that any tax which shall be lawfully imposed upon any kind or class of real or personal property shall be apportioned and assessed upon all such property equally, etc. *Portland v. Water Co.*, 87 Me. 135. It does not require the Legislature to impose taxes upon all the real and personal property within the state of whatever kind and to whatever use applied. The Legislature may, nevertheless, determine what kinds and classes of property shall be taxed, and what kinds and classes shall be exempt from taxation. It has exercised this power of exemption frequently and continually, without question, since the adoption of the Constitution. *Portland v. Water Company*, supra. See the 11 paragraphs of section 6 of chapter 9, Rev. St., for numerous instances of such exemptions. It is now too late to question the power.

Nor does the constitutional provision prohibit the Legislature from imposing other

taxes than those on real and personal property. The Legislature is left free to impose other taxes such as poll taxes, excise taxes, license taxes, etc. It can impose such taxes in addition to, or instead of, taxes on property. It can subject persons and corporations to both or either kinds of taxation or exempt them from either kind.

Further, the Legislature can adopt such mode, or measure, or rule as it deems best for determining the amount of an excise or license tax to be imposed, so that it applies equally to all persons and corporations subject to the tax. It may make the amount depend on the capital employed, the gross earnings, or the net earnings, or upon some other element.

Applying the foregoing propositions to the questions submitted, it is our opinion:

First. That an excise tax prohibiting the assessment of all other taxes upon railroads, their property, or stock according to their just value is not plainly forbidden by any provision in the Constitution, and is therefore constitutional.

Second. That a tax can be lawfully levied upon the franchise of a railroad and also a separate tax upon the roadbed, rolling stock, and fixtures at their cash value.

Third. That the present law whereby railroads operating in this state are taxed upon a percentage of their gross receipts is not repugnant to the provisions of the Constitution of this state relative to taxation. The tax is an excise tax upon the franchise and measured as to amount by the gross earnings of the railroad.

In support of the above opinion we cite the following authorities: *State v. Western Union Telegraph Co.*, 73 Me. 518; *State v. Maine Central R. R. Co.*, 74 Me. 383; *Maine v. Grand Trunk Ry. Co.*, 142 U. S. 217, 12 Sup. Ct. 163, 35 L. Ed. 994; *Commonwealth v. N. E. State & T. Co.*, 18 Allen (Mass.) 393; *Cooley on Taxation* (2d Ed.) 232; *Northampton Co. v. Coal Co.*, 75 Pa. 461.

Respectfully your obedient servants,
LUCILIUS A. EMERY,
WM. P. WHITEHOUSE,
SEWALL C. STROUT,
ALBERT R. SAVAGE,
FREDERICK A. POWERS,
HENRY C. PEABODY,
ALBERT M. SPEAR,
CHARLES F. WOODARD.

(102 Me. 353)

GOODWIN v. FALL.

(Supreme Judicial Court of Maine. Jan. 25, 1907.)

1. ESTOPPEL—BY DEED—EFFECT OF FRAUD.

The general rule that a party will be estopped to question his own deed does not apply where the deed has been procured by fraud, as the doctrine is now well established that a conveyance obtained by fraud will not operate by way of estoppel against the grantor.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Estoppel, § 25.]

2. DEEDS—VALIDITY—MISREPRESENTATION.

A bond or deed procured by fraud will not operate as an estoppel upon the party defrauded. Relief may be granted under the circumstances at law, not only when fraud enters into it and vitiates the execution of the instrument, but when it consists in the misrepresentation of the nature and value of the consideration.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 16, Deeds, §§ 163-182; vol. 8, Bonds, §§ 44, 45.]

3. FRAUD—DECEPTION CONSTITUTING FRAUD—FALSITY AND KNOWLEDGE THEREOF.

If a person states to another person that which he knows to be false, or recklessly states that which he does not know to be true concerning a material matter, and the person to whom such statement is made is justified by the circumstances connected with the matter concerning which such statement is made in relying upon such statement without further investigation or inquiry, then such statement is characterized in law as a fraudulent representation. It is classified among the wrongs inflicted by one person upon another by means of deception, and in contemplation of law an intention to deceive is always involved.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Fraud, §§ 2-8.]

4. SAME.

A fraudulent purpose may be inferred from a willfully false statement in relation to a material fact; and it is not always necessary to prove that the person making such statement knew that the facts stated by him were false. If he recklessly states as of his own knowledge material facts susceptible of knowledge which are false, it is in effect a fraud upon the party who relies and acts upon the statement as true.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Fraud, §§ 5, 46, 47.]

5. TRESPASS—CUTTING TIMBER—MISREPRESENTATIONS BY GRANTEE OF TIMBER—EVIDENCE.

In the case at bar the original plaintiff, Newell Goodwin, died after the commencement of the suit and before trial, and the action was prosecuted by his executor, Mr. Goodwin by deed had conveyed to the defendant a certain parcel of land, also "all the growth" standing on a certain other lot of land bounded on the north "by the above described lot this day deeded to said Charles W. Fall, running easterly to a certain spotted yellow birch tree standing by an elm." The defendant cut and removed certain growth standing on the last-described land, and Mr. Goodwin brought an action of trespass quare clausum against the defendant, claiming that the defendant had committed a trespass, although the defendant had only operated within the limits of the last-described land. At the trial the plaintiff claimed that another yellow birch tree standing within one or two rods from a "scraggy maple," about 30 rods westerly from the "spotted yellow birch by the elm," was the monument for the northeasterly corner of the last-described land intended and agreed upon by the parties before the deed was executed, and that Mr. Goodwin was induced to assent to the bound described in the deed by means of the defendant's positive assurance that it was only "between one and two rods" from the "scraggy maple." The testimony of the magistrate who wrote the deed was offered in behalf of the plaintiff to show that the defendant made fraudulent representation to the grantor, Mr. Goodwin, respecting the location of the "spotted yellow birch near the elm," for the purpose, as it was claimed, of inducing Mr. Goodwin to accept that monument as the northeast corner to be mentioned in the deed, and that Mr. Goodwin was thereby induced to execute the deed as it was written with calls embracing the growth on six acres more than he intended to

sell to the defendant. The plaintiff claimed that this evidence, considered in connection with the other evidence, was sufficient to create an estoppel against the defendant and preclude him from claiming the growth on land embraced in the deed thus obtained by means of a false representation, and that the plaintiff was not estopped by a deed thus obtained by fraud. The presiding justice excluded the evidence of the magistrate and ordered a verdict for the defendant.

Held, that the evidence of the magistrate respecting the representation made by the defendant to Mr. Goodwin, the grantor, should have been admitted, and the case submitted to the jury upon the question of estoppel.

(Official.)

Exceptions from Supreme Judicial Court, York County.

Action by Newell Goodwin against Charles W. Fall. Verdict directed for defendant, and plaintiff excepts to the rulings of the court. Exceptions sustained.

Trespass quare clausum to recover damages for cutting wood and timber on land claimed by the original plaintiff, Newell Goodwin, who died after the action was commenced and before the trial thereof, and the action was prosecuted by his executors. Plea, the general issue, with a brief statement alleging title in the defendant to all the growth cut by him by virtue of a deed from said Newell Goodwin to the defendant.

Tried at the January term, 1906, of the Supreme Judicial Court, York county. During the trial the plaintiff offered certain evidence, which was excluded by the presiding justice. To this ruling the plaintiff excepted. At the conclusion of the evidence the presiding justice "ruled, as matter of law, that the evidence presented was not sufficient to authorize a verdict in favor of the plaintiff, and directed a verdict for the defendant," and the verdict was so rendered. To this ruling the plaintiff also excepted.

The case fully appears in the opinion.

Memorandum. One of the justices sitting at the term of the law court at which this case was argued did not sit in this case, being disqualified under the statute by reason of having ruled therein at nisi prius.

Argued before WHITEHOUSE, SAVAGE, POWERS, and SPEAR, JJ.

George F. & Leroy Haley, for plaintiff. Mathews & Stevens, for defendant.

WHITEHOUSE, J. This is an action of trespass quare clausum to recover damages for cutting timber and wood on land claimed by the original plaintiff, Newell Goodwin. The plea is the general issue, with a brief statement alleging title in the defendant to all the growth cut by him by virtue of a deed from Newell Goodwin, dated October 18, 1899.

Newell Goodwin deceased after the commencement of the suit and before trial, and the action is now prosecuted by his executor.

The defendant purchased of Goodwin a certain parcel of woodland, and also "all

the growth" standing on a certain other lot bounded on the north "by the above-described lot this day deeded to said Charles W. Fall, running easterly to a certain spotted yellow birch tree standing by an elm." This action of trespass grows out of a controversy respecting the northeastern corner of the lot thus located by the description in the deed at "a certain yellow birch tree standing by an elm."

The plaintiff claims that another yellow birch tree standing within 1 or 2 rods from a "scraggy maple," about 80 rods westerly from the "spotted yellow birch by the elm," was the monument for the northeastern corner intended and agreed upon by the parties before the deed was executed, and that Mr. Goodwin was induced to assent to the bound described in the deed by means of the defendant's positive assurance that it was only "between one and two rods" from the "scraggy maple."

With respect to the alleged acts of trespass, the case discloses the following stipulation: "It is agreed that if the line is from the place marked 'yellow birch' up by the elm, if that is the corner, there has been no trespass; that if it is down where the maple is, or anywhere between them, it is admitted that there has been a trespass."

It appears from the testimony of a surveyor, and is not in controversy, that a large yellow birch tree, at least sixteen inches in diameter, spotted on three sides for a corner, was readily found by him, in making a survey after the commencement of this suit, near a large elm at the north end of the easterly line claimed by the defendants; but about 80 rods westerly from this spotted yellow birch the stump of another yellow birch tree of about the same size, recently cut, was found at the northerly end of the line claimed by the plaintiff, within 1 rod and 22 links from the large "scraggy maple."

The testimony of J. S. Wentworth, the magistrate who wrote the deed in question from Newell Goodwin to the defendant, was offered in behalf of the plaintiff, with the following statement respecting its purpose and tendency:

"Our position is, and the evidence that we offer will tend to prove, and I offer it for the purpose of proving, that at the time the deed was prepared Mr. Goodwin gave Mr. Wentworth instructions, in the presence of Mr. Fall, to run the line opposite the maple tree marked upon the plan, and run across to the line of Orren B. Goodwin, or Goodwin's heirs, as afterwards stated in the deed; that at that time Mr. Fall stated to him that he did not think it was quite far enough to take in all of the old growth, and said, 'Why not run to the yellow birch that is near the elm, about a rod or two?' Mr. Goodwin states, 'I don't remember any elm there; but I do remember a yellow birch there,' and Mr. Fall then states that there is an elm close to the yellow birch, and it

is only between one and two rods from the maple. Mr. Goodwin says, 'Then, if that is so, if it ain't any farther than that, a rod or two, it won't make any difference and it may go to that point'; and that was the point we claim at which they intended to make the deed, and that Mr. Fall having made that representation—and, according to the testimony, he had walked that same forenoon over that same road—that he is estopped claiming it in any different place." The rules of evidence in equity would be the same as in law, and I do not understand that there is any difference in regard to the effect of an estoppel if a man has, by his conduct or by his declaration, misled a party to that party's disadvantage, and he ought not to be allowed to take advantage of his own wrong, and if the testimony of this boy is true that he had walked over that that forenoon by both trees, and the boy said he had, and had walked down there as the boy says he had that long distance, 25 rods and 62 links, he knew when he was making that statement that it was false, and he cannot be allowed to take advantage of it.

Upon objection by the defendant's counsel, the presiding judge ruled that this evidence was not admissible, and thereupon ordered a verdict for the defendant. The case comes to this court upon exceptions to these rulings.

The evidence of the magistrate excluded by the court does not appear to have been offered for the purpose of authorizing the jury to substitute the yellow birch tree near the "scraggy maple," for the spotted yellow birch by the elm which was clearly designated in the deed as a monument to mark the northeast corner. It was obviously inadmissible for that purpose. It had not been claimed, or suggested that there was any ambiguity in the description of the bounds in the deed, or that any uncertainty in regard to them had been created by extrinsic evidence. The monument at the northeast corner was so clearly designated that it was at once definitely located on the surface of the earth by the surveyor, and the "clear and unambiguous calls of a deed cannot be set aside and different ones substituted in their place by parol evidence of the acts of the parties either before or after the deed is made." *Ames v. Hilton*, 70 Me. 41, and cases cited.

The line run from the spotted yellow birch by the elm must, therefore, be deemed the true boundary line as disclosed in the deed, and in that event, as before seen, the parties agreed in the report that "there has been no trespass." It is not contended by the defendant, however, that this stipulation was intended to be conclusive upon the question of the defendant's liability. It was designed simply as an agreed statement of fact that there had been no cutting beyond the line described in the deed. It was claimed at the trial, and insisted in argument by the plaintiff's counsel, that the evidence of the magistrate was admissible to

show that the defendant made fraudulent representation to Mr. Goodwin respecting the location of the "spotted yellow birch near the elm," for the purpose of inducing him to accept that monument as the northeast corner to be mentioned in the deed; that Mr. Goodwin was thereby induced to execute the deed, as it was written with calls embracing the growth on six acres more than he intended to sell to the defendant.

It is contended by the plaintiff that this evidence, considered in connection with the other evidence in the case, is sufficient to create an estoppel against the defendant and preclude him from claiming the growth on land embraced in a deed thus obtained by means of a false representation, and that the plaintiff is not estopped by a deed thus obtained from him by fraud.

It appears from the evidence offered and excluded that Mr. Goodwin gave the surveyor instructions, in the presence of the defendant, to run the line opposite the maple tree which was afterwards designated on the plan as "scraggy maple," but, in order to take in all of the old growth, the defendant preferred to have the line run to "the yellow birch near the elm," and stated as a positive fact that it was "only between one and two rods" from the maple, whereas in truth and in fact as already noted it was more than 30 rods distant from it. It also appears from the testimony of the defendant's son that only a few hours before the deed was prepared he and his father went over the lot, down past the "scraggy maple" to the yellow birch by the elm, and that his father then spotted the yellow birch before they went to the magistrate's office. It is claimed that the jury would have been warranted in finding that the defendant stated to Mr. Goodwin what he knew to be false, or recklessly stated what he did not know to be true, and that Mr. Goodwin, being aged and infirm and residing two miles distant from the lot, was justified in relying upon the defendant's statement without further investigation or inquiry. Such a statement is characterized in law as a fraudulent representation. It is classified among the wrongs inflicted by one person upon another by means of deception, and in contemplation of law an intention to deceive is always involved, but a fraudulent purpose may be inferred from a willfully false statement in relation to a material fact; and it is not always necessary to prove that the defendant knew that the facts stated by him were false. If he recklessly states as of his own knowledge material facts susceptible of knowledge which are false, it is in effect a fraud upon the party who relies and acts upon the statement as true. *Braley v. Powers*, 92 Me. 209, 42 Atl. 362; *Litchfield v. Hutchinson*, 117 Mass. 195.

Substantially the same rule prevails in regard to the doctrine of estoppel. It was expressly declared by this court in *Martin v. Maine Central Railroad Co.*, 83 Me. 100, 21

Atl. 740, that "it is not necessary that the original conduct creating the estoppel should be characterized by an actual intention to mislead and deceive," and this was expressly affirmed in *Rogers v. Portland & B. St. Ry.*, 100 Me. 93, 60 Atl. 713, 70 L. R. A. 574. See, also, *Trenton Banking Co. v. Duncan*, 86 N. Y. 221.

The general rule that a party will be estopped to question his own deed does not apply where the deed has been procured by fraud. *Harding v. Randall*, 15 Me. 332. The doctrine is now well established that a conveyance obtained by fraud will not operate by way of estoppel against the grantor. 11 Encyc. of Law, p. 394; 16 Cyc. of Law & P. p. 708. A bond or deed procured by fraud will not operate as an estoppel upon the party defrauded. Relief may be granted under the circumstances at law, not only when fraud enters into it and vitiates the execution of the instrument, but when it consists in the misrepresentation of the nature and value of the consideration. *Herman on Estoppel*, § 587; *Bigelow on Estoppel*, 255; *Hazard v. Irwin*, 18 Pick. 95; *Phillips v. Potter*, 7 R. I. 289, 82 Am. Dec. 598; *Hoitt v. Holcomb*, 23 N. H. 535.

It will be remembered that in this case the question does not arise respecting a conveyance of land in fee. It was a permit to cut and remove the growth standing on the land described. By the same deed the defendant took a conveyance of one lot of land in fee, and the right to cut and remove the growth standing on the parcel in question. At the time of the commencement of this action this right to cut and remove the growth from the disputed section had been fully exercised, and he had no further interest in that part of the permitted lot from which the growth had been removed. There was no necessity or occasion for a proceeding in equity to reform the deed. The defendant had no further right or interest in the land. If the plaintiff's contention is correct, the true line to which the defendant had the right to cut should have been run from the yellow birch within 2 rods of the "scaggy maple," instead of the "spotted yellow birch by the elm," 30 rods farther east. The apparent right to cut between these two lines, the plaintiff says, was obtained by fraud. The growth standing between these two lines was on the plaintiff's land, upon which the defendant had in truth no lawful right or authority to enter; his prima facie right having been vitiated by fraud. The line claimed by the plaintiff beyond which the defendant acquired no valid right to cut is no more uncertain or indefinite in this action of trespass than it would be in an action on the case to recover damages for the defendant's fraudulent representations, and the assessment of damages would be no more difficult in the one case than in the other. There seems to be no reason in principle why the doctrine of equitable estoppel should not apply to such a case.

In *Stubbs v. Pratt*, 85 Me. 429, 27 Atl. 341, the court say: "The doctrine of estoppel has been very much extended within the last half century, and is now as freely applied in actions at law as in suits in equity. It is a doctrine so well calculated to suppress fraud and oppression that we do not wish to be understood as limiting its application in the slightest degree in proper cases."

It is accordingly the opinion of the court that in the case at bar the evidence of the magistrate respecting the representation made by the defendant to the grantor before the deed was executed should have been admitted and the case submitted to the jury upon the question of estoppel.

Exceptions sustained.

(102 Me. 340)

HAYFORD v. MUNICIPAL OFFICERS OF CITY OF BANGOR.

(Supreme Judicial Court of Maine. Jan. 24, 1907.)

1. CERTIORARI—NATURE AND GROUNDS—REVIEW OF ERRORS IN LAW.

The writ of certiorari can only be issued to correct errors in law.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Certiorari, §§ 1, 180-182.]

2. SAME—QUESTIONS OF FACT.

When the issues raised by the assignment of errors relates entirely to questions of fact to be determined by evidence outside of the record, such questions cannot be reached by a writ of certiorari.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Certiorari, §§ 180-182.]

3. SAME—DISCRETION OF COURT.

The writ of certiorari is not a writ of right, but one of discretion. If the record offered exhibits errors, it is within the discretion of the court to admit evidence aliunde the record to show that, even though erroneous, justice and equity do not require that it should be quashed. When such record and evidence have been produced, it is within the discretion of the court to issue or refuse the writ.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Certiorari, § 177.]

4. EMINENT DOMAIN—NATURE OF POWER—VALIDITY OF EXERCISE—DETERMINATION.

The Constitution of Maine (article 1, § 21) provides that "private property shall not be taken for public uses without just compensation; nor unless the public exigencies require it." Under this section, the first proposition arising with respect to the taking of private property by the right of eminent domain is whether the public exigency or necessity requires it. This is a legislative question, and is not open to judicial revision.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Eminent Domain, §§ 165, 166.]

5. SAME—EFFECT OF LEGISLATIVE ACTION.

The Legislature, by the enactment of section 89 of chapter 4 of the Revised Statutes, in relation to the taking of "suitable lands for . . . a public library building" by cities and towns, has not undertaken to say that any specific piece of land may be taken, but has declared that the public exigency, requiring that some private property may be taken for "a public library building," exists, and thus the exigency or necessity is established by the enactment of the statute authorizing the taking. In such a case, municipal officers do not pass upon the question of necessity, as that has already been

done by the Legislature before the duties of the municipal officers under this section of the statute begin.

6. SAME—DELEGATION OF POWER—MUNICIPAL CORPORATIONS.

The Legislature, having the constitutional right of taking lands for a public purpose, also has the right to delegate such authority to municipal officers, and the act of municipal officers in the exercise of the authority conferred by Rev. St. c. 4, § 89, to take land for a public library building, is the exercise of a legislative function, and is not reviewable by the court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Eminent Domain, §§ 168-170.]

7. SAME—EXTENT OF RIGHT—DETERMINATION.

Not only is the question of exigency or necessity for the taking a matter for the Legislature, or those to whom it delegates its authority, but also the extent to which property may be taken is also a matter for the Legislature.

(Official.)

Report from Supreme Judicial Court, Penobscot County.

Petition by Laura Hayford, trustee, for writ of certiorari to quash a record of the municipal officers of the city of Bangor. Case reported. Writ denied, and petition dismissed.

Petition for a writ of certiorari to quash a record of the municipal officers of the city of Bangor, wherein are contained the proceedings of the city in taking certain real estate of the plaintiff, in said city, by right of eminent domain for a public library building, under the provisions of Rev. St. c. 4, § 89.

Heard at the October term, 1906, of the Supreme Judicial Court, Penobscot County. At the conclusion of the evidence, the case by agreement was reported to the law court "to be determined upon so much of the evidence as is legally admissible."

The case appears in the opinion.

Argued before EMERY, C. J., and WHITEHOUSE, SAVAGE, POWERS, PEABODY, and SPEAR, JJ.

Charles F. Woodard and Erastus C. Ryder, for plaintiff. E. P. Murray, O. A. Bailey, and T. D. Bailey, for defendant.

SPEAR, J. This case involves an application for a writ of certiorari to quash a record of the municipal officers of the city of Bangor, wherein are contained the proceedings of the city, in taking certain real estate of the plaintiff by right of eminent domain for a public library building, in accordance with Rev. St. c. 4, § 89, which reads: "Any city or town containing more than one thousand inhabitants, upon petition in writing signed by at least thirty of its taxpaying citizens, directed to the municipal officers, describing the land to be taken as herein-after provided, and the names of the owners thereof so far as they are known, at a meeting of such town, or of the mayor, aldermen and council of such city may direct such municipal officers to take suitable lands for public parks, squares, or a public library

building; and thereupon such officers may take such land for such purposes, but not without consent of the owner, if at the time of filing such petition, with such officers, or in the office of the clerk of such town or city, such land is occupied by a dwelling-house wherein the owner or his family reside."

The grounds upon which the plaintiff claims the writ should be issued are stated as follows:

(1) It is claimed by the plaintiff that the whole premises are not necessary for a library lot; that the amount of land included in the premises is largely in excess of what is reasonably required for a public library building.

(2) It is claimed that part of the premises is not adapted for use as a lot for a public library building, and therefore is not suitable for that purpose.

It does not appear to be alleged or claimed that any defect in the chain of proceedings, required by law for a legal condemnation of the premises in question, is found in the record. In other words, the record discloses that all the proceedings in the taking of the land were regular. The contention of the plaintiff therefore does not seek to assign any errors apparent upon the face of the record.

The issue which she raises in her assignment of errors relate entirely to questions of fact to be determined by evidence outside the records.

But such questions cannot be reached by a writ of certiorari. The writ can only be issued to correct errors in law. The petitioner can present no evidence dehors the record. It is not a writ of right, but one of discretion. If the record offered exhibits errors, it is then within the discretion of the court to admit evidence aliunde the record to show that, even though erroneous, justice and equity do not require that it should be quashed. When such record and such evidence had been produced, it is in the discretion of the court to issue or refuse the writ.

The authorities upon this branch of the case have so recently been considered in *Stevens v. County Commissioners*, 97 Me. 121, 53 Atl. 985, that we need only to refer to this case as authority for the uniform practice in this state of issuing the writ of certiorari only upon evidence presented by the record itself, and to correct errors in law. These conclusions are decisive of the plaintiff's case, and require that the writ should be denied.

While the case may have been properly decided upon the production of the record only, yet, inasmuch as the plaintiff has presented and fully argued her contention upon the errors assigned, it is the opinion of the court that it may not be improper to briefly allude to the question raised, waiving, arguendo, the fact that the case is concluded by the record.

The Constitution of Maine (article 1, § 21) provides that "private property shall not be taken for public uses without just compensation; nor unless the public exigencies require it." Under this section, three propositions arise with respect to the taking of private property by the right of eminent domain: First, whether the public exigency or necessity requires it; second, whether the taking is for a public use; third, that just compensation must be made. The matter of compensation is not here raised. The first, so far as we are aware, is held to involve a legislative question, and is not open to judicial revision. The second is a judicial question, and may be reviewed by the court. Neither is this question raised in these proceedings.

In the case at bar, the plaintiff's first claim is "that the whole premises are not necessary for a library lot." The issue here raised by the plaintiff is clearly a subject for legislative action. Such action has been taken and promulgated in Rev. St. § 89, c. 4, above quoted. The Legislature has not undertaken to say, by its action, that any specific piece of land may be taken, but has declared that the public exigency, requiring that some private property may be taken for a public library building, exists, and thus the exigency or necessity is established by the enactment of the statute authorizing the taking.

It will therefore be observed that the municipal officers do not pass upon the question of necessity. That has already been done by the Legislature before their duties begin.

The exigency or necessity having been declared to exist, the act then prescribes the method of procedure for the condemnation of the particular piece of property required to meet such exigency, and, among other things, delegates to the municipal officers authority to determine whether the land described in the petition of the "30 taxpaying citizens" is suitable, the mere exercise of legislative judgment by the tribunal appointed. Having determined that the land is suitable, a duty preliminary to the taking, the municipal officers are then directed and authorized to take the land described for a public library building. Now, if the Legislature, having the constitutional right of taking lands for a public purpose, if necessary, have also the right to delegate such authority to the municipal officers, as they have undertaken to do by the terms of the statute quoted, then, no doubt can be entertained that the act of the municipal officers, in the exercise of the authority conferred to take the land, was the exercise of a legislative function, and not reviewable by the court. That the Legislature can delegate such authority seems to be well established. In *Riche v. Bar Harbor Water Company*, 75 Me. 91, it is said: "There is nothing better settled than the power of the Legislature to exercise the right of emi-

nent domain, for purposes of public utility. This may be done through the agency of private corporations, although for private property, when the public is thereby to be benefited. It is upon this principle that private corporations have been authorized to take private property for the purpose of making public highways, railroads, canals, erecting wharves and basins, establishing ferries, etc. The use being public, the determination of the Legislature that the necessity which requires private property to be taken exists, is conclusive." If the Legislature can delegate to a private corporation the authority to pass upon the necessity of taking private property for a public use, a fortiori can it delegate such authority to a quasi public corporation.

Judge Dillon, in his work on *Municipal Corporations* [4th Ed.] § 600, states the principle as follows: "Of the necessity, or expediency of exercising the right of eminent domain, in the appropriation of private property to public uses, the opinion of the Legislature, or the corporate body or tribunal upon which it has conferred the power to determine the question, is conclusive upon the courts, since such a question is essentially political in its nature and not judicial."

Judge Cooley, in his *Constitutional Limitations* ([7th Ed.] p. 77), approves of the above rule, and proceeds to say, with respect to a work of improvement of local importance, that the Legislature not only may, but generally does, refer the question of necessity "which must be determined by a view of the facts which the people of the vicinity may be supposed best to know," to some local tribunal.

In *Lynch v. Forbes*, 161 Mass. 302, 37 N. E. 437, 42 Am. St. Rep. 402, it is held that the body or individuals to whom the statute has delegated the authority to take by right of eminent domain "have the same power as the state acting through any regularly constituted authority would have."

It has also been held that not only the question of necessity and exigency for the taking are matters for the Legislature, or those to whom it delegates its authority, but also the extent to which the property may be taken.

In *Shoemaker v. U. S.*, 147 U. S. 282, 289, 13 Sup. Ct. 890, 37 L. Ed. 170, it is held "that the extent to which such property shall be taken rests wholly in the legislative discretion, subject only to the restraint that just compensation shall be made." To the same effect is *United States v. Gettysburg Electric Ry.*, 160 U. S. 680, 16 Sup. Ct. 427, 40 L. Ed. 576.

Thus, it will be seen that courts have no power to re-examine the question of necessity or exigency, or the extent to which land may be taken for a public use, unless that power is expressly reserved to them.

The only limitation, which, by the authorities, seems to have been placed upon the right

of the Legislature, or those to whom they have delegated the power, to exercise the function of taking property by right of eminent domain, is found in the manifest abuse of the power granted or bad faith in its existence. *A. & E. Ency.* (2d Ed.) vol. 10, p. 1057; *Burnett v. Boston*, 173 Mass. 173, 53 N. E. 379; *Old Colony Ry., Pet'r*, 163 Mass. 356, 40 N. E. 198.

The second ground of complaint presented by the plaintiff is that "the premises is not adapted for use as a lot for a public library building; therefore is not suitable for that purpose."

This proposition has already been decided, and need not be further discussed.

It seems to us to be well established that neither of the plaintiff's assignments of error, if properly before us for decision, neither bad faith nor abuse of power being alleged, could be regarded as sufficient in law to defeat the proceedings of the respondents in taking the plaintiff's land for the location of a public library building.

Writ denied.

Petition dismissed with costs.

(102 Me. 272)

INHABITANTS OF HOULTON v. TITCOMB et al.

(Supreme Judicial Court of Maine. Dec. 18. 1906.)

1. MUNICIPAL CORPORATIONS—POLICE POWER—EXTENT OF POWER—BUILDING REGULATIONS.

Rev. St. c. 4, § 93, among other things, provides as follows: "Towns, cities and village corporations may make by-laws or ordinances, not inconsistent with law, and enforce the same by suitable penalties, for the purposes and with the limitations following: * * * (8) Respecting the erection of buildings therein, and defining their proportions, dimensions and the material to be used in the construction thereof; and any building erected contrary to a by-law or ordinance adopted under this specification is a nuisance."

2. SAME—PROCEEDINGS OF GOVERNING BODY—ORDINANCES—CONSTRUCTION.

Municipal ordinances are in derogation of the common law, and must be strictly construed. They cannot be enlarged by implication.

3. EQUITY—GROUNDS OF JURISDICTION—VIOLATION OF ORDINANCE—NUISANCE.

A bill in equity cannot ordinarily be maintained for the mere violation of a municipal ordinance. The threatened act of violation must amount to a nuisance, if done.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Equity, § 88.]

4. NUISANCE—PUBLIC NUISANCES—NATURE OF INJURY—STATUTORY PROVISIONS.

A thing is not a nuisance simply because a municipal ordinance declares it to be such, but the state may declare what may at law be deemed a nuisance, and this state has declared that buildings erected contrary to ordinances legally made in accordance with the provisions of Rev. St. c. 4, § 93, are nuisances.

5. SAME—ABATEMENT—INJUNCTION.

A court in equity at common law has jurisdiction to restrain nuisances, and has specific jurisdiction in this state "in cases of nuisance and waste." Therefore equity will take jurisdiction for the threatened violation of a municipal ordinance when such violation contemplates

an act which is a nuisance in law, not because the act is a violation of the ordinance, but because it is a nuisance.

6. SAME — WHO MAY SUE — MUNICIPAL CORPORATION.

A municipal corporation as the representative of the equitable rights of its inhabitants may enjoin nuisances affecting matters with reference to which a portion of the power of the state has been confided to it. The prevention of fires is a matter which the state has confided to towns.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Nuisance, § 195.]

7. MUNICIPAL CORPORATIONS—POLICE POWER — VIOLATION OF REGULATIONS.

In the case at bar the plaintiff town had legally adopted an ordinance which provided that "no wooden or frame building shall hereafter be erected nor any building now erected or hereinafter to be erected, be altered, raised, roofed, enlarged, or otherwise added to or built upon with wood," etc., within certain prescribed limits called the "Fire District." By the provision of another ordinance the municipal officers of the plaintiff town were authorized to "grant licenses to erect, alter, raise, roof, enlarge or otherwise add to or build upon or move any wooden building" within the limits of said district, etc. The defendant Titcomb undertook "to complete, erect, alter, raise, roof, enlarge, add to and build upon with wood" a certain wooden building within the limits of said fire district without a license therefor from the municipal officers of the plaintiff town. But at a special town meeting of the plaintiff town previously held it was voted to authorize and allow the defendant Titcomb "to repair and put in an inhabitable condition" the aforesaid wooden building. *Held* (1) that this vote did not contravene or modify the application of the ordinances; (2) that the violation of the ordinances constituted a nuisance against the public as a violation of a police regulation.

(Official.)

Appeal from Supreme Judicial Court, Aroostook County, in Equity.

Action by the inhabitants of Houlton against Frank W. Titcomb and others. Heard on report on agreed statement of facts. Injunction granted.

Bill in equity brought by the inhabitants of Houlton in the name of their selectmen against the defendants, Frank W. Titcomb and the Houlton Savings Bank, to restrain them from the alleged, and intended, violation of certain municipal ordinances of the town of Houlton regulating the erection, alteration, and enlargement of wooden buildings within the limits of the fire district in said town.

The bill, omitting formal parts, is as follows:

"The inhabitants of the town of Houlton, in the county of Aroostook, by Thomas P. Putnam, Frank W. Pearce, and Wallace A. Dykeman, the selectmen of said town, complain against Frank W. Titcomb, of said Houlton, and the Houlton Savings Bank, a corporation duly existing by the laws of said state of Maine, and having its place of business at said Houlton, and say:

"First. At a legal meeting of the inhabitants of said town of Houlton, held on the 31st day of March, 1890, being the regular annual meeting of said town for the year

1890, and the warrant for which meeting contained a sufficient article for that purpose, said town made and adopted the following by-laws or ordinances respecting the erection of buildings therein, and defining their proportions, dimensions, and the material to be used in the construction thereof, and establishing a fire district in the village of said Houlton, and to regulate the building and prohibit the construction of wooden and frame buildings therein:

"Section 1. For the purpose of securing the prevention of fire in the village of Houlton, a fire district is hereby established therein, the boundaries of which shall be as follows: [The boundaries of said fire district here follow.]

"Sec. 2. No wooden or frame building shall hereafter be erected, nor any building now erected, or hereafter to be erected, be altered, raised, roofed, enlarged or otherwise added to or built upon with wood, nor any wooden building be removed from other territory, to and upon the territory described in section one, nor from any portion of said fire district to another portion thereof, except as hereinafter provided, and any such building so erected, added to, or removed contrary to the provisions of this ordinance, shall be deemed a public and common nuisance and abated as such.

"Sec. 3. The municipal officers may grant licenses to erect, alter, raise, roof, enlarge or otherwise add to or build upon, or move any wooden building within said District, upon such terms and conditions and subject to such limitations and restrictions as they may prescribe; but before any such license is granted, a notice of the application therefor shall be published in a newspaper printed in said town, at the expense of the petitioner.

"Sec. 4. Any person, whether owner, lessee, contractor or agent, who shall violate the provisions of this ordinance shall forfeit and pay for the use of the town the sum of fifty dollars, to be recovered by an action of debt in the name of the town treasurer; which said by-laws and ordinances were, thereafterwards, on the same day, duly entered, and recorded in the town records of said town of Houlton, and are still in force."

"Second. Said Frank W. Titcomb and said savings bank are now, and for a long time heretofore have been, seised in fee or otherwise entitled to and in possession of a certain tract or parcel of land, situated within the boundaries named and set forth in section one, and bounded and described as follows: [The boundaries of said land here follow.]

"Third. Said Frank W. Titcomb and said savings bank are now erecting, altering, raising, roofing, enlarging, and otherwise adding to, and building upon with wood, a certain two-story wooden or frame building upon their said lot or parcel of land hereinbefore named and described, without any license from the municipal officers of said town of

Houlton to do the same, and in violation of said by-laws and ordinances, and in violation of law

"Fourth. Said Frank W. Titcomb and said savings bank threaten, purpose, intend, and are about to proceed forthwith to fully complete, erect, alter, raise, roof, enlarge, add to, and build upon with wood, said wooden building, without any license from the municipal officers of said town of Houlton to do so, and are now at work upon the same in violation of said by-laws and ordinances.

"Fifth. That said wooden building if so erected, altered, raised, roofed, enlarged, added to, and built upon with wood, as threatened, intended, and purposed by said Frank W. Titcomb and said Savings Bank, and as they are now doing the same, will be a public and permanent nuisance, by force of said by-laws and ordinances, and the statute in such case made and provided; that it is situated in the most compact part of the village of said Houlton, and closely surrounded by other buildings; that it will jeopardize the other property and buildings situated in said village, and render them much more liable to damage and destruction by fire, and greatly lessen the value of all other property situated in said village, and that the damage so arising as aforesaid will be great, irremediable, and permanent; and that unless prevented by the order of your honorable court a great, irreparable, and permanent injury will be at once done to your complainants.

"Wherefore, inasmuch as your complainants have no plain or adequate remedy at law, and great, irreparable, and permanent injury will result to them unless your honorable court will interfere to prevent the same, may it please your honors, as a court in equity, forthwith, on due notice first given, to require of the defendants full, true, and perfect answer to make all and singular the several allegations of this bill, and that thereupon, on proper hearing had of the parties, you would order and decree that said defendants be perpetually enjoined and restrained against erecting, altering, raising, roofing, enlarging, or otherwise adding to, or building on with wood, said wooden building, in any way as threatened, intended or purposed by them as aforesaid, and that such other or further decree may be made as to your honors may seem fit and proper in the premises; and, further, for the reasons aforesaid, may it please your honors to grant an immediate preliminary injunction, such as above prayed for to continue until a full hearing of the parties and a final adjudication shall be arrived at, and it may please your honors to decree costs to the complainants."

This bill is dated May 19, 1903.

The answer of the defendant Titcomb, omitting formal parts, is as follows:

"First. The said defendant admits that the inhabitants of said town of Houlton, on the 31st day of March, 1890, adopted the ordi-

nance set forth in paragraph 1 of the plaintiffs' bill.

"Second. The said defendant admits that he and the Houlton Savings Bank are the owners of the land and premises named and described in paragraph 2 of the plaintiffs' bill.

"Third. The said defendant admits that on the 19th day of May, 1903, said Frank W. Titcomb was about to raise, roof, and enlarge the building situate on the premises described in paragraph 2 of the plaintiffs' bill, and referred to in paragraph 3 and 4 of the plaintiffs' bill.

"Fourth. The said defendant admits that he, the said Frank W. Titcomb, on the said 19th day of May, 1903, did purpose and intend to alter, raise, roof, and enlarge the building then and there situate on the premises named in paragraph 2 of the plaintiffs' bill, and referred to in paragraphs 3 and 4 of plaintiffs' bill; but the defendant denies that he was altering, raising, roofing, or enlarging, or that he intended then and there to alter, raise, roof, and enlarge the said building without license, but he avers and declares that he, the said Frank W. Titcomb, then and there had authority and license from the inhabitants of the said town of Houlton, then and there to alter, raise, roof, and enlarge said building, as he was proceeding to do.

"Fifth. The said defendant denies that the said wooden building named and referred to in paragraphs 2, 3, and 4 of the plaintiffs' bill, if erected, altered, raised, roofed, enlarged, added to, and built upon with wood as intended and proposed, then and there by said Frank W. Titcomb, would be a public and permanent nuisance by force of any by-laws, ordinances, or statute in such case made and provided, because they say that in truth and in fact the said building is not situate in the most compact part of the village of said Houlton, and is not closely surrounded by other buildings, and that said building would not jeopardize the other property and buildings situate in said village, and would not render much more liable to damage and destruction by fire, and would not greatly lessen the value of other property situate in said village, and that there would be no damage arising therefrom, and that there would be no irreparable, and no permanent injury done to said plaintiffs or any one else; but in truth and in fact the said defendant, Frank W. Titcomb, says for the defendant to raise, alter, repair, and complete said building as he proposed to do, would be a permanent benefit to said village of Houlton, and an increase of the value of property in said Houlton.

"Sixth. And the said defendant further says that the said plaintiffs are estopped from setting up the claim made by them in their bill, and that the defendant should not be enjoined and restrained as requested in the plaintiffs' bill, by virtue of the ordinance

set forth and named in paragraph 1 of the plaintiffs' bill, because he says that on the 27th day of April, 1903, at a legal meeting of the voters and inhabitants of said town of Houlton duly called for that purpose, the said plaintiffs so assembled in their town meeting as aforesaid voted to allow the said Frank W. Titcomb to rebuild, alter, enlarge, raise, and repair the said building referred to in said plaintiffs' bill, in any manner which the said Frank W. Titcomb saw fit, as by the record thereof in the office of the town clerk in said Houlton will appear, which said records the said defendant offers to produce to said court, and the defendant claims that by reason of said votes of said town the said Frank W. Titcomb and the building so owned by him as aforesaid were exempt from the provisions of the ordinance named and set forth in paragraph 1 of the plaintiffs' bill."

The answer of the defendant Houlton Savings Bank, omitting formal parts, is as follows:

"First. Said defendant admits that the inhabitants of said town of Houlton adopted the ordinance set forth in paragraph 1 in the plaintiffs' bill, as therein specified.

"Second. Said defendant is informed and believes that said Frank W. Titcomb is the owner of the premises described in the plaintiffs' bill, and the only interest that said Houlton Savings Bank has in and to the premises is under and by virtue of a mortgage thereon held by said bank.

"Third. Said Houlton Savings Bank denies that it is now or has been erecting, altering, raising, roofing, enlarging, or otherwise adding to and building upon a wooden building on said premises, as set out in the third paragraph of the plaintiffs' bill, but neither admits or denies that said Frank W. Titcomb may have been so engaged.

"Fourth. Said defendant denies all and singular the allegations contained in the fourth paragraph of the plaintiffs' bill so far as the same relates to the said Houlton Savings Bank.

"Fifth. Said Houlton Savings Bank neither admits nor denies the allegations contained in the fifth paragraph of the plaintiffs' bill, except to say that said bank has not been engaged and has not intended to engage in the erection or maintenance of anything on said premises which would constitute a public nuisance."

At the hearing before the justice of the first instance, an agreed statement of facts was filed and then by agreement the cause was reported to the law court for decision.

The agreed statement of facts is as follows:

"It is hereby agreed by the plaintiffs and defendants in this case: That the by-laws and ordinances set forth in paragraph 1 of the plaintiffs' bill were legally enacted and adopted by said town of Houlton, and since their enactment and adoption have been in

full force and virtue in said town of Houlton ever since, except so far as the same may have been modified, changed, altered, amended, or repealed by the special town meeting of said town held April 27, 1903, as set forth in the sixth paragraph of the answer of said defendant Frank W. Titcomb.

"That said defendants were duly seised and possessed of the real estate as set forth in paragraph 2 of plaintiffs' bill. That the defendants admit the acts complained of by said plaintiffs in paragraphs 3 and 4 of plaintiffs' bill, and claim to justify said acts by the action of said special town meeting set forth in paragraph 6 of the answer of said defendant Frank W. Titcomb.

"That on the 27th day of April, 1903, at a legal meeting of the legal voters of said town of Houlton, duly called for that purpose by a legal warrant containing the following article: 'Art. 3. To see if the town will authorize and allow Frank W. Titcomb to repair, and put in an inhabitable condition the old Sleeper House, so called, on the north side of Bangor street, in said Houlton, opposite the Foundry.' Said town voted under said article as follows: 'Art. 3. Voted to authorize and allow Frank W. Titcomb to repair, and put in an inhabitable condition the old Sleeper House, so called, situate on the north side of Bangor street, in said Houlton opposite the Foundry.'

"That the premises described in said article 3 of said town warrant and in said vote above set forth are the same premises set forth and described in paragraphs 2 and 3 of plaintiffs' bill, and that said premises and buildings at the time of the filing of plaintiffs' bill, and ever since, were and are within the fire limits as described in the ordinance set forth in the first paragraph of the plaintiffs' bill, except so far as the same may have been removed from said fire limits by the act of the said special town meeting held April 27, 1903, as aforesaid.

"That said defendants prior to the filing of the bill in this case had never received any license from the municipal officers of said Houlton to erect, alter, raise, roof, enlarge, or otherwise add to or build upon any wooden building described in paragraph 2, 3, 4, and 5 of plaintiffs' said bill."

Argued before WISWELL, C. J., and WHITEHOUSE, SAVAGE, POWERS, PEABODY, and SPEAR, JJ.

Ira G. Hersey, for plaintiffs: Shaw & Lewin, for defendant Frank W. Titcomb. Powers & Archibald, for defendant Houlton Savings Bank.

SPEAR, J. This is a bill in equity by the town of Houlton in the name of their selectmen against Frank W. Titcomb and the Houlton Savings Bank to restrain them from the alleged and intended violation of the town ordinances regulating the erection, altera-

tion, and enlargement of wooden buildings within the fire district of said town. The case comes to this court upon the bill, answer, replication, and agreed statement of facts.

The bill properly sets out the ordinances alleged to have been violated, their adoption at a legal town meeting, the ownership of property by the respondents and their violation and intended violation of the ordinances, and that, if their intention is carried into effect, it will produce the existence of a public and permanent nuisance against the by-laws and ordinances of the town and statutes of the state. We think it is unnecessary to specifically refer to any of the allegations of the bill except the third and fourth items which we insert in full. The third is as follows: "Said Frank W. Titcomb and said savings bank are now erecting, altering, raising, roofing, enlarging, and otherwise adding to, and building upon with wood, a certain two-story wooden or frame building upon their said lot or parcel of land hereinbefore named and described, without any license from the municipal officers of said town of Houlton to do the same, and in violation of said by-laws and ordinances, and in violation of law."

The fourth reads: "Said Frank W. Titcomb and said savings bank threaten, purpose, intend, and are about to proceed forthwith to fully complete, erect, alter, raise, roof, enlarge, add to, and build upon with wood, said wooden building, without any license from the municipal officers of said town of Houlton to do so, and are now at work upon the same, in violation of said by-laws and ordinances."

These are the two items, it will be observed, that respectively charge the defendants with the actual and intended violations of the ordinances of the town. The Houlton Savings Bank in its answer avers that the only interest which it has in the premises described is by virtue of a mortgage thereon held by the bank. But by the agreed statement this defendant admits its joint ownership and the acts complained of in paragraphs 3 and 4 of the bill. It must therefore stand or fall with the defendant Titcomb.

Titcomb in his answer admits the truth of the allegations of fact in the third and fourth items of the plaintiffs' bill, but denies, in the fourth item of his answer, that the acts done and proposed to be done are in violation of the town ordinances, and avers that he had authority and license from the inhabitants of the town of Houlton to alter, raise, roof, and enlarge said building as he was proceeding to do. He also denies in the fifth item that his proposed alterations upon the building would make it a public nuisance.

The ordinances upon which the plaintiffs rely to prevent the defendants from the prosecution of the work which they have undertaken upon the buildings in question reads as follows: Section 2: "No wooden or frame

building shall hereafter be erected, nor any building now erected, or hereafter to be erected, be altered, raised, roofed, enlarged or otherwise added to or built upon with wood, nor any wooden building be removed from other territory, to and upon the territory described in section one, nor from any portion of said fire district to another portion thereof, except as hereinafter provided, and any such building so erected, added to, or removed contrary to the provisions of this ordinance, shall be deemed a public and common nuisance and abated as such." Section 3: "The municipal officers may grant licenses to erect, alter, raise, roof, enlarge, or otherwise add to or build upon, or move any wooden building within said district, upon such terms and conditions and subject to such limitations and restrictions as they may prescribe; but before any such license is granted, a notice of the application therefor shall be published in a newspaper printed in said town, at the expense of the petitioner."

The defendants concede that the above by-laws and ordinances were legally enacted and adopted by the town, and since their enactment and adoption have been in full force and virtue. The agreed statement also shows that the defendants admit the acts complained of by said plaintiffs in paragraphs 3 and 4 of their bill, but claim to justify said acts by the action of the special town meeting, set forth in paragraph 6 of the answer of the defendant Titcomb, that on the 22d day of April, 1903, the town of Houlton, at a legal meeting called for the purpose, authorized him to operate upon the building as he was doing and intended to do. Article 3 of the warrant calling this town meeting, under which he claims to justify his acts, was as follows: "Art. 3. To see if the town will authorize and allow Frank W. Titcomb to repair, and put in an inhabitable condition the old Sleeper House, so called, on the north side of Bangor street, in said Houlton, opposite the Foundry." The town voted upon this article as follows: "Art. 3. Voted to authorize and allow Frank W. Titcomb to repair, and put in an inhabitable condition the old Sleeper House, so called, situate on the north side of Bangor street, in said Houlton opposite the Foundry."

It is further conceded that the premises described in said article 3 are the ones involved in this controversy, and are within the fire limits described in the ordinances herein set forth, "except so far as the same may have been removed from said fire limits by the act of the said special town meeting." Nor is it claimed that the defendants have ever received the license, authorized by article 3 of the ordinances above quoted, to perform any of the acts prohibited by the ordinances and complained of in plaintiffs' bill. The defendants in their argument also ad

mit the legality and constitutionality of the fire ordinances in question.

The only issue, therefore, raised in this case, is whether the vote of the special town meeting above quoted under article 3 of the warrant relieved the defendants from the operation of the ordinances with reference to the wooden building, which they were seeking to alter as set forth in the plaintiffs' bill and admitted in their answer. The defendants claim in item 6 of their answer that, on account of the vote in this special town meeting, the town should be estopped to invoke the application of the ordinances to their proposed action. Without determining whether the doctrine of estoppel would apply if the vote in the special town meeting had authorized the defendant to do all that the ordinances prohibited, let us first discover whether, as a matter of fact or legal inference, the vote in the special town meeting did authorize the defendants to do any of the things which the ordinances prohibited. In other words, does the subject-matter of the vote conflict with the subject-matter of the ordinance?

The language of section 2 of the ordinances which directly applies to the issue raised in this case reads: "No wooden or frame building shall hereafter be erected nor any building now erected or hereinafter to be erected, be altered, raised, roofed, enlarged, or otherwise added to or built upon with wood," etc. The defendants admit in their answer that they were "about to raise, roof and enlarge the building." That is, they were about to do just what the ordinances inhibit. Now, did the vote of the town at its special meeting authorize the defendants to do any of these inhibited things? We think not. This vote, strictly following the article in the warrant, simply authorized the defendants "to repair and put in an inhabitable condition the old Sleeper House," etc., which is the house in question. By a comparison of the phraseology of this vote with the language of the ordinances, it will be observed that it does not repeal or modify the inhibitions or become inconsistent with the complete application of the ordinances to the facts set out in the plaintiffs' bill and admitted by the defendants' answer. The ordinances do not pretend or assume to prevent the ordinary repair of a house and putting it into inhabitable condition. It was not intended by the ordinances to prohibit such action on the part of the householder. It would be clearly unreasonable if it did. Undoubtedly many of the houses in Houlton require more or less repairs every year to make them inhabitable. A house might become uninhabitable for want of shingling, yet it would hardly be contended that the above ordinances were intended to prevent the repair of shingling to make it inhabitable without a license from the municipal officers. We are, indeed, at a loss to know just what

the town meant by the passage in its town meeting of the above vote. There is nothing in the case or the vote which tends to show the condition of the house which it authorized the defendant to repair, or what repairs would be necessary to make it inhabitable—whether it was shingling, clapboarding, inserting sills, or putting on a roof, or that any of the repairs permitted by the vote came within the scope of the ordinances. Our conclusion consequently is that the vote of the town authorizing the defendants to repair and make their house inhabitable in no way contravenes or even modifies the application of the ordinances invoked by the plaintiffs.

The ordinances are in derogation of the common law, and must be construed strictly. They cannot be enlarged by implication. The defendants had a right, therefore, to do anything to their property not strictly inhibited by the ordinances. Hence it seems, so far as the case or the vote shows, that the town only authorized the defendants to do what they had a right to do without any such vote, and without any violation of the ordinances in question. But when the defendants proceed to go farther, and, as is alleged in the plaintiffs' bill and admitted in the answer, attempt "to complete, erect, alter, raise, roof, enlarge, add to and build upon with wood, said wooden building without any license from the municipal officers," they then clearly bring themselves within the prohibition of the ordinances.

But the mere fact that the proposed act of the defendants is in violation of the ordinances will not enable the plaintiffs to sustain their bill.

A bill in equity cannot ordinarily be sustained for the mere violation of a municipal ordinance. The threatened act of violation must amount to a nuisance, if done. 13 Am. & Eng. Encyc. 401; *Mayor of Manchester v. Smyth*, 64 N. H. 380, 10 Atl. 700; *President and Trustees of the Village of Waupun v. Moore*, 34 Wis. 450, 17 Am. Rep. 446; *Dillon on Munic. Corp.* § 405.

Nor is a thing a nuisance merely because a municipal ordinance declares it to be such. *Hutton v. City of Camden*, 39 N. J. Law, 122, 23 Am. Rep. 212; *Ex parte O'Leary*, 65 Miss. 180, 3 South. 144, 7 Am. St. Rep. 640; *Jackson v. Castle*, 82 Me. 579, 20 Atl. 237; *Pine City v. Munch*, 42 Minn. 342, 44 N. W. 197, 6 L. R. A. 768.

But the state may declare what may at law be deemed a nuisance. *Metropolitan Board of Health v. Heister*, 37 N. Y. 661; *Hutton v. City of Camden*, 23 Am. Rep. 212, note; *Dillon on Munic. Corp.* 1, § 93.

This state has declared (Rev. St. c. 4, § 93, par. 8) that buildings erected contrary to the ordinances for which this section provides are nuisances.

The court in equity at common law has jurisdiction to restrain nuisances, and has

specific jurisdiction in this state "in cases of nuisance and waste." Rev. St. c. 73, § 6, par. 5.

Therefore it is clear that equity will take jurisdiction for the threatened violation of a municipal ordinance when such violation contemplates an act which amounts to a nuisance in law, not because the act is a violation of the ordinance, but because it is a nuisance.

Another question which arises in the discussion of this case is how and when a municipal corporation may maintain a bill to restrain a nuisance in the violation of an ordinance which constitutes a nuisance. Some cases uphold the right when it appears that the municipality would sustain special damages or be put to additional responsibility by reason of the threatened acts. *Coast Co. Applt. v. Mayor, etc., of Spring Lake*, 58 N. J. Eq. 586, 47 Atl. 1181, 51 L. R. A. 657, note; *El. & A. R. R. Co. v. Inhabitants of Greenwich*, 25 N. J. Eq. 585; *Jersey City v. Central R. R. Co.*, 40 N. J. Eq. 417, 2 Atl. 262; *Hutchinson Twp. v. Filk*, 44 Minn. 536, 47 N. W. 255. And, when no special damages or additional responsibility was shown, relief was denied. *Ward v. City of Little Rock*, 41 Ark. 526, 48 Am. Rep. 46; *Dover v. Portsmouth Bridge Co.*, 17 N. H. 200; *Mayor v. Smyth*, 64 N. H. 380, 10 Atl. 700; *Town of Sheboygan v. Sheboygan & Fond du Lac R. R. Co. et al.*, 21 Wis. 675.

But some courts have held that a municipal corporation as the representative of the equitable rights of the inhabitants may enjoin nuisances affecting matters with reference to which a portion of the power of the state has been confided to it. The right is limited to such matters. With respect to other matters the right depends upon the same conditions as the right of individuals, namely, special damages, etc. 51 L. R. A. 657, supra, note. *Metropolitan City Railway Co. v. City of Chicago*, 96 Ill. 620; *Pine City v. Munch*, supra, *Winthrop v. Farrar*, 11 Allen (Mass.) 398; *Watertown v. Mayo*, 109 Mass. 315, 12 Am. Rep. 694; *Taunton v. Taylor*, 116 Mass. 254. *Board of Health of the City of Yonkers v. John Copcutt*, 140 N. Y. 12, 35 N. E. 443, 23 L. R. A. 485.

This last proposition seems to be logical and sound, and would appear to authorize a town to maintain injunction proceedings against threatened nuisances affecting matters of which the state has confided to it either control or regulation.

The prevention of fires is a matter, which the state has confided to the town. Rev. St. c. 28, §§ 13, 20, 22, 25, 26-45, inclusive.

As the violation of the ordinances in the case at bar constituted a nuisance against the public as a violation of a police regulation, the entry must be:

Bill sustained, with costs. Perpetual injunction to issue. Case remanded to the court below for a decree in accordance with this opinion.

(6 Pen. 323)

STATE v. WOLF.

(Court of General Sessions of Delaware. New Castle. May 22, 1907.)

1. LARCENY—DEFINITION.

Larceny is the wrongful or fraudulent taking and carrying away of the personal goods or property of another, with the felonious intent to convert it to his own use and make it his own property without the consent of the owner.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Larceny, § 1.]

2. SAME—EVIDENCE—BURDEN OF PROOF.

In a larceny trial, the burden is upon the state to prove by competent and satisfactory evidence every essential ingredient of the offense.

3. SAME—SUBJECT OF LARCENY.

To convict of larceny, the state must show the property taken was personal, and not real, property.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Larceny, §§ 1, 11.]

4. SAME.

To convict of larceny, it must be shown the property was taken by defendant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Larceny, §§ 22, 27.]

5. SAME—ASPORTATION.

To convict of larceny, the state must show the property was carried away by defendant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Larceny, § 30.]

6. SAME—INTENT.

To convict of larceny, the state must show defendant took the property and carried it away with intent to steal it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Larceny, §§ 3, 6.]

7. PROPERTY—REAL PROPERTY—DEFINITION.

Real property is land, and, generally, whatever is erected or growing upon or affixed to land.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Property, § 4.]

8. LARCENY — SUBJECT — FIXTURES — SEVERANCE.

Though defendant, after detaching parts of machinery in a leather factory, did not lay them down or otherwise cease to hold them, and afterwards by a separate and independent act take them into his possession again and steal them, and the severance and carrying away were one continuous transaction, with intent to steal, he committed larceny; the parts becoming personal property the instant they were severed from the realty.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Larceny, § 14.]

9. SAME—EVIDENCE—POSSESSION OF STOLEN PROPERTY.

Where stolen property is found in the possession of another recently after its larceny, he is presumed to be guilty, unless his possession is satisfactorily explained or his innocence is otherwise satisfactorily shown.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Larceny, §§ 170-178.]

10. CRIMINAL LAW—EVIDENCE—PRESUMPTION.

Every prisoner is presumed innocent, until he is proven guilty beyond reasonable doubt.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 731-737.]

11. SAME—REASONABLE DOUBT—DEFINITION.

A reasonable doubt of defendant's guilt is not a trivial, fanciful, or speculative one, or a mere possible doubt, but is such a substantial doubt as intelligent, fair-minded jurors may rea-

sonably entertain after a careful consideration of all relevant evidence in the case.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1267, 1268, 1904-1922.]

John Wolf was indicted for larceny. Verdict, guilty, with recommendation to the mercy of the court.

Argued before LORE, C. J., and GRUBB and PENNEWILL, JJ.

Daniel O. Hastings, Deputy Atty. Gen., for the State. William G. Jones, for defendant.

GRUBB, J. (charging the jury). John Wolf, the prisoner at the bar, stands charged in the indictment with the larceny of a certain piece of machinery, commonly called a "pump dome," of the value of \$20 lawful money of the United States of America, and 50 pounds of brass, each pound thereof of the value of 12 cents like lawful money as aforesaid, of the goods and chattels of George F. Betts, trading as George F. Betts & Co. As very nice technical questions have been raised by the counsel in this case, we will define to you what larceny is in law. Larceny is the wrongful or fraudulent taking and carrying away of the personal goods or property of another, with the felonious intent to convert it to his own use and make it his own property, without the consent of the owner.

The burden is upon the state, the prosecution, to prove to you by competent and satisfactory evidence every essential ingredient of the offense, the larceny, charged in the indictment. First, in this case, as the prominent point in the case, the state must prove that the property alleged to have been taken in this instance was personal property, and not real property. If the state has established that, it must then show that such personal property was, first, taken by the accused; second, that it was carried away by the accused; and, third, that it was so taken and carried away with intent to steal it.

The main defense in this case, as the court understand it, is that these articles alleged to have been taken—that is, this pump dome and the brass—were real property, and not personal property. We say to you, if they were real property when taken and carried away with intent to steal them, then they would not be the subject of larceny, and the prisoner could not be convicted for taking them. If, however, within the meaning of the law, they became personal property and were such at the time of the alleged taking and carrying of them away with the said felonious intent, then the prisoner may be found guilty under this indictment, if upon the facts in evidence in this case you are satisfied in so finding. So that the question for you and the court now to consider is whether this property was real property or not. Real property is land, and, generally, whatever is erected or growing upon or affix-

ed to land. There are many articles, known as "fixtures," which, though originally wholly movable and personal in their nature, have acquired, by having been affixed to real estate or applied to use in connection with it, the character of realty.

With that general definition of what real property is, you will consider the facts in this case—of this being, if you find it to be proven by the evidence, an establishment for the manufacture of leather, and that it had within it the machinery for that purpose, including boiler, engine, pump, pipes, and various other things essential for its operation as a factory for the manufacture of leather. Now, then, suppose you find from the evidence that these articles were so connected with the machinery and with that factory and the real estate or land upon which it was situated that it was real estate within the meaning of the law, and that these articles were so affixed to the property as to be a part of the real estate, consisting of the factory, etc.: It is contended by the state that, although you should find that it was real estate at the time of the commission of this alleged larceny, still it was then so severed from the real estate as to have become personal property, and, being personal property, the subject of larceny. Now, if you should find, under the law and the facts in this case, that it was severed from the realty and did become personal property at the time of the commission of the larceny, and also find the other essential ingredients of the offense from the facts before you, then you might find the defendant guilty of the larceny charged. So it is necessary for us to explain to you what, in law, may constitute such a severance of any part of the realty as to make it personal and subject to larceny.

The state contends that if the prisoner did take those articles and did carry them away, as alleged in the indictment, with intent to steal them, the mere act of taking those articles from their connection with the machinery became a severance in law from the realty, making them thereupon personal at the instant of the detaching of them, and that they then and there became the subject of larceny. In passing upon that contention of the state we will state to you the general tenor and progress of the law upon the subject of severance. The property must be personal, and there can be no larceny of things fixed to the soil; but as the taking and carrying away would necessarily terminate the character of the property as realty, even if it were such, it has been held that the important point of this distinction is that if the severance from the realty of anything which is a part thereof, or annexed thereto so as to go with the realty by descent or in case of a conveyance, is made by the wrongdoer himself, so that the taking and carrying away is a continuous act, the offense is not larceny, because the taking and carrying

away is not of the personal property of another; that which was severed not having been in his possession as a chattel, but only as a portion of the realty. But some courts have expressed their disapproval of a doctrine so technical, even while compelled to follow it; and in many cases of constructive annexation other courts have held the taking and carrying away to be larceny, such as of window sashes not permanently annexed to the building, chandeliers, doors taken from their hinges, rails in a fence, belts belonging to a mill, valves in a portable pump, or keys of a door, etc. It often has been ruled that, if once severed by the owner, a third person, or the thief himself, as a separate transaction, that part of the realty becomes the subject of larceny. The said objectionable early technical ruling has been modified from time to time in England, so as to afford protection to things fixed to the freehold. The rule was never satisfactory, and the courts in modern times have been inclined to confine it within the narrowest limits.

The question now before this court has heretofore been raised in this state many years ago in the case of *State v. William Hall*, 5 Har. 492, who was indicted for stealing four copper pipes, the property of Duncan & Woolaston. It appeared from the evidence that these pipes were part of a steam engine, which was attached to a manufacturing establishment in Wilmington. It was contended, on behalf of the prisoner, that these pipes could not be the subject of larceny, being joined to the freehold and a part of it, and therefore the detaching and taking them away, if done at the same time, amounted only to a trespass. In that case the court charged the jury that the question whether this was or was not a larceny depended on whether or not the severing and carrying away were one continuous transaction, and said: "Larceny is the felonious stealing, taking, and carrying away of the personal goods of another. If these pipes were not, when carried off, the personal goods of Duncan & Woolaston, they could not be stolen. As a part of the realty, they were not under the protection of the criminal law, so as to make the taking of them a felony. It was but a trespass. Whilst a part of the engine, which was itself a part of the building, they were a part of the building; and, if thus taken and carried away, by one act of severance and separation, it did not come within the definition of larceny, not being a stealing and carrying away of personal property. But if they were severed by the defendant, or by another, at one time, so that they became personal property, and after they assumed this new character were taken and carried away by him with a felonious intent, it was a case of larceny, and the prisoner ought to be convicted." In that case the court held that the act of taking and carrying away the proper-

ty from its connection with the realty, at one and the same time, with intent to steal it, did not amount in law to such a severance as to change it from realty to personalty and make such continuous transaction larceny. The court in that case, therefore, seems to have held that there must be first the act of taking it from its connection with the realty, and after the act of taking it from its connection with the realty there must be a subsequent actual, separate act of taking and carrying it away, in order to constitute the offense of larceny.

In view of the tendency of the more modern authorities since the date of this decision in *Harrington's Reports* in this state, this court have unanimously arrived at the conclusion that we ought to depart from that very technical and unsatisfactory ruling of the earlier law, which was followed by the court in this *Harrington* case, and that we should hold that there need not be first an act of severance, and after that an actual, separate, and distinct act of taking and carrying away, to constitute a severance and larceny, but that the act of taking and holding and carrying away, at and from the instant of separating it from its connection with the realty—that is, the one continuous transaction of detaching it from its connection with the realty, retaining possession of it, and carrying it away, with intent to commit larceny—amounts to a severance or larceny in law, although the severance and the taking and carrying away are one continuous transaction. When done by the accused with intent to steal it, the detaching of the article from its connection with the realty is a severance, which thereupon makes it personalty and the subject of larceny. The continuing to hold it thereafter, for even the briefest period of time, is in sound legal contemplation and construction a taking, and the removing it from the place of such taking is a carrying away, and such severance, taking, and carrying away, with intent to steal it, if shown by the evidence, will amount to larceny. So that we say to you, although you may not be satisfied from the evidence that the prisoner took these articles off the machinery of the factory and from their connection with it as real estate and laid them down, or otherwise ceased to hold them, and then afterwards, by a separate, independent act, took them into his possession again and carried them away, for the purpose of larceny, but are satisfied that the severance and the taking and carrying away were one continuous transaction, with intent to steal the articles, then you may, if the evidence warrants, find it to be a severance and a taking and carrying away, so as to constitute those ingredients of the offense of larceny.

We have arrived at the conclusion to depart from the ruling in 5 Har. 492, because we consider that it is sound judicial policy to do so and is necessary for the protection of the

public. We always are loth, when a question has been raised and argued heretofore before this court, and deliberately considered and decided, especially by a unanimous court, to overrule a prior decision of the court, preferring to leave that to the Supreme Court of the state, the court of highest resort, to determine finally what the law shall be, if either party desires to have it passed upon by the court above and finally settled. But in these criminal cases, while the defendant may take a writ of error, the state cannot, under our new Constitution. Therefore, if we should decide against the state, the question could not be taken up and passed upon. But if we disregard this prior decision, and in doing so decide against the prisoner, he can take it up and have it passed upon by the court above, and then have the opinion of the court of years ago and the opinion of the court at present passed upon by the tribunal provided by the Constitution for that purpose, and settled definitely, and also in accordance with the modern trend of authority, if the Supreme Court deem it lawful and proper to do so.

Now, gentlemen, as we stated to some of you recently in another case, the guilt of the accused person may be proved by direct evidence; that is, by some one who was present, in case of larceny, for instance, and saw the prisoner take the property and carry it away, with intent to steal it. But all crimes cannot be proven by those who see the offense committed, because a crafty, skillful criminal will select some time to do the stealing when nobody is present to see him and give direct evidence. Therefore, in the interest of the administration of justice, it has been necessary to prove guilt by circumstantial evidence, as we call it; that is, by proving those circumstances from which a fair-minded and intelligent jury may reasonably infer the guilt of the accused person. In this case the state contends that it has shown to you that these articles were found in the possession of the accused. The law is that, where stolen property is found in the possession of another recently after the larceny of it, the party in possession of it is presumed to be guilty, unless his possession is satisfactorily explained or his innocence is otherwise satisfactorily shown by the evidence before the jury.

We will simply add that every prisoner is presumed to be innocent until he is proven guilty beyond a reasonable doubt. But a reasonable doubt is not a trivial, fanciful, speculative doubt, or a mere possible doubt, but is such a substantial doubt as intelligent, fair-minded jurors may reasonably entertain after a careful consideration of all the relevant evidence in the case.

Exception noted for defendant.

Verdict, guilty, with a recommendation to the mercy of the court.

(217 Pa. 476)

SACCHETTI v. FEHR.

(Supreme Court of Pennsylvania. April 1, 1907.)

1. LIBEL—JUSTIFICATION—PROOF.

In an action for libel, where defendant pleads justification, the burden is on him to show that the publication was substantially true in every material matter; but he need not establish the guilt of plaintiff beyond a reasonable doubt, so as to warrant his conviction in the criminal court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Libel and Slander, § 280.]

2. SAME—PREPONDERANCE OF EVIDENCE.

Act April 11, 1901, § 2 (P. L. 74), requiring that in libel the plea of justification must be proved to the satisfaction of the jury as in other cases, requires only a preponderance of evidence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Libel and Slander, §§ 280, 332.]

Appeal from Court of Common Pleas, Northampton County.

Action by Onofrio Sacchetti against Oliver I. Fehr. Judgment for defendant, and plaintiff appeals. Affirmed.

The court charged in part as follows: "He is not required to produce a measure of proof to satisfy you beyond a reasonable doubt that would be sufficient to convict this plaintiff of a criminal offense, if it did charge a criminal offense under the statute, if he were upon trial in a criminal court. He must satisfy you by the weight of the evidence. If you find that the defendant has satisfied you by the full measure of proof, as I have described it, then that ends this controversy, and your verdict must be for the defendant."

Verdict and judgment for defendant. Plaintiff appealed.

Argued before FELL, BROWN, MESTREZAT, POTTER, and ELKIN, JJ.

George W. Geiser, for appellant. E. J. Fox and J. W. Fox, for appellee.

PER CURIAM. The single question raised by the assignments of error relates to the measure of proof required to sustain a plea of justification in an action for libel. The instruction by the learned trial judge to the jury was that the burden was on the defendant to satisfy them by the evidence that the publication was substantially true in every material respect, but that he was not required to produce proof that would establish the guilt of the plaintiff beyond a reasonable doubt and that would warrant his conviction in a criminal court. Section 2 of the act of April 11, 1901 (P. L. 74), provides that "in all civil actions for libel the plea of justification shall be accepted as an adequate and complete defense, when it is pleaded and proved to the satisfaction of the jury as in other cases, that the publication is substantially true and is proper for public information or investigation, and has not been maliciously or negligently made." Proof

to the satisfaction of the jury "as in other cases" means proof as in other civil cases by a preponderance of evidence; and, whatever the rule may have been before, that is the measure of proof now required.

The judgment is affirmed.

(217 Pa. 490)

WEHR v. CARBON COUNTY ELECTRIC RY. CO.

(Supreme Court of Pennsylvania. April 1, 1907.)

STREET RAILROADS—INJURY TO PERSON ON TRACK—QUESTION FOR JURY.

In an action against a street railway company to recover for the death of plaintiff's husband, killed by a car while endeavoring to lead his horse from the track, the question of defendant's negligence held for the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Street Railroads, §§ 251, 253.]

Appeal from Court of Common Pleas, Carbon County.

Action by Emma J. Wehr against the Carbon County Electric Railway Company. Judgment for plaintiff, defendant appeals. Affirmed.

Argued before FELL, BROWN, MESTREZAT, ELKIN, and STEWART, JJ.

Frederick Bertolette and W. W. Watson, for appellant. E. O. Nothstein and William G. Freyman, for appellee.

PER CURIAM. The husband of the plaintiff was killed under these circumstances: He went from his home to Mauch Chunk with a wagon load of vegetables to sell. While his horse and wagon were standing on a borough street between the curb and the car track, and he was at the rear of the wagon talking to purchasers, a car approached in front. His attention was called to the car by his son seven years of age, who was seated in the front part of the wagon. He went to the horse's head and took hold of the bridle. The horse was alarmed by the noise of the car and turned onto the track. While endeavoring to control the horse and lead him from the track, the deceased was struck by the car. The horse was gentle, accustomed to steam and trolley cars, and had not before been known to frighten at either. The questions in the case were whether the death was the result of an unavoidable accident caused by the horse's sudden turning onto the track in front of the car, or whether it resulted from the negligence of the motorman in not exercising vigilance and care in the management of the car. Since there was evidence tending to show that when the horse turned onto the track the car was over 70 feet from it, and could have been stopped within 25 feet, and that the motorman was not at his post on the front platform, but was in the middle of the car, the case was necessarily for the jury.

The judgment is affirmed.

(217 Pa. 423)

CRAWFORD v. SCHOOLEY.

(Supreme Court of Pennsylvania. April 1, 1907.)

1. WILLS—PROBATE—APPEAL—OPENING DECREE.

On appeal to the orphans' court from the decree admitting the will to probate, appellant produced a testamentary paper bearing a later date and proof as to its execution by two witnesses. Held, that the orphans' court could open a decree admitting the earlier will to probate and direct appellant to make proof of the later will before the register, but had no jurisdiction to consider an application for an issue to determine the validity of the paper claimed to be the later will.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, §§ 840, 842.]

2. SAME—ISSUE FOR JURY.

Where the subscribing witness of a will testified to its due execution, an issue to determine its genuineness is a matter of right, if requested by proponent.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, § 750.]

Appeal from Orphans' Court, Lackawanna County.

In the matter of the estate of James L. Crawford. From a decree dismissing the appeal from the register, George B. Schooley appeals. Reversed.

The following is the opinion of Sando, P. J., in the court below:

"The decedent, James L. Crawford, a resident of Scranton, Pa., died in Florida on February 19, 1905, leaving to survive him a widow, Huldah A. Crawford, and a stepson, James G. Shepherd. On February 27th, a will dated September 13, 1896, was probated, and his widow appointed executrix. By this will, with the exception of an inconsiderable legacy to a sister and a comparatively small devise to his stepson, his entire estate was given to his widow. The personal estate left by Mr. Crawford, as shown by the inventory and appraisal filed, amounted to \$971-802. In addition, he left real estate, as shown by the testimony, some of which was rented and yielding an income of about \$750 per month, and the rest consisting of his Scranton and Florida homes. On June 27, 1906, 16 months later, George B. Schooley took an appeal to the orphans' court from the decision of the register, admitting to probate the will dated September 13, 1896, as the last will and testament of the decedent, and granting letters testamentary thereon. On June 30, 1906, Mr. Schooley presented his petition to the orphans' court, praying that a citation issue to Huldah A. Crawford and J. G. Shepherd commanding them to appear and answer the petition and to show cause why such appeal should not be sustained and an issue awarded. In this petition he averred that on January 30, 1905, James L. Crawford, at the city of Philadelphia, made his last will and testament, a copy of which was attached as part of the petition. To this citation a suggestion was filed August 13th, in which the respondents stated they were in-

formed that there had been a codicil accompanying the proposed will and asking for a citation for its production before they should make answer. Such a citation was issued, and in response to it, on August 28th, the petitioner presented the proposed codicil dated January 30, 1905. To this petition as thus completed the respondents filed their answer, in which they suggested, *inter alia*, that the alleged will and codicil produced by the petitioner were forgeries and that the signatures of James L. Crawford to the will and codicil had been forged.

"Upon the issue made up a hearing was had, the questions being, stating them in the language of the petition, '(a) whether said paper writing dated September, 1896, is the last will and testament of James L. Crawford, deceased; (b) whether the said James L. Crawford, deceased, executed the will dated New York, N. Y., December 16, 1904, and witnessed by A. N. Bahman and C. F. Biedel, and whether at the same time, on January 30, 1905, he executed a codicil thereto.' The rules of law governing this case are simple and well settled. The forty-first section of the act of March 15, 1832 (P. L. 146), declares: 'Whenever a dispute upon a matter of fact arises before any register's court the said court shall, at the request of either party, direct a precept for an issue to the court of common pleas of the county for the trial thereof.' The orphans' courts possess all the jurisdiction and powers formerly vested in the 'registers' courts.' Const. 1874, art. 5, § 22; Act May 19, 1874, § 6 (P. L. 207). The construction given by the courts to this statute clearly leaves it in the discretion of the court to determine in any given case whether a substantial dispute as to material facts has arisen which must be submitted to a jury. The test by which the court is to determine whether such a substantial dispute has arisen is now well settled in a number of decisions. Substantially in the dispute is that a verdict could be supported by a trial judge upon a review of all the evidence (*De Haven's Appeal*, 75 Pa. 337; *Harrison's Appeal*, 100 Pa. 458; *Schwilke's Appeal*, 100 Pa. 628); as to whether or not a signature is genuine is that a verdict in favor of the genuineness could be supported upon a review of the whole evidence. There is only one safe and reliable test. If the testimony is such that after a fair and impartial trial, resulting in a verdict against the proponent of the alleged will, the trial judge, after a careful review of all the evidence, would feel constrained to set aside the verdict as contrary to the manifest weight of the evidence, it cannot be said that a dispute, within the meaning of the act, has arisen. *Knauss' Appeal*, 114 Pa. 10, 6 Atl. 394; *Sharpless' Estate*, 134 Pa. 250, 19 Atl. 630; *Tallman's Estate*, 148 Pa. 286, 23 Atl. 986; *Douglass' Estate*, 162 Pa. 567, 29 Atl. 715. It is not our purpose to review the numerous cases which have been decided,

having a bearing on the matter under consideration. In some of the cases it is held that the granting of an issue is within the discretion of the court. This position renders it necessary that the court shall, to some extent at least, make judicial inquiry into the facts. The discretion to be exercised in such case must not be arbitrary or willful, but it must be based upon facts, the knowledge of which is judicially acquired. If this court has no power to judge whether there are in truth matters in dispute affecting the merits of the controversy, it has no duty to perform but to certify alleged facts to another court, to register the decision of that court when it is returned, and to enter a decree in accordance therewith.

"After a careful consideration, aided by the light of the many cases cited upon argument and others, we have no difficulty in reaching the conclusion that the court not only has the power, but is charged with the duty to ascertain from the evidence adduced by the parties whether there are material disputed facts, and whether the character of such dispute is such that, if the facts found by a jury in favor of one who requests the issue, such finding could upon consideration of the whole evidence in good conscience be sustained. Having reached a conclusion as to the correct rules to apply in a case like the present, our next duty is to apply them.

"Why in any event or under any circumstances refer evidence to a jury when, if their verdict should be against the weight of it, it would have to set aside? We have taken up the evidence to determine whether there is a substantial dispute demanding an issue. If evidence be so strong as necessarily to produce certainty and conviction, it matters not by what kind of evidence the effect is produced; and the intensity of the proof must be precisely the same, whether the evidence be direct or circumstantial. When it is stated that a fact has been established by direct and positive evidence, it is meant that it has been testified to by witnesses as having come under the cognizance of their senses, and of the truth of which there seems to be no reasonable doubt or question, and, when it is stated that a fact has been established by circumstantial evidence, it is meant that the existence of it is fairly and reasonably to be inferred from other facts proved in the case. When circumstances connect themselves closely with each other, when they form a large and strong body, so as to carry conviction, it may be proof of a more satisfactory sort than that which is direct.

"On the part of the petitioner it is claimed that to entitle him to an issue all that is required of him is to establish by the proofs a *prima facie* case. On the part of the respondents it is claimed that an issue ought not to be directed if upon the whole evidence, as well that of the petitioner as that of the respondents, a verdict ought not to be allowed to stand. We think the latter is the

principle which must guide us in the disposition of the case.

"Applying the principles of law which are well established by the authorities, we are irresistibly led to the conclusion that the issue as prayed for must be refused. It is true that the petitioner and the two subscribing witnesses have testified that they saw the decedent sign his name to the alleged will and codicil, and ordinarily it might be said that such testimony should be sufficient to support a verdict in accordance with it, but upon consideration of the overwhelming evidence to the contrary we could not in conscience allow such a verdict to stand. We would subserve no purpose in discussing the circumstances which so convince us. It would require too much time and space. But we are satisfied that a disinterested reading and consideration of all the evidence cannot fail to satisfy anyone that it would be unrighteous to grant the issue prayed for.

"Appeal dismissed and demand for an issue refused."

Argued before FELL, BROWN, MESTREZAT, POTTER, and STEWART, JJ.

W. U. Hensel and S. B. Price, for appellant. Welles & Torrey, Roswell H. Patterson, and Joseph O'Brien, for appellees.

STEWART, J. This proceeding, so far as it was an appeal from the decree of the register admitting to probate the will of James L. Crawford, bearing date of September 13, 1896, was entirely regular. So far as it was a proceeding to determine whether the alleged will bearing date of January 30, 1905, was a forgery, it was not only irregular, but was coram non judice. This latter results necessarily from the fact that in the probate of wills the orphans' court is without original jurisdiction. The appeal here put at issue a single question, and that related exclusively to the will which had been admitted to probate: Was it the testator's last will? Appellant contended that it was not, and, to establish his contention, he produced a paper purporting to be a will of the same testator executed more than eight years subsequent to the date of the will probated. This paper was in the case simply as matter of evidence. An adjudication in appellant's favor would not have established it as a will. That could only be done in the first instance through the probate of the register, and the correctness of his adjudication could only be inquired into by the orphans' court on appeal. The paper had never been before the register. It had never been the subject of a judicial decree, and was not before the court in this proceeding except as evidence in connection with the issue being tried. To make effective his appeal, all that was required of appellant was to prove by two witnesses the execution of the paper he produced. It bore a later date, and was clearly testamentary

in its character. If proved by two witnesses, then prima facie the will that had been admitted to probate was not a last will. This much was done, and the inquiry should have there ended. What remained was for the orphans' court to open up the decree admitting to probate the earlier will, and direct that the appellant produce before the register the paper which he claimed to be a later will, and proceed to make proof of its execution and validity in the usual manner. Whether the paper so offered for probate was forged or genuine would then become a question to be inquired into, if contested on such ground, and the orphans' court, either upon the appeal from the register's decree, or upon certificate from him that the case presented a difficult and disputable question, would have jurisdiction to determine it. On an appeal from the decree of the register with respect to some other will, it had no authority to make such inquiry, and its conclusion with respect to it was without effect. The application for an issue to test the genuineness of the paper alleged to be a later will was premature, and the proceeding under it may be wholly disregarded. If authority is needed for the view here expressed, it may be found in *Cawley's Estate*, *Cawley's Appeal*, 162 Pa. 520, 29 Atl. 701.

Since the question considered by the court below—to no purpose as we have seen—is sure to arise when the disputed will shall come to be offered for probate, we take occasion here to say that in proceedings of this character, when the subscribing witnesses to a will testify to its due execution, an issue to determine the genuineness of the instrument, if requested by the proponent, is a matter of right.

The decree appealed from is reversed, and the record remitted for further proceedings in accordance herewith.

(217 Pa. 496)

VAUGHN v. VAUGHN et al.

(Supreme Court of Pennsylvania. April 1, 1907.)

PARENT AND CHILD—GIFTS—UNDUE INFLUENCE—BURDEN OF PROOF.

Unless there is evidence of undue influence, the burden is not on the donee to show the fairness of a gift from a parent to his child.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37. Parent and Child, §§ 129-131.]

Appeal from Court of Common Pleas, Lackawanna County.

Bill by John Vaughn against Daniel W. Vaughn and the South Scranton Building & Loan Association. From a decree dismissing the appeal, plaintiff appeals. Affirmed.

Argued before FELL, BROWN, MESTREZAT, POTTER, and STEWART, JJ.

S. B. Price and P. E. Kilcullen, for appellant. T. A. Donahoe and M. J. Donahoe, for appellees.

PER CURIAM. The bill in this case was filed by an administrator to set aside the assignment of a note made by the decedent a few days before his death to his son. The averments of the bill are that the decedent, because of sickness and the infirmities of age, was unable to transact business, and that the assignment was procured by undue influence and fraud. Neither of these averments was sustained by the evidence. It was found by the learned judge that the decedent was not mentally weak when the assignment was made, but was of sound mind and capable of transacting business and fully understood the nature and character of his acts; that no confidential relations existed between him and his son; and that there was no evidence that he was in any way influenced to make the assignment, or that it was not his voluntary act. As between parent and child, there is no presumption of the invalidity of a voluntary gift, and unless there is evidence of undue influence, or of circumstances that give rise to a suspicion, the burden is not on the donee to show the fairness of the transaction. *Worrall's Appeal*, 110 Pa. 349, 1 Atl. 380, 765; *Simon v. Simon*, 163 Pa. 292, 29 Atl. 657; *Kleckner v. Kleckner*, 212 Pa. 515, 61 Atl. 1019.

The decree is affirmed, at the cost of the appellant.

(217 Pa. 512)

COMMONWEALTH v. EYLER.

(Supreme Court of Pennsylvania. April 15, 1907.)

1. HOMICIDE — INTOXICATION — DEGREE OF CRIME.

Where the killing is admitted, and the only defense is intoxication, the only issue is the degree of guilt, which depends on the degree of intoxication.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Homicide, § 46.]

2. CRIMINAL LAW—EVIDENCE—OPINION EVIDENCE—INTOXICATION.

Opinions of nonexperts are admissible, on a trial for murder, where the defense is that of intoxication.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 1046.]

3. SAME.

On trial for murder, where the defense is intoxication, a witness who has actual knowledge and observation of the killing should be allowed to supplement his description thereof by his opinion as to the condition of the accused in the matter of the intoxication.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 1046.]

Appeal from Court of Oyer and Terminer, Adams County.

William Eyer was convicted of murder in the first degree, and appeals. Affirmed.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, and STEWART, JJ.

Wm. Hersh, for appellant. S. D. Keith, Dist. Atty., and W. C. Sheely, for the Commonwealth.

MITCHELL, C. J. The killing and the manner and circumstances of it, including the weapon used, were admitted by the prisoner, appellant. The defense was intoxication, and it was conceded by the commonwealth that the prisoner had been drinking. The only issue, therefore, was the degree of guilt, and that depended on the degree of intoxication.

The law as to the various grades of homicide, murder, with its distinction of degrees, and manslaughter, was fully and accurately explained to the jury, and then the law as to intoxication—that it is not an excuse for crime, but that when it is of such degree as to render the prisoner incapable of deliberation or premeditation, or even of the formation of a specific intent, it may reduce the grade of the offense. All this was carefully explained to the jury, and its application pointed out, in a detailed and elaborate charge, in which we find no error, notwithstanding the numerous assignments. The evidence contained all the elements of murder of either degree, and if the jury took the view unfavorable to the prisoner it was not through any errors of the court.

The only matter assigned as error which it is worth while to notice specially is the admission of the opinions of witnesses as to the degree of intoxication of the prisoner, without, as it is alleged, requiring a sufficient preliminary statement by them of the facts on which their opinions were based. This line of testimony as to the intoxication of the prisoner was opened by the defense in its cross-examination of the commonwealth's witnesses. The prosecution objected, but the testimony was admitted by the court for its presumed bearing on the corpus delicti. The subsequent course of the trial is thus stated by the learned judge in his opinion refusing a new trial. "The defense also called a number of witnesses on the same question, both before and immediately after the assault, who gave it as their opinion that the defendant was under the influence of liquor; that he was drunk. Some of those witnesses had a better foundation for their opinion than others; but the whole was left to the jury for their judgment and determination. In rebuttal the witnesses for the commonwealth but followed in the wake of the witnesses for the defense. No opinion as to the defendant's intoxication was given, except as it was grounded on what was seen and noticed of the defendant at the time, affording, in the judgment of the court, sufficient opportunity for observation and inference." It would be sufficient in regard to the assignments of error on this point, to say that the objection now made was not made to the court at the trial. When the commonwealth's witnesses were asked the question, the only objection made was that it "was not proper rebuttal," though after the testimony had been given the defense objected "to all the testimony on the part of the commonwealth as to the so-

briety of the defendant as incompetent, immaterial, inadmissible, and not proper rebuttal." There was no motion to strike out the testimony, and the objection was clearly too vague and too general to be sustained.

But, even if it had been in proper time and proper form, it could not have prevailed. The rule as to the admissibility of opinions of nonexpert witnesses was settled in the leading case of *Graham v. Penna. Co.*, 139 Pa. 149, 21 Atl. 151, 12 L. R. A. 298: "Where mere descriptive language is inadequate to convey to the jury the precise facts, or their bearing on the issue, the description by the witness must of necessity be allowed to be supplemented by his opinion, in order to put the jury in position to make the final decision of the fact." And quoting from *Com. v. Sturtivant*, 117 Mass. 122, 19 Am. Rep. 401: "The exception includes the evidence of common observers, testifying to the results of their observations made at the time, in regard to common appearances or facts, and a condition of things which cannot be reproduced and made palpable to a jury." In *Auberle v. McKeesport*, 179 Pa. 321, 36 Atl. 212, it was said that the rule of *Graham v. Penna. Co.*, "has not been departed from. Whether its application to existing facts in subsequent cases has always been correct is a matter on which opinions may naturally differ, because, as said in that case, quoting Chief Justice Shaw in *New England Glass Co. v. Lovell*, 61 Mass. 319, there is extreme difficulty in laying down any rule precise enough for practical application, and the only proper course is to keep the principle steadily in view and apply it according to the circumstances of each case." In *Graham v. Penna. Co.* it is said: "In several classes of questions the line between the witness' judgment or opinion and his affirmation of a fact is so indistinct that it cannot be marked out in practice. Such are questions of identity of persons or things, of the lapse of time, of comparative shape or color or sound, of expression and through it of meaning, etc. In all of these, however positively the witness may affirm facts, what he says is after all largely his opinion, but so blended with knowledge and recollection that the line where opinion ends and fact begins cannot be distinguished."

In this class must certainly be included the question of intoxication. The effects of drink differ so widely in degree and visible manifestations that mere descriptive language is inadequate to convey to others the subtler gradations of evidence on which the observer's judgment is really formed. A man may be quiet and inert under circumstances that usually produce activity, and it may be because he is overcome with fatigue, or sleep, or is sodden with liquor. The outward conduct, and therefore the verbal description, will be closely similar in either case. So, on the other hand, his manifestations of excessive or noisy activity may be because he is excited, or angry, or fighting drunk. With-

out the observer's opinion as to the producing cause, a mere description, which would almost always, from the inadequacy of language, lack some of the subtler details, would afford a very uncertain basis for judgment of the actual condition. Hence it is proper in such cases that a witness who has actual knowledge and observation of an occurrence should be allowed to supplement his description by his opinion. Of course, actual knowledge and observation on the part of the witness are the essential basis of the reception of his opinion, and in the usual and regular course such facts must be first proved as a foundation. In the present case it appears that one, at least, of the witnesses was asked his opinion without the ordinary preliminary inquiry into his means and opportunity of knowledge. But, as already said, this objection was not made at the time. It was apparently clear to everybody that he had been present, and that fact was brought out in full on the cross-examination. No witness was allowed to give an opinion who did not possess the requisite personal knowledge of the facts.

The precise point that intoxication is a matter of common observation, on which the opinions of nonexperts are admissible, does not seem to have been expressly passed upon by this court, probably because it has never been seriously or formally challenged. But all the analogies, including the far more serious one of insanity, point to the reception of such opinions. In other states the authorities are uniform. In *People v. Eastwood*, 14 N. Y. 562 (1856), the Court of Appeals of New York said: "A child may answer whether a man whom it has seen was drunk or sober. It does not require science or opinion to answer the question, but observation merely. But the child could not probably describe the conduct of the man so that, from its description, others could decide the question. Whether a person is drunk or sober, or how far he was affected by intoxication, is better determined by the direct answer of those who have seen him than by their description of his conduct." "A witness was allowed to state that the plaintiff was intoxicated. This was objected to as being the expression of the opinion of a witness."

* * * In a certain sense a vast deal of testimony is but statements of opinion. But it is not opinion in an objectionable sense. It is everyday practice for witnesses to swear to such facts as the quantity, weight, size, and dimensions of a thing, to heat and cold, age, sickness and health, and many other matters of that kind. In such cases witnesses do not express an opinion founded on hearsay or the judgment of other men. It is not an opinion based upon facts recited and sworn to by other witnesses. It is their own judgment, based upon facts within their own observation. It is, so far as such a thing can be, knowledge of their own. It is an opinion which combines many facts, without

specifying them. It has been described as 'an abbreviation of facts,' a 'shorthand rendering of facts.' It is an inference equivalent to a specification of the facts. The witness in effect describes the facts when he gives his opinion. It is his way of stating them. Such testimony is admitted from necessity. A witness can seldom give in detail all the points and particles which go to make up his belief, but he can characterize them." *Stacy v. Portland Publishing Co.*, 68 Me. 279. "Whether a person is drunk is a question which a person not an expert is competent to answer, as this is something which may be fairly considered to be a matter of common knowledge." *Burt v. Burt*, 168 Mass. 204, 46 N. E. 622. "The witnesses were rightly allowed to testify whether the plaintiff was intoxicated. It was not a matter of opinion, any more than questions of distance, size, color, weight, identity, age, and many other similar matters are." *Edwards v. Worcester*, 172 Mass. 104, 51 N. E. 447. "Under proper circumstances a common witness may testify directly as to sanity, * * * and whether a person was drunk or sober." *Gallagher v. People*, 120 Ill. 179, 11 N. E. 335. And see *State v. Huxford*, 47 Iowa, 16; *Hardy v. Merrill*, 56 N. H. 227, 22 Am. Rep. 441; *Sydleman v. Beckwith*, 43 Conn. 9; *Choice v. State*, 81 Ga. 424 (467); and *Elam v. State*, 25 Ala. 58.

Judgment affirmed, and record remitted for purpose of execution.

(217 Pa. 497)

CUNNINGHAM v. WANAMAKER.

(Supreme Court of Pennsylvania. April 15, 1907.)

SALE—ACTION BY PURCHASER—RECOVERY OF PRICE PAID.

Plaintiff purchased and paid for two electric vehicles, and after delivery found they were unsatisfactory, and the vendor requested plaintiff to ship them back for adjustment. On a subsequent test plaintiff demanded a return of his money, which was refused, and thereafter he wrote the vendor, stating that he had left the vehicles with him for sale on plaintiff's account. Thereafter he wrote several letters to the vendor, telling him to sell the vehicles for the best price he could get, but on receiving an offer from the vendor for about one-third of the price he made no reply. *Held*, that he could not recover the purchase price paid by him in a suit brought after three years; he by his action having ratified the sale.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales, §§ 117, 296.]

Appeal from Court of Common Pleas, Philadelphia County.

Action by Percy A. Cunningham against John Wanamaker. Judgment for defendant, and plaintiff appeals. Affirmed.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

De Forrest Ballou, for appellant. Alex. Simpson, Jr., and Wm. L. Nevin, for appellee.

BROWN, J. In October, 1900, the appellant, wishing to procure two steam omnibuses, called at the store of the appellee and entered into negotiations for their purchase. On the 23d of that month a written proposition was submitted to him by the appellee to deliver them to him for \$2,200 each, "as near sixty (60) days from receipt of this order as is possible," and they were "to be constructed in accordance with usual plan designed for such wagons." This proposition was accepted by the appellant in writing on the same day it was made, and in accordance with its terms he paid one-third of the purchase money. On February 14, 1901, nearly four months afterwards, the vehicles reached Lewistown—the point to which they were to be shipped—with bill of lading attached for the balance of the purchase money, which the appellant paid. Whether they were built "in accordance with the usual plan designed for such wagons" does not appear; but it is clear from the testimony that they did not work satisfactorily. On the contrary, when the appellant attempted to operate them, he was unable to do so, and, it may be assumed, on account of their defective construction. Before he received them, in a letter written by Joseph S. Bunting, the representative of the appellee with whom he dealt, he was told that they were "substantial and strong," "neater than any automobile 'bus'" that the writer had ever seen, and mechanically seemed to him to be almost perfect. Appellant notified the appellee of his inability to operate them, and on April 6, 1901, the latter wrote him that he thought they could be put in satisfactory shape, and requested him to ship them to Philadelphia for the purpose of making them satisfactory. The omnibuses were immediately shipped to the appellee, and in response to a notice that they had been put in shape, and a request that he come and see them tested, the appellant went to Philadelphia and witnessed a test of them on May 16, 1901, which, according to his testimony, was most unsatisfactory, and he demanded a return of his money, which was refused.

The question in this case is not whether, under the foregoing facts, the appellant could have rescinded his contract and demanded a return of the money he had paid for the vehicles, but is whether what he subsequently did on May 16, 1901, amounted to his ratification of the contract and a release by him to the appellee from all liability. After the representative of the appellee, upon whom the appellant had made the demand for the return of his money, had refused to return it, there was a further conversation between them, resulting in a written direction by the appellant to the appellee to sell the omnibuses for him. This direction was in the following form: "I have to-day left at your automobile station my two steam 'buses, for you to sell for my account and

risk at \$2,200 each. I assume all risks in case of loss or damage to my vehicle by fire." The appellee not being able to sell at the price fixed, the appellant, by a letter inclosed in an envelope postmarked Lewistown, July 3, 1901, wrote Bunting as follows: "Dear Sir: Sell 'buses as soon as you can, the best price you can get for them." On July 8, 1901, the appellant again wrote to the representative of the appellee as follows: "Inclosed find article signed. Mr. Bunting, get as much for these 'buses as you can, and sell them as quick as possible. I am now out about two thousand on this job." The article inclosed in the letter was as follows: "John Wanamaker Automobile Station, 23d and Walnut Streets. I have left at your automobile station my two steam 'buses for you to sell for my account and risk at the best price you can secure for them above \$1,500 each. I assume all risks in case of loss or damage to my vehicle by fire. P. A. Cunningham. Residence, Lewistown. Date, July 8, 1901. To supersede my authorization of May 16, 1901." On July 10th appellant again wrote Bunting; the following being a copy of his note: "Dear Sir: Do your best to get more than \$1,500 for the 'buses, as I should think you could get four thousand (\$4,000) for them. At any rate, do what you can for me. Very respectfully, P. A. Cunningham." In February, 1903, the appellee wired the appellant that an offer of \$1,500 had been made for both 'buses. The telegram was followed by a letter confirming it and advising acceptance of the offer. Apparently no attention was paid to this, and in the following April the appellee notified the appellant that, as he had had the omnibuses on hand for almost two years, during which time two offers made for them had been submitted to him and refused, he would no longer keep the vehicles without charging storage. Nothing seems to have occurred after this until the institution of the suit on April 21, 1904.

Even if it be assumed that the appellant had, on May 16, 1901, a right to rescind the contract after the test made on that day, showing that the omnibuses would not work, it was incumbent upon him to exercise that right promptly within a reasonable time; and, under undisputed facts, what is a reasonable time is for the court. *Leaming v. Wise*, 73 Pa. 173. The facts in this case are not in dispute. The defendant called no witnesses, and the oral testimony submitted by the plaintiff must be taken as true. It shows that on May 16, 1901, he demanded a return of his money, and, if he had stopped when the return was refused, he might have stood upon his rescission of the contract and recovered what he had paid. But this we do not decide, because it is not a question in the case under the admitted facts. When he was told that his money would not be returned to him, instead of standing upon his right to have it returned, if he had such

right, he in writing ratified the contract, treated the omnibuses as his own property, and gave specific direction that they be sold by the appellee for him. With commendable frankness he states that he signed the paper of May 16, 1901, "so I couldn't come back on him." He repeats this further on in his testimony: "I say on the 16th of May I went in—after we broke down I went in—and demanded my money, and he refused it, and simply told me he would not give me the money. That was all there was of it. He said he would sell the 'buses, and he produced a paper and told me to sign that, and he would sell them. He said if I would sign it for the purpose of getting my money, if they would be able to sell them, I should sign off, so I could not come back on them; and I signed." The paper signed by him is, on its face, a distinct direction to the appellee to sell the omnibuses for him, and with his unqualified admission that he signed it that he might not have recourse to the appellee, taken in connection with the papers of July 3d, 8th, and 10th, repeating the direction to sell for him, a court ought not to be asked to say that the paper is not effectual for the very purpose for which it was admittedly given. The only error assigned is the instruction of the learned trial judge to the jury that the effect of these papers was an assumption of ownership of the automobiles by the appellant and a waiver of any right which he might have previously had to compel the appellee to return his money. Any other instruction would have been error, and, if the appellant cannot now recover, it is because he has placed himself in a position precluding recovery.

The assignment is overruled, and the judgment affirmed.

(117 Pa. 535)

VANT v. ROELOFS.

(Supreme Court of Pennsylvania, April 22, 1907.)

1. MASTER AND SERVANT—VICE PRINCIPAL.

A person is not a vice principal, unless he has entire charge of the business, or a distinct branch thereof, having authority to superintend the work and exercising control of such business, or unless the employer has delegated to him a duty of his own, which is an absolute obligation, from which nothing but performance can relieve him.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 422-426, 437-448.]

2. SAME—INSTRUCTING EMPLOYÉ.

An employer is not required to instruct an employé as to an obvious danger.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 310, 316½.]

Appeal from Court of Common Pleas, Philadelphia County.

Action by Harry Vant against Henry H. Roelofs, trading as Henry H. Roelofs & Co. Judgment for plaintiff, and defendant appeals. Reversed.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

John H. Fow and F. Carroll Fow, for appellant. Henry A. Craig and Augustus Trask Ashton, for appellee.

ELKIN, J. The statement of claim in this case charges two acts of negligence: First, that the appellee was not properly instructed in the use and operation of the machine upon which he was injured; and, second, that the defendant was negligent in furnishing a machine which was so dangerous and defective as to render it unsafe. The evidence failed to support the allegation that the machine was defective, and therefore unsafe, and we do not understand that this branch of the case was insisted upon in the court below or that it is pressed here. We may disregard this allegation in the further consideration of the question involved here.

We then come to the question whether the appellant was negligent in failing to give proper instructions to the appellee before placing him at work on the machine. The appellee relies wholly on the allegation that Mr. Lauber was a vice principal, and that he instructed him to take his fingers and stretch out the wrinkles when the machine was running, and asserts in following these instructions the revolving cone carried his hand against the disk and caused the injuries about which complaint is made. The appellee admits, however, that, when Lauber instructed him how to take the wrinkles out, he first stopped the machine, put his hand on the felt, and smoothed out the wrinkles before the machine was again set in motion. If appellee had done the same thing, he would not have been injured. It is contended, however, that Lauber told appellee that he could smooth the wrinkles out while the machine was revolving; but it was obvious to any one with reasonable intelligence that if he put his hand upon a revolving cone, and permitted it to remain there, it would be drawn against the disk. It did not require instructions from any one to inform an employé about a danger that was so perfectly obvious to any one with eyes to see and hands to feel. The machine was not complicated, and had no hidden or latent dangers about which it was the duty of the employer to instruct an employé. The appellee was a young man about 20 years of age, had worked as an apprentice in the factory for a year, and on this particular machine about 10 days at the time of the accident.

Even if it be conceded that Lauber improperly instructed appellee in his duties, and this is not conceded, it would still be necessary for appellee to go one step farther and show that Lauber was a vice principal. The learned court below submitted this question to the jury. It is true that in some cases this is a question of fact to be deter-

mined by the jury. It must not be overlooked, however, that it is the duty of the court to first determine whether, assuming all the facts proven at the trial to be true, they are sufficient to show that the relation of vice principal was established. A vice principal is one placed in entire charge of the business, or a distinct branch of it, having not mere authority to superintend certain work or certain workmen, but who exercises control of the business, or a particular branch of it, and where the employer does not exercise discretion or oversight of his own; or, secondly, one to whom the employer delegates a duty of his own, which is a direct, personal, and absolute obligation, from which nothing but performance can relieve him. *N. Y., L. E. & W. R. R. Co. v. Bell*, 112 Pa. 400, 4 Atl. 50; *Lewis v. Seifert*, 116 Pa. 628, 11 Atl. 514, 2 Am. St. Rep. 631; *Ross v. Walker*, 139 Pa. 42, 21 Atl. 157, 159, 23 Am. St. Rep. 160; *Prescott v. Engine Company*, 176 Pa. 459, 35 Atl. 224, 53 Am. St. Rep. 683; *Casey v. Paving Company*, 198 Pa. 348, 47 Atl. 1128; *Green v. Washington Oil Company*, 216 Pa. 35, 64 Atl. 877. Certainly the testimony offered in this case did not come up to this legal requirement, and was insufficient to submit to the jury to determine the question of vice principalship.

Judgment reversed, and is here entered for defendant.

(217 Pa. 477)

McAULEY v. CHAPLIN-FULTON MFG. CO.
et al.

(Supreme Court of Pennsylvania. April 1, 1907.)

PATENTS—INFRINGEMENT—WATER REGULATORS.

Patent No. 662,488, dated November 27, 1900, for improvement in water regulators for boiler, held not an infringement of the McAuley-Fulton patent, dated November 12, 1895, No. 549,877, for an automatic water feeder for boilers.

Appeal from Court of Common Pleas, Allegheny County.

Bill by Robert G. McAuley against the Chaplin-Fulton Manufacturing Company and Louis B. Fulton. Decree for defendants, and plaintiff appeals. Affirmed.

The following is the opinion of Frazer, P. J., in the court below:

"The purpose of this bill is to secure an accounting for royalties upon the sale of boiler feeders manufactured and sold by defendant company under patents in which plaintiff claimed to have an interest. From the bill, answer, and proofs we find the following facts:

"Finding of Facts.

"(1) In generating steam the water in the boiler is constantly varying within certain vertical limits. For the purpose of periodically renewing and providing a supply of water numerous appliances have been patented

both in this and in foreign countries, for automatically controlling the flow of water into the boiler. These devices are not new to the art, and all are to a greater or lesser extent constructed on the same principle.

"(2) Plaintiff and the defendant, Louis B. Fulton, are the joint inventors of an automatic water feeder for boilers, the operation of which is controlled by the water in the boiler, whereby the appliance is automatically set in operation upon the water in the boiler falling below low-water mark, and stopped when a proper supply of water has been obtained; the invention being covered by letters patent of the United States, dated November 12, 1885, and numbered 549,877, which letters patent were subsequently assigned to the Chaplin-Fulton Manufacturing Company in accordance with an agreement between plaintiff and defendants, dated August 19, 1895.

"(3) The agreement referred to in the preceding finding provides for the assignment by McAuley and Fulton to the Chaplin-Fulton Manufacturing Company of the letters patent for the boiler feeder when granted, and, in consideration therefor, the Chaplin-Fulton Manufacturing Company agrees to pay McAuley and Fulton a royalty of \$4 on each and every boiler feeder made and sold by it. It is further provided that in the event of the Chaplin-Fulton Manufacturing Company discontinuing the manufacture of such feeders for a period of more than 12 months, or failing to pay the royalties provided for within 60 days after the same became due and payable, 'the entire right, title and interest in and to said invention and letters patent is to revert to the parties of the first part [McAuley and Fulton], and in that event the party of the second part [the Chaplin-Fulton Manufacturing Company] agrees to reconvey to said parties of the first part all of said right, title and interest.' And it is further provided, in clause 5 of the agreement, as follows: 'The parties of the first part agree, jointly and severally, to assign to the party of the second part any and all interest in and to any improvements that they or either of them may at any time make on said invention; the same to be included within the terms of this agreement.'

"(4) Subsequent to the granting of the letters patent above referred to, the Chaplin-Fulton Manufacturing Company began the manufacture of boiler feeders in accordance with such letters patent, and continued to do so until March, 1901; about 123 feeders in all being manufactured and sold by defendant company, at an average price of \$100 each, upon which plaintiff is entitled to royalties.

"(5) On November 6, 1897, Louis B. Fulton, one of the defendants, filed his application for letters patent for an improvement in water regulators for boilers, having for its object the automatic control of the feed water supply to a boiler, and received from the

United States government letters patent, dated November 27, 1900, and numbered 662,488, which letters patent were duly assigned by him to defendant company.

"(6) Defendant company, since such assignment to it by Louis B. Fulton, has been engaged in the manufacture and sale of feed water regulators under the letters patent assigned to it by him, and is still engaged in manufacturing and selling the same. The water regulators manufactured under the patent of Louis B. Fulton are less complicated than those manufactured under the patent of McAuley and Fulton, and are much cheaper; the average price for which the same are sold being about \$75 each. Under these letters patent a large number of feeders have been manufactured and sold and are now in use throughout the country.

"(7) The McAuley-Fulton invention provides an automatic feeder, the operation of which is controlled by the water in the boiler, whereby it will be automatically set in motion as soon as the water in the boiler falls below the low-water mark, and stops when the proper supply has been obtained. In the operation of making steam and the necessary periodical renewal of the water in the boiler, the water level is constantly varying within certain prescribed vertical limits. The surface of the water in the boiler being turbulent and foaming, to secure a quiet water level, connection is made with a water column, located outside the boiler; the water column being connected below with the water in the boiler, and above with the steam therein. The water supply to the boiler is effected through an intermittently operating injector or pump or other flow device controlled by the machine of the patent. The machine is designed to operate valves which control a steam supply and exhaust to and from the flow device, so that when the water of the boiler falls to the low level the flow device will operate, and when the water in the boiler rises to the high level the flow device will stop operating. This valve mechanism is actuated by a pivoted tilting lever arranged to make striking or abutting contact with the projecting valve stem. The pivoted lever is counterweighted at one end, and is provided at the other end with a water-actuated body, the weight of which is variable, owing to the presence or absence of water, at high or low level. The water-actuated body is a hollow sphere and communicates, through the hollow arm of the lever which supports it, with a tube which leads down to the low-water level in the water column. When the bottom of this tube is uncovered by the falling water in the column, steam forces the water out of the hollow water-actuated sphere, thus decreasing its weight so that the counterweight at the other end will tilt the lever and actuate the valve to set the water flow device into operation. When the bottom of the tube is covered by the rising water in the column, steam in the tube and

hollow sphere condenses, causing a partial vacuum, and the steam pressure in the upper part of the water column forces water through and around the tube and into the sphere, increasing its weight and overbalancing the counterweight at the opposite end, causing it to tilt in the opposite direction to effect reverse operation of the valve mechanism, by which the water flow device is stopped. To facilitate quick filling and emptying of the water-actuated sphere, the hollow arm of the lever communicates downwardly with a partitioned chamber in the water column; the water being always subject to the same conditions of level and steam pressure existing in the water column and boiler. To facilitate free exhaust of steam from the water flow device, a secondary relief valve is arranged at the other side of the lever bearing and is actuated by the tilting lever alternately with the pressure valve. To insure quick and prompt operation of emptying the water-actuated sphere, it is located at a considerable height above the normal water level in the water column and boiler.

"(8) In the Fulton invention, a casing having an interior chamber is mounted on top of a water column and connects at its bottom with the latter, at a point beneath the water level therein, through a pipe, and at its top through another pipe, which opens into the column at what is normally the level of the water in the boiler. Within the vessel is located a displacement body, which may be composed of a block of wood or any other suitable material. This displacement body is mounted on the end of a lever which is fulcrumed on the lateral extension of a vessel, and the outer arm of such lever is provided with a counterbalancing weight. To the upper portion of this vessel is secured the casing of a valve which is unseated when the vessel is filled with water, being held from its seat by steam pressure entering the casing through a pipe. Steam so entering the casing will pass through the pipe to and above the diaphragm of the pressure or controlling valve, which latter is unseated when the pressure is cut off through a pipe by the seating of another valve; such controlling valve being opened by pressure against its under side. When the water in the boiler lowers beneath the end of the pipe which extends into the boiler, steam will pass through such pipe into the upper part of the casing, causing the water therein to flow back to the boiler or water column through a pipe; the displacement body in its descent serving to aid the outflow of the water from the casing. Thereupon the fingers of a lever, acting on the extension, will force a valve to its seat so as to cut off the admission of steam pressure, allowing a valve to be unseated by the combined action of pressure against its under side and a spring. Thereupon water will be supplied to the boiler, and when the proper quantity has been obtained the lower end of the pipe

which extends into the boiler will be submerged, thereby entrapping the steam in the chamber, and, such steam being condensed, water will rise in the casing, and the impetus thereof, together with the agency of the counterbalancing weight, will cause the elevation of the displacement body, and consequently the tilting of the lever. The pressure of the finger being relieved from the extension, a valve will be automatically unseated by the steam pressure, allowing the latter to pass from the casing through a pipe to the diaphragm of a valve, effecting the seating of the latter, and the cutting off of steam to the injector and stopping the flow of water into the boiler.

"(9) While the two machines perform the same duty, they are dissimilar in appearance and materially different in construction and operation. In the Fulton device the lever is operated by the presence and absence of water, not within, but at the outside, of the operating device; whereas, in the McAuley-Fulton invention, and all previous structures of the kind called to our attention, the lever is operated by the presence and absence of water introduced into a hollow shell or body forming part of the lever or mounted on one end thereof; the water being emptied by the introduction of steam into such hollow body or enlarged end of a pipe leading directly to the latter. In all constructions previous to the Fulton device, the only agency for effecting the tilting of the lever was the supplying and discharging of water into the lever itself. In the Fulton appliance, a body suspended from a solid lever and located in a stationary vessel, into which water is alternately supplied and emptied, is employed as the means of putting the appliance into operation; the operation of the Fulton feeder being the reverse of the McAuley-Fulton device.

"(10) While the McAuley-Fulton device and the Fulton device are quite dissimilar in appearance, construction, and arrangement, both are operated by the same force differently applied, and both accomplish the same purpose.

"(11) In accordance with the terms of the contract of August 19, 1895, defendant company bestowed good workmanship on the McAuley-Fulton device manufactured by it, and in good faith endeavored to introduce the invention into general use and promote its sale, and no feeders were manufactured by it in accordance with the Fulton letters patent until there was no longer any sale for the McAuley-Fulton device.

"(12) Defendant company at the trial tendered complainant and Louis B. Fulton a reassignment of the McAuley-Fulton patent, as provided for in the agreement of August 19, 1895.

"Conclusions of Law.

"The sole question here is whether the Fulton machine is a new invention or an

improvement to the McAuley-Fulton machine. If the former, this bill must be dismissed; if the latter, plaintiff is entitled to an accounting. Robinson on Patents, § 210, defines an improvement to be 'an addition to or alteration in some existing means, which increases its efficiency without destroying its identity.' And in section 213: 'But inasmuch as no improvement can subsist without an original on which to rest, this development must always leave the essence of the original invention unimpaired. Whenever, in extending the efficiency of an idea of means, the line which separates that means from every other is crossed, through any change in its essential characteristics, identity is lost, the idea of the original invention is excluded, and the result of the inventive act becomes a new and substantive invention.' And, again, in section 215: 'If the changes indicate the introduction in the idea of means of a different force, a different object, or a different mode of application, it is more than a change of form, more even than an improvement. It is a separate invention.' In determining what is and what is not an improvement, it seems to be the policy of the courts in passing upon contracts to assign improvements to construe such contracts so as to cover only improvements in the particular patent or machine which forms the immediate subject-matter of the assignment. In *Independent Electric Co. v. Jeffrey Mfg. Co.* (C. C.) 76 Fed. 981, the court construed a contract to assign improvements, much more comprehensive in its terms than the one before us, to include only improvements upon the particular machine secured by the patent, and said: 'To hold that the assignment in question would pass all of Leckner's future mining machine patents would, as counsel for complainant suggests, be equivalent to holding that these two assignments constituted, in fact, a mortgage on Leckner's brain, to bind all his future products, which is exactly the thing objected to by the court in *Manufacturing Co. v. Gill* (C. C.) 32 Fed. 697. In that case, Justice Bradley made it clear that under the rule in *Littlefield v. Perry*, 88 U. S. 205, 22 L. Ed. 577, only improvements on the particular machine secured by the patent would pass by an assignment of a patent with future improvements.' Other cases to the same effect might be cited. While the McAuley-Fulton machine and the Fulton machine are intended to perform the same duty, that fact alone does not make the latter device merely an improvement on the former. These devices are constructed upon entirely different lines. They are dissimilar in appearance, and in the Fulton machine the force putting the device into operation is applied in a manner different from all previous constructions of the kind. In machines constructed previous to the Fulton device, the lever was operated by the presence or absence of water on the outside and not within. In the construction

of his machine, Mr. Fulton ignored this idea and was the first inventor to introduce into feed water regulators the principle of employing a body suspended from a solid lever and located in a stationary vessel into which water is alternately supplied and emptied; the displacement body having no interior communication, and its own weight being always the same. In the McAuley-Fulton invention there is a lever, one arm of which is hollow, carrying a sphere at its outer end, which sphere communicates with the interior of the boiler; the emptying of water being effected by the introduction of steam through a pipe which passes through the hollow arm and opens into the sphere. In the Fulton invention the lever has no hollow arm, the hollow sphere being connected through a hollow arm with the interior of the boiler, and no steam pipe passing through an arm of the lever into the sphere. The water never enters the displacement body or the float. The latter lowers by its own weight. When water is passing through the chamber it is elevated by the buoyancy of the water, coupled with condensation of steam under the chamber wherein it is located. The lever cannot, under any interpretation of the scope of the invention of McAuley and Fulton, be construed as a McAuley-Fulton lever or as operating on the same principle. If the water were introduced into and discharged from the displacement body or float, and the latter connected through the hollow arm of the lever with the interior of the boiler, it might be an equivalent; but, instead, the lever and displacement body of the Fulton invention are so radically different from the McAuley-Fulton invention as, in our opinion, to constitute a new invention in the art, operating on a different principle, and not in any way dependent upon the employment of a hollow lever having a sphere at one end connecting with the interior of the boiler. To hold the Fulton invention to be an equivalent of the McAuley-Fulton machine would, in our opinion, be contrary to the principle laid down in *Electric Co. v. Jeffrey Mfg. Co.* and *Manufacturing Co. v. Gill*, above referred to.

"After considering all the evidence in the case, together with the construction and operation of the two machines, we are of opinion that the Fulton machine is a new invention, and not an improvement upon the McAuley-Fulton device; that the 'essential characteristics' of the former are different from those of the latter; that the Fulton device could not be applied to the McAuley-Fulton appliance 'without destroying its identity.' We, therefore, conclude that plaintiff is not entitled to an accounting on account of machines manufactured and sold under the Fulton device.

"The bill is therefore dismissed, at his costs. Let a decree be drawn accordingly."

Argued before FELL, BROWN, MESTREZAT, POTTER, and ELKIN, JJ.

Charles M. Clarke and W. H. McClung, for appellant. J. Nota McGill and J. S. Ferguson, for appellees.

PER CURIAM. The decree dismissing the bill is affirmed, at the cost of the appellant on the findings of fact and the conclusions of law of the learned judge of the common pleas.

(217 Pa. 459)

LAW et al. v. FULLER.

(Supreme Court of Pennsylvania. April 1, 1907.)

1. CORPORATIONS—LOANS BY PRESIDENT—TAKING SECURITY.

Where the president of a corporation in good faith loans to the company money for its use, he may take a note given as security for the loan, and purchase the company's property at judicial sale for his own benefit.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, §§ 1366-1373.]

2. SAME—RIGHT TO SUE IN NAME OF CORPORATION—DEMAND—NECESSITY.

A stockholder cannot sue in his own name to assert the rights of the corporation, unless he has made a demand on the corporation to bring suit, and it has refused so to do, or the demand will be useless.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, §§ 792-796.]

Appeal from Court of Common Pleas, Lackawanna County.

Bill by John B. Law, for himself and other stockholders of the Girard Coal Company, and Alexander B. Law, against E. L. Fuller. From a decree dismissing the bill, plaintiffs appeal. Affirmed.

The following is the opinion of Kelly, J., in the court below:

"The plaintiffs, claiming to be stockholders of the Girard Coal Company, seek to have the defendant declared a trustee for them for their proportionate share of the value of the property of the company, which was sold at sheriff's sale to the Seneca Coal Company, a corporation, the capital stock of which was, at the time, practically all owned by the defendant, upon judgments obtained by E. L. Fuller & Co., a copartnership, of which the defendant was a member, and E. L. Fuller, while he was the owner of a majority of the stock of the Girard company, and was its president, which property, with other properties, were subsequently sold to the Lehigh Valley Railroad Company for \$1,000,000. The plaintiffs base their claim for an account upon the general principle of law that officers and directors of a corporation are trustees for its stockholders, and are forbidden in equity to acquire any interest hostile to the interest of the stockholders, and that, whenever any such officer or director purchases the property of the corporation, he takes it as a trustee for the stockholders; while, on the part of the defendant, it is contended that under the facts of this case the rule does not apply.

"While it is true that, generally speaking,

a director of a corporation cannot acquire the property of the company, either at private or public sale, to the prejudice of a stockholder, yet there are exceptions to this general rule. He may loan money to the company and take security for it, and he may enforce such security in the same manner as any other creditor, if he acts in entire good faith. The principle is stated in 10 Cyc. 812, and sustained by many cases cited in the notes, as follows: 'The only just and practicable doctrine is that the director of a corporation may advance money to it, may become its creditor, may take from it a mortgage or other security, and may enforce the same like any other creditor, but always subject to severe scrutiny, and under the obligation of acting in the utmost good faith.' In *Oil Co. v. Marbury*, 91 U. S. 587, 23 L. Ed. 328, the principle is laid down that while a director of a joint-stock company occupies a fiduciary relation, where his dealings with the subject-matter of his trust and with the company are viewed with jealousy by the courts, and may be set aside on slight grounds, yet one director, among several, might loan money to the corporation, when the money is needed, and the transaction is open and otherwise free from blame, and might buy at a sale under a mortgage given to him by the company to secure the money loaned, if the sale was a fair one. This principle is recognized as the law in Pennsylvania, as will be seen by reference to the opinion of Mr. Justice Dean, in *Muelier v. Fire Clay Co.*, 183 Pa. 450, 38 Atl. 1009, in which he quotes from the opinion of Mr. Justice Miller, the principle just stated as a proper statement of the law, and who thus states the rule: 'The true interpretation of the rule, as shown by our own cases and the weight of authority in the United States, is that the burden is on the officer having both the power and preference to show that the contract was fair under all the circumstances.' We find no cases in conflict with these principles of law, nor are there any referred to in the brief furnished us by the plaintiffs' counsel. The principal case upon which they rely is *Aultman's Appeal*, 98 Pa. 505. There is nothing in that case which is in conflict with the principles stated. It is authority for the general principle that a stockholder of a corporation cannot buy the corporate property without being held to account as a trustee for the other stockholders, but does not touch upon the question of the right of directors to advance moneys to a corporation and take and enforce security for it. The question therefore is: As far as the merits are concerned, does the defendant, under the facts of the case, come within the general rule which would constitute him a trustee for the other stockholders, or does he come within the exception to it, which allows a director to advance moneys to a corporation, take and enforce security for it, and at a judicial sale

of the company's property purchase it for his own benefit?

"The Girard Coal Company, the sale of whose property constitutes the subject-matter of the controversy, was operated at a loss from the time it first began business, up to the time of the sale of its property to the Seneca Coal Company, which, as by reference to our findings will appear, we treat as a sale to the defendant. John B. Law was its manager and superintendent up to November 1, 1899, when he was removed, and under his management it lost money; and from that time until its property was sold at sheriff's sale in April, 1901, under the management of his successor, it continued to lose money, so that, from the time it began to operate until it ceased, it had lost, exclusive of all expenditures for equipment and betterments, upwards of \$21,000. On March 1, 1899, it owed the Old Forge Coal Company \$16,000, which was paid on that date by the firm of E. L. Fuller & Co., and the debt transferred to them. This was while Mr. Law was the manager and had access to the books of the company, and who was a member of the firm of E. L. Fuller & Co. at that time. This firm advanced moneys to it from time to time, until on October 1, 1900, it owed them \$38,000. While it does not appear that Mr. Law knew of these advances, yet, as a member of the firm of E. L. Fuller & Co., up to June 25, 1900, when he assigned his interest, he was in a position to know of them if he saw fit to inform himself, and as a stockholder and director of the Girard Company he was in a position to keep himself informed with reference to its affairs. There is no evidence that he was misled in any way or deceived as to the transactions between E. L. Fuller & Co. and the Girard Company, or that he ever was denied any information. The meeting of the directors of the Girard Company was called by E. L. Fuller, as the president, 'for the purpose of authorizing the treasurer to give the company's note to E. L. Fuller & Co. for money borrowed from them during the last two years, viz., \$38,000 and interest.' A notice of this meeting was prepared in the office of the company to be sent to Mr. Law; but, whether mailed or not, it did not reach him, and he had no notice of the meeting. If this notice was served upon him, or if it had reached him through the mail, he could certainly not deny the fairness of the transaction by which the property was sold. The validity of the debt is not questioned, nor is there any suggestion that the loans were not made in good faith to supply the needs of the company. We cannot see how the fact of the notice not reaching Mr. Law can affect Mr. Fuller. It was not his duty, as president, to personally send out the notice, and there is no evidence or intimation that he was concerned in any way in the failure of the notice to reach Mr. Law, or that he knew that Mr. Law had not had notice. In addition to the indebtedness of

the company to E. L. Fuller & Co. of \$38,000, which, with interest at the time of the sale, amounted to upwards of \$41,322.99, which was the amount of the judgment entered against it on March 16, 1901, it owed the defendant personally the sum of \$13,090.33, which he had advanced to it from time to time, and for which a judgment note had been given him. The validity of this indebtedness is not questioned, nor is there any evidence to call in question the good faith of the defendant in making the loans. In both it owed, at the time its property was sold, upwards of \$54,000, practically all its property was worth. It is true its value became much higher shortly after the sale to the Lehigh Valley Company; but that was due to the general advance in the price of all coal properties in the anthracite regions at about that time, and we must view the conditions as they existed at the time of the transaction, by which the defendant became the owner of the property. It cannot be fairly found as a fact, in view of the uncontradicted evidence, that the property of the Girard Company formed any part of the \$1,000,000 consideration for the sale of the Old Forge, Newton, and Girard properties, in excess of \$40,000, which was the estimate placed upon it by the representative of the purchaser, after an examination by experts, which sum was much less than the amount of its indebtedness.

"Under these circumstances and all of the facts of the case, we cannot see that the defendant was guilty of any dishonest conduct, or that he acted in bad faith. It is true that there was a rather abrupt change of conduct on the part of the defendant when he ceased advancing moneys to the company and began to enforce collection of his claims, for which he and the firm, of which he was a member, had already loaned, apparently with a view of combining the three properties; but, as we understand the law, that fact would not render the transaction a dishonest one. He had the undoubted right to cease advancing moneys at any time, and at any time to take legitimate legal action to collect what was already due him, either individually or as a member of a firm, and, in the absence of any perfidious conduct on his part in doing so, he had the right, under the law, to become the purchaser of the company's property.

"Having found that on the merits the plaintiffs have failed to make out a case, it is, perhaps, not necessary to discuss the technical objections that are interposed against them. We will refer to one of them, however. It is that the plaintiffs, as stockholders, cannot maintain their suit, in the absence of an averment in the bill and proof of the fact that they made every reasonable effort to have the action brought by the Girard Coal Company itself. There is neither averment nor proof that there was any effort whatever made to induce the directors

to institute any proceedings against the defendant. The law upon this question appears to be clear. In *Hawes v. Oakland*, 104 U. S. 450, 26 L. Ed. 827, it is stated by the Supreme Court of the United States as follows: 'Before a shareholder is permitted, in his own name, to institute and conduct a litigation, which usually belongs to the corporation, he should show, to the satisfaction of the court, that he has exhausted all the means within his reach to obtain, within the corporation itself, the redress of his grievances.' Our own Supreme Court, in a per curiam opinion, in *Holton v. Railway Co.*, 138 Pa. 111, 20 Atl. 937, makes use of this language: 'The bill was filed by Noble Holton, as a stockholder, to enforce the rights of the railway company. It is settled law that such suit must be brought by and in the name of the corporation; or, if brought by a shareholder, the bill must contain an averment of a demand by the shareholder upon the corporation to bring suit, and a refusal to do so. This is familiar law, and does not need the citation of authority.' And, again, by Mr. Justice Mitchell, in *Wolf v. Railroad Co.*, 195 Pa. 91, 45 Atl. 936, is the rule stated fully, and to the same effect. He said: 'The first matter for consideration is the status of the plaintiff to maintain such a bill. It is a bill to assert rights of the corporation, and therefore must ordinarily be brought by the corporation itself. The right of an individual stockholder to act for the corporation is exceptional, and only arises on clear showing of special circumstances, among which inability or unwillingness of the corporation itself, demand upon the regular corporate management, and refusal to act are imperative requisites. And the refusal by the corporate management must appear affirmatively to be a disregard of duty, and not an error of judgment, a nonperformance of a manifest official obligation, amounting to a breach of trust. Beach on Private Corporations, § 873. There must be averred and proved an actual application to the directors, and a refusal by them to bring suit, or to allow plaintiff to do so in the corporate name, and, where misconduct of the directors themselves is alleged, the bill must show an effort to secure plaintiff's rights through meetings of the corporation. Beach, §§ 882, 885. "The shareholder should set forth in his bill the efforts that he had made to induce the corporation to act in the matter, should allege its refusal or failure to sue," and "facts showing that he has left undone nothing which in reason he might have done to prevail on the corporate management to bring the action." Taylor on Corporations, §§ 138, 140. See Morawetz on Corporations, §§ 241, 244.'

"The plaintiffs say, in defense of their right to sue as stockholders, that, inasmuch as the defendant was the president and the owner of a large majority of the stock of the company, a demand upon the company would

have been useless. We cannot assume that such demand would be useless simply because the defendant owned a large majority of the stock. The charter of the company fixed the number of directors at four. Who they were at the time this bill was filed does not appear. On January 23, 1901, according to the minutes of the meeting held on that day, the directors present were E. L. Fuller, Frank T. Patterson, and Percy C. Maderia. Whether Mr. Patterson and Mr. Maderia were still directors at the time the bill was filed, or who the other two were, has not been shown. Proceedings of ouster were begun against the company by the Attorney General in the Dauphin county court on March 14, 1902; but there was no decree of ouster until November 18th following, so we cannot see how that fact affects the question.

"In the absence of any proof of who the directors were about the time the bill was filed, and that they were mere representatives of the defendant, we do not think, in view of the authorities upon the subject, that the plaintiffs, as stockholders, can maintain the bill."

Argued before FELL, BROWN, MESTREZAT, POTTER, and STEWART, JJ.

J. B. Woodward, of Woodward, Darling & Morris, and Joseph O'Brien, for appellants. Everett Warren, for appellee.

PER CURIAM. This bill was by stockholders of a corporation against its president for an account, on the ground that he had procured a sale of the property of the company and had acquired possession thereof under circumstances that made him a trustee of the stockholders. There is no dispute as to the findings of fact.

The law applicable to them is clearly stated by the learned judge of the common pleas, and on his opinion we affirm the decree, at the cost of the appellant.

(217 Pa. 456)

BICKEL v. PENNSYLVANIA R. CO.
(Supreme Court of Pennsylvania. April 1, 1907.)

1. RAILROADS — ACCIDENT AT CROSSING — DEFENSES.

Where a traveler was injured at a crossing, it is not a conclusive answer for the railroad to say that the bell was rung or the whistle sounded, unless it appears that under the circumstances the signal was sufficient to give timely notice to travelers approaching on the highway.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, §§ 988, 990.]

2. SAME—QUESTIONS FOR JURY.

In an action for injuries at a crossing which the person injured was approaching with restive horses, it is for the jury to determine whether the railroad company gave proper signals at a point where the driver would have heard them in time to save himself from being placed in a dangerous position.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, § 1161.]

Appeal from Court of Common Pleas, Berks County.

Action by Angeline F. Bickel against the Pennsylvania Railroad Company. Judgment for plaintiff. Defendant appeals. Affirmed.

Argued before MITCHELL, C. J., and BROWN, MESTREZAT, ELKIN, and STEWART, JJ.

Cyrus G. Derr, for appellant. Isaac Hiestor, for appellee.

MESTREZAT, J. This is an action of trespass brought by the plaintiff to recover damages for the death of her husband, who was killed by a collision with the defendant company's train at a grade crossing. In a charge, exceptionally clear and concededly adequate, the learned trial judge submitted the question of the defendant's negligence and the deceased's contributory negligence to the jury, who returned a verdict for the plaintiff. A formal motion for a new trial was made, but not pressed, and the learned counsel for the defendant company took a rule upon the plaintiff to show cause why judgment non obstante veredicto should not be entered for the defendant under the act of April 22, 1905 (P. L. 236). In an exhaustive opinion by the trial judge, he has reviewed at length the facts, as well as the law applicable to the case, and has conclusively demonstrated that there was sufficient evidence to justify the court in submitting the case to the jury. The authorities cited amply sustain his view of the law, and the testimony to which he refers clearly shows that the case could not have been withdrawn from the jury on either of the two questions submitted for their consideration. The defendant company has therefore had its case considered twice by an able and thoroughly competent court, who heard the testimony and who dealt with every question which now appears upon this record. So satisfactory to the defendant's counsel was the case disposed of in the court below that the single complaint in this court is that the trial court erred in not directing a verdict for the defendant, and subsequently, in not entering judgment for the defendant notwithstanding the verdict.

Under the testimony in the case, the defendant's negligence was clearly a question of fact for the jury. And it was made to turn upon the question whether the whistle was blown at the whistle post and the fireman rang the bell for the crossing at which the deceased was killed. The court, on request of defendant's counsel, instructed the jury that "if the defendant's engineman sounded the whistle at the whistle post, and the fireman rang the bell thence to the crossing at which the accident happened, the verdict must be for the defendant." In affirming that point the learned court surely gave the defendant company all it was entitled to under the facts of the case. Notwithstanding

the topography of the country, the character of the crossing, and the obstructed view which the deceased had of the approaching train, the learned judge told the jury that the defendant company was relieved from liability if it blew the whistle at the post and rang the bell until the crossing was reached. Under the submission the verdict establishes the fact that the engineer failed to give the signal at the whistle post which, by making a rule requiring it, the defendant company shows that it regarded the signal at that place as necessary to protect the public who had occasion to use the crossing. The learned counsel for the defendant company contends that the testimony of its witnesses shows conclusively that the signal was given at the whistle post, but we think the trial court's analysis of it clearly discloses that the engineer is the only witness who testifies positively that the signal was given. The testimony of the defendant's other witnesses is clearly open to the doubt and uncertainty which the trial judge points out in his opinion. We think the contradictions of the engineer warranted the jury in disregarding his testimony entirely on that point. Material parts of it are flatly contradicted by other witnesses who were corroborated by certain uncontroverted facts in the case. For the trial court under these circumstances to have instructed the jury that they should believe the testimony of the engineer and disregard all the other testimony in the case as to whether the signal was given at the post or not would have been manifest error. As we have said, an analysis of all the testimony on this point, of the defendant as well as of the plaintiff, shows that the question was undoubtedly for the jury.

The learned judge, as we have seen, gave the jury positive instructions that, if the whistle was sounded at the whistle post and the fireman rang the bell thence to the crossing, the defendant's employees had done their duty, and the defendant company was relieved from liability for the death of the plaintiff's husband. The learned court might have gone further and told the jury broadly that it was the duty of the defendant's employees in charge of the train to have given timely and sufficient warning of its approach to the crossing in view of the circumstances of the case, such as the character of the crossing, the ability of travelers to see an approaching train, the rate of speed of the train, etc., and that, failing to do so, the plaintiff, in the absence of negligence on the part of the deceased, was entitled to recover. While the law does not point out any particular mode or manner in which notice of trains approaching a crossing shall be given, it does require that some suitable and adequate means, adapted to the circumstances, shall be adopted and applied. Sterrett, J., in *Philadelphia & Reading Railroad Co. v. Killips*, 88 Pa. 405. In *Ellis v. Lake Shore, etc., Railway Co.*, 138 Pa. 506, 21 Atl. 140,

the defendant company submitted several points for instruction; its first point, which was negated by the trial court, being as follows: "If the jury find from the evidence in this case that the engineer of the defendant company sounded the whistle at a proper distance, and rang the bell as they approached the road crossing, then the defendants have done their whole duty, and are guilty of no negligence, and there can be no recovery in this case." In sustaining this ruling, this court said (page 519 of 138 Pa., page 142 of 21 Atl.): "We do not think it was error to decline to affirm the defendant's first point. The vice of the point is that it assumed that the railroad company had performed its whole duty, provided the whistle was sounded and the bell rung at a proper distance from the crossing. But there was another element in the case which the jury were necessarily compelled to pass upon, viz., the rate of speed at which the train approached the crossing. The character of the crossing itself was a circumstance which could not be ignored, and which necessarily affected the relative duties of both the plaintiff and the company. If it was a dangerous crossing, as was practically admitted on both sides, it was the duty of the plaintiff to exercise the more care in approaching it. At the same time it was equally the duty of the defendant company to see that their trains passed at a reasonable rate of speed, proportioned to the danger. In other words, negligence is the absence of care according to the circumstances, and must be measured by the apparent danger." In *Childs v. Pennsylvania Railroad Co.*, 150 Pa. 73, 24 Atl. 341, the court discusses the rate of speed at which a railroad may run its trains in the open country, and its duty to give signals in approaching a crossing. It is there said (page 77 of 150 Pa., page 342 of 24 Atl.): "While railroad companies may move their trains at such rate of speed as the character of their machinery and roadbed may make practicable, they must not forget that increased speed for the train means increased danger to those who must cross the tracks, and that increased care on their part to guard against accidents becomes a duty." After referring to the facts of the case, the court continues: "The question suggested by these facts is whether, at such a crossing, and with such a rate of speed, the bell can be heard far enough to be a proper method of giving warning. If it could be heard a quarter of a mile away, it would afford a trifle more than a quarter of a minute for the traveler to determine what to do, and to do it. If the whistle could be heard twice or three times as far, the time afforded the traveler to escape from danger would be twice or three times as great. If, for want of a few additional seconds of time, which another mode of giving warning would have afforded, property or life be destroyed, is it not for the jury to say whether or not the

longer warning ought, under the circumstances, to have been given?" In concluding the opinion, the learned judge says (page 78 of 150 Pa., page 342 of 24 Atl.): "We think there was one question clearly raised by the testimony which was exclusively for the jury, viz., whether a train approaching a crossing, situated like that at Dark Run Lane, at a high rate of speed, can give sufficient notice of its approach by ringing a bell? If they should find the fact to be that a train moving at the rate of speed at which this train was running would cover the distance between a point from which its bell could be heard at the crossing and the place of crossing in so short a time as to make the signal of little or no use to one in the act of crossing the track, then the failure to give notice by the whistle from a longer distance away would be negligence."

From these and other cases the rule is established that it is the duty of the employees of a train approaching a crossing to give such signal as will protect the traveler if he is in the exercise of ordinary care. It is not a conclusive answer for a railroad company to say that the bell was rung or the whistle was sounded in reply to a charge that a train negligently approached a grade crossing unless it appears that under the circumstances of the case such signal was sufficient to give timely notice to travelers who were approaching the crossing on the highway. At such crossing the duties of the company and of the traveler are reciprocal. Each must approach the crossing with a due regard for the rights of the other, and, when either fails to observe the care required, it is negligence for which the guilty party is responsible. Either party will only be absolved from the charge of negligence if he has done what the circumstances of that particular case required a prudent man to do.

The question of the contributory negligence of the deceased was likewise for the jury. Here, again, we are met with the testimony of the engineer, but again we are compelled to suggest that his veracity was on trial and was a question for the decision of the jury. "*Falsus in uno, falsus in omnibus*," is a maxim which applies to the testimony of the engineer. The testimony of some of the other witnesses is wholly irreconcilable with that of the engineer; and hence the duty imposed upon the jury to say whether or not he was mistaken as to the conduct of the deceased and his son when they approached the fatal crossing. In the absence of a similar experience, we cannot determine what our conduct would be if we were within a few yards of a grade crossing with a team of skittish horses and an approaching train sounding shrill blasts from its whistle was discovered turning a curve about 700 feet distant and traveling towards us at the rate of 45 miles an hour. Whether we would back the horses, turn them to one side, or attempt to cross the track, or could

control the team at all few men can tell until they are subjected to the perils of such a situation. A judge in his chambers or a lawyer in his office without the experience may surmise what he would do or what another ought to do under those circumstances, but it would simply be a guess on his part, lacking the confirmation of a practical test, and hence without the weight and deference due the finding of 12 intelligent men whose experience in the everyday affairs of life fit them more certainly to judge of what a prudent man would do under such circumstances. Here the deceased and his son were traveling on a highway almost parallel with the railroad and with their view of an approaching train obstructed by buildings, trees, etc., until they were within about 60 or 70 feet of the crossing, when they could see a train for a distance of about 750 feet. The crossing was approached on a highway about 12 feet wide and of ascending grade. Sixty-seven feet distant from the crossing was a branch of the Reading Railroad which the travelers were required to cross before they reached the defendant's road. The train was traveling at a speed of at least 45 miles an hour, which would have required possibly about 10 seconds for it to have run 750 feet from the place where it could first have been seen by the deceased to the crossing where it struck him. Conceding that the Reading Road was seldom used, yet his duty required the deceased not to stop upon it, and hence he was within less than 67 feet from the crossing, and had not more than 10 seconds "to determine what to do, and to do it." What a prudent man ought to do under those circumstances was clearly for the jury to say. If a proper signal had been given at the whistle post 1,387 feet away, the chances are that the deceased and his son would have heard it, and that they would not have been placed in this most dangerous position. In determining the duty of the deceased at this time, regard must be had not only to his own conduct, but that of the defendant company. As said in *Bard v. Philadelphia & Reading Railway Co.*, 190 Pa. 94, 48 Atl. 684: "In determining the negligence of a plaintiff in a case of this character, it is often necessary to consider not only his conduct on the occasion, but also that of the defendant. This was at the crossing of a street where both parties had a right to be. Each party had also the right to act with the belief that the other would exercise his right at the place in the manner and way his duty required him to do. * * * The plaintiff was justified in believing that the defendant's employes would perform their duty in this respect (observe the care required in approaching a grade crossing), and he could act on such belief without any imputation of negligence." The exact distance of the deceased from the crossing at the time he discovered the approaching train is not shown, but he must have been very nearly commit-

ted to the act of crossing, because his horses were across the defendant company's tracks when the engine struck the wagon "right opposite the seat." Considering the delay caused by the unruly conduct of his horses, as disclosed by the engineer's testimony, the deceased would have had no difficulty in passing the crossing in safety, had not the rapid approach of the train and the two shrill blasts from the whistle frightened the horses and made them unmanageable. To a horse unaccustomed to a steam whistle, there is nothing that will frighten it more than the successive blasts of the whistle of a locomotive in the near vicinity. When, therefore, we consider the character of this crossing, the conduct of the defendant company's employes, and the position of the deceased at the moment of his first warning of the approaching train, it is clear that the nature of his conduct on the occasion, whether negligent or otherwise, was under all the circumstances a question for the jury. It unquestionably was his duty to stop, look, and listen for an approaching train at a proper place, and to continue to observe due care to prevent a collision until he had passed entirely beyond the company's track, yet the law presumes, in the absence of evidence to the contrary, that this duty was performed. The credibility of the engineer, as well as that of all the other witnesses, was for the jury, and the testimony being sufficient, the learned judge committed no error in submitting the case.

The assignment of error is overruled, and the judgment of the court below is affirmed.

(217 Pa. 485)

XANDER v. EASTON TRUST CO. et al.

(Supreme Court of Pennsylvania. April 1, 1907.)

WILLS—NATURE OF ESTATE.

Testator devised to his son C. an equal share in his estate, "to be invested by my herein named executors, who shall pay the annual interest or income therefrom to my said son C., and on his death divide it among 'his children, share and share alike.'" Held, that the son took a life estate only.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, §§ 1394, 1399, 1412.]

Appeal from Court of Common Pleas, Northampton County.

Action by George L. Xander, administrator of Samuel Hayden, deceased, against the Easton Trust Company and others. Judgment for plaintiff, and defendants appeal. Affirmed.

The following is the opinion of Scott, J., in the court below:

"The single question for decision here is whether Cornelius Hayden was invested with an absolute estate, devised by his father in the paragraph of the will, a copy of which follows, viz.: 'The rest and remainder of my estate, real, personal and mixed of whatever nature and kind the same may be, I give, devise and bequeath unto my children

and grandchildren in manner as follows, to wit: The same to be divided into five equal shares of which my son Howard A. Hayden shall receive one equal share; my son George W. Hayden one equal share; my son Cornelius Hayden one equal share, which said one equal share shall be invested by my hereinafter named executor, who shall pay the annual interest or income arising therefrom to my said son Cornelius Hayden and upon his death divide it among the children of the said Cornelius Hayden share and share alike; one of said equal parts of my estate as aforesaid divided between my son Edward Hayden and his son Harry Hayden in the manner following, to wit: Three-fourths of the said equal share to my son Edward Hayden and one-fourth of said one equal share to his son Harry Hayden; the remaining one-fifth equal share of my estate as aforesaid to be divided share and share alike among Cora Hayden, Daniel Hayden and Nina Hayden, the three youngest children of my deceased son Daniel Hayden; in case any of the said three grandchildren should be dead at the time of my decease, then the share or shares of such deceased grandchild or grandchildren is to be divided equally between the survivor or survivors of them; in case any of the said three grandchildren should die after my decease, then the part or share of such deceased grandchild or grandchildren shall go to the survivor or survivors of the three; in case all three of the children aforesaid, to wit, the children of my deceased son Daniel should die without lawful heirs, then in that case the part or share of my estate that went to such child or children, shall revert to my estate and be divided equally among my sons Howard A., George W., Edward and Cornelius, share and share alike forever.' Under the stipulation filed, and upon the statement of facts therein contained, judgment is to be entered for the plaintiff, as administrator d. b. n. with will annexed of Samuel Hayden, deceased, if Cornelius Hayden had but a life estate; otherwise, for defendants.

"If it be conceded, notwithstanding the primary and technical meaning attached to the word 'children' as one of purchase (*Pifer v. Locke*, 205 Pa. 716, 55 Atl. 790), that it was clearly the intention of the testator the remainderman should take by descent from the donee as 'heirs of the body'; that the devise would thus in ordinary cases become absolute by the operation of the rule in *Shelley's Case* (*Haldeman v. Haldeman*, 40 Pa. 29; *Yarnall's Appeal*, 70 Pa. 335; *Simpson v. Reed*, 205 Pa. 53, 54 Atl. 499; *Vilsack's Estate*, 207 Pa. 611, 57 Atl. 32); that this testamentary purpose is apparent from the will itself beyond all doubt (*Guthrie's Appeal*, 37 Pa. 9; *Oyster v. Oyster*, 100 Pa. 538, 45 Am. Rep. 388); that the provision for division over distributively as tenants in common, but without superadded words of limitation, does not so support the original presumption

of taking by purchase that an intent otherwise may still be patently implied (*Guthrie's Appeal*, 37 Pa. 9; *Haldeman v. Haldeman*, 40 Pa. 29; *Physick's Appeal*, 50 Pa. 128; *Ogden's Appeal*, 70 Pa. 501)—all of which is not too certain, yet there is a serious obstacle in the path of the contention that the estate of Cornelius became absolute. The rule in *Shelley's Case* cannot be applied unless the estate of the life tenant and that of those in remainder are the same quality. Both must be equitable, or both legal. If there be an active trust for the former, with remainder over of the legal estate, they will not unite (*Rife v. Geyer*, 59 Pa. 393, 98 Am. Dec. 851; *Little v. Wilcox*, 119 Pa. 439, 13 Atl. 468; *Eshbach's Estate*, 197 Pa. 153, 46 Atl. 905); nor if there be a special trust to preserve contingent interests.

"The residuary estate of the testator is divided into five equal shares, one of which the devisee was to receive, but 'which said one equal share shall be invested by my hereinafter named executor, who shall pay the annual interest or income arising therefrom to my said son Cornelius Hayden, and upon his death' divide it share and share alike among his children. The son was unmarried and childless at the time of testator's death. Act June 4, 1879 (P. L. 88). There was a contingent remainder in fee of the legal estate. *Keller et al. v. Lees et al.*, 176 Pa. 402, 35 Atl. 197. The interest of Cornelius was not devised expressly to the executors, or any third person in trust for him; but the intention to withhold the corpus, by the direction for his executors to invest and pay over the annual income, is plain. *Livezey's Appeal*, 103 Pa. 201; *Craig's Est.*, 12 Phila. 163. It was not to be indefinite in duration. The purpose to give him but a life estate in this one share is manifest enough from the limitation over. The rule in *Shelley's Case* cannot be applied to discover an intention. *Guthrie's Appeal*, 37 Pa. 9. The fact that he had a contingent, absolute, undivided interest in the share devised to the children of another brother is immaterial to the present subject-matter of dispute. It is not necessary that a trustee should be named in the will so nomine. The duties imposed upon the executor are the incidents of a trust, and not functions of his in administration upon the decedent's estate. *Sheets' Estate*, 52 Pa. 257; *Anck's Estate*, 11 Phila. 118.

"The trust herein created cannot be treated as executed in the life tenant for two reasons. It protects the estate in remainder, and the trustee is required to exercise judgment and discretion respecting investments. The line of authorities upon these propositions are summarized by Judge Ashman in *Hemphill's Estate*, 180 Pa. 95, 36 Atl. 409. He was affirmed, per curiam, upon his 'concise and satisfactory opinion,' and I need not refer to other cases. 'The automatic function,' said the learned judge, 'of merely receiving for

the cestui que trust, and immediately paying over to him the trust fund, or its income, will not make a trust active.' For this reason, in *Haldeman v. Haldeman*, 40 Pa. 29, where the question seems to have been suggested, although the reporter does not state it, it was held that no such trust was created by the terms of that will, as would prevent the operation of Shelley's rule. In some of the other cases, involving not dissimilar conditions, the matter was not discussed nor decided. But it may be taken as settled that, if there is a testamentary direction to 'invest' the corpus of an estate and pay over the income, an active trust is established. *Keene's Estate*, 81 Pa. 183; *Estate of Mary Ann Craigé*, 12 Phila. 163, and cases cited. The same result follows in bequests of personality. *Elchelberger's Estate*, 135 Pa. 160, 19 Atl. 1006, 1014. As it is presumed no intestacy is intended, that construction is to be adopted, if possible, which will avoid it. But sometimes it is inadmissible and forbidden.

"The exceedingly able argument of the counsel who appeared for the parties intervening has not convinced me that his contention can be sustained. Now, December 10, 1906, judgment is directed to be entered for the plaintiff on the case stated, and against the defendant, for \$4,167.30."

Argued before FELL, BROWN, MESTREZAT, ELKIN, and STEWART, JJ.

Robert E. James, Jr., for appellants Lochman and others. Edward J. Fox, for appellant trust company. O. H. Meyers and George L. Xander, for appellee.

PER CURIAM. The judgment entered in this case is affirmed, for the reason stated in the opinion of the learned judge of the common pleas.

(217 Pa. 419)

HASTINGS et al. v. ENGLE et al.

(Supreme Court of Pennsylvania. April 1, 1907.)

1. WILLS—NATURE OF ESTATE—FEE SIMPLE.

Testatrix gave and bequeathed to V. for life and the heirs of her body at her decease all of her real estate, and, in case of her or her children dying without leaving issue, the "said real estate I give" to the Board of Home Missions. Held, that V. took the estate in fee simple.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, §§ 1372-1378.]

2. SAME.

Where testator devised certain land to V. for life and the heirs of her body at her decease, the devisees in remainder took as heirs of the devisee of the particular estate, and not as purchasers under the testatrix.

3. SAME—"CHILDREN."

Where it is clear that the word "children" is used in the sense of heirs or heirs of her body used in a former part of the will, it must be so construed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, § 977.]

Appeal from Court of Common Pleas, Indiana County.

Action by Virginia Hastings and John S. Hastings against H. B. Engle and Clara E. Engle, executors of J. H. Engle, deceased. Judgment for plaintiffs, and defendants appeal. Affirmed.

Argued before FELL, BROWN, MESTREZAT, POTTER, and STEWART, JJ.

M. C. Watson and Peeler & Felt, for appellants. D. B. Taylor and Frank Keener, for appellees.

MESTREZAT, J. This is an action of assumpsit to recover the purchase money for real estate sold by the plaintiffs to the defendants' decedent. The facts appear in full in the case stated. The right to recover is resisted by the defendants on the ground that the plaintiffs cannot convey a good title to the premises. The title was acquired by Virginia Hastings, the wife of the other plaintiff, under the will of Elizabeth Coleman, deceased, which provides, *inter alia*, as follows: "I give and bequeath to Mrs. Virginia Hastings during her lifetime, and the heirs of her body at her decease all my real estate, and in case of her or her children dying without living issue the said real estate I give to the Board of Home Missions of the United Presbyterian Church of North America. I also give Virginia Hastings my piano and all my household goods absolutely." On April 18, 1900, the following codicil was added: "I give and bequeath to Gula Hastings one thousand dollars to be paid to her out of my real estate." The plaintiffs contend that Mrs. Hastings takes a fee-simple estate under the will, but the defendants claim that the devise to her creates only a life estate, and that, therefore, she cannot convey a fee-simple estate.

At the time the will was written Mrs. Hastings had one child, a son, Ralph, to whom the testatrix bequeathed \$1,000, payable out of the bank stock. Subsequently her daughter was born, to whom the testatrix made a bequest, payable out of the real estate. The primary devise is "to Mrs. Virginia Hastings during her lifetime, and the heirs of her body at her decease." If the testatrix had ended her testament here, there could be no doubt of her intention, or as to the quantum of the estate which Mrs. Hastings would take under the devise. The first taker is Mrs. Hastings and the remaindermen are "the heirs of her body." These are technical words, and are presumed to be used in a technical sense, unless the context indicates a clear intention to the contrary. *Graham v. Abbott*, 208 Pa. 68, 57 Atl. 178. Under this language it is firmly settled in this state that the devisees in remainder take as heirs of the devisee of the particular estate and not as purchasers under the testatrix, and hence as the stock of a new inheritance. Mrs. Hastings becomes the root of descent, and

from her the title passes in a continuous line of succession. Therefore "the heirs of her body" are not descriptive of the persons who take the remainder, but define and limit the estate devised to Mrs. Hastings. Such is clearly the legal signification of these words, and, standing alone and uncontrolled by other parts of the will, it will be presumed that by their use the testatrix intended not individuals, but quantity of estate and descent. *Guthrie's Appeal*, 37 Pa. 9. Under all our numerous authorities, without a single exception, the life estate devised to Mrs. Hastings was enlarged into an estate tail which, by operation of the act of April 27, 1855 (P. L. 368), was converted into a fee simple estate.

We now turn to the clause of the will immediately succeeding the one containing the primary devise, and which passes the estate over. Its language is as follows: "And in case of her or her children dying without living issue the said real estate I give to the Board of Home Missions of the United Presbyterian Church of North America." The purpose of this clause, apparent on the face of it, was to meet the contingency of the beneficiaries named in the primary devise dying without issue. The testatrix believed she had disposed of the whole estate in the first clause, which was true, but, to avoid an intestacy caused by the death of the primary devisees, she supplemented it with the succeeding clause. That is the manifest purpose of the latter clause of the will. She, however, has used in this clause "her children" instead of the words "heirs of her body," and this is the ground for the appellant's contention that the testatrix intended to give Mrs. Hastings "a life estate only and at her death a life estate to her children if living, and the fee simple to the living issue of her children, and if Virginia Hastings or her children should die, without living issue, then to the Board of Home Missions of the United Presbyterian Church of North America." But we are convinced that it was not the intention of the testatrix by this clause of the will to cut down or disturb the estate given to Mrs. Hastings in the first clause of the will. There is no unequivocal determination shown to interfere with or diminish the quantum of the estate given to the first taker in the primary devise. It is true that *prima facie* "children" is a word of purchase, and not of limitation, and, uncontrolled by the context, must be so construed. But where it is clear that it is used in the sense of "heirs" or "heirs of the body," used in a former part of the will, it must be so construed, and the intent of the testator be permitted to prevail. In this case the testatrix evidently used the word "children" in the devise over in the same sense as "heirs of the body" in the primary devise. It is plain, we think, that the testatrix by this clause meant to devise the estate over in

the event of an indefinite failure of the issue of Mrs. Hastings. So long as there were any "living issue" the estate was to continue in them, and not until their extinction was it to go over. To carry out the intention of the testatrix, it was not necessary to insert the words "her children" in the second clause of the will, but the context shows the meaning of those words, and hence they do not change or defeat the estate primarily given the first taker. The thought of the testatrix in both clauses of the will, expressed in the first by "the heirs of her body" and in the other, by "her children," was of the lineal descendants of Mrs. Hastings. In either case, as said in *Shapley v. Diehl*, 208 Pa. 566, 53 Atl. 374: "The children would have come in as first in the line of inheritance."

The rule in *Shelley's Case*, as we have often said, is not one of construction, but of law, and it operates only after the intention of the testator has been ascertained from the language of the will. Here the testatrix devised her real estate to the devisee for life and to the heirs of her body, and, if she or her heirs died without issue, then over. Such having been ascertained to be the intention of the testatrix, the law then declares, as announced in *Shelley's Case*, that Mrs. Hastings takes an estate in fee tail under the provisions of the will. This being converted into a fee simple by the act of 1855, it follows that she with her husband can convey a good title to the premises which they sold to the defendant's decedent, and hence the plaintiffs are entitled to recover in this case.

The assignments are overruled, and the judgment is affirmed.

(217 Pa. 564)

LAMB v. PHILADELPHIA & R. RY. CO.
(Supreme Court of Pennsylvania. April 22, 1907.)

1. MASTER AND SERVANT—INJURY TO SERVANT—EVIDENCE.

In an action by an employé to recover for injuries sustained by the giving way of a portion of the roof of a roundhouse wherein he was working, it is error to refuse to permit him to show that for two years prior to the accident he had never seen any one inspecting or repairing the roof, and that during the month before the accident he saw parts of the roof frequently fall to the floor of the roundhouse.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 919, 922.]

2. EVIDENCE—SIMILAR FACTS—ADMISSIBILITY.

In an action for injuries caused by a fall of a portion of roof of roundhouse, plaintiff could show the bad condition of other portions of the roof similarly situated.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 399-402; vol. 34, Master and Servant, § 919.]

Appeal from Court of Common Pleas, Philadelphia County.

Action by Frank J. Lamb, by his mother and next friend, Eleanor A. Gordon, against the Philadelphia & Reading Railway Com-

panty. From an order refusing to take off a nonsuit, plaintiff appeals. Reversed.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

Russell Duane, for appellant. Gavin W. Hart, for appellee.

ELKIN, J. The appellant, Lamb, a boy 18 years of age, while in the employ of the defendant company, was ordered by its foreman to clean the skylights which made the roof of a certain roundhouse belonging to the appellee. According to his testimony he was standing on a skylight, cleaning it with a mop, when one of the sashes suddenly gave way, and he fell to the floor below, sustaining severe injuries for which damages are claimed in this action. The negligence complained of is that appellee had negligently and carelessly permitted the skylights to fall into such a condition of nonrepair and to become so weakened and defective as to make them an unsafe place on which to work. The roof of the roundhouse was cone shaped and almost entirely covered with skylights, each skylight being between five and six feet long and three feet wide, and supported and kept in place by strips of metal about an inch and a half wide and extending the length of a skylight. Testimony was introduced in the court below tending to show that the smoke or soot emitted by the locomotives which passed in and out of the roundhouse had caused these metal strips or frames to rot or corrode, and as a result thereof the roof was in a condition of decay and nonrepair; that pieces of glass and metal strips were constantly falling down from the skylights, and that prior to the date of the accident there had been no inspection of the skylights or repair of the defective conditions. At the trial a compulsory nonsuit was entered on the ground that there was no evidence to show what caused the accident. The ruling of the learned trial judge in this respect, and also his refusal to admit the testimony on behalf of the plaintiff relating to the failure of the defendant to make proper inspection or repair, and also as to the general bad condition of the roof, have been assigned for error.

The third and fourth specifications of error relate to the refusal of the trial judge to admit the testimony of the plaintiff tending to show that prior to the accident the roof of the roundhouse had not been inspected or repaired by the defendant company. The appellant was not permitted to testify that during the time of his employment at the roundhouse for a period of almost two years, with many opportunities to observe the skylights, he had never seen anyone inspecting or repairing them. This testimony should have been admitted, and it was error to exclude it. It was proper to show these facts, which,

taken in connection with other evidence in the case, should be considered by the jury in determining the question whether proper inspection had been made and a reasonably safe place provided.

The ninth specification of error relates to the action of the trial judge in striking out all the testimony of the witness Dally with regard to the condition of the roof: The substance of Dally's testimony is that during the month preceding the accident he saw pieces of glass from the skylight and of metal strips which supported the same frequently falling to the floor of the roundhouse. He also saw pieces of these metal strips protruding downward from the skylights. The testimony was introduced for the purpose of showing the bad condition of the roof. It was stricken out apparently on the ground, as stated by counsel for defendant company in making the motion, that it was introduced upon the assurance of counsel for plaintiff that expert testimony would be introduced to show that the condition Mr. Dally found was caused by something which the expert would testify about. The expert, Link, previously called by the plaintiff, did testify as to the cause of the bad condition of the roof, and what produced it, and we can see no sufficient reason why the testimony of Dally should have been stricken out. This testimony, showing the defective condition of the skylights in conjunction with that of the expert Link showing what caused the condition, was clearly admissible. Even though the expert's testimony had not been introduced to show what caused the roof to fall into a state of decay and nonrepair, the testimony of Dally as to the general bad condition of the roof was admissible. Nor do we agree under the facts of this case that it was necessary to show the condition of the exact spot where the injury occurred, but it was proper to prove the bad condition of other portions of the roof similarly situated and affected as that in the immediate vicinity of the accident. This would come clearly within the rule stated in 21 Am. & Eng. Ency. of Law (2d Ed.) 518, wherein it is said: "Where also, from evidence of the condition or quality of other portions of the structure or premises than that immediately causing the injuries, it is reasonable to infer the condition or quality of the portion directly involved, at the precise point or place where the injuries occurred, such evidence is proper for the consideration of the jury."

Under all the circumstances of this case, it was for the jury to say whether there had been sufficient inspection, and whether the roof was a reasonably safe place on which to work.

The first, third, fourth, and ninth assignments of error are sustained.

Judgment reversed and a venire facias de novo awarded.

(217 Pa. 449)

MILES et al. v. PENNSYLVANIA COAL CO.
(Supreme Court of Pennsylvania. April 1, 1907.)

1. MINES AND MINERALS—SUPPORT OF SURFACE.

The owner of the surface may by contract relieve the owner of the mineral estate from any duty to support the surface, and from liability for any injury done to it by the mining and removing of the minerals.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 84, Mines and Minerals, §§ 153, 243.]

2. SAME—MINING LEASE—SUPPORT OF SURFACE.

An owner of land granted a lease to remove all the coal, giving unlimited surface rights, and stipulating that the lessee should not be liable for any falling in of the surface because of the mining of the coal. *Held*, that the lessee could remove all of the coal without any liability for injuries to the surface, and a provision in the lease, giving the lessors authority to enter the workings to satisfy themselves as to the correctness of the lessee's return, and giving them the right to designate where pillars are to be left, does not change such construction.

Appeal from Court of Common Pleas, Lackawanna County.

Bill by William Miles and others against the Pennsylvania Coal Company. From a decree dismissing the bill, plaintiffs appeal. Affirmed.

See 63 Atl. 1032, 214 Pa. 544.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

H. M. Hannah and S. B. Price, for appellants. Everett Warren, E. N. Willard, Henry A. Knapp, and Charles P. O'Malley, for appellees.

MESTREZAT, J. By an agreement in writing, dated November 23, 1880, the plaintiffs, or those under whom they claim, demised, leased, and to mine let to the defendant company "all the merchantable coal lying and being in the veins in, under and upon" a certain described tract of land in what was then Lackawanna township, Luzerne county, this state. The defendant company, by virtue of this authority, mined and removed two-thirds of the coal, leaving the one-third thereof in the shape of pillars which support the surface. The company was proceeding to mine and remove the pillars, when the plaintiffs filed this bill in the court below, averring that the removal of the pillars would cause irreparable damage to the surface, and praying an injunction to restrain such action by the defendant company. The defendant filed an answer, averring that it had the right to mine and remove all the coal under the premises, including the pillars, and that any damage which might be caused to the surface of the land is released by the contract between the parties. A motion was made for a preliminary injunction, which was refused. An appeal was taken by the plaintiffs to this court, which was heard last year, and the

decree of the court refusing the preliminary injunction was sustained. Miles v. Pennsylvania Coal Company, 214 Pa. 544, 63 Atl. 1032. On the return of the record to the court below, the case was proceeded in until a final decree, refusing an injunction, was entered from which we have this appeal.

The single question raised by the appeal is whether the defendant company has the right to mine and remove all the coal under the plaintiffs' premises without leaving sufficient pillars to support the surface. The answer to the question requires the interpretation of the lease, and depends entirely upon the proper construction of that instrument. An able and elaborate opinion was filed by the trial judge in the court below on refusing the motion for a preliminary injunction, and will be found in the report of the case when it was here on the previous occasion. The law applicable to the interpretation of such contracts is there correctly stated, as appears by the citation of our own cases and of other recognized authorities, and it is clearly pointed out that, applying the well-settled principles announced in those cases, the lease conferred upon the defendant company the right to mine and remove all the coal without leaving any pillars to support the surface, and without liability for any damage done to the surface.

It is settled law in this state that, in the absence of a contract providing the contrary, the owner of the mineral estate in a tract of land owes a duty, *ex jure naturæ*, to the owner of the superincumbent estate of absolute support to the surface. The owner of the coal, like the owner of the surface, has an estate in land; but the former holds his subject to the right of the latter to demand that he do no injury to the surface by removing the coal. As we have said in a former case, the owner of the mineral must support the surface, if it requires every pound of coal to be left in place for that purpose. There can be no doubt that such are the reciprocal rights of the owners of the surface and of the mineral estate in this commonwealth. The several cases of this court on the subject conclusively determine the question. While, however, the owner of the surface is entitled as of natural right to its support by the owner of the subjacent mineral estate, it is equally well settled that the common owner of both estates, or the owner of the fee simple title to the tract of land, may by contract relieve the owner of the mineral estate from any duty to support the surface and from liability for any injury or damage done to it by mining and removing all the mineral. Being the common owner of the whole title, and therefore having the *jus disponendi*, he may make any legal disposition of the property he may desire. He may sell the coal and retain the surface, or he may sell the surface and retain the coal. In self-

ing or leasing the coal he may grant such rights to the vendee or lessee as either may desire or deem proper or necessary to remove the entire body of coal, as well as such rights in, through, or over the surface as may be necessary for the same purpose. In other words, having the absolute dominion over the property, he may grant such rights therein and thereto as may be agreed upon and are stipulated for in the contract. This naturally and logically follows from his ownership of the fee-simple title to the property.

In *Barringer and Adams on Mines and Mining* (076) it is said: "Though the right of surface support is absolute, yet the sub-jacent owner may be relieved of the corresponding obligation by a release from the surface owner or by the terms of the instrument creating his estate." In *Williams v. Hay*, 120 Pa. 485, 495, 14 Atl. 379, 382, 6 Am. St. Rep. 719, Mr. Justice Paxson, speaking for the court, says: "It is settled law in this state that where one person owns the surface and another person owns the coal or other minerals lying underneath, the under or mineral estate owes a servitude of sufficient support to the upper or superincumbent estate. This principle has no application where the same person is the owner of both estates, nor does it apply where by the contract between the parties they have covenanted for a different rule. Like any other right, the owner of the surface may part with the right to support, by his deed or covenant." *Scranton v. Phillips*, 94 Pa. 15, was an action to recover damages for injuries done to a lot and the building thereon by reason of the settling of the surface, caused by mining and removing the coal. It was held that the implied right of surface support might be excepted from the grant by apt words in the contract, and, in delivering the opinion, Mr. Justice Mercur, in construing the contract between the parties, said (page 22): "Thus, in clear, express, and distinct language, it was agreed the owner of the mine, his heirs and assigns, should be exempt from the very liability now attempted to be fastened on him and his assigns. We see no reason why a person shall not be bound by his agreement to exempt another from liability for damages in working a coal mine, as well as from liability for damages resulting in the performance of any other kind of labor. No rule or policy of law forbids it." In *Smith v. Darby et al.*, L. R. 7 Q. B. 716, Mr. Justice Mellor says (page 726): "The man who grants the minerals and reserves the surface is entitled to make any bargain that he likes. Both parties are just as much at liberty to make a bargain with reference to coals and minerals, as to make a bargain with reference to anything else."

The question, therefore, in this case, is whether the contract of the parties permits

the removal of all the coal, including the pillars, by the defendant company, without liability for injury done thereby to the surface. If the plaintiffs by their contract have granted such right to the defendant company, they are not now in a position, against the wishes of the defendant, to recall it, notwithstanding it may be, as their counsel urgently insists, injurious to their interests. Both parties must stand by the contract, which, on proper application, the court is required to enforce. A careful examination of the contract convinces us that the only purpose which both parties had in view when it was executed was the mining and removal of all the coal, and that such mining operations by the lessee should be without regard to the effect they might have upon the surface. The different provisions of the contract all point to this as the main and important purpose of the parties in entering into the lease. The demise is of "all the merchantable coal * * * in the veins in, under and upon" the land, "together with the right to mine and remove said coal in said veins until all the merchantable coal has been mined and removed from said veins on said hereby leased premises." Then follow unlimited surface rights. The lessee is granted the right to use the lands "for the digging and making of all air-shafts to and through the surface of said lands, with the right to dig the same as in the opinion of the said lessee may be necessary for the proper working and ventilation of the workings in the said veins of coal." It is further covenanted that the lessee company may use any shafts, slopes, or other openings already opened on the demised premises; and the company is granted without any restrictions whatever "the right to deposit culm, dirt and refuse on the said lands hereby demised." The surface was further put under the servitude of the lessee for road purposes by the following covenant: "The said lessee shall have the right of way over the surface of the said hereby demised tract of land for the construction and making of any and all railroads and the roads that may be necessary for the removal and transportation of coal during the continuance of this lease, and after the coal on said hereby demised tract of land has been exhausted."

It is apparent, we think, from these brief excerpts from the lease, that the intention of the lessors in entering into the contract was for the purpose of having the entire body of their coal mined and removed, so that they could realize upon it; and that this was to be done without regard to the effect of the mining operations upon the surface. The contract grants in terms all the coal, with the right to mine and remove it. The surface rights, it will be observed, are unlimited, and substantially confer authority upon the lessee to use the surface to the exclusion of its owners. The rights of the lessee company to the surface could scarcely be greater, if

the lessors had granted it the fee during the continuance of the mining operations. These stipulations show the intention of the parties in entering into the contract, and that the manifest purpose on the part of the lessors was to realize upon the entire mineral estate.

In addition to the intention of the lessors, thus clearly disclosed, that the lessee should mine and remove all the coal without regard to the injury done the surface, it is specifically covenanted in the agreement as follows: "It is hereby further agreed that the said lessee shall not be liable for any falling in of any part or parts or all of the surface of the said hereby demised premises in consequence of the mining and removing of all of the said coal, and the said lessors shall indemnify the said lessee against any liability for any falling in of any surface of any lots on said demised premises the surface of which may have been sold by said lessors." Here is an express covenant by the lessors, not only relieving the lessee from injury to the surface in consequence of the mining operations in removing all the coal, but also indemnifying the lessee against liability for injury that may be done to the surface of any lots which may be owned by other persons than the lessors. Read in connection with the stipulations in the lease granting the right to remove all the coal, this covenant against liability for injury to any part of the surface arising from the act of mining and removing all of the coal is conclusive against the contention of the lessors that the lessee is required under the lease to leave pillars or any part of the coal for the support of the surface. As said by Mr. Justice Mercur, in *Scranton v. Phillips*, 94 Pa. 15: "In each case the question is: Did the parties agree there should be no obligation in regard to support?" In the case in hand, the agreement is explicit, and clearly confers upon the lessee the right to remove all the coal without regard to the damage which may result to the surface. Of course, in exercising the right to remove all the coal, the lessee must use proper methods in its mining operations, and must not by careless and negligent mining injure the surface. *Youghiogheny River Coal Co. v. Allegheny National Bank*, 211 Pa. 319, 60 Atl. 924, 69 L. R. A. 637. But aside from this limitation the lessee company may, under its contract, remove all the pillars which it has heretofore left to support the surface, and, if it results in injury to the superincumbent estate, the owner has no redress against the company.

It is contended, however, by the plaintiffs, that the following clause of the lease prevents the removal of the pillars, and shows that the parties intended they should remain in place to support the surface: "It is hereby further agreed that the said lessors shall have the privilege at any time, by their agent or engineer, to enter upon the workings of

the said lessee in and upon the said hereby demised lands, and to satisfy themselves as to the correctness of the returns of the quantity of the coal mined, and if said lessors may wish at any time to have more pillars left in the mines than it appears to be the intention of the said lessee to leave, or than said lessee may have left in similar workings in said hereby demised premises, the said lessors may by written notice to said lessee designate where and in what manner such pillars are to be left." Notwithstanding the very earnest argument of the plaintiffs' counsel in support of their interpretation of this clause of the contract, we are clear that it is not tenable. This clause must be construed with the other parts of the agreement with a view of giving effect to the whole instrument. It was not the intention that it should abrogate those parts of the agreement which give the lessee the right to remove all the merchantable coal with a release from liability for injury done the surface. That will not be presumed, in the absence of language clearly importing such purpose. The first part of the clause gives the lessors the right to enter the mine to verify the correctness of the quantity of coal returned as mined by the lessee, and the latter part was to enable the lessors to ascertain if the mining operations were being conducted so that "all the merchantable coal could be removed." Both clauses were inserted in the contract to enable the lessors to protect their interests, and for that purpose the latter had the stipulation inserted that they might "designate where and in what manner such pillars are to be left." The lessee company was impliedly required to conduct the mining operations skillfully and carefully, but the lessors intended by the stipulation in question to make themselves the judges of the fact, with authority to direct the place and number of the pillars necessary to accomplish the purpose. Had the pillars been removed, or an insufficient number of pillars been left in the progress of the mining, it is apparent that it would have greatly diminished the quantity of coal which could have been removed from the mine, and consequently the amount of royalty which the lessors would have received. It was therefore necessary that the lessors secure their interests by a provision in the contract that they might, at any time during the progress of the mining, require the lessee to protect the mine by additional pillars of such extent and in such locality as the lessors might designate. This was the manifest purpose of the clause in question. After all the coal, except the pillars, had been mined, and the pillars were no longer needed to protect the mine and the mining operations, the lessee was authorized by the contract to remove them and account to the lessors for the royalty.

The assignments of error are overruled, and the decree is affirmed.

(217 Pa. 542)

IN RE CARTER'S ESTATE.

(Supreme Court of Pennsylvania. April 22, 1907.)

WILLS—CONSTRUCTION—DEATH OF LIFE TENANT.

Testator created a trust for his children for life, and directed that after the death of any such child the principal of its share should be paid to any widow, husband, or children surviving such child, in the manner provided by the intestate laws, and, in default of such widow, husband, or children, then to the brothers and sisters of such deceased child, share and share alike. A son died, leaving a widow, but no children. *Held*, that his personality should be distributed one half to the widow of the deceased son, and the other half to testator's surviving children.

Appeal from Orphans' Court, Philadelphia County.

In the matter of the estate of William T. Carter, deceased. From a decree sustaining exceptions to adjudication, Katharine E. Carter appeals. Affirmed.

Argued before MITCHELL, C. J., and BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

H. Gordon McCouch, for appellant. John G. Johnson, for appellees.

BROWN, J. Katharine E. Carter, a daughter-in-law of William T. Carter, deceased, claims the entire share of his estate which he left in trust for a deceased son, her husband, Charles J. J. Carter, who died without leaving children. The following is the clause in the codicil to the will of the testator under which this claim is made: "The rest, residue and remainder of my estate, real and personal, I order and direct the said trustees to hold in trust for my children share and share alike, until their arrival respectively at the age of twenty-three years, with full power to the said trustees to apply so much of the income of the share of any such child which may in their judgment seem proper for their liberal maintenance and education; and upon the arrival of any of said children at said age, to pay the one-fourth part of the principal of the share coming to said child to him or her, absolutely, and to retain in trust for each of my said children the other three-fourths part thereof, to pay him or her the income thereof during his or her natural life, and at and immediately after the death of any such child to pay the principal of said share to any widow, husband or children surviving any such child, in such proportions as are provided by the intestate laws of this commonwealth, and in default of such widow, husband or children, then to the brothers and sisters of such deceased child, share and share alike."

What the testator meant is free from all doubt. He gave to the son, Charles J. J. Carter, no power of appointment over the portion of his estate which he left in trust

for him, and the son could not have disposed of it by will. The father was unwilling that the son should do so, for he himself directed what disposition should be made of it at the son's death. That disposition is that it shall be divided among those persons who would be entitled to receive it, if the share had been the son's absolutely and he had died intestate. When the testator provided that the principal of the share held in trust for the deceased son should go to the widow or children surviving him in such proportions as are provided by the intestate laws of this commonwealth, he meant that she should receive such portion of his estate as the intestate laws would give her in it if it were her husband's. The meaning of the testator's language could not be clearer. He did not provide that she should have the husband's full share if he died without leaving children surviving, but that she should have only such portion of it as the intestate laws would give to her as a widow. They do not give her what she claims. With no children surviving a husband, the widow takes one-half of the personality absolutely and a life estate in one-half of the realty; with children surviving, her interest is one-third. If children of Charles J. J. Carter had alone survived, they would take the entire share of their father in their grandfather's estate, because under his will the intestate laws would give it to them. They do not give it to the widow, and she cannot therefore get it under the will of her father-in-law, which provides that she is to get only a widow's share. We are asked by counsel for the appellant to say the testator meant that only in default of widow and children can the brothers and sisters of a deceased child take. The testator did not so write his will, but unmistakably expressed his intention that in default of children the widow should take one-half of the son's share; that with widow and children surviving she should take a third, and they the remainder; and, with children alone surviving, they should take all. These are the proportions provided by the intestate laws. To read "or" "and" would not only be to read the codicil as the testator did not write it, but as he clearly did not intend to write it. On the opinion of the learned judge below expressing this view, the decree may well be affirmed.

Whether the will of the testator worked a conversion of his real estate is not, as was properly held by the court below, a material question in this distribution, and need not be decided. Under the power given to sell, there has been an actual conversion, and one-half of the deceased son's share has been awarded to the appellant absolutely as personality. She cannot therefore very well raise the question of conversion, and it is not raised by either of the assignments.

Both are overruled, and the decree is affirmed, with costs to the appellees.

(217 Pa. 546)

**REAL ESTATE TITLE INS. & TRUST CO.
v. McNICHOL.**

(Supreme Court of Pennsylvania. April 22, 1907.)

ARBITRATION AND AWARD—UNCERTAIN AWARD.

An agreement for arbitration provided that the amount found should be considered a debt presently payable, for which judgment might be entered. *Held*, that an award providing that to an amount fixed other items might be added without fixing their amount was void for uncertainty.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 4, Arbitration and Award, §§ 298-309.]

Appeal from Court of Common Pleas, Philadelphia County.

Action by the Real Estate Title Insurance & Trust Company against Patrick McNichol. From an order discharging rule to strike off judgment, defendant appeals. Reversed.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

Wm. Morgan Montgomery and John C. Bell, for appellant. J. H. Brinton and Geo. McCurdy, for appellees.

BROWN, J. The partnership of D. & P. McNichol was dissolved by the death of Daniel McNichol on or about April 9, 1900. The partnership accounts not having been settled, and there having been various matters in dispute between the executors of the deceased partner and the appellant, they agreed on December 6, 1901, in writing, to submit the settlement of the partnership accounts and the various matters in dispute between the parties in relation thereto to an arbitrator under a stipulation that this decision should be final and conclusive, and that the amount found by him to be due from either party to the other should be considered a debt presently payable, for which judgment might be entered by the party in whose favor the award should be made. On August 16, 1902, the arbitrator or referee made his report awarding to the estate of Daniel McNichol the sum of \$3,679.81, but to this definite award he added the following: "To this sum are to be added one-half of any amounts received by the surviving and liquidating partner, Patrick McNichol, since February 11, 1901, for account of the old firm, together with one-half of any book accounts and municipal claims owned by the firm." This at once destroyed the certainty of the award.

It was the intention of the parties to the submission that the referee should pass upon the unsettled partnership accounts and the various matters in dispute, and finally settle, by a definite and certain award, the liability of the surviving partner, or the representatives of the deceased, and for the amount of the award judgment was to be entered against the party against whom it might be made. It is a cardinal requisite of every

award that it be certain. *Hennessey v. Meyer*, 4 Whart. 358. The stipulation in this case was that the amount found by the referee should be considered a debt presently payable, for which judgment might be entered against the party found to owe it. But for what amount could judgment be entered on this award? No definite amount was found to be due by Patrick McNichol. The arbitrator directs that to the sum he finds due other items be added, without fixing their amount. He clearly regarded these items as being among those he was to settle, or he would not have directed them to be added to the sum awarded, and, if they were within the terms of the submission, it was his duty to definitely find their amount and embody it in his award. He could have found what amounts had been received by the surviving partner since February 11, 1901, on account of the old firm, and could readily have ascertained the amount of the book accounts and municipal claims owned by them. Instead of so finding, though he makes these items the subject of liability by the appellant, he leaves what they amount to for future ascertainment by someone else. This may cause litigation between the parties, though the very purpose of the agreement was to settle all the partnership matters without any litigation. The award, if allowed to stand, instead of preventing it, may lead to it, for, under the direction of the referee unascertained items, which may be disputed, are to be added to the award.

The very essence of awards is certainty. They are to put an end to controversy between the parties and are to be certain and final. *Spalding v. Irish*, 4 Serg. & R. 322. In *Zerger v. Sailer*, 6 Bin. 24, there was an award for £60 "to be paid by the plaintiff deducting an unsettled account of the plaintiff's against the defendant." The award was held to be void, and it was said by Tlghman, C. J.: "It is neither certain, final, nor conclusive. How much was to be paid by the plaintiff to the defendant? No man can say. Before that question is answered, you must settle the plaintiff's account and the settlement of that action may involve the parties in another suit." So here, to determine what moneys were received by the liquidating partner since February 11, 1901, and what book accounts and municipal claims are owned by the firm and held by the surviving partner, may involve him and the representatives of a deceased partner in another suit. The judgment entered on this award should have been stricken off. No reason was given by the court for allowing it to stand.

The first and second assignments of error are sustained. The order of the court below discharging the rule to strike off the judgment is reversed, and the record is remitted, with direction that the said judgment be stricken off.

(80 Conn. 716)

BLOCH v. DE LUCIA.(Supreme Court of Errors of Connecticut.
June 5, 1907.)**1. PRINCIPAL AND AGENT—AGENCY—EVIDENCE.**

The question whether an agency has been created by the conduct of the parties is a matter of fact, to be determined by the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Principal and Agent, § 722.]

2. APPEAL—REVIEW—QUESTIONS OF FACT.

An assignment of error that the court erred in deciding from the facts found that an alleged agent had authority from defendant to enter into any contract with plaintiff does not present any question of law on appeal, where it appears that from the facts found the court might properly draw the conclusion that defendant authorized such agent to act for him; such conclusion being one of fact, for the trial court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3318.]

Appeal from District Court of Waterbury; Frederick M. Peasley, Judge.

Action by B. K. Bloch against Frank De Lucia to recover the price of goods sold. From a judgment for plaintiff, defendant appeals. Affirmed.

Francis P. Gullifolle, for appellant. Michael J. Byrne, for appellee.

HAMERSLEY, J. There is no material question of law presented by the record in this case. The complaint alleges that on May 16, 1905, the plaintiff sold to the defendant, at an agreed price of \$132.55, five barrels of whisky in bond, and delivered to the defendant a United States bonded warehouse certificate, which entitled the defendant, upon presentation thereof, to have said whisky delivered to the defendant in accordance with its terms; that said whisky remains in said warehouse, and the defendant still holds said certificates; that the defendant has not paid any portion of said purchase price, and the same is wholly due and unpaid. The answer admits that the defendant has paid no part of said purchase price, and denies each of the other allegations. The trial court found the issues thus raised by the pleadings for the plaintiff, and adjudged that the plaintiff recover the amount of said purchase price. This judgment is the true conclusion of the law upon the facts as alleged and found, and must be affirmed, unless it appears from the record that the trial court erroneously decided adversely to the defendant some question of law which was distinctly raised at the trial and which is specifically stated in the reasons of appeal, and that such error is a material one or injuriously affected the defendant.

It appears from the record: That the alleged contract of sale was made by a selling agent of the plaintiff at the place of business of the defendant, and its terms contained in a written order signed by the plaintiff's agent and to which the name of the defendant was signed as purchaser. By this

order it appeared that the purchase price was to be paid in installments, payable two, four, six, and eight months from date. The amounts thus payable were further witnessed by five negotiable notes, to which the name of the defendant was signed, and which were delivered to the plaintiff's agent. That the name of the defendant was signed by his son, Martin De Lucia, who as clerk and bartender was in charge of the defendant's saloon. That Martin, having arranged with the plaintiff's agent the terms of the sale, told him he would have to consult his father, the defendant, before closing the transaction, and the two then went to the defendant, who was in an adjoining room in the same building, where he worked as a cobbler when not engaged in tending his saloon, and there, in presence of plaintiff's agent, the defendant and his son conversed. The defendant spoke with difficulty very little broken English, and the conversation was carried on in his native tongue, as was his custom when his son wished to consult him about purchases, which language was unknown to the plaintiff's agent. Martin, with the agent, thereupon returned to the saloon, where Martin signed his father's name to the order and promissory notes, and upon delivering the same to the plaintiff's agent received from the agent the warehouse certificate, which certified that the five barrels of whisky purchased and described in the contract of sale were stored in the designated United States bonded warehouse for account and subject to the order of the defendant, Frank De Lucia, and placed this certificate in the defendant's cash register, where it remained until after this action was commenced. The defendant daily removed from his cash register, where said certificate was kept, the proceeds of each day's sale. He spent some time in his saloon when his bartenders were away, and usually spent several hours in his saloon each evening, waiting upon customers. The defendant refused to pay each of the five notes as they fell due. The foregoing are in substance the evidential facts which the court incorporated in its finding in pursuance of the defendant's request for a finding. It further appears from the record that the defendant, his son Martin, and the plaintiff's agent all testified upon the trial, in chief and upon cross-examination, in respect to the conduct of the parties and the disputed question of agency, and that the court found from the evidence that the defendant's son acted as the defendant's agent in the transaction of sale. The question whether or not an agency has been created by the conduct and acts of the parties is a matter of fact depending upon all the evidence in the case, and as such is to be determined by the trier of facts; i. e., the trial court or the jury, as the case may be. *Torry v. Holmes*, 10 Conn. 499, 513, *General Hospital Society v. New Haven Rendering Co.*, 79 Conn. —, 65 Atl. 1065.

The only error in deciding any question of law (aside from questions of evidence), specified in the reasons of appeal, is expressed in varying forms, and is in substance this: The court erred in deciding from the facts found that Martin De Lucia had authority from the defendant to enter into any contract with the plaintiff. This assignment does not, under the circumstances of this case, present a question of law. It does not clearly appear from the finding that in drawing its inferences of fact the trial court has violated the plain rules of reason, or that some fact found is inconsistent with the conclusion reached. *Metcalf v. Central Vermont Ry. Co.*, 78 Conn. 614, 619, 63 Atl. 683. On the contrary, it appears that, in view of the facts thus found, and of all the inferences the court might properly draw from them in connection with the incidents of the trial the conclusion that the defendant authorized his son to act for him is one of fact, which the court might reach without adopting any erroneous principle of law and without violation of the plain rules of reason. *General Hospital Society v. New Haven Rendering Co.*, 79 Conn. —, 65 Atl. 1065. The rulings upon evidence were correct or harmless. The exceptions to the finding are not supported by the record.

There is no error in the judgment of the district court of Waterbury. The other Judges concurred.

(80 Conn. 26)

MUELLER v. RHEIN et ux.

(Supreme Court of Errors of Connecticut.
June 5, 1907.)

ESTOPPEL—EQUITABLE ESTOPPEL—TERMS OF LEASE.

Where, in an action for room rent, the tenants pleaded a written lease of a store and the rooms and payment thereunder, on proof that the landlord executed the lease, he was estopped to assert he never knowingly consented that it and the rental thereunder should include the rooms; no fraud or improper conduct on the tenants' part being charged.

—Appeal from City Court of Hartford; Herbert S. Bullard, Judge.

Action by John Mueller against Rudolph Rhein and wife on the common counts to recover a month's rent of a tenement of three rooms. Judgment for the plaintiff, and appeal by the defendant. Reversed.

J. T. Robinson and L. H. Katz, for appellant. J. L. Barbour, for appellee.

THAYER, J. The plaintiff's bill of particulars claims rent for the month of October, 1906. The answer of the defendants alleges that the plaintiff executed a written lease to Ida Rhein, one of the defendants, wherein it was stipulated that she was to have "the store occupied and used as a grocery situated and located at No. 51 John street, in said Hartford, also the three rooms in the rear of said store and used and to be used as a

tenement and living apartments," for a monthly rent of \$25; that the tenement mentioned in the plaintiff's bill of particulars is the tenement referred to in the lease; and that the defendant "Ida Rhein had paid to the plaintiff \$25 for the rent of the store and tenement, No. 51 John street, for said month of October, in total fulfillment of the terms of said lease." The plaintiff's reply admits the execution of a lease to Mrs. Rhein of the grocery store, but denies that when said lease was executed it contained the words "also the three rooms in the rear of said store and used and to be used as a tenement and living apartments," and alleges that if said words appear in said lease they were inserted after he had signed the same without his knowledge or consent. The case was tried upon these pleadings, and the court found that the words "also the three rooms in the rear of said store and used and to be used as a tenement and living apartments" were contained in the lease at the time of its execution; that the lease was read to the plaintiff; and that he took it and appeared to read it and handed it back to the attorney who had drawn it, with the remark, "It is all right," and then signed it. The court also found from something which appeared in the evidence that the plaintiff is a poor reader of English, and did not notice or comprehend that the quoted words were in the instrument, and that he did not knowingly agree that they should be included in it, and that he understood that the lease was a lease of the store alone. The plaintiff, after the trial, at the suggestion of the court, amended his reply by adding "or if said words appeared in said lease when it was signed it was without the knowledge or consent of the plaintiff, who never knowingly agreed that said words should be included in said lease, and never knowingly agreed that the rental of said three rooms in the rear of the store to be used as a tenement should be included in said sum of \$25, which, according to the plaintiff's understanding, was to be the monthly rent for said grocery store only." The defendants having declined, to offer further evidence upon the issue thus attempted to be raised, although given an opportunity to do so, the court ruled that the lease was invalid, upon the ground that there was no meeting of the minds of the parties, that it furnished no defense to the action, and rendered judgment for the plaintiff.

After proof that he executed the lease set up in the answer, the plaintiff was estopped to deny that he was bound by its terms. No fraud or improper conduct or act on the part of the defendants inducing the plaintiff to sign the lease is alleged, and, if he signed it without knowing its terms, it would appear to have been through negligence so gross that a court of equity upon proper pleadings would refuse to cancel or correct the lease. It is unnecessary to determine this question, however. This is an action at law for rent,

and no such relief is asked for. The defendants proved that they occupied the premises in question under a written lease under seal, and that they had paid in full the rent reserved in the lease. They were therefore entitled to judgment. The court erred in ruling that the lease afforded no defense to the action.

The judgment of the city court is reversed. The other Judges concurred.

(80 Conn. 44)

HARMON v. HARMON et al.

(Supreme Court of Errors of Connecticut.
June 5, 1907.)

1. PERPETUITIES—REMOTENESS OF LIMITATIONS.

Testator gave all his property to a trustee to pay the interest and income thereof to testator's wife and daughter, during their lives, in equal proportions. The will provided that, if the daughter should survive the wife, then the whole income should be paid the daughter, and after the death of both wife and daughter the residue of the estate should go to the lawful heirs of the daughter. *Held*, that the gift to the lawful heirs of the daughter was void as contravening the statute of perpetuities.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Perpetuities, § 18.]

2. WILLS—DISPOSITION OF VOID BEQUESTS.

Where a gift by way of remainder was void as a violation of the statute against perpetuities, it became intestate estate, and vested in the heirs of the testator at the time of his death.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, § 2165.]

3. SAME—ELECTION—PROVISION FOR SURVIVING WIFE.

The acceptance and enjoyment by the widow of a provision of the will expressly made in lieu of dower, without having claimed any further interest in the estate, debarred her from any share under the statute in the testator's personal estate.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, § 2074.]

Case Reserved from Superior Court, Hartford County; William S. Case, Judge.

Action by George A. Harmon, trustee, against Israel Harmon and others. On reserved questions. Questions answered.

Hugh M. Alcorn, for plaintiff. Walter H. Clark, for Israel and Rufus Harmon and others. William H. Teete, for Sarah C. Stiles, executrix, and others.

HALL, J. Julius Harmon died testate at Suffield, in this state, November 22, 1842. By his will, dated November 22, 1842, he gave all his property to a trustee to pay the interest and income thereof annually to his wife and his daughter, Sarah E. Denison, during their lives, in equal proportions. Then followed this language: "If my said wife should survive my said daughter and my said daughter should die leaving no children, then the said share of my daughter shall go to my said wife during her life, but if she, my said daughter, should leave children, then to go to said children, and if my said daughter

should survive my said wife then thereafter the whole of said rents, profits, interest and income shall go and be paid over to my said daughter during her life, and after the death of both my said wife and said daughter, the said trustee after retaining enough of my estate to pay him the sum of five hundred dollars, as a reward and compensation for executing the duties of the aforesaid trust, shall deliver and transfer the remainder and residue of said estate to the lawful heirs of my said daughter, Sarah E. The above bequest to my said wife is to be received by her in lieu and full satisfaction of her claim to dower in my estate." Mary Harmon, the testator's widow, died October 8, 1858. His daughter and sole heir at law, Sarah E. Denison, died March 11, 1905, leaving neither husband nor children, and leaving a will, the residuary legatee and the executor of which are parties to this suit. Her estate is in process of settlement in the probate court of the county in Massachusetts where she resided at the time of her death. Other parties to this suit are the administrator c. t. a. of the estate of said Julius Harmon, the children and the representatives of children of deceased brothers, and of a deceased sister of the testator, who survived him, and children and the representatives of children of a half-brother and of a half-sister of the testator's first wife, who survived her. The plaintiff is the successor of the trustee named in the will, and has now in his hands in this state personal property of the value of \$3,250 and real estate in Massachusetts of the value of \$250. The advice originally asked for by the complaint was whether the property in the trustee's hands should be distributed to the lawful heirs of Sarah E. Denison, as determined by the laws of Massachusetts, where her kindred of the full and half blood would share equally in her estate, or by the laws of this state, which would exclude her kindred of the half blood. Subsequently, by amendment, the plaintiff asked advice, first, as to whether the attempted disposition of the remainder after the death of Sarah E. Denison contravened the statute of perpetuities, and, if so, when and in whom the title to the remainder vested; and, second, whether, if such remainder was intestate estate, any portion of it vested in the widow of the testator and should be distributed to her heirs.

By the repeated decisions of this court the testator's attempted gift of the remainder of the trust estate, upon the death of his daughter, Sarah E. Denison, leaving no children, "to the lawful heirs of my (his) said daughter," was void by our statute against perpetuities in force when the testator made his will and when he died. *Alfred v. Marks*, 49 Conn. 473; *Leake v. Watson*, 60 Conn. 498, 21 Atl. 1075; *Gerard v. Ives*, 78 Conn. 485, 62 Atl. 607.

By the laws of this state said remainder was intestate estate, and vested in the heirs

of Julius Harmon, at the time of his death, and the personal property in the hands of the plaintiff trustee should be delivered by him to the administrator c. t. a. of the estate of said Julius Harmon.

As to the disposal of the real estate in Massachusetts, of the value of \$250, over which we have no jurisdiction, we give no advice.

The gift to the widow of at least one-half, and possibly the whole, of the income of the entire estate during her life, was expressly made in lieu of dower, and was a valid gift, which she accepted and enjoyed, apparently without having claimed any further interest in the estate. The disposal of the entire income of the estate during the lives of his wife and daughter was inconsistent with an intention on the part of the testator that the former should receive a further one-third share of his estate upon his death. The acceptance and enjoyment by the widow of the provision of the will for her benefit, without having claimed any further interest in the estate, debarred her from any share under the statute in the personal estate of the testator. *Leake v. Watson*, supra; *Walker v. Upson*, 74 Conn. 128, 49 Atl. 904; *Grant, Adm'r, v. Stimpson, et al.*, 79 Conn. —, 66 Atl. 166.

These answers to the inquiries propounded by the amendment to the complaint render it unnecessary for us to consider the other questions asked.

The superior court is advised to render judgment in conformity with the above opinion. No costs will be taxed in this court. The other Judges concurred.

(80 Conn. 1)

SISTARE v. SISTARE.

(Supreme Court of Errors of Connecticut.
June 5, 1907.)

JUDGMENT—FOREIGN JUDGMENTS—ENFORCEMENT.

A decree for the payment of maintenance which is inconclusive in its character by reason of the reservation to the court which made it of the unrestricted right to change or annul it at discretion, and which is not enforceable in the state of its origin except by special processes, exclusive of execution, or judgment thereon and execution, is not a decree creating such a debt of record as will justify extra-territorial enforcement.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, § 1497.]

Appeal from Superior Court, New London County; John M. Thayer, Judge.

Action by Mathilde Von Ellert Sistare against Horace Randall Sistare. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Action to recover upon a New York decree granting periodical payments for future maintenance. Demurrer to complaint overruled. Facts found and judgment rendered for the plaintiff, to recover \$5,805, and an ap-

peal by the defendant. Judgment set aside, and judgment for defendant ordered.

In 1899 the plaintiff was by the courts of New York granted to separation from the defendant, her husband, and awarded the custody of their minor son. By the judgment it was further ordered, adjudged, and decreed that the defendant from and after the entry thereof should pay to the plaintiff for her maintenance and support and the maintenance and education of said son the sum of \$22.50 per week, to be paid into the hands of the plaintiff's attorneys of record on each and every Monday. It was further ordered, adjudged, and decreed that the plaintiff have leave to apply from time to time for such orders at the foot of the judgment as might be necessary for its enforcement and for the protection and enforcement of her rights in the premises. Section 1771 of the New York Code of Civil Procedure then in force, under which this order for payments to the wife for her benefit and that of her son was made, provided that in actions for a separation the court might either in the final judgments or by orders made from time to time before such judgment give such directions as justice required between the parties for the custody, care, education, and maintenance of any of the children of the marriage, and, where the action should be brought by the wife, for her support. It was further provided that the court might upon the application of either party, after due notice to the other, by order annul, vary, or modify such directions. The right of the defendant to make such an application was conditioned upon leave of the court to make it having been first obtained. Section 1772 provided that the court might require the husband to give security for the payments which he might be directed to make as aforesaid, and that, in case of a failure on his part to make payments or give security as directed, his personal property and the rents and profits of his real property might be sequestered, a receiver thereof appointed, and the property thus sequestered applied under the direction of the court to the satisfaction of the payments ordered as justice should require. Section 1773 further provided that where a husband was in default of his payments, and it appeared presumptively that the proceedings specified in section 1772 would be ineffectual, the court might in its discretion institute proceedings against him for his punishment for contempt. The defendant made none of the payments required of him by said order and decree, and this suit was brought to recover the amount in arrears, which at the commencement of the action was \$5,805. Judgment for that sum was rendered. The complaint recited the issuance of the order and its terms in full, that it still remained in full force and effect, and that payments had not been made as ordered to the amount of \$8,500, and prayed for judgment for \$10,000 damages. The defendant demurred for the reasons that

the so-called judgment or decree sought to be enforced was not one for the present payment of a definite sum of money, and therefore could not be enforced in this state; that it did not create a debt or obligation which was enforceable in an action of the character of the present, but only by the court which issued it; and that it was not such a judgment as was entitled to full faith and credit in this state and enforceable by action here. This demurrer was overruled, whereupon the defendant answered over. Upon the trial the same questions which were presented upon the demurrer were again presented. The trial court, however, accepted the rulings upon the demurrer as the law of the case and upon the facts found rendered judgment as stated.

Walter C. Noyes, for appellant. Benjamin Slade, for appellee.

PRENTICE, J. (after stating the facts). The nature, operation, and effect within the state of New York of orders like that in question directing payments in futuro to a wife by a husband living in judicial separation and passed in 1899, pursuant to the then provisions of statute, have been well settled by the repeated decisions of the courts of that jurisdiction. They have been declared to be tentative provisions which remain at all times within the control of the court issuing them and subject to being at any time modified or annulled. *Tonjes v. Tonjes*, 14 App. Div. 542, 43 N. Y. Supp. 941. The right of modification or annulment which is thus reserved to the court is one which extends to overdue and unsatisfied payments, as well as to those which may accrue in the future. *Sibley v. Sibley*, 66 App. Div. 552, 73 N. Y. Supp. 244; *Goodsell v. Goodsell*, 94 App. Div. 443, 88 N. Y. Supp. 161; *Kiralfy v. Kiralfy*, 36 Misc. Rep. 407, 73 N. Y. Supp. 708; *Wetmore v. Wetmore*, 34 Misc. Rep. 640, 70 N. Y. Supp. 604. "The amount awarded does not exist as a debt in favor of the wife against the husband in the sense of indebtedness as generally understood." *Tonjes v. Tonjes*, 14 App. Div. 542, 43 N. Y. Supp. 941. The order is not one "which simply directs the payment of a sum of money," and not such a one as can have enforcement by execution. *Weber v. Weber*, 93 App. Div. 149, 87 N. Y. Supp. 519. The special remedies provided in sections 1772 and 1773 for the enforcement of the orders are exclusive. *Weber v. Weber*, *supra*; *Branth v. Branth*, 13 N. Y. Supp. 20, 59 Hun, 623. No judgment in another court can be entered upon them. *Branth v. Branth*, *supra*. Such being the character of the order before us as declared by the courts of the jurisdiction from which it comes, the conclusion would seem inevitable, not only that the courts of this state are under no constitutional obligation to give effect to it in the manner here sought, but ought not, as an act of comity, to do so, since it would thus

be given a greater effect than would be given to it in the jurisdiction of its origin. *McElmoyle v. Cohen*, 13 Pet. (U. S.) 312, 326, 10 L. Ed. 177; *Mills v. Duryee*, 7 Cranch (U. S.) 481, 3 L. Ed. 411; *Bank v. Wheeler*, 28 Conn. 433, 439, 73 Am. Dec. 683.

But we are not left without authoritative declarations as to the extraterritorial value of this New York decree. A Mrs. Lynde was by the Court of Chancery of New Jersey granted a separation from her husband, and it was adjudged that she was entitled to recover \$7,840 as alimony then due and payable, and that her husband pay to her permanent alimony at the rate of \$80 a week from the date of the decree. The statutes of New Jersey contained no express reservation of power to the court to modify or annul allowances of alimony so made, but the courts had said that they exhibited the intention that the subject should be continuously dealt with according to the varying conditions and circumstances. Gen. St. N. J. p. 1269 et seq.; *Lynde v. Lynde*, 54 N. J. Eq. 473, 476, 35 Atl. 641. As to the methods of enforcing such decrees the New Jersey statutes contained substantially the same provisions for security, sequestration and receivership proceedings as were embodied in the New York Code when the order in the present case was made as recited in the statement of facts. It thus appears that the provision for the payment of future alimony to Mrs. Lynde in New Jersey was affected by no condition which did not equally affect that to Mrs. Sistare in New York. There was the same reserved power of modification, only the more clearly and emphatically expressed, and the same provision of special remedies which the New York courts had gone so far as to declare to be exclusive. Mr. Lynde having failed to make any of the payments required of him, Mrs. Lynde brought suit against him in the courts of New York for the recovery of both the \$7,840 and the amount of the accrued weekly payments. The appellate courts of that state, whose decisions have special interest as embodying the views prevailing in the jurisdiction from which the order before us comes, and the Supreme Court of the United States, to which the case was finally taken upon the federal question involved, concurred in holding that the award of \$7,840 created a debt of record to which full faith and credit should be given in the courts of a sister state, and that the order for future payments did not create such a debt, and did not constitute such a judgment or judicial proceeding as was within the purview of section 1, art. 4, of the Constitution of the United States. *Lynde v. Lynde*, 41 App. Div. 280, 58 N. Y. Supp. 567; *Id.*, 162 N. Y. 405, 56 N. E. 979, 48 L. R. A. 679, 76 Am. St. Rep. 332; *Id.*, 181 U. S. 187, 21 Sup. Ct. 555, 45 L. Ed. 810. The conclusion thus reached is succinctly stated, and the reasons therefor sufficiently indicated, in the language of the opinion of the federal court

as follows: "The decree for the payment of \$7,840 was for a fixed sum already due and the judgment of the court below was properly restricted to that. The provision for the payment of alimony in the future was subject to the discretion of the Court of Chancery of New Jersey which it might at any time alter, and was not a final judgment for a fixed sum."

In respect to any claim which might be made that, although the courts of this state are under no obligation to enforce the present New York decree, they should as an act of comity do so, the opinions in the cases referred to suggest a sufficient answer to it when they note the inconclusive character of a decree which remains subject to change in the discretion of the court rendering it, and further invoke the elemental principle that collateral remedies provided in one state for the enforcement of its decrees cannot be carried over into another jurisdiction and there utilized. "The provision for a bond, sequestration, receiver, and injunction, being in the nature of execution and not of judgment, could have no extraterritorial operation; but the action of the courts of New York in these respects depended on local statutes and practice of the state." *Lynde v. Lynde*, 181 U. S. 187, 21 Sup. Ct. 555, 45 L. Ed. 810. Our courts are now asked to render a money judgment for the accrued payments as upon a debt of record and to enforce that judgment by execution. To do so involves not only disregarding the discretionary control reserved to the New York court in respect to both past and future payments, but also giving effect by judgment and execution to a decree which could not, as we have seen, be made the foundation of such a judgment in New York or enforced by execution there. But it is said that the case of *Barber v. Barber*, 21 How. (U. S.) 582, 16 L. Ed. 226, lays down a doctrine contrary to that expressed in *Lynde v. Lynde*, that this earlier case was not overruled in the later, and that, therefore, it is to be reckoned with before any statement of the federal doctrine can be confidently made. A careful examination of the two cases referred to will disclose that neither holds all that is frequently attributed to it, and that, when rightly interpreted, there is no lack of harmony between them. The *Barber* Case grew out of an allowance of future alimony made to Mrs. Barber by the courts of New York in 1844. Subsequently the husband in judicial separation moved to Wisconsin, where the wife, having found him, brought an action in equity in the United States District Court for the District of Wisconsin to recover the amount of the payments in arrears, and judgment was rendered in favor of her contention. The controversy waged in the Supreme Court of the United States concerned the question of jurisdiction, and the somewhat extended opinion rendered deals with the various aspects of that question, which the majority opinion stated to

be "whether a wife divorced a mensa et thoro may not have a domiciliation in a state of this Union different from that of her husband in another state to enable her to sue him there by her next friend in equity in a court of the United States to carry into judgment a decree which has been made against him for alimony by a court having jurisdiction of the parties and the subject-matter of divorce." Page 588 of 21 How. (16 L. Ed. 226). As incidental to the discussion of one of the subordinate phases of this general question, the character and effect of the New York decree and its extraterritorial value were touched upon and the statement made that such orders constituted judgments of record and created debts of record enforceable against the husband by execution or attachment against his person issuing from the court which gave it, and that actions might be brought in the courts of other jurisdictions to carry them into judgment and effect. The judgment of the lower court was affirmed.

It is to be noticed that this statement of the court embodies two propositions, to wit, one as to the local character and effect of the New York decree in question, and the other as to the consequent extraterritorial value of it, and that the second of the propositions is plainly predicated upon the first. Therein lies the gist of the decision in respect to the subject now under discussion; for, while the language employed is general in its terms, it manifestly was used of such orders and decrees absolute in their adjudication, conclusive in their character, and enforceable by ordinary legal processes, as was that under consideration, and as manifestly was not used of every conceivable order and decree relating to future alimony or maintenance. No question was made as to the conclusive character in New York of the decree in question as establishing there a debt of record. No discussion upon that point appears in the opinion, and no intimation was made as to what the court would have held had the decree been one of a different character. The absence of any such question or discussion and the unqualified assertion of the first proposition referred to—that is, that the question presented for decision arose upon a conclusive judgment of record enforceable by execution issuing from the court of its origin—is explained when the statutes and decisions of New York are examined, and it is found that the assertion was well founded as respects a decree passed in 1844, and for that matter at any time during the next half century. The courts of New York have no authority in matters of divorce, separation, alimony, etc., save that which is conferred by statute. *Erkenbrach v. Erkenbrach*, 96 N. Y. 456; *Walker v. Walker*, 155 N. Y. 77, 49 N. E. 663; *Livingston v. Livingston*, 173 N. Y. 377, 66 N. E. 123, 61 L. R. A. 800, 93 Am. St. Rep. 600. From 1730 to 1894 no authority was conferred upon the New York courts to

modify a decree in separation proceedings directing the payment of alimony or an allowance for future maintenance. Once fixed, it remained fixed, except that the decree of separation could be revoked upon the joint application of the parties and the production of satisfactory proof of reconciliation. *Rev. St. N. Y. (1st Ed.)* pt. 2, c. 8, tit. 1, § 54; *Goodsell v. Goodsell*, 82 App. Div. 65, 68, 81 N. Y. Supp. 806; *Erkenbrach v. Erkenbrach*, 96 N. Y. 456; *Walker v. Walker*, 155 N. Y. 77, 80, 49 N. E. 663. Under such a decree the amount allowed became a vested property right. *Livingston v. Livingston*, 173 N. Y. 377, 66 N. E. 123, 61 L. R. A. 800, 93 Am. St. Rep. 600. In 1894 and 1895 the legislation which was in force when the present decree was passed and concerning the effect of which the adjudications hereinbefore referred to have been made supplanted that which had previously been upon the statute books. In 1900 an act was passed expressly making this new legislation with its reservations of the power of modification or annulment at any time applicable to decrees granted prior to 1894. This act was declared unconstitutional and ineffective as impairing vested rights. *Livingston v. Livingston*, 173 N. Y. 377, 66 N. E. 123, 61 L. R. A. 800, 93 Am. St. Rep. 600. Allowances of future alimony made prior to 1894 created a judicial debt of record and furnished a proper basis for recovery in another action. *Wetmore v. Wetmore*, 149 N. Y. 520, 44 N. E. 169, 33 L. R. A. 708, 52 Am. St. Rep. 752; *Moore v. Moore*, 40 Misc. Rep. 162, 81 N. Y. Supp. 729; *France v. France*, 79 App. Div. 291, 295, 79 N. Y. Supp. 579. The opinion in the *Barber Case*, after observing that the New York court which granted the decree had the power to enforce it by the issuance of execution, proceeded to express its conclusion as to the extraterritorial value of the decree by saying that, when local enforcement could not be had by reason of the husband's departure from the jurisdiction, action could be brought on behalf of the wife in other jurisdictions to carry the decree into judgment there with the same effect that it had in the state in which the decree was given. Page 595 of 21 How. (16 L. Ed. 226). The last part of the statement has been commented upon as affirming the extraterritorial operation of special collateral remedies, and as therefore antagonistic to those portions of the opinion in the *Lynde Case* which touch upon that subject. It is perfectly apparent, however, that the court was speaking of decrees which created fixed debts enforceable by the ordinary judicial processes, and that its language was used only to emphasize the fullness of the faith and credit which would be given to such a decree. It thus appears that while the *Barber Case* is authority for the proposition that a decree directing periodical payments by a husband to a wife living in separation by way of future alimony or maintenance, if it is conclusive in its character and

creates a fixed obligation to pay a certain sum of money which will within the home jurisdiction be regarded as a debt of record enforceable by execution issuing from the court which granted it, is one to which extraterritorial effect will be given, it is not authority for the doctrine frequently attributed to it, that all orders or decrees for future alimony, regardless of their character, will be given such effect. The *Lynde Case*, on the other hand, is authority for the proposition that a decree for the payment of future alimony or maintenance which is inconclusive in its character by reason of the reservation to the court which made it of the unrestricted right to change or annul it at discretion, and which is not enforceable in the state of its origin otherwise than by special processes exclusive of execution and judgment thereon and execution, is not one creating such a debt of record as will entitle it to or justify extraterritorial enforcement. It is not, as has been sometimes assumed, authority for the larger proposition that no decree for future alimony or maintenance, whatever its character, can claim or have enforcement in another state. The two cases may therefore well stand together as declarative, as far as they go, of authoritative federal principles. It is quite conceivable that there lies between them no little debatable ground. It is quite possible that the limits to which the doctrine of the *Lynde Case* ought to be carried are not clearly determined. But, whatever questions of that kind might be suggested, we are not here concerned with them, since it is apparent that the facts of the present case fill out the full measure of the conditions presented in the *Lynde Case* and bring it within the application of the doctrine there laid down. Our conclusion must therefore be controlled by that decision, adversely to the plaintiff's right to recover.

There is error, the judgment is reversed, and the cause remanded for the rendition of judgment in favor of the defendant. The other Judges concurred.

(80 Conn. 37)

STAFFORD SPRINGS ST. RY. CO. v.
MIDDLE RIVER MFG. CO.

SAME v. EASTERN CONNECTICUT
REALTY CO.

(Supreme Court of Errors of Connecticut.
June 5, 1907.)

1. EMINENT DOMAIN — CONDEMNATION OF
LAND FOR STREET RAILROAD—CONDITIONS
PRECEDENT.

Gen. St. 1902, § 3681, providing that every railroad company before applying to the commissioners for their approval of the location of its road shall deposit with the State Treasurer a specified sum for each mile of its proposed road, when considered in connection with the facts that it was enacted in 1832 when street railroads were operated by horses, and that it was placed in the Revision of 1902, in the chapter relating to steam railroads, and not referred to in the subsequent chapter relating to street railroads, and when considered in

connection with sections 3680, 3687, and 3844, authorizing railroad companies to acquire land necessary for the construction of their roads, and authorizing every street railway company to purchase land for its road, and regulating the conditions and methods of exercising the power of eminent domain given to steam railroads, does not apply to a street railway company authorized by its charter to take land in the manner provided for taking land for steam railroads, and it need not deposit with the Treasurer of the state any sum for each mile of its proposed road before it can maintain proceedings to condemn land for its road.

2. CORPORATIONS—MEETINGS OF DIRECTORS—VALIDITY.

Four of the seven directors of a corporation held a meeting pursuant to a call made by the secretary of the board by telephonic communication with them. The other three could not be reached before the meeting, and had no notice of it, but after its close they with the other four signed a waiver of notice. *Held*, that the action taken at the meeting was valid.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, §§ 1298, 1302.]

3. EMINENT DOMAIN — CONDEMNATION FOR STREET RAILROAD—ATTEMPTED AGREEMENT WITH LANDOWNER.

In proceedings by a street railroad to condemn land for its road, it appeared that the approval of the location of the road by the commissioners was first asked and given in January, 1907, and that the only attempts made by the company to agree with the owners of the land sought to be taken took place in 1906. *Held*, that it was immaterial that negotiations with the owners for the purchase of the land were not renewed after the approval of the location of the road.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Eminent Domain, § 462.]

4. EVIDENCE — PRESUMPTIONS — CONTINUANCE OF FACT.

Proof that several years before the trial a person was the treasurer of a domestic corporation which failed to thereafter file any annual statement giving the names of its officers as required by law authorized the inference that he was its treasurer up to the time of the trial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 87.]

5. EMINENT DOMAIN—PROCEEDINGS TO CONDEMN LAND FOR A STREET RAILROAD—NEGOTIATIONS FOR PURCHASE—NECESSITY.

Under Gen. St. 1902, § 3687, providing that, when a railroad company cannot obtain real estate for railroad purposes by agreement with the parties interested, it may apply to any judge for the appointment of appraisers to estimate damages that may arise from the taking of the land, etc., an application by a street railroad company to condemn land for its right of way cannot be sustained without proof that the company could not obtain the land by agreement with the owner, and it was not enough to prove that it had negotiated, though in the best of faith, with some one not in fact owning the land or representing the owner.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Eminent Domain, § 462.]

6. SAME—EVIDENCE—ADMISSIBILITY.

In proceedings by a street railroad to condemn land for its right of way, evidence that its agent entered into negotiations with a third person who claimed to represent the corporation owning the land sought to be taken, and had in his possession deeds of the land executed to it and named a price for the land which the company declined to pay, and that the agent received several letters in regard to the matter from the third person, one of which was sub-

scribed by the name of the corporation, followed by the name of the third person, was admissible to show negotiations with one representing the owner, essential to the maintenance of the proceedings.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Eminent Domain, § 538.]

7. EVIDENCE—BEST AND SECONDARY—CONDEMNATION PROCEEDINGS.

In proceedings by a street railroad to condemn land for its right of way, the court did not err in permitting its agent, who testified that he took a draft contract for the sale of the land sought to be taken, and owned by a foreign realty company, to an individual shown by a statement previously filed by the corporation to be its treasurer, to state that the contract, not produced nor its absence accounted for, was drawn in terms as a contract by the foreign company, though the evidence was not the best evidence; the rule requiring the exclusion of secondary evidence not being inflexibly applied in such proceedings.

8. EMINENT DOMAIN—CONDEMNATION PROCEEDINGS—NEGOTIATIONS WITH OWNER—EVIDENCE.

Where, in proceedings by a street railroad to condemn land for a right of way, the evidence showed that its agent had entered into negotiations with a third person who claimed to represent a company owning the land sought to be taken, with a view of purchasing the same, evidence of the tax collector of the town where the land was located that the year before he received from the third person a list of the property owned by the corporation which was liable to taxation was admissible to show that the third person acted for the company.

Appeal from Superior Court, Tolland County; Joel H. Reed, Judge.

Applications by the Stafford Springs Street Railway Company against the Middle River Manufacturing Company and against the Eastern Connecticut Realty Company for the appointment of appraisers in proceedings to condemn land for a right of way. From an order appointing appraisers, entered after a hearing held in 1907, after overruling demurrers to each application and the sustaining of a demurrer to a paragraph of each answer, defendants appeal. Affirmed.

Donald G. Perkins and Robert H. Flisk, for appellant. Benjamin I. Spock, for appellee.

BALDWIN, C. J. Neither application contained any allegation that the company preferring it had made a deposit with the Treasurer of the state of a sum equal to \$11 for each mile of its proposed road in this state. Demurrers on this ground were overruled, and averments in the answers that no such deposit had been made were held insufficient. The charter of the company authorizes it to take land for its charter "in the same manner as provided for taking land for steam railroad purposes." 13 Sp. Laws, p. 919, § 11. In chapter 213 of the General Statutes of 1902, the title of which is, "Location and Construction of Steam Railroads," it is provided (section 3680) that every railroad company may take, with the approval of the railroad commissioners, as much real estate as may be necessary for the proper construction and security of its road, and section 3681

reads as follows: "Every such company, before applying to the commissioners for their approval of the location of its road, shall deposit with the State Treasurer a sum equal to eleven dollars for each mile of its proposed road in this state. And the comptroller shall include such company among the several railroad companies in his next annual apportionment of the office expenses and salaries of said commissioners, estimating the length of its main track or tracks as equal to the proposed length of its road; and said treasurer shall deduct from said deposit the amount so apportioned to such company, and return the remainder to the treasurer of such company." Gen. St. 1902, § 3882, directs that in the apportionment of the office expenses and salaries of the railroad commissioners among the several companies all companies "operating railroads and street railways in this state" shall be included. Gen. St. 1902, § 1, provides that "the phrase 'railroad company' shall be construed to mean and include all corporations, trustees, receivers, or other persons, that lay out, construct, maintain, or operate a railroad operated by steam power, unless such meaning would be repugnant to the context or to the manifest intention of the general assembly." The applicant's charter (section 2) excludes the use of steam power upon its railway. Gen. St. 1902, § 2432, declares that "the existing statutes with regard to the taxation of railroads shall apply, extend to, and include all street railways of every description." A street railway company is a kind of railroad company, but it does not follow that it is affected by every statute concerning railroad companies. That is a question to be determined in each case by a study of the whole body of legislation bearing upon the question. *Mass. Loan & Trust Co. v. Hamilton*, 88 Fed. 588, 32 C. C. A. 46, 59 U. S. App. 403. Such a study of the statutes to which reference has been made satisfies us that Gen. St. 1902, § 3681, does not apply to street railway companies. Its first words, "every such company," manifestly refer to the initial words of section 3680, which are that "every railroad company may lay out its road not exceeding six rods wide." For street railways the taking of such a width of the street is never required. Gen. St. 1902, § 3681, was first enacted in 1882. At that time street railways were operated by the use of horses, and seldom, if ever, laid except on the highway; nor, it is believed, had any street railway charters been granted which conferred the power of taking land without the consent of the owner. The placing of this statute, 20 years later, in arranging the Revision of 1902, in a chapter entitled as relating only to steam railroads, and the omission of any reference to it in the subsequent chapter (217) of the same title entitled "Street Railway Companies," indicate that it was not intended to

enlarge the scope of its application. Gen. St. 1902, § 3844, authorizing every street railway company to purchase land for its roadbed, would also have been unnecessary, had they been included under the terms of section 3680. That section gives steam railroad companies power to take land by condemnation. It, also, in connection with section 3687, regulates the conditions and methods of exercising the power, and it is to such regulations of the manner of proceeding that section 11 of the plaintiff's charter refers.

The records of the directors of the applicant showed that a vote to take the lands in question was passed by them on February 9, 1907, at 11 a. m. In fact, a meeting of the board for that time had been called by the secretary on the preceding day by telephonic communication with four directors. They were present at this meeting and constituted a quorum. The total number of directors was seven. The other three could not be reached before the meeting was held, and had no notice of it. After its close all seven signed a waiver of notice, bearing the date of February 9th. The management of a corporation cannot be paralyzed by every absence of a director from its place of business or from the state at a time when a meeting of the board seems necessary. Notice to a majority, in such a case, if they, being all that can be reached, proceed to hold the meeting, will, in the absence of any by-law to the contrary, support their action, at least if, as in the present instance, the others subsequently sign and file a waiver of notice, and the corporation acquiesces in what was done by making it the basis of a claim of legal right. *Chase v. Tuttle*, 55 Conn. 455, 12 Atl. 874, 3 Am. St. Rep. 64. The approval of the railway location by the railroad commissioners was first asked and given in January, 1907. The only attempts made by the applicant to agree with the defendants as to terms of purchase took place in 1906. It is immaterial that they were not renewed after the approval of the location and the vote of the directors. Their failure was the only occasion for that vote which, had they been successful, would have been unnecessary. Negotiation with landowners naturally precedes a resort to condemnation proceedings.

The Middle River Manufacturing Company is a Connecticut corporation. The lands in question are in Stafford. The applicant produced evidence that one Sheehan was its treasurer in 1903, and that since that year the company had failed to file with the Secretary of the state any annual statement giving the names of its officers as required by law. This authorized the inference that he was its treasurer up to the time of trial. *Gray v. Finch*, 23 Conn. 495, 513. The applicant offered evidence that its land agent made reasonable inquiry for some one with whom to negotiate for a purchase of the land

of that company, and as a result entered into negotiations with Sheehan, who claimed to represent it, had in his possession deeds of land in Stafford executed to it, and named a price for the land desired, which the applicant declined to give, and that he received several other letters in regard to the matter from Sheehan, one of which was subscribed: "The Middle River Manufacturing Co., Inc. J. M. Sheehan." This evidence was offered and received only to show that the applicant had endeavored in good faith to obtain the land from the company by agreement. Under Gen. St. 1902, § 3687, the application could not be sustained without proof that the applicant could not obtain it by agreement with the owner. It was not enough to prove that it had negotiated, though in the best of faith, with some one not in fact owning the land or representing the owner. But the applicant was entitled to the admission of this evidence as tending to show negotiations with one who did represent the owner. Summary administrative proceedings of this nature before a judge at chambers are not governed in respect to pleadings and evidence by the strict rules prescribed for ordinary actions at common law. They are in their nature comparatively informal. The hearing takes place, not before jurors for whose protection against being led off into immaterial inquiries or confused by remote evidence, those rules have been devised, but before a single magistrate of trained mind, who is learned in the law. The application is one calling for speedy action. The judge to whom it is addressed, while exercising judicial power, is at liberty to receive any evidence which is fairly calculated to aid him in coming to a just conclusion. Although there was no evidence as to the powers of the treasurer of the Middle River Manufacturing Company, it was competent for the judge to assume that they were such as were naturally implied in Sheehan's acts while assuming to negotiate in its behalf, and while the holder of that office.

The Eastern Connecticut Realty Company is a New York corporation. Its statement, filed in the proper office of that State in 1903, showed that Sheehan was then its treasurer. Evidence of negotiations with him as agent of that company, similar to that of the negotiations had with him as agent of the Middle River Manufacturing Company was, for reasons already sufficiently stated, properly admitted. The land agent of the plaintiff, having also testified that he took a draft contract for the sale of the land owned by the Eastern Connecticut Realty Company to Sheehan to obtain the company's signature, was permitted to state further (the contract not having been produced nor its absence accounted for) that it was drawn in terms as a contract by that company. The objections of the Eastern Connecticut Realty Company to the admission of this testimony

were properly overruled. In hearings of this nature the rule excluding any but the best evidence need not be inflexibly applied.

Testimony was also properly received from the tax collector of Stafford, that in the fall of 1906 he received from Sheehan a list of the property owned by each of the defendants which was liable to taxation there, with a request to file it. This tended to fortify the presumption that Sheehan was then the treasurer of each, because he acted as such an officer naturally would in a matter in which it was important that the company should act.

The evidence introduced fully justified the finding that each application was proved true.

There is no error in either case. The other Judges concurred.

(80 Conn. 11)

BRANSFIELD v. WIGMORE et al.

(Supreme Court of Errors of Connecticut.
June 5, 1907.)

WILLS—CONSTRUCTION—ESTATES ACQUIRED.

A testator, after providing for the payment of a legacy to a person named, gave the residue of his estate, consisting of personality, in trust for his son, his only heir, the income to be paid to the son, and provided that if, during the trust, the son should be competent to take care of his property in the judgment of the trustee, or in the event of his marriage, the trust should terminate. Held, that the son, in addition to the right to receive the income of the estate during his life, took a transmissible title to the entire estate.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, §§ 1607, 1608.]

Case reserved from Superior Court, Middlesex County; Howard J. Curtis, Judge.

Action by John Bransfield, trustee of the will of Thomas Wigmore, deceased, against Michael Wigmore and others, for the construction of the will of the deceased. Reserved for the advice of the Supreme Court of Errors. Decree advised.

Clarence E. Bacon, for plaintiff. Gustaf B. Carlson, for defendant William Wigmore's estate. William J. Coughlin, Jr., for defendants, Ellen and Margaret O'Brien. Daniel J. Donahoe, for defendants Michael Wigmore et al.

HALL, J. Thomas Wigmore, late of Portland, in this state, died testate October 28, 1900, leaving an estate, consisting wholly of personal property, of the value, after the payment of debts, of about \$11,000. His will, executed September 24, 1900, after providing for the payment of his debts, for a legacy of \$100 to a person whose relation to the testator does not appear, and for the appointment as executor of the person named elsewhere in the will as trustee, contains only this remaining provision: "Third. I give, devise and bequeath unto Patrick Sullivan, of said Portland, all the rest, residue and remainder of my estate of every name and nature in

trust for my son, William Wigmore, of said Portland, the income thereof to be paid over to my said son by said trustee. If at any time during the continuance of said trust my said son should be competent and capable of taking care of his property (or in the event of my son's marriage) in the judgment of my said trustee, then I instruct that this trust shall terminate, and my said trustee is to turn over to my said son the balance of said trust estate, and in that event I give, devise and bequeath all the unexpended balance of said trust estate to my son William and his heirs forever."

William Wigmore was the testator's sole heir at law. He never married, nor was the trust estate ever turned over to him under said provision of the will. He died in 1906, leaving a will, the executor of which, is a party to this action. Other parties are the children of deceased brothers of said testator, Thomas Wigmore, his sister, the maternal aunts of William Wigmore, and the administrator c. t. a. of the estate of said Thomas Wigmore. The plaintiff is the successor of the trustee named in the will. The questions upon which our advice is asked are, in substance, whether by said provision of his father's will William took only a life estate in said personal property, the remainder being intestate estate of Thomas Wigmore, or whether, in addition to the right to receive the income of the estate during his life, William also took a transmissible or devisable title to the entire estate.

Presumably the natural desire of Thomas Wigmore was that his only child should inherit his property. The will itself suggests a reason why, in order to secure to his son the income from the property, the testator deemed it necessary to limit to some extent his son's control over it, namely, that he might not be "competent and capable of taking care of his property." Apparently the testator's only reason for making a will, apart from his desire to make the bequest of \$100, was to guard against such loss to his son of the income from the estate as he feared might result from the latter's inability to properly care for the property. To accomplish this purpose the testator does not, even in case William neither marries nor is found competent to have the care of the property, expressly limit William's interest in this personal property, as he might have done, to a life estate, or to the mere right to receive the income from the property; nor does the language of the bequest to the trustee indicate that William's rights and interest in the property were intended to be so limited. On the contrary, the entire residue of the estate is given in trust to William. The language of the will is: "I give, devise and bequeath [to the trustee named] all the rest, residue and remainder of my estate [after the payment of debts and the \$100 legacy] of every name and nature in trust for my

son. * * * " Later in the will the property so given in trust is referred to as "his [William's] property."

It is to be presumed that in making his will the testator intended to leave no part of his estate intestate. He has made no gift over of any remainder after the death of William. The language of the will is broad enough to describe a gift to the trustee of the entire legal title to the residue of the estate remaining after the payment of debts and the legacy named, and to William of the entire beneficial interest in such residue, subject only to the restrictions and conditions imposed by the trust. We are of opinion that the testator intended to make such a complete disposition of all of his estate by his will, and that William had the power to dispose of the estate in question by will.

We therefore advise the superior court that the personal property in the hands of the plaintiff is not intestate estate of Thomas Wigmore; that William Wigmore took a devisable interest in said estate, under the will of his father; and that the plaintiff should pay over or deliver said estate in his hands as trustee to the executor of the will of William Wigmore, less such expenses and fees as may be allowed by said court. No costs will be taxed in this court. The other Judges concurred.

(80 Conn. 23)

KEARNS v. NICKSE.

(Supreme Court of Errors of Connecticut. June 5, 1907.)

1. PRINCIPAL AND AGENT—POWERS OF AGENT.

The creation of an agency clothes the agent with such authority as is proper and necessary to effectuate its purposes.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Principal and Agent, § 254.]

2. SAME—SALES—BARTER.

Where plaintiff delivered his horse to a special agent for some purpose connected with its sale, the agent had no apparent authority to exchange the horse for another horse and some money.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Principal and Agent, § 291.]

Appeal from Court of Common Pleas, Hartford County; John Coats, Judge.

Replevin by Michael H. Kearns against Herman R. Nickse. Judgment for defendant, and plaintiff appeals. Error, and new trial granted.

Upon the trial it was undisputed that the plaintiff, the owner of a horse, intrusted it to one Pearson for some purpose, that Pearson traded the horse to the defendant in return for another horse and the defendant's check for \$28, that the plaintiff subsequently having found the horse in the defendant's possession, and learned the facts of the trade, demanded it, and that the demand was refused. The plaintiff offered evidence to show that the horse was delivered to Pearson for

the sole purpose of showing it to one Hills, with a view to a sale to him for \$100. The defendant sought to establish that the horse was placed in Pearson's hands for sale generally for \$100. There was evidence tending to show that Pearson had dealt more or less in horses to the knowledge of each of the parties, neither of whom, however, were well acquainted with him; that the horse taken by him from the defendant in said trade was the same day sold to one McNamara, who still has it; that Pearson collected said \$28 check; that he never accounted to the plaintiff for the proceeds of said trade; and that he has since been in parts unknown to the parties. The plaintiff requested the court to instruct the jury that the power to sell conferred upon an agent in such a case did not clothe the agent with the apparent authority to barter or exchange, and that third parties dealing in the form of barter or exchange with such agents so authorized did so at their own risk. The court charged the jury upon that subject as follows: "The plaintiff claims that he delivered the horse to Pearson for the purpose of having Pearson show the horse to one Hills, with the view of a sale by plaintiff of the horse to Hills for the price of \$100, and for no other purpose. The defendant claims, in substance, that plaintiff delivered the horse to Pearson to sell for \$100. If the plaintiff's claim is true, then Pearson would have no authority to sell, and the mere intrusting of Pearson with the possession for a special purpose would not clothe him with any real or apparent authority to make the trade with defendant—the mere intrusting of Pearson with the possession. If plaintiff, on the other hand, intrusted the horse to Pearson for sale, the mere fact that his authority to sell was restricted by the plaintiff without knowledge on the part of the defendant to a sale to Hills alone, or to a sale for cash, or at a fixed price, would neither of them render a trade such as Pearson made with the defendant void. I will repeat that. If plaintiff, on the other hand, intrusted the horse to Pearson for sale, the mere fact that his authority to sell was restricted by the plaintiff, without knowledge on the part of the defendant to a sale to Hills alone, or to a sale for cash, or at a fixed price, would neither of them render a trade such as Pearson made with the defendant void. Pearson, in such a case, would be acting within the apparent scope of an authority, where authority was given him, though of a more limited character; such restrictions being unknown to the defendant. And when an agent acts within the apparent scope of his authority, without any knowledge on the part of the person who is acting with him with reference to any restriction, the action of the agent will bind his principal so far as he acts within the apparent scope of his authority."

Andrew J. Broughel, Jr., for appellant.
William F. Henney, for appellee.

PRENTICE, J. (after stating the facts). Pearson was, upon the conceded facts, a special agent of the plaintiff intrusted with the latter's horse for some purpose connected with its sale. Upon the trial the parties disagreed both as to the power in terms conferred upon the agent and as to the apparent authority with which as a matter of law that power, attended as it was with the possession of the horse, clothed him with respect to dealings with third parties. It was incumbent upon the court to give the jury instructions appropriate to such a situation as the evidence should establish, and this duty it undertook to perform.

The creation of an agency carries with it the usual and appropriate means of accomplishing its object, and clothes the agent with such authority as is proper and necessary to effectuate its purposes. *Benjamin v. Benjamin*, 15 Conn. 356, 39 Am. Dec. 384; *Thames Steamboat Co. v. Housatonic R. Co.*, 24 Conn. 51, 63 Am. Dec. 154. In the absence of any trade usage, the power to sell does not carry with it or imply the power to barter or exchange. *Woodward v. Jewell*, 140 U. S. 253, 11 Sup. Ct. 784, 35 L. Ed. 478; *Hayes v. Colby*, 65 N. H. 193, 18 Atl. 251; *Drury v. Barnes*, 29 Ill. App. 166; *Cleveland v. State Bank*, 16 Ohio St. 236, 88 Am. Dec. 445; *Trudo v. Anderson*, 10 Mich. 357, 81 Am. Dec. 795; *Brown v. Smith*, 67 N. C. 245.

The court was therefore in error in respect to a material matter when it told the jury, in effect, that, if the power of sale was given to Pearson, he thereby became clothed with apparent authority to make such a trade as he in fact made. There is nothing in the record upon which an apparent authority to barter could be predicated.

There is error, and a new trial is granted. The other Judges concurred.

(30 Conn. 29)

LEPARD v. CLAPP et al.

(Supreme Court of Errors of Connecticut. June 5, 1907.)

1. PERPETUITIES—SUSPENSION OF POWER OF ALIENATION—REAL ESTATE.

A will, after making a gift in trust to pay the income to testator's wife for life, the income after her death to be divided among testator's five sons, provided that, after the death of the last son, the principal should be divided equally among the issue of the five sons per stirpes. *Held*, that the gift over of the principal contravened the statute against perpetuities, as a gift to descendants generally, to take effect at a future time.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Perpetuities, §§ 46, 47.]

2. SAME.

Testator gave property in trust to pay the income to his wife for life, on her death to divide the income into five equal parts semi-annually, with authority to pay one of such parts to each of testator's five sons, or to the legal representatives of any, who may have deceased, per stirpes, in case the trustee shall be satisfied that said part of said income is needed for the comfortable support of said son

or his family, and will not be used in payment of any of his debts; the semiannual income to be so distributed till the death of all the sons. *Held*, that such gifts over of the income on the decease of testator's sons, respectively—giving the term "personal representatives" any reasonable meaning, in view of the qualifying words "per stirpes" and testator's apparent purpose of equality and impartiality—were void as contravening the statute against perpetuities.

3. WILLS—EFFECT OF PARTIAL INVALIDITY.

Testator created a trust fund, and provided that the income should be divided into five equal parts, semiannually, and one of such parts paid to each of his five sons, or to the legal representatives of any who may have deceased. *Held*, that the gift over of the income on the decease of the sons respectively being void, as contravening the statute of perpetuities, so that testator's scheme of equality was destroyed, the whole provision would be considered void, and the property treated as intestate property.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, §§ 992-995.]

Case Reserved from Superior Court, Hartford County; William S. Case, Judge.

Action by Frederick P. Lepard, trustee, against Allen C. Clapp and others, for construction of the will of Caleb Clapp, deceased. Facts found, and case reserved for the advice of the Supreme Court of Errors. Provisions declared invalid.

Caleb Clapp of Hartford died February 15, 1881, possessed of both real and personal estate, and leaving a will which has been duly probated. He also left surviving him a widow and five sons, his only children. By the will \$1,000 was given to each son. All the residue of the estate was by item 2 converted into a trust fund, and the widow given the entire income of it during her life. Items 3 and 4 were as follows:

"Item 3. Upon the decease of my said wife, the net annual income of said trust fund shall be divided by said trustee into five equal parts semi-annually, and one of those parts may be paid to each of my five sons above named, or to the legal representatives of those, if any, who may have deceased per stirpes, in case the said trustee shall be satisfied that said part of said income is needed for the comfortable support of said son or his family, and will not be used in payment of any of his debts. Semi-annual income to be disposed of in this manner until all of my said five sons shall have deceased.

"Item 4. Upon the decease of my last surviving son, said trust shall cease, and the principal of said trust fund shall be equally divided to and among the issue of my said five sons per stirpes, and I give and bequeath said fund to the descendants of my said five sons per stirpes and to their heirs and assigns forever."

Mrs. Clapp, the widow, died October 24, 1899, having received the income of the fund to that date. One son, Willis M., died September 17, 1884, and another, Howard S., October 18, 1898. Each left a widow and one child, a daughter, who in each case was the sole heir at law of her father. The daughter

of the first-named son is married, that of the second unmarried. Whether or not these daughters reside with their mothers is not found. A third son, Henry P., died in October, 1906, leaving a widow, Lena B., with whom he had resided, but no child or representative of children. All of the widows of said three sons are now living. Two of the five sons survive. The plaintiff is the trustee of said fund. Other facts found need not be recited.

The following questions are propounded for advice: "(1) Is the said Lena B. Clapp, widow of said Henry P. Clapp, entitled to any part of the income which would be payable to her husband if living? (2) Should the preceding question be answered affirmatively, then what part of said income should be paid to her? (3) Should only a part of said income be paid to her, to whom should the remainder be paid? (4) Should the principal of said estate be kept intact and the income only be paid until the death of the last surviving son of said Caleb Clapp, or is some part of the said principal now distributable, and, if so, what part and to whom? (5) Should it be answered that said principal should be kept intact until the death of said last surviving son, then to whom should it be paid upon the death of said last survivor?"

Charles M. Joslyn, for plaintiff. Charles Welles Gross, for Lucy B. and Marjorie Clapp. William S. Pardee, for Lena B. Clapp. Walter H. Clark, for Ella J. C. Clapp. Warren B. Johnson, for Allen C. and Arthur S. Clapp. Harry M. Burke and John A. Stoughton, for Louise C. Loomis.

PRENTICE, J. (after stating the facts). It is apparent from the provisions of the testator's will that it was his controlling purpose, in the disposition which he made of his estate, to treat with such perfect equality and impartiality as the circumstances would permit his five sons and only children, and upon the death of each one of them to substitute for him in this scheme of equal benefaction those whom the testator conceived to be the proper persons to stand for and represent the deceased as being of or belonging to his stock. The purpose to avoid all discrimination is one which the testator carried, not only to the sons, but to their stocks and to all members of them in whatever degree. It is equally apparent, however, that the testator had in mind circumstances or possibilities which led him to wish to create spendthrift trusts, in order that beyond peradventure the impartial benefactions which he desired to make might be secured to the intended beneficiaries. To accomplish this result, certain provisions giving the trustee discretionary power to withhold payments of income appear, which at first sight are suggestive of possible inequalities; but, when these provisions are viewed as mere incidents, as they plainly

are, of an attempt to accomplish the testator's secondary object, his main purpose of strict impartiality is only the more clearly indicated. *Mason v. Rhode Island Hospital Trust Co.*, 78 Conn. 81, 85, 61 Atl. 57. This main purpose is one which should be given controlling weight in interpreting and giving effect to the language which he has used in his attempt to effectuate it. *Mathewson v. Saunders*, 11 Conn. 145, 149.

Counsel for all interests agree that the gift over contained in item 4 is void as being in contravention of the statute against perpetuities in force at the death of the testator. It is impossible to interpret the language of that item with a due regard for either the ordinary meaning of words or the intent of the testator already indicated, without discovering in it gifts to descendants generally to take effect at some future time, and therefore gifts which the statute in question forbade. *Tingler v. Chamberlin*, 71 Conn. 466, 42 Atl. 718. In items 2 and 3 the testator undertook to dispose of the income of the trust fund during the continuance of the trust. No doubt can exist as to the right of the widow under item 2 to receive that income during her life. Before her death, October 24, 1899, two of the sons had died; each leaving a widow and child. A third has since died leaving a widow, but no children or representatives of children. The question is presented as to the effect of the provisions made in contemplation of such conditions. By the terms of item 3 one-fifth of the net annual income is given to each of the sons "or to the legal representatives of those, if any, who may have deceased per stirpes" with the limitation, however, that the trustee should be satisfied that the same was needed for the comfortable support of said son or his family and would not be used in the payment of his debts. The term "personal representatives," thus used by the testator to describe those whom he wished to make the beneficiaries of income in the place of a deceased son, is one of flexible meaning. *Staples v. Lewis*, 71 Conn. 288, 290, 41 Atl. 815. The sense in which the testator intended it to be used must therefore be gathered, if possible, from the language of the whole instrument, read in the light of the relevant circumstances existing at the time of its execution. *Johnson v. Edmond*, 65 Conn. 492, 498, 83 Atl. 503; *Crosgrove v. Crosgrove*, 69 Conn. 416, 419, 38 Atl. 219. If it be said that the intent of the testator was to designate as the substitute beneficiaries either the lineal descendants of the deceased son, his heirs at law, those who would be the distributees of his estate, or those to whom his estate would immediately pass in its way to the ultimate beneficiaries thereof, it is clear that the obstacle of the statute against perpetuities would be encountered. *Tingler v. Chamberlin*, 71 Conn. 466, 469, 42 Atl. 718. The uncertainty which oftentimes attends the meaning to be given to the unqualified term

"personal representatives" is, in the present instance, however, greatly relieved by the addition of the words "per stirpes," so that it would require strong indications to the contrary to justify a belief that any different body of persons was intended than those who would inherit from the deceased son or be the distributees of his estate, to be determined either as of the time of his death or as of the time of the several payments, or possibly lineal descendants only. For the present purposes of our discussion it would matter not which of these somewhat variant forms the testator's intention may have assumed, since all would alike meet the same ultimate fate of invalidity. That any other group of persons than one of these was in the testator's mind as comprising that body who should stand in the place of a deceased son is rendered all the harder to believe in view of the general scheme and controlling purpose of the will.

But it is urged that the language immediately following the description of the substitute beneficiaries as "personal representatives per stirpes" indicates that these words were used as synonymous with "family," so that the body which the testator had in mind was the family of the deceased child. It is to be noticed that this word was not used anywhere in the will to describe the beneficiaries. The word only appears as a part of the testator's attempt to create spendthrift trusts, and as furnishing to the trustee as a standard for his exercise of the discretion reposed in him, the comfortable support not only of the son, but of his family also. But if the difficulties in the way of any other constructions than one of those already indicated are passed by, and it be assumed that it is the family of the deceased son which the testator intended to put in his place, we shall have only succeeded in substituting one word of flexible and uncertain meaning for another, and shall not have succeeded in avoiding the obstacle of the statute upon any reasonable meaning not palpably inconsistent with the testator's intent. *Crosgrove v. Crosgrove*, 69 Conn. 416, 421, 38 Atl. 219.

It is to be borne in mind that the designated group of persons is one whose individual members are given the right to share directly and in some ascertainable proportions the testator's bounty. It is not one whose members can only enjoy the benefits of such bounty by indirection and through benefactions made directly to another. If it be said that the word "family" thus substituted as expressive of the testator's conception of the group whose members would be entitled to thus share between them the semiannually recurring income which would have fallen to the lot of a son, if living, is to be interpreted as denoting a stock of descent, the statute plainly would be contravened. *Hoadley v. Wood*, 71 Conn. 452, 456, 42 Atl. 263. If it be held that it is to be construed as designating that collective body of persons living together in

the household of which the deceased son was, when living, the head, that body might include more or less than those the testator desired to reach, and might include those whose inclusion the statute forbade. *Wood v. Wood*, 63 Conn. 324, 327, 28 Atl. 520. If the word is to be taken in some narrower sense as including only those members of each household who were the heirs at law of the deceased son or the distributees of his estate, the result would be the same. *Hart v. Goldsmith*, 51 Conn. 479, 480. So, if the process of elimination be carried further in the effort to avoid the statute, and it be said that the word should be construed as embracing only those members of each household who might legally participate in the testator's bounty, and whether inclusive or exclusive of a widow, the testator's desire for equality might not be carried out. *St. John v. Dann*, 66 Conn. 401, 405, 34 Atl. 110. If we should say that what was meant was that body of persons who were his heirs at law or distributees wherever they resided, the statute would again be encountered. *Hart v. Goldsmith*, 51 Conn. 479, 480. If in a final effort to escape the prohibitions of the statute, and not too obviously to lose sight of the testator's controlling purpose, it be held that we should be justified in saying, and should say, that the adopted word could and ought to be construed as descriptive of those persons, and those only, wherever residing, who were the heirs at law or distributees of the estate of the deceased son, and yet so circumstanced as to be unaffected personally by the prohibitions referred to, we should arrive at a strained conclusion which, especially in view of the qualifying words "per stirpes," which the testator evidently employed for some purpose, it cannot reasonably be imagined that he had in mind and which, in possible contingencies, would defeat what he sought to accomplish.

We are of the opinion, therefore, that the gifts over of income upon the decease of the testator's sons, respectively, as contained in item 3, were void as contravening the statute against perpetuities. As a result, two of said gifts, being that of two-fifths of the income, had failed before the widow's death, thus creating intestacy, and one other has since failed, with a like result. In this situation, if the gifts of two-fifths of the income be permitted to stand in favor of the surviving sons, and of one-fifth in favor of the last survivor, until by his death the trust should be terminated, the consequence would be the complete overthrow of the testator's testamentary scheme and the utter defeat of his main purpose and intent. Where he had planned equality, gross inequality would appear. The benefactions which he had sought to make certain and secure for all who seemed to him to have a claim upon his bounty would be put to the hazard of accidental circumstance, and the outcome determined in favor of one or another by turns of the

wheel of fortune. The situation is precisely that which was disclosed in *White v. Allen*, 76 Conn. 185, 190, 56 Atl. 519, and for the reasons there stated it must be held that, except for the gifts of income prior to the death of the testator's widow the estate given in trust was the intestate estate of the testator to be administered and distributed as such. See, also, *Andrews v. Rice*, 53 Conn. 563, 5 Atl. 823; *Morris v. Bolles*, 65 Conn. 45, 31 Atl. 538; *Ketchum v. Corse*, 65 Conn. 85, 31 Atl. 486.

This conclusion renders it unnecessary to give specific answers to the questions set out in the complaint.

The superior court is advised that the defendant George H. Gilman, as administrator with the will annexed *de bonis non* of the testator, Caleb Clapp, is entitled to the net amount of said trust estate now in the hands of the plaintiff trustee, and it is directed to render judgment accordingly. No costs in this court will be taxed in favor of either party.

(30 Conn. 14)

WILSON v. GRISWOLD.

(Supreme Court of Errors of Connecticut.
June 5, 1907.)

1. LANDLORD AND TENANT—FARM LEASES—RIGHT TO PERSONAL PROPERTY.

The lessee of a farm, with live stock, tools, and utensils thereon, who by the terms of the lease was at the expiration thereof to deliver over to the lessor live stock, tools, and utensils equal in value to what was on the farm at the beginning of the term, acquired no absolute title to any of the personal property, but merely a right to sell or barter by virtue of a special power implied for a special purpose, so that his creditors could not claim it as against the lessor, though he dealt with it as if he owned it, as he had a right to do.

2. SAME—RECORDING LEASES.

Omission to record a lease for five years does not affect its validity as to the first year.

3. SAME—DETERMINATION OF RIGHT TO PERSONAL PROPERTY ON LEASED LAND.

Where a lease on a farm, with live stock, tools, and utensils thereon, provided that at termination thereof the lessee should deliver over to the lessor live stock, tools, and utensils equal to what was on the farm at the beginning of the term, it was necessary, on termination thereof, either by lapse of time or forfeiture and entry therefor, for the parties to determine by agreement or an equitable action what part of the personal property then on the farm belonged to each; and the lessor, before entry for forfeiture, having attached certain of the property as that of the lessee, and the lessee's trustee in insolvency having then sued the lessor for conversion thereof, there was in effect an implied agreement, binding on the parties, that the property attached belonged to the lessee.

4. TROVER AND CONVERSION—PROOF OF TITLE.

A lease of a farm, with live stock, tools, and implements thereon, provided that on expiration thereof the lessee should deliver over to the lessor live stock, tools, and implements equal in value to what was on the farm at the beginning of the term. *Held*, in an action by the trustee in insolvency of the lessee against the lessor for conversion of the personalty on termination of the lease, that as there could be recovery only for property, the legal title of which was shown to be in the lessee, plaintiff could not recover for

property which had not been set off to the lessee by agreement with the lessor, or by an equitable action; no equitable relief being asked in the action for conversion.

Appeal from Court of Common Pleas, Hartford County; Epaphroditus Peck, Judge.

Action by Albion B. Willson, trustee in insolvency, against Henry O. Griswold, for conversion of goods of insolvent. Verdict and judgment for plaintiff. Both parties appeal. Affirmed.

Ralph O. Wells, for plaintiff. Herbert O. Bowers, for defendant.

BALDWIN, C. J. This cause on a former trial (see 79 Conn. 18, 63 Atl. 659), resulted in a judgment for the defendant. The present judgment for the plaintiff was rendered upon evidence which was much the same, except that certain written leases affecting the title to the property in question were introduced by the defendant.

The later of these is the only one material to the issues. It granted and demised to Wheeler, of whose estate in insolvency the plaintiff is trustee, the defendant's farm, for five years from April 1, 1904, with live stock, tools and utensils, valued at certain specified amounts, at a rent of \$800 a year; \$66.66 being payable monthly. Part of the dwelling house and stabling for one horse were reserved for the use of the defendant and his family, and also the privilege of appropriating for that use such products of the farm as his needs might call for. All manure and fodder then on the farm or thereafter produced upon it were to remain and be used upon it, except that fodder not needed for the live stock leased, nor for such as might replace it to at least an equal value, might either be sold or fed out to additional stock at Wheeler's option. At the end of the lease he was to deliver over to the defendant live stock, tools, utensils, and fodder equal in value to what was on the farm at the beginning of the term. Should any rent becoming due remain unpaid for 15 days, the lessor might re-enter without demand or notice, and take possession of the leased premises, whereupon the lease should terminate. Evidence was introduced at the second trial tending to prove that Wheeler absconded in January, 1905, the rent for several months being then overdue, that in the middle of February the defendant took possession of the farm under a claim of forfeiture by the failure to pay the rent, and that prior to this, on February 9th, he had caused six cows and certain fodder found upon the farm, being a part of the property, a conversion of which was charged, to be attached in a suit brought by him against Wheeler. There was also evidence tending to prove that for six months before he absconded Wheeler had dealt with the personal property demised as if he owned it, selling or exchanging it, and buying to replace what was sold, in his own name, whereby the lease not

having been recorded, certain of the creditors represented by the plaintiff were led to believe Wheeler to be the owner, and therefore to give him credit. It did not appear whether the cows attached were among those originally demised, or had been acquired by Wheeler subsequently by purchase or barter. There was evidence that Wheeler left on the farm personal property of the nature of that demised, to the value of \$883, and to all of this the plaintiff claimed title. Other attachments by other creditors followed that of the defendant, and all were dissolved by the insolvency proceedings.

The lease did not divest the defendant of all title to the personal property demised. It put in Wheeler's hands the power of administering it in the usual course of husbandry. He was a lessee with a power to sell or exchange. Any purchases or acquisitions by exchange of property of this kind which he might make would take the place of any similar property with which he had parted, subject to his right at the termination of the lease to claim and remove, as its absolute owner, any of such property then in excess of what he was bound to surrender. Upon his absconding, leaving rent more than 15 days overdue, the defendant had a right to enter for a forfeiture and to take steps to ascertain whether the personal property left on the place was equal in value to that demised. Before making such an entry he procured an attachment of part of this property as Wheeler's. At that time the accounts between them were unsettled. If both had met before the service of the writ, and agreed that these particular articles should be set apart as Wheeler's property, and they had thereupon been set apart and attached, it would, in the absence of fraud, have been conclusive as to Wheeler and all claiming under him. The same result follows from what was done. The defendant has assumed to state the account himself. He has set apart, by his attachment, certain articles as belonging to Wheeler. The plaintiff, as representing Wheeler and his creditors, has, by bringing the present suit, assented to and affirmed this action of the defendant. It was therefore effectual to debar the defendant from ever setting up any claim of title in himself to that which he had attached. The verdict for the plaintiff, which gave him the value of the property attached, was therefore right, and the defendant has no cause to complain of the judgment entered upon it.

The plaintiff claims that it should have been for all he demanded, namely, the value of all the demised personal property which was left on the farm when Wheeler absconded, including such as had been acquired by purchase or exchange in the course of good husbandry. But the lease put the parties to it in equitable relations of a peculiar character. The defendant had sold nothing. Wheeler had acquired no absolute title to

anything. He could sell or barter, but only by virtue of a special power implied for a special purpose. See *Downer v. Rowell*, 22 Vt. 351. Having a right to deal with the property as if he owned it, his creditors have only themselves to blame, if they were misled by his exercise of it. Nor did the omission to put the lease on record affect its validity during the year in which the acts in question were done. *Baldwin v. Walker*, 21 Conn. 163.

At the expiration of the lease, had it continued for its full term, it would have been necessary for the parties to it to come to an agreement as to whether the personal property then on the farm was equal in value to that originally turned over to the lessee, or, if unable to agree, to submit the determination of their respective rights in it to a court having equitable powers. Conditions entailing similar consequences followed the termination of the lease by entry for forfeiture. All that remained of the personal property demised, and all acquired to replace such of it as had been parted with, to an aggregate amount in value equal to that of what was originally demised, belonged to the lessor; but what that property was could not be ascertained without taking an inventory and stating an account. Either party to the lease had a right to bring an equitable action for this purpose. Neither, without the consent of the other, could claim an absolute title to any particular portion of it. They stood, in this respect, in a position analogous to that of copartners after the dissolution of the firm. When Wheeler absconded, he abandoned the custody of the property. It was more than a month after the re-entry by the defendant before the plaintiff was appointed trustee in insolvency of Wheeler's estate, and another month elapsed before he made the demand upon the defendant for possession which is the foundation of this action. The plaintiff has not sought any equitable relief. He could only maintain his action by proof that Wheeler had a legal title to what he has alleged that the defendant converted. To make out such a title he relied on the lease, and that, as has been shown, did not support his contention. Under its terms, and after its termination, Wheeler or the trustee in insolvency, could only establish a title to it by agreement with the defendant or a judgment against him in a suit for equitable relief. The only agreement made or implied was that as to the property attached. The only suit brought was the present action for legal relief. The plaintiff therefore was entitled to no larger judgment than that which he recovered.

Our view of the legal effect of the lease renders it unnecessary to consider the exceptions founded on the admission of parol evidence to show what the parties to it understood that effect to be.

The charge of the trial court brought the jury to a correct result, and we therefore

need not inquire whether the theory on which it proceeded could in all respects be maintained.

There is no error on either appeal. The other Judges concurred.

(30 Conn. 19)

HOSKINS et al. v. SAUNDERS.

(Supreme Court of Errors of Connecticut.

June 5, 1907.)

1. EXECUTORS AND ADMINISTRATORS — CLAIMS OF RELATIVES.

Claims against an estate by relatives for caring for decedent should be carefully scanned and established only upon clear proof that the services were rendered under a mutual agreement for payment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 22, Executors and Administrators, §§ 732, 733, 903½.]

2. SAME—FORM OF CLAIM—SUFFICIENCY.

A claim against decedent's estate reading, "To providing a home for and care and support of H. from the decease of her husband until her death \$2000,"—was sufficient in form.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 22, Executors and Administrators, § 811.]

3. APPEAL—REVIEW—HARMLESS ERROR—OVERRULING OBJECTION TO QUESTION.

Any error in overruling an objection to a question asked a witness is harmless where the question is not answered.

4. EXECUTORS AND ADMINISTRATORS — CLAIMS AGAINST ESTATE—EVIDENCE.

In an action to recover on an implied contract for services rendered decedent, plaintiffs could show there had been an express agreement for the services which they fully performed to rebut the presumption defendant urged arising from plaintiffs' and decedent's relationship that the services were not to be paid for.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 22, Executors and Administrators, §§ 732, 733, 1862.]

5. SAME.

In an action by relatives to recover from decedent's estate for caring for her, if deeds from decedent's husband to plaintiffs, made before decedent's marriage to him, were relevant to show a moral obligation on plaintiff's part to support decedent, their stepmother, and hence a probability that plaintiffs cared for her without expecting payment, they were so remote that their admission lay within the court's discretion, and their exclusion was not error.

Appeal from Superior Court, Hartford County; Edwin B. Gager, Judge.

Action by Edward A. Hoskins and another against George A. Saunders, executor, to recover for services rendered in providing a home and care for the defendant's testatrix during the last six years of her life. Judgment was for the plaintiffs, and the defendant appealed. No error.

Ward Church and Harrison Hewitt, for appellant. Theodore M. Maltbie and William M. Maltbie, for appellees.

THAYER, J. There appears to have been no question upon the trial in the superior court that the services for which the plaintiffs brought this action were in fact rendered for the decedent; the defendant's claim there, as here, being that the evidence was not

sufficient, in view of the family relationship existing between the parties (that of stepsons and stepmother), to warrant the finding of a contract to pay for such services. We agree with the counsel for the defendant and with the authorities which they cite that claims of this character against a decedent's estate should be carefully scanned by the court. They should be established only upon clear and satisfactory proof that the services were rendered under a mutual understanding or agreement of the parties that they would be paid for. If so established, the law will enforce them. Nothing in the record indicates that the superior court acted upon a different view than this. That court having found that "the decedent engaged the plaintiffs to give her a home, support and care, and promised to pay for the same" and that at their home "the plaintiffs gave the decedent all the support and care which her circumstances and situation required from 1897 until her death, relying upon her promise to pay them for the same," the defendant is concluded by such finding. There is no question of law presented for this court to review.

The plaintiffs' claim as presented against the estate of the decedent read as follows: "To providing a home for, and care and support of, Lucy A. Hoskins from the decease of her husband until her death, \$2,000." This was a sufficient general statement of the claim to satisfy the law. It gave the executor notice of the amount and nature of the claim and the dates between which it accrued. The decedent died in December, 1904; her husband in September, 1884. In their complaint the plaintiffs claim to recover only for services rendered subsequent to December, 1897. The court allowed them only for services rendered during the last six years of the decedent's life. The appellant claimed and asked the court to rule that the original claim was for \$100 per year for 20 years, and that the statute of limitations, which was pleaded, ran against \$1,400 of the claim. But no yearly sum was mentioned in the claim, and it might well be, as the finding shows the fact to have been that only slight services were rendered during the first 14 years, the decedent during that time residing in New York, merely storing her furniture with the plaintiffs. The court therefore properly overruled the defendant's claim. During the trial one of the plaintiffs was asked the following question: "If at any time she [the decedent] had any talk with you about becoming a member of your household, state where it was and when it was." The defendant objected to this question and to any question offered to prove an express contract, upon the ground that the complaint alleges an implied contract. The objection was overruled. It does not appear that the witness answered the question, and so it does not appear that the defendant was harmed by the ruling. But, treating the objection broad-

ly, it was competent for the plaintiffs in an action on an implied contract for services to show that there had been an express agreement for the services which they had fully performed to rebut the presumption which the defendant was urging, arising from the family relationship of the parties, that the services were not to be paid for. *Starkey's Appeal*, 61 Conn. 199, 201, 23 Atl. 1061; *Grant v. Grant*, 63 Conn. 530, 545, 29 Atl. 15, 38 Am. St. Rep. 379.

Certain deeds to the plaintiffs and their sisters from their father, Asa Hoskins, executed more than 11 years prior to his death and more than 6 years prior to his marriage with the decedent, but recorded after his death, were offered in evidence by the defendant and excluded by the court. They were offered "for the purpose of showing just exactly what was the situation at the time when Asa Hoskins died." It is now urged that the fact that the plaintiffs had received a large amount of property from their father prior to his marriage with the decedent would tend to show a moral obligation on their part to support his widow, their stepmother, and thus to show a probability that the services in question were rendered without understanding or expectation that they were to be paid for. If it were to be granted that the deeds were relevant for such purpose, they were so remote that their admission lay within the discretion of the court, and error cannot be predicated upon its action in rejecting them.

Other matters assigned as error in the appeal have not been pursued in the defendant's brief, and are therefore passed without consideration.

There is no error. The other Judges concurred.

(30 Vt. 24)

STRONG v. BURLINGTON TRACTION CO.
(Supreme Court of Vermont, General Term.
May 10, 1907.)

1. CARRIERS—STREET RAILWAYS—COLLISION—INJURY—LIABILITY OF COMPANY.

Though a street car's collision with a wagon resulted from the driver's negligence in crossing the track, the company was liable to a passenger for her injury, if the motorman's negligence in running the car at a very rapid and unusual rate of speed, or too close to a car in front, after the passing of which the driver drove his wagon across the track, prevented him from avoiding the collision.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, § 1211.]

2. SAME.

Where a street car's collision with a wagon caused a passenger's injury, the motorman was not negligent as a matter of law merely because the ringing of the gong, which was not done, would have prevented the obstruction; the inference of negligence not being necessarily contained in that finding.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, §§ 1211, 1223.]

3. SAME—DUTY OF MOTORMAN.

A motorman had no right, as to passengers, to assume that one driving a wagon along the

street in the same direction the car was going would not attempt to cross the track "mid block," but owed her the duty to exercise the most watchful care and the most active diligence for her safety against collision with the wagon.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, §§ 1121, 1211.]

4. SAME—QUESTION FOR JURY.

In an action against a street railway company for injury to a passenger, caused by a collision with a wagon crossing the track, whether the motorman was negligent *held*, under the evidence, a question for the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, §§ 1211, 1323.]

Exceptions from Chittenden County Court; Willard Wheeler, Judge.

Action by Mary M. Strong against the Burlington Traction Company. From a judgment for plaintiff, defendant brings exceptions. Reversed and remanded.

Argued before ROWELL, C. J., and TYLER, MUNSON, and WATSON, JJ.

Darling & Mower and C. S. Palmer, for plaintiff. A. G. Whittemore, V. A. Bullard, and R. E. Brown, for defendant.

ROWELL, C. J. The plaintiff, a passenger on defendant's open street car, being frightened by a collision between the car and delivery wagon crossing the track, jumped or was thrown from the car and injured, for which she seeks damages. The wagon was covered, and the seat hooded with side lights. The driver could look back through the glass doors in the rear end of the wagon. There was a car just ahead of the plaintiff's car, between which and the curb the deliveryman was driving at a trot in the same direction the car was going, and just as the car passed him he suddenly turned his horse at right angles and trotted onto the track for the purpose of crossing to the other side of the street, and when the horse got onto the track it slowed up and walked, and the collision happened then, and about "mid block."

The defendant claims that its motion for a verdict should have been sustained, for that the evidence showed that the direct and immediate cause of the accident was the negligent act of the deliveryman in driving across the track; that the motorman was not bound to anticipate the act of the deliveryman, and did all he could to prevent the collision after he saw that the deliveryman was going to cross. But the testimony on the part of the plaintiff tended to show that the car on which she was riding was going at a very rapid and an unusual rate of speed, and was running too close to the car ahead of it. Now, in one or both of these respects, the motorman may have been negligent, and that negligence may have been the reason why he could not prevent the collision after he saw the situation, and therefore the motion was properly overruled. Railroad Company v. Harrell, 58 Ark. 454, 472, 25 S. W. 117, a case much in point.

The testimony was conflicting as to whether

er the gong was rung to warn the deliveryman of the approach of the plaintiff's car. The court charged that that question bore exclusively on whether the defendant had anything to do with obstructing the track and creating the condition that plaintiff claimed occasioned her injury; that if the ringing of the gong would have prevented the obstruction, by deterring the deliveryman from crossing the track, and it was not rung, the obstruction was a negligent act on the part of the defendant. This was error, for it does not follow as matter of law that the motorman was negligent merely because the ringing of the gong would have prevented the obstruction; for the inference of negligence was not necessarily contained in that finding, and therefore the finding was not so decisive of negligence that it could be ruled as matter of law. It was a question of fact, and should have been submitted to the jury.

However it might be as to the deliveryman, as to the plaintiff, who was a passenger, it cannot be said as matter of law that the motorman had a right to assume that the deliveryman would keep along as he was, and not attempt to cross the track "mid block." His duty to her required of him the most watchful care and the most active diligence for her safety. Hadley v. Cross, 34 Vt. 586, 80 Am. Dec. 699; 2 Hutch. Carriers (3d Ed.) § 893. Whether he performed this duty or not was, in the circumstances, a question of fact.

The other questions are not considered, for some of them are not likely to arise again, and, if others do, probably not in a way to present the same questions they now present.

Reversed and remanded.

(80 Vt. 148)

HARRISON'S ADM'R v. NORTHWESTERN MUT. LIFE INS. CO.

(Supreme Court of Vermont. Rutland. May 18, 1907.)

INSURANCE—ASSIGNMENTS OF LIFE POLICY—VALIDITY—EVIDENCE.

Where, in an action on a life insurance policy by the administrator of insured, defendant alleged that insured had assigned the policy, plaintiff was entitled to impeach the assignment by evidence that the consideration therefor was the agreement of the assignee to continue illicit relations with insured, the assignor.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Insurance, § 489.]

Exceptions from Rutland County Court; Willard W. Miles, Judge.

Assumpsit by Harrison's administrator against the Northwestern Mutual Life Insurance Company. Judgment for plaintiff, and defendant excepted. Judgment affirmed.

For former report, see 78 Vt. 473, 68 Atl. 321, 112 Am. St. Rep. 932.

Argued before ROWELL, C. J., and TYLER, MUNSON, and WATSON, JJ.

Butler & Moloney and F. S. Platt, for plaintiff. Lawrence & Lawrence, for defendant.

ROWELL, C. J. This case has been here before. 78 Vt. 473, 63 Atl. 321, 112 Am. St. Rep. 932. It is assumpsit on a policy of insurance issued by the defendant on the life of the intestate, payable to his executors, administrators, or assigns. The defendant pleaded the general issue, and gave notice therewith according to the statute that it would rely in defense upon an assignment in writing of the policy by the intestate to one Mary Agnes Gleason for a valuable consideration. The defendant does not question its liability on the policy, but defends for its own protection, as the suit is not brought at the request nor for the benefit of the assignee, but against her will and interest, and for the benefit of the assignor's estate. The assignment is not under seal, but purports to be "for a valuable consideration," the receipt of which the assignor thereby acknowledges. The defendant introduced the assignment in defense, and rested without offering any evidence of its consideration other than what the assignment itself affords.

The plaintiff, claiming that the assignment was void because of the turpitude of its consideration, offered to show in rebuttal that for some time prior to the taking out of the policy, and for a long time thereafter, and to within a year or six months of the death of the intestate, who was all that time a married man, illicit relations existed between him and the assignee, and that during all that time she was his mistress, and that the assignment to her was made in consideration of her promise and agreement to continue that relation. The defendant objected that the plaintiff could not impeach the assignment by thus debasing the character of the intestate; but the objection was overruled, and the testimony admitted, and the only question made is whether that was error. We think it was not, for the plaintiff could make out his case, and did make it out, without relying upon or even disclosing the assignment, and therefore he could impeach it by showing the turpitude of its consideration. *Monahan v. Monahan*, 77 Vt. 133, 59 Atl. 169, 70 L. R. A. 935.

But the defendant says that the plaintiff had to rely upon and prove the turpitude of the consideration in order to defeat the assignment, as it contains evidence on its face of a valuable consideration, and therefore made a primary case for the defendant, which cast the burden of proof upon the plaintiff, and so his case, as a whole, does not come within the rule stated. But it is a mistake to suppose that the burden of proof was thus cast upon the plaintiff, for he was under no duty to prove anything on this issue. His sole function was to repel and defeat the defendant's attempt to val-

date the assignment, which it had set up as a defense, and the burden of establishing which rested upon it throughout, and the question was to be determined upon the whole evidence, and, if the plaintiff succeeded in making the scales hang in equal poise only, it was enough for him, for it would defeat the defendant. In *Stevenson v. Gunning's Estate*, 64 Vt. 601, 25 Atl. 697, it was held that, though the plaintiff made out a prima facie case by the introduction of a promissory note, signed and delivered by the intestate, and purporting to have been given for value received, yet, although the defendant introduced evidence tending to show want of consideration, the burden was still upon the plaintiff to establish consideration, having weighed in his favor the prima facie import of consideration furnished by the note. In *Central Bridge Corporation v. Butler*, 2 Gray (Mass.) 180, the averment that the plaintiff was bound to maintain was that the defendant was liable to pay tolls. In answer to this, the defendant averred no new fact, such as payment, accord and satisfaction, or release, but introduced evidence to show only no liability. It was held that he did not thereby assume the burden of proof, which still rested upon the plaintiff. So, in *Phipps v. Mahon*, 141 Mass. 471, 5 N. E. 835, it is held that making a prima facie case did not change the burden of proof; that that still rested upon the plaintiff, though the defendant gave evidence to rebut the plaintiff's proposition, as deduced from his evidence. *Hingeston v. Kelley*, 18 L. J. N. S. Ex. 800, is precisely to the same effect.

There is much confusion and uncertainty in the cases about the burden of proof; but Prof. Thayer treats the matter clearly, and accurately we think, when he says that it is always the actor and never the true reus or defendant who has to bring his proof to the required height, for, strictly speaking, it is only the actor that has the duty of proving at all. That whoever has that duty does not make out a prima facie case till he comes up to the requirement as regards quantity of evidence or force of conviction that applies to his contention, and he has not, of course, accomplished his task at the end of the debate, unless he has held his case good and at the legal height against all counter proof. That this duty, in the nature of things, cannot shift, but is always the duty of one party, and never of the other. But as the actor, if he would win, must begin by making out a case, and must end by keeping it good, so the reus, if he would not lose, must bestir himself when his adversary has once made out his case, and must repel it and then the actor may again move and restore his case, and so on. That this shifting of the duty of going forward with argument or evidence may go on during the trial; but that the thing that shifts and changes is not the peculiar duty of each party, for that

remains peculiar, but the common and interchangeable duty of going forward with argument or evidence whenever your case requires it. Prelim. Treat. Ev. 300.

Judgment affirmed.

(80 Vt. 124)

FLANDERS v. MULLIN.

(Supreme Court of Vermont. Rutland. May 18, 1907.)

1. BANKRUPTCY—DISCHARGE—JUDGMENT FOR WILLFUL INJURY.

The exception of the bankrupt act from the operation of a discharge of judgments in actions "for willful and malicious injuries to the person or property of another" extends to all actions in which the facts of intent and malice are judicially ascertained, and a close jail certificate may be included in the consideration of the question whether the injuries for which judgment was recovered were willful and malicious.

2. SAME.

A close jail certificate in an action for injuries sustained while undergoing a surgical operation, that the cause of action "arose from the willful and malicious act of the defendant and for willful injuries to the person of the plaintiff," sufficiently shows that the judgment was founded on a willful and malicious injury to the person, so as to bring it under the provision of the bankrupt act, excepting from the operation of a discharge judgments in actions "for willful and malicious injuries to the person or property of another."

3. EXECUTION—AGAINST PERSON—CLOSE JAIL CERTIFICATE.

Under the statute, the court may incorporate in a close jail certificate, not only the finding that the cause of action "arose from a willful and malicious act of the defendant," but that it was also for "willful injuries to the person of the plaintiff."

Petition to the Supreme Court for a writ of prohibition by William G. E. Flanders against Bridget E. Mullin. Petition dismissed.

Argued before ROWELL, C. J., and TYLER, MUNSON, WATSON, and POWERS, JJ.

W. L. Burnap, Henry Ballard, and V. A. Bullard, for petitioner. Butler & Moloney, for defendant.

MUNSON, J. The petitioner obtained a judgment against the petitioner in an action of tort, and an adjudication that the cause of action arose from the willful and malicious act of the defendant. The petitioner has obtained a discharge in bankruptcy, and contends that the collection of this judgment is barred by it. The bankrupt act excepts from the operation of a discharge judgments in actions "for willful and malicious injuries to the person or property of another." The suit was for injuries sustained by the plaintiff while undergoing surgical treatment at the hands of the defendant, and was tried on the general issue. The declaration alleges throughout that the acts complained of were done negligently, carelessly, improperly, and unskillfully. There is no allegation that they were done intentionally, willfully, or maliciously. The petitioner contends that

the question whether the injuries were willful and malicious is to be determined solely from an inspection of the pleadings, that the charge made and denied is one of negligence merely, that the scope of the judgment is limited to the issue tried, and that the action of the court can add nothing to the judgment as thus determined. But the petitioner claims that the question is to be determined from the record as a whole, and that the findings of the court in granting a close jail certificate determine the willful and malicious character of the acts complained of in the declaration.

We think the exception in question must be held to cover all cases in which the facts of intent and malice are judicially ascertained by direction of the law, however, the act may be characterized by the allegations. The plaintiff's right to a close jail certificate does not depend upon a finding by the jury, but upon a supplemental finding of the court, which may be based upon further evidence. This may be had in all actions founded on tort, regardless of the nature of the allegations. So we proceed to a consideration of the case with the certificate included. The certificate contains a finding, in the words of the statute, that the cause of action "arose from the willful and malicious act of the defendant." But the petitioner contends that the malice meant by the federal law is actual malice, and not malice in the broader sense, recognized in passing upon the right to a close jail certificate, and that a mere adjudication of malice in the words of our statute does not bring the case within the exception relied upon. It seems clear that the federal provision contemplates something more restricted than malice in the broader sense. The term "fiduciary capacity," as used in the same section, is held to include only cases of technical trusts, and not cases of implied trusts. *Hennequin v. Clews*, 111 U. S. 676, 4 Sup. Ct. 576, 28 L. Ed. 565; *Stickney v. Parmenter*, 74 Vt. 53, 52 Atl. 73. The word "fraud," also, as used in a previous statute, was held to mean positive fraud, or intentional wrong, and not implied fraud, such as may exist without any bad faith. *Neal v. Scruggs*, 95 U. S. 704, 24 L. Ed. 536. We have found no satisfactory ground upon which to give a broader meaning to the word as used in the present bankrupt act, although the possibility of this is suggested in *Tinker v. Colwell*, 193 U. S. 473, 24 Sup. Ct. 505, 48 L. Ed. 754. If the word "malice" is to receive a similar construction, something more than the ordinary finding of a willful and malicious act is required. The cases relied upon by the petitioner cannot be considered authorities to the contrary. In *re Freche* (D. C.) 6 Am. Bankr. Rep. 479, 109 Fed. 620, and *Colwell v. Tinker*, 169 N. Y. 531, 7 Am. Bankr. Rep. 334, 62 N. E. 663, 58 L. R. A. 765, 98 Am. St. Rep. 587, affirmed in *Tinker v. Colwell*, above cited, the debts were judgments recovered in cases of seduc-

tion and criminal conversation. The acts there were wrongful in themselves, and afforded a basis for the deduction of malice not found in the charge involved here. A surgical operation is in itself proper, and there must be a finding of something beyond a negligent performance of the operation—a finding of some act or neglect due to a wrongful motive.

But in granting this certificate the court did not confine itself to the words of the statute. Its finding is that the cause of action "arose from the willful and malicious act of the said defendant, and for willful injuries to the person of the plaintiff." Our further inquiry is as to the meaning and effect of the second clause. The clause was apparently intended to add something sufficiently specific to bring the case clearly within the provision of the federal law. "Willful" means "intentional"; and the fair meaning of the entire finding is that the willful and malicious act consisted of intentional injuries to the person of the plaintiff. It cannot fairly be claimed that, in thus speaking of willful or intentional injuries, the court referred to the injuries essential to the operation, and, if not, it must have referred to injuries wrongfully inflicted beyond the scope of the operation. The petitioner is first found guilty of a willful and malicious act, and, if he intentionally injured his patient in something not essential to the operation, his act therein was willful and malicious in the required sense. It is claimed, however, that this part of the finding is not authorized or warranted by the statute, and must be treated as a nullity. The language of the statute covers two classes of cases, only one of which meets the requirement of the bankrupt law. The finding in the words of the statute authorizes a close jail certificate, but is not sufficient to protect the judgment against a discharge in bankruptcy. The additional finding does not go beyond the statute, but indicates the class covered by the statute to which the case belongs. The federal bankrupt act is of governing force, and the rights it gives to litigants in our courts are to be recognized and protected. We are not compelled to admit that our courts are powerless to secure to successful suitors a benefit which the bankrupt act intends they shall retain. If the facts justified a finding that would make the certificate effectual under the federal law, the court might well incorporate it in its adjudication.

Petition dismissed, with costs. Let execution issue.

(80 Vt. 55)

In re CONSOLIDATED RENDERING CO.
(Supreme Court of Vermont. Chittenden. May 11, 1907.)

1. HABEAS CORPUS—GROUNDS OF REMEDY—STATUTORY PROVISIONS.

V. S. 1610, providing that one confined for contempt shall be entitled to a writ of habeas

corpus, has no application to a case where the penalty imposed is merely a fine.

2. CERTIORARI—GROUND—STATUTORY PROVISIONS.

Where contempt proceedings are taken to the Supreme Court by exceptions duly filed, and the exceptions are sufficient to bring up the full record, a writ of certiorari is unnecessary.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 73, Certiorari, § 4.]

3. ERROR — GROUNDS OF JURISDICTION — SOURCE—STATUTORY PROVISIONS.

Writs of error are not appropriate for the purpose of taking contempt proceedings from the county court to the Supreme Court, notwithstanding V. S. 1025, providing that questions of law determined by the county court upon the trial of any special or summary proceedings placed upon the record by allowance of the court may pass to the Supreme Court for final decision as in cases which are according to the course of the common law, since that statute has no reference to writs of error.

4. CONTEMPT — PROCEEDINGS — APPEAL — DISCRETION OF LOWER COURT—POWER TO REVIEW.

The only question that can arise on the review of a contempt proceeding in the Supreme Court is as to the jurisdiction of the lower court, since the power to punish for contempt is a discretionary power, and, if fairly exercised in a case within the jurisdiction of the court, no review can be had.

5. SEARCHES AND SEIZURES—CONSTITUTIONAL LAW — PERSONAL RIGHTS—SECURITY FROM SEARCH OR SEIZURES.

Laws 1906, p. 79, No. 75, providing that any corporation doing business in the state shall upon notice produce before any court, grand jury, tribunal, or commission acting under authority of the state, all books, correspondence, memoranda, papers, and data which may contain any account, reference, or information concerning the proceedings or subject of inquiry pending before the body, and which may at any time have been made or kept within the state and are in the custody of the corporation, or which relate to any transaction within the state or with parties residing or having a place of business therein; and providing for the manner of service of the order to produce and for punishment for contempt in case of noncompliance, does not contravene Const. art. 11, relating to the search or seizure of property and the particularity of description required in warrants therefor, since the act restricts the order to such books and papers as contain information concerning the subject of inquiry, and is sufficiently definite and limited.

6. SAME.

An order issued under Laws 1906, p. 79, No. 75, directing a corporation to produce before a grand jury certain books and papers, and sufficiently describing them, is in effect the same as a subpoena duces tecum, except that it applies to a corporation, and where it requires no search of the company to find the books and papers demanded, and no hardship to produce them, the order is not for an unreasonable search or seizure, in violation of Const. art. 11, as no force or quest by the officer is authorized, and that article was not intended to interfere with the power of the court to compel the production of documentary evidence in any proceeding therein.

7. SAME.

The order and proceedings for contempt for a violation thereof were not an infringement of Const. art. 11, as a seizure, on account of the fact that no tender was made to cover the fees and expenses for appearing before the court with the books and documents, since under the

law it is the duty of any witness summoned in behalf of the state in a criminal case to appear according to the summons without a preliminary tender of his fees.

8. WITNESSES—RIGHT TO JUSTICE—COMPELLING ONE TO GIVE EVIDENCE AGAINST HIMSELF.

The statute, order, and contempt proceedings were not contrary to Const. art. 10, providing that no one can be compelled to give evidence against himself, since the company was not a party nor charged with any crime, and was simply summoned to appear before the grand jury with the documentary evidence, where the privilege could have been claimed if desired.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, § 1009.]

9. SAME—DUTY TO APPEAR AND PRODUCE DOCUMENTS WHEN ORDERED.

Where a witness has been duly summoned, it is his duty to attend at the time and place named in the subpoena, and, if required to produce documentary evidence, it is his duty to produce what is called for, if it is in his possession or control.

10. SAME—COMPETENCY—DETERMINATION AS TO COMPETENCY.

Whether the documentary evidence is relevant, and would be proper testimony to be used in the case when produced, is for the court, and not for the witness, to say.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, § 1066.]

11. SAME—EXAMINATION—PRIVILEGE OF WITNESSES.

A witness must obey his subpoena and be sworn before he can claim his privilege from giving evidence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, § 1064.]

12. SAME—BY WHOM PRIVILEGE MUST BE CLAIMED.

The testimonial privilege on account of tendency to incriminate is purely personal, and can be claimed only by the witness himself.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, § 1058.]

13. SAME—DETERMINATION OF RIGHT TO PRIVILEGE.

Whether certain testimony sought is privileged must be determined by the court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, §§ 1065, 1066.]

14. SAME—WAIVER OF PRIVILEGE.

If the privilege of a witness is not claimed by him, it will be waived.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, §§ 1053, 1063.]

15. SAME—CLAIM OF PRIVILEGE—CONDITIONS UNDER WHICH CLAIM MAY BE MADE.

A witness cannot refuse to obey a subpoena, and still claim the privilege that his testimony, if given, would incriminate himself.

16. SAME—PRIVILEGE AS TO PRODUCTION OF DOCUMENTS—TIME AND MANNER OF CLAIM.

A witness cannot disobey a subpoena duces tecum and refuse to produce books and papers when called for, and still claim through his attorney the privilege that the books and papers, if produced, would tend to incriminate him, since the claim of privilege must be made by himself under oath in court, and the claim considered and acted upon by the court in the proceeding for which the witness was called.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, §§ 1058, 1064.]

17. SAME—METHOD OF CLAIMING PRIVILEGE.

In a contempt proceeding for failure to obey an order to produce certain books and papers, where the petition in the proceeding contains no allegation relating to any claim of privilege or any testimony that appears to be

incriminating, the question of privilege on account of the tendency to incriminate cannot be raised in a motion to dismiss the petition, since a motion to dismiss is not issuable, and reaches defects only which appear on the face of the pleading affected by it.

18. CORPORATIONS—FOREIGN CORPORATIONS—SUBJECTION TO LAWS GOVERNING DOMESTIC CORPORATIONS.

Where a foreign corporation has complied with the provisions of law entitling it to admission to a state, and is doing business under its authority, so far as pertains to business done therein and all matters connected therewith, it is amenable to the laws of the state, and in duty bound to obey them as though it were a domestic corporation.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, § 2529.]

19. EVIDENCE—DOCUMENTARY EVIDENCE—PRODUCTION BY ADVERSE PARTY.

If a foreign corporation doing business in a state under authority of its laws sees fit to remove its books and papers from the state for the purpose of putting them beyond its jurisdiction in anticipation of being called on to produce them in proceedings against citizens of the state, it should not be permitted to plead its act as an excuse for not obeying an order to produce them.

20. CORPORATIONS—ACCESS TO CORPORATE BOOKS AND PAPERS—JURISDICTION.

The books and papers of a foreign corporation, pertaining to business done in a certain state under authority of its laws, which are required as evidence in legal proceedings therein, though taken outside the state, are still within the jurisdiction of its courts in contemplation of law, since the corporation is within its jurisdiction, and the books and papers are within the control of the corporation and belong in that state for all legitimate purposes of evidence required by its courts.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, § 2573.]

21. CONSTITUTIONAL LAW—EQUAL PROTECTION OF LAWS—DISCRIMINATION BY REASON OF CONDITION—ARTIFICIAL PERSONS.

Laws 1906, p. 79, No. 75, requiring corporations doing business in the state to produce upon notice before any court, grand jury, tribunal, or commission acting under authority of the state, all books and papers containing information concerning proceedings pending before the body, and which may at any time have been made or kept within the state and are in the custody of the corporation, or which relate to any transaction within the state or with parties residing or having a place of business therein, and providing for the manner of service of the order to produce and for punishment for contempt in case of noncompliance, and that execution may issue for the collection of any fine imposed, is not contrary to Const. U. S. Amend. art. 14, in discriminating between artificial and natural persons, and denying to artificial persons equal protection of the laws, since it merely removes the prior distinction and requires of a corporation what could formerly be demanded of an individual by subpoena duces tecum.

22. SAME—DUE PROCESS OF LAW—CONTEMPT PROCEEDINGS.

The statute is not contrary to Const. U. S. Amend. art. 14, as depriving the corporation of its property without due process of law, by authorizing a fine for contempt in case of refusal to produce documentary evidence when ordered, since the law is not otherwise unconstitutional, and the proceedings for punishing the contempt are in accordance with the ordinary mode prescribed by law in such cases and adapted to the end to be attained.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Constitutional Law, § 927.]

23. SAME—DEPRIVATION OF PROPERTY—COMPELLING ATTENDANCE OF WITNESSES WITHOUT PAYMENT OF FEES.

The statute does not violate Const. U. S. Amend. art. 14, by taking property without due process of law, in that it provides no compensation for time, trouble, and expense in producing documents and papers from other states, since the law provides fees and mileage for witnesses, and any loss from inadequate fees is incident to the legitimate exercise of the powers of government for the public good.

24. CONTEMPT—POWER TO PUNISH—JURISDICTION.

Under Laws 1906, p. 79, No. 75, the county court has jurisdiction to fine a corporation for contempt for a violation of an order to produce books and papers before the grand jury in an investigation of an alleged breach of a criminal statute by citizens of the state in their dealings with the corporation therein.

Exceptions from Chittenden County Court; John W. Rowell, Judge.

Proceedings against the Consolidated Rendering Company for a contempt. Order adjudging the company guilty, and excepts. Exceptions overruled.

The respondent was adjudged guilty of contempt and fined \$3,000. Exceptions by respondent; also petition for writ of certiorari, and petition for a writ of error. The Consolidated Rendering Company is a corporation organized under the laws of the state of Maine, having its principal business office at Boston, Mass., and carrying on a meat and rendering business plant at Burlington, Vt., under the name of the Burlington Rendering Company. At the September term, 1906, of the Chittenden county court, the grand jury of that county had under consideration certain charges against four persons named, members of the board of cattle commissioners of the state of Vermont, for having sold diseased meat for food purposes, at said Burlington, contrary to the statute of this state. October 10, 1906, said company was served by an officer with a copy of an order of said court to produce before the grand jury on the 17th day of said October "all books of account, letters, accounts, memoranda, data, copies of bills, statements and copies of statements at any time made or kept or had by said company at said Burlington, which contain any account with, statement of, or relating to, or concerning any deal or business with any of the following parties since January 1, 1904 [naming the four persons], or with the cattle commissioners of the state of Vermont, or with the state of Vermont; also all books, vouchers and receipts issued by your company, or by any officer or employé of your company at said Burlington since January 1, 1904, to any of the above-named parties; also all statements, correspondence, data, memoranda, books, vouchers, and receipts, made or kept at said Burlington, which relate to the payment by your company to any of the above parties on the following dates and for the amounts specified opposite each date [and here followed some over 40 dates and amounts, commencing

January 4, 1905, and ending June 29, 1906, and] to be used as might be legally admissible before the grand jury relative to the matter of complaint pending, and there to be investigated before said grand jury in which [said four persons] are charged with having unlawfully sold diseased meat for food purposes at said Burlington." The alleged contempt was for the refusal to produce the documentary evidence. The proceedings are sufficiently set forth in the opinion.

Argued before TYLER, MUNSON, and WATSON, JJ., and WATERMAN, Superior Judge.

Clarke C. Fitts, Atty. Gen., and A. L. Sherman, State's Atty., for the State. R. E. Brown, W. B. C. Stickney, J. J. Enright, Freedom Hutchinson, and Albert Hutchinson, for rendering company.

WATERMAN, Superior Judge. The respondent has adopted three methods of bringing the case before this court for reviewing the proceedings of the county court: Exceptions were taken to the rulings of the court, which were duly filed; a petition for a writ of certiorari was filed in this court; and also a petition for a writ of error. It is of no importance in this case which of the first two methods is deemed the most appropriate, nor would a discussion of the methods pursued in other jurisdictions be beneficial. We have a statute under which such a case may be taken to the Supreme Court on exceptions. V. S. 1625. It is true our statute (V. S. 1610-1612) provides for bringing contempt proceedings before this court by habeas corpus, but, of course, that applies only to cases where the relator is actually in confinement for noncompliance with some order of court. It can have no application in a case like this. A writ of certiorari is unnecessary in this case, as the exceptions are sufficient to bring up the full record, and to raise all questions which the respondent desires to present. Section 1625 has no reference to writs of error. Hence their use in this respect remains the same as before the law of that section was enacted—not appropriate except where the county court exercises its jurisdiction substantially according to the course of the common law. *Beckwith v. Houghton*, 11 Vt. 602; *Stiles v. Windsor*, 45 Vt. 520.

It is conceded by counsel for the respondent that the findings of fact by the court below are conclusive, and the authorities are abundant as to this. It is also conceded that the power to punish for contempt is inherent in courts of law, and their action is not reviewable if within their jurisdiction. The power to punish for contempt is a discretionary power, and must be fairly exercised, and when so exercised in a case within the jurisdiction of the court no review can be had. So, really, the only question here is as to the jurisdiction of the court.

The grand jury was engaged in the inves-

tigation of an alleged breach of a criminal statute by certain persons in this state, and in the course of those inquiries an order was made upon the respondent company by the court, under the provisions of the statute, to produce the books and papers mentioned in the order. The company produced some books and papers, but not all those required, and, the grand jury having reported to the court the neglect of the company to produce the requisite documents, a complaint was filed by the Attorney General, and the company was summoned before the court to show cause why it should not be dealt with for contempt. These proceedings were had in pursuance of a statute of this state passed by the Legislature at its session held in 1906 (Laws 1906, p. 79, No. 75) the first section of which is as follows: "Any corporation doing business within this state whether organized under the laws of this or any other state or country, shall, when notice thereof is served upon it according to the provisions of this act, produce before any court, grand jury, tribunal or commission, acting under the authority of this state, all of the books, documents, correspondence, memoranda, papers and data which may contain any account of, reference to, or information concerning, the suit, proceeding, action, charge, or subject of inquiry pending before, or to be heard or determined by such court, grand jury, tribunal or commission, and which have at any time been made or kept within the state of Vermont, and are in the custody or control of such corporation within this state or elsewhere at the time of such notice upon it." The second section (page 80) is identical with the first, except that the books and papers mentioned are limited to those "which in any way relate to, or contain entries, data or memoranda concerning any transaction within the state of Vermont or with any party residing or having a place of business within the state of Vermont." The third section relates to the manner of service of the order to produce. The fourth provides for punishment for contempt in case of noncompliance with the order, and that execution may issue for the collection of any fine imposed. These sections are all that are of importance in this case.

The respondent claims that the court had no jurisdiction because the statute is unconstitutional. It is claimed that this statute contravenes the provisions of the tenth and eleventh articles of the Constitution of Vermont, and of the fourteenth amendment to the Constitution of the United States.

1. It is insisted by the respondent that the act is in contravention of the eleventh article of the Constitution of Vermont, in that it authorizes a search and seizure of books and papers of a corporation, and also because it compels the production of such books and papers in court without providing compensation for the time and expense in so doing. It is claimed that the act is not restricted,

as it should be, to permitting such books and papers as are admissible to be called for, but includes all in the custody or control of the corporation. The act restricts the order to such as "contain any account of, reference to, or information concerning, the suit, proceedings, action, charge or subject of inquiry, pending before, or to be heard by such court." This is about as definite and limited a provision as could be inserted in an act which could be of general use in its application to all kinds of cases likely to arise. The order in this case was limited to producing such books and papers as contained accounts or entries relating to dealings with the parties being investigated, and especially those containing certain entries specified therein, giving dates and items, to be produced and used "as may be legally admissible as evidence before said grand jury, relative to the matter of complaint pending, and then to be investigated by said grand jury," against the persons named. The act leaves it for the tribunal to determine what books and papers are needed and may be called for, in the order to be issued, and to describe them as far as practicable. The order in this case is not subject to the criticism made by the court in *Carson v. Hawley*, 82 Minn. 204, 84 N. W. 746, that it is so general that it does not indicate any knowledge on the part of the person demanding documentary evidence of any book or paper desired. The order indicates that the grand jury had knowledge of the dates, and of many items they wished to verify by the books and papers, and these were plainly stated in the order. It required no undue and improper inquisition into the affairs of the company. By comparison with the items and dates given in the order, the books could easily have been found. The court in its findings of fact says: "It is conceded by the defendant company that before and on the 22d of August last it had in its possession and subject to its control the papers that it was subsequently notified to produce before the grand jury." So it required no search on the part of the company to find them, and its officials or employees knew they had them at that time. It was no hardship or detriment to their business to require them to be produced. According to the statements made in behalf of the company before the court, they were not needed in carrying on business, for it was asserted by the witness they had been destroyed. The order was certainly not an unreasonable search or seizure, but a requirement under this statute, reasonably made, for the production of certain specified books and papers, to be used, so far as admissible, before the grand jury; the order to be served by the delivery of a copy. No objection was made before the grand jury or the court on account of indefiniteness of description. The witness who testified in behalf of the company knew just what was required, and the concession above quoted was made. If in

definiteness was really an objection, the witness might have stated the difficulty he encountered in understanding the order and complying with its terms. If he was the person delegated by the company to appear and respond to the order, it was his duty to appear and produce the books and papers, or give a reasonable and truthful excuse for their nonproduction, and then, if he desired, or was so advised, could raise any objection to their use in evidence. *Doe v. Kelley*, 4 Dowl. Pr. 273; *Amey v. Long*, 9 East, 473; Wig. on Ev. § 2200, at page 2979.

The proceedings in this case under the statute were in effect the same as under a subpoena duces tecum, which is an ancient writ (*Starkie*, Ev. 86, note) with this difference: That this statute authorizes the service of the order for the production of books and papers upon the corporation itself, while a subpoena duces tecum without the statute would be served upon some officer or employé commanding him to appear and bring with him the documents. The object sought is the same in both cases, the production of evidence to be used, so far as admissible, before the court. When service was made, it was the duty of the corporation to comply with the order. No force was used or threatened or authorized by the order; no quest was made by the officer. There was no interference with the business, or with the property rights of the corporation. We do not think the eleventh article of our state Constitution was intended to interfere with the power of courts to compel, through a subpoena duces tecum, or such a proceeding as is authorized by this statute, and was used in this case, the production in any proceeding in court of documentary evidence. *Hale v. Henkel*, 201 U. S. 43, 73, 26 Sup. Ct. 370, 50 L. Ed. 652; *Amey v. Long*, 9 East, 473; *Bull v. Loveland*, 10 Pick. (Mass.) 9; *U. S. Express Co. v. Henderson*, 69 Iowa, 40, 28 N. W. 426; *Green*, Ev. 469a; 1 Chit. Cr. Law, 577. There might be a case where such an order and process might be so made, and used in such a manner as to contravene the provisions of that article of the Constitution. The order might be so broad and unlimited, in its scope, as to constitute an unlawful inquisition into the private affairs of the person summoned, or authorize such a search and disturbance of business as to entitle him to protection against it. But that is not the case with these proceedings.

2. The respondent further claims that the proceedings were an infringement of the same article of our Constitution, because no tender was made to the company to cover its fees and expenses for appearing before the court with the books and documents. The statute of 5 Elizabeth (chapter 9, § 12) provided for summoning witnesses to attend court, and that they should be tendered their expenses, and for a fine for nonattendance, as well as damages to the party injured, and ever since that time statutes in many differ-

ent jurisdictions have contained provisions for tendering fees to witnesses. There is such a statute in this state. V. S. 1252. But the statute of Elizabeth related only to witnesses in civil cases. So does our own, and so far as we know none of the statutes in the different states contain any provision for tendering fees to witnesses summoned in behalf of the state in criminal cases. There is no such statute in this state, and no such practice has ever prevailed here. Under our laws it is the duty of any witness summoned upon a subpoena issued in behalf of the state in a criminal case to appear according to the summons, without a preliminary tender of his fees. Having performed his duty as a witness, he is then entitled to his fees, which are allowed by statute, or by order of the court. He has no right to refuse to attend because his fees are not tendered. It was said by the Duke of Argyle, in 1742, that the public has a claim to every man's evidence, and Lord Hardwicke, assenting to this statement, added: "It is undoubtedly true that the public has a right to all the assistance of every individual." This general proposition has been repeated many times, in various courts of England and of this country. The duty to appear upon a state subpoena and give testimony is not conditional on prepayment of fees. Mr. Wigmore says: "That condition was never imposed upon the prosecution in criminal cases. * * * That burden [upon a witness to appear without tender of fees] is not considered by the law a hardship in criminal cases." Wig. on Ev. § 2201; 2 Hawk. P. O. c. 46, § 168. In this state, by order of court, upon a showing by the respondent that he is peculiarly unable to procure the attendance of his witnesses, the names of his witnesses, limited to the number allowed by the court, may also be inserted in the subpoena in behalf of the state, and in such case the fees are not paid in advance. In many states by statute fees of witnesses on both sides in criminal cases need not be tendered in advance. No rights of the respondent in this respect under the above-named article of our organic law have been violated. A similar holding was had in *West v. State*, 1 Wis. 209, which case will be more particularly noticed later.

3. It is further contended that the statute and these proceedings are contrary to the provisions of article 10 of our Constitution, providing, in part, " * * * nor can he be compelled to give evidence against himself," because the corporation was ordered to produce the books and papers mentioned, which it now claims would tend to its crimination. When a claim for protection under this provision has been properly raised, the courts of this state, and the federal courts under the fifth amendment to the Constitution of the United States, which is similar, have always given it fair and careful consideration. Such a claim must be presented to the court by the witness, for it is a personal privilege,

which belongs to the witness alone, and should be made in good faith and under oath.

In determining the question here raised, it is necessary to notice more fully the proceedings in the court below. Before the grand jury there was an investigation of charges against certain persons, for a breach of a criminal statute of this state. Under the statute of 1906 an order of that court, dated October 10th, was issued to the company to produce certain books and papers before the grand jury October 17th, to be used so far as admissible in that investigation, which was duly served. October 17th the company produced certain books of account and checks, but not all those required, and produced nothing further in response to the notice. October 19th the grand jury reported to the court what the company had done, and what it had failed to do, by way of compliance with the order. On the same day the Attorney General filed in court the petition in this case, asking that the company be dealt with for contempt, and on the same day the court issued notice to the company to appear October 30th to show cause why it should not be so dealt with. The company by its attorneys filed a motion to dismiss the petition, first, because the memoranda and papers called for are not legally material and competent evidence in the investigation being made by the grand jury; secondly, because it is sought by said petition to compel said company to bring into this state, for use before said grand jury, papers and memoranda which may tend to criminate said company and render it liable to criminal prosecution; and, thirdly, because said statute and the requirements thereof are in contravention of the fourth, fifth, and fourteenth amendments of the Constitution of the United States, and of the tenth and eleventh articles of the Constitution of the state. October 30th, the day set for hearing on this petition, one of the attorneys of the company filed his own affidavit, sworn to before a notary public, in substance that the papers and memoranda which the company had failed to produce before the grand jury would, if produced in evidence, tend to criminate the company and render it liable to criminal prosecution. On the same day the company also filed an answer to the petition, setting forth that during the period covered by the order it kept and filed at its office in Burlington certain papers and memoranda similar to the papers attached to the petition; that on or about August 20th all of the books and papers of the company kept at Burlington relating to the transactions mentioned were sent to the main office of the company at Boston for examination and verification, and long before the service of the order said papers or memoranda were destroyed at Boston; that it was unable to find two of the checks called for; and that, aside from said papers, memoranda,

and checks, it had produced everything called for in the notice. To this answer the Attorney General filed a replication, denying its truth, and joining issue thereon. On testimony introduced, the court made findings of fact, adjudged the company guilty of contempt, and imposed a fine. The court finds from the testimony that Mr. Brigham, manager of the Burlington plant, was in Boston just before August 21st and had a talk with Mr. Heath, the manager of the company, in regard to the business of the company in Vermont, in connection with the cattle commissioners, and about the time Brigham was in Boston one Mantor, an employe of the company in Boston, telephoned the bookkeeper in Burlington to bring all the books and papers to Boston, and he did take them all there. And the court finds, notwithstanding the claim of Mantor that the books and papers were destroyed, with the exception of those produced before the grand jury, that they were not destroyed, that Mantor knew that the matter was being looked up in Vermont to some extent, and that he sent for the books and papers to be brought to Boston for the very purpose of taking them out of the jurisdiction of this state, and keeping them where he thought they could not be produced. The finding is, in effect, that the testimony and circumstances show that the story of Mantor of the destruction of the books and papers was false, that they were still in existence, and in the custody and control of the company. Nobody testified they were destroyed except Mantor, and, on account of the contradictory statements made by him and the suspicious circumstances, the court says he was absolutely discredited. A suspicious circumstance in the mind of the court was that the bookkeeper of the Burlington plant who took the books and papers to Boston has never returned to Vermont and gave no testimony before the court in any form. As the court said in its findings, he was the man of all others who knew and could testify in regard to these matters. The papers would enable the grand jury to trace the history of every animal sold, and without them this would be impossible, and they would be corroborative evidence as against the persons named, in the investigation.

The court further says that Mantor, the only witness who says he saw the books, testified there was nothing there that would incriminate anybody. He was the only witness produced by the company as to this. No witness testified there was anything in them which was incriminating. The court has not found that there was. The substance of these findings by the court is that the claim of incriminative testimony was not set up by any witness, and was never asserted and maintained by the company in any way previous to the commencement of the contempt proceedings, and then was made by counsel, but not by any witness; and that the witness who testified in regard to the books was dis-

credited. Was the privilege properly and legally claimed by the company? The first mention of such a claim was in the motion to dismiss. This was after the failure to produce the books and papers, and after the contempt proceedings had been commenced. The motion to dismiss is signed by counsel for the company. The next mention is in an affidavit of one of the attorneys making the naked statement that the papers were incriminating. It is not stated that the affiant had ever seen the books or papers. He makes no statement as to the contents or upon what facts contained in them he bases his opinion or statement that they would be incriminating. A bare expression of opinion, or legal conclusion, without a statement of the facts upon which it was founded, may not have had much weight with the court, even if this was the proper method of asserting the privilege.

There has been some difference in the statement of the law as to the privilege of a witness, and its assertion and enforcement, in the courts of England and of this country, but the rule at the present time is quite uniform. When a witness has been duly summoned, it becomes his duty to attend at the time and place named in the subpoena. It seems well settled that, if he is required to produce documentary evidence by a subpoena duces tecum, it is his duty to produce what is called for, if it is in his possession or control. There may be, of course, good reasons why the witness is unable to attend, and should be excused, but there is nothing in this case indicating the existence of any excuse for non-attendance by some person duly authorized by the company. The findings of the court are such that no excuse appears for not producing the documents called for. Whether they would be proper testimony to be used in the case, when produced, is not for the witness to say. Their relevancy is for the court to determine, and not for him. *Rapalje*, Law of Wit. § 302. "But this right of a mere witness to raise the question of jurisdiction in this manner [by a refusal to testify] has not met with the favor of the judges, and in several jurisdictions is virtually denied; a fortiori a witness cannot be permitted to refuse to answer a question on the ground that it is irrelevant. To hold that a witness could decide for himself upon the relevancy of a question, against the opinion of the judge presiding, or the officer taking the deposition, would be subversive of all order in judicial proceedings." *Rapalje* on Wit. § 303. Also, in section 304: "The officer of the writ of subpoena duces tecum extends only to compel the bringing into court by a party or witness of books and papers of which he has control, and an inspection of which is deemed to be essential to the proper determination of the issues presented for trial. The writ has no effect upon the question of the admissibility of books and papers so brought in as evidence in the case"—citing *Bonesteel v. Lynde*, 8 How. Prac. (N. Y.) 226; *Mott v. Consumer's Ice Co.*,

52 How. Prac. (N. Y.) 244. "In all cases it is a question for the consideration of the judge at the trial, whether upon the principles of reason and equity production should be required under a subpoena." *Amey v. Long*, 9 East, 475; *Corson v. Dubols*, 1 Holt, N. P. 87. "The question of relevancy is never one for the witness to concern himself with; nor is the applicability of a privilege to be left to his decision. It is his duty to bring what the court requires, and the court can then, to its own satisfaction, determine by inspection whether the documents produced are irrelevant or privileged. This does not deprive the witness of any rights of privacy, since the court's determination is made by its own inspection, without submitting the documents to the opponent's view, and, unless such a mode of determination were employed, there could be no available means of preventing the constant evasion of duty by witnesses." *Wig. on Ev.* § 2200, citing *Amey v. Long*, 9 East, 473. In that case Lord Ellenborough delivered the opinion, and in which Park, Marryatt, and Bell, the distinguished counsel for the successful side, said: "As the obligation of the witness to answer by parol does not depend upon his own judgment, but on that of the court, the same rule must prevail with respect to his production of documentary evidence. The witness is bound, at all events, to bring with him the paper which he has been subpoenaed to produce; and, when it is in court, he may then state any legal or reasonable excuse for withholding it, of which the court will judge." A witness must obey a subpoena and be sworn. Then he can claim his privilege. In *re Eckstein*, 148 Pa. 509, 24 Atl. 63; *U. S. v. Kimball* (C. C.) 117 Fed. 156.

Many other cases might be cited, bearing on the question of the duty of a witness to obey a subpoena and actually appear, and in case of a subpoena duces tecum produce the documentary evidence called for; but these are sufficient to answer the claim made in the motion to dismiss that the testimony was not material, and to show beyond question that it is the duty of a witness to respond to a subpoena by appearing and producing books and papers, leaving all questions which he desires to raise to be settled and determined when he and the testimony demanded are before the court. The testimonial privilege is purely personal. It can be raised only by the witness himself. Whether the testimony is privileged is for the court to decide. *Wig. on Ev.* §§ 2296, 2270; *Chamberlain v. Willson*, 12 Vt. 491, 36 Am. Dec. 856; *Janvrin v. Scammon*, 29 N. H. 280. It is upon this question that there has been some difference in expression by different courts. In some cases the statement has been so broad that it seemed to give the witness the right to decide whether he would assert the privilege, and, also, whether he would answer the question, thus leaving nothing for the court; but the great tendency of modern cases has been such that

a rule seems now to prevail in this country, which has but few exceptions. Rapalje, *Law of Wit.* § 286, says: "The result of a comparison of the adjudications seems to be that the preliminary question, 'can any answer, responsive to the question, subject the witness to a criminal prosecution?' must be decided by the court, and not by the witness. If the court holds the affirmative of that question, then the witness has a right to decide whether the answer he would give to the question would have such an effect." Also: "The court will require to be satisfied that the witness is acting an honest part, and that he may incur danger by answering; when satisfied of this, he will allow the privilege." "Where a party calls his adversary as a witness, he has a right to insist on his going on the stand to be sworn, although the counsel for the witness state to the court that he will not answer the questions that will be put to him, as the answers would tend to incriminate him. If the questions have that tendency, the objection must be taken by the party himself on oath." *Rapalje on Contempt*, 100; *Boyle v. Wiseman*, 29 Eng. L. & Eq. 473; *Powell's Ev.* (4th Ed.) 109. The question may be lawfully put, however its tendency to draw out self-incriminating testimony, and the witness must decide himself whether he will assert his privilege, or waive it and answer it. 1 *Green. Ev.* § 451; 2 *Phil. Ev.* 783; *Whart. Crim. Ev.* § 465.

Chief Justice Marshall, in the trial of Aaron Burr, said: "It is the province of the court to judge whether any direct answer to the questions which may be proposed will furnish evidence against the witness." And in this case he also said, in substance, that if the witness stated under oath that the answer would tend to criminate him he would not be compelled to answer. Taking all he said together, a fair conclusion would be that the privilege must be asserted under oath by the witness, and if his statements are found to be true the court will not compel him to answer. In *Reg. v. Garbett*, 2 Car. & K. 474, the court held that, if a witness asserts his privilege, and there appears to be ground for believing that his answer would criminate him, he is not compellable to answer. In another English case the court held that a merely remote possibility of legal peril to a witness from answering a question is not sufficient to entitle him to the privilege of not answering; that, to entitle him to this privilege, the court must see from the circumstances of the case and the nature of the evidence which he is called to give that there is reasonable ground to apprehend danger to the witness from his being compelled to answer; that the danger to be apprehended must be real and appreciable, with reference to the ordinary operation of law in the ordinary course of things; that the position that the witness is sole judge as to

whether his evidence would bring him into danger of the law; and that the statement of his belief to that effect, if not manifestly made mala fide, should be received as conclusive, is untenable. But that if the fact of the witness being in danger be once made to appear, great latitude should be allowed to him in judging for himself of the effect of any particular question. *Reg. v. Boyce*, 1 Best & Smith, 811.

There has been some modification of the statement of the law in the opinion of Chief Justice Marshall, in the Burr Case, as to the right of the witness to judge for himself whether his answer will expose him to prosecution, in a number of American cases, and it is held more generally that it is for the court to decide after claim made by the witness, of his privilege. *Chamberlain v. Willson*, 12 Vt. 491, 38 Am. Dec. 356. Chief Justice Shaw, in *Bull v. Loveland*, 10 Pick. (Mass.) 9, said: "It has been decided, though it was formerly doubted, that a subpoena duces tecum is a writ of compulsory obligation, which the court has power to issue, and which the witness is bound to obey, and which will be enforced by proper process to compel the production of the paper, when the witness has no lawful or reasonable excuse for withholding it. But of such lawful or reasonable excuse the court at nisi prius and not the witness is to judge." In *State v. Thaden*, 43 Minn. 253, 45 N. W. 447, Mitchell, J., in delivering the opinion, which contains a very full and clear discussion of the subject, says: "All the authorities agree to the general proposition that the statement of the witness that the answer will tend to criminate himself is not necessarily conclusive, but that this is a question which the court will determine from all the circumstances of the particular case, and the nature of the evidence which the witness is called upon to give." This opinion cites with approval the rule laid down by Cockburn, L. C. J., in *Regina & Boyce*, before cited. We understand this is practically the rule in this state. The respondent here was not a party; was not charged with any crime, but was merely asked to perform its duty as a witness. Being summoned and appearing before the grand jury with the documentary evidence would not be a violation of its constitutional rights. The privilege of a witness could then be claimed, or not, as seemed advisable; if not claimed it would be waived. In *State v. Duncan et al.*, 78 Vt. 364, 63 Atl. 225, 4 L. R. A. (N. S.) 1144, 112 Am. St. Rep. 922, this court considered the question of incriminating testimony brought up in a different form. It was upon a demurrer to a plea in abatement to an indictment, alleging that the indictment was found upon testimony of the respondent, criminating himself, which he was compelled to give before the grand jury. It is there said that the privilege is that of the witness,

and he alone can claim it, and is waived if not seasonably asserted. The plea did not show that the respondent asserted his privilege. The compulsion alleged was held to be a conclusion of the pleader, from the facts, and not justified, as stated. In that case the witness appeared and testified before the grand jury, but did not claim his privilege. Here he refused to produce the testimony, and therefore no question of privilege in regard to it arose before the grand jury or court.

We have called attention to the requirements of the law as shown by the above authorities as to a claim of privilege by a witness, mainly for the purpose of showing the necessity of the claim being made by the witness himself, under oath, and in court, and that the claim, having been asserted by the witness, must be considered and acted upon by the court. The witness cannot refuse to obey a subpoena, and still claim the privilege that his testimony, if given, would incriminate himself. Neither can a witness disobey a subpoena duces tecum and refuse to produce books and papers called for, and still claim the privilege that the books and papers, if produced, would tend to criminate him. To permit such a course to be taken would be to permit courts of justice to be trifled with, and the course and progress of the law to be obstructed and delayed. The privilege of a witness as to these books and papers was never asserted in any manner allowed or authorized by law. It was not shown or claimed to the court, before the contempt proceedings were commenced, that they would tend to incriminate the corporation, or that the privilege of a witness as to it was claimed. The only excuse made by the witness Mantor was that they had been destroyed, and this was found by the court to be untrue. This being so, the constitutional question does not arise, for the respondent never put itself in a position to raise it.

4. We do not take the view of the respondent, in argument, that the question of privilege was properly raised by the motion to dismiss, and that no such question could have been raised before the grand jury. Such a question of privilege could not be raised by a motion to dismiss the petition. A motion to dismiss is not issuable. It reaches defects only which appear on the face of the pleading to be affected by it. The petition contains no allegation relating to any claim of privilege or any testimony which appears to be incriminating. It sets forth the facts of the order, service, and refusal to produce. The motion to dismiss alleges new matter, the claimed privilege, as the ground for dismissal. No precedent has been shown for this method of making a claim of privilege. Besides, this was after the contempt, if any, had been committed, and was an attempted excuse or palliation for what had taken place. The grand jury is a part of the court.

Any such question could have been raised before that body, and reported to the court for its action. This case differs from *Ballman v. United States*, 200 U. S. 186, 26 Sup. Ct. 212, 50 L. Ed. 433. In that case the witness in fact appeared at the time he was ordered by the court to appear, and asserted his privilege within the time allowed him in which to give his testimony. The witness in this case made no claim of privilege, at any time, or in any manner, and the claim as it was finally attempted to be made by counsel was too late, and not properly asserted. *Hale v. Henkel*, 201 U. S. 43, 26 Sup. Ct. 370, 50 L. Ed. 652, contains an interesting opinion as to the rights of corporations and of their officers when called to testify in regard to the transaction of the corporate business, and the privilege of a witness is asserted on the ground that the testimony might be incriminating. It is true that the questions raised in that case are analogous to those relating to visitatorial powers which may be exercised by the state granting the charter, and bear upon the right of the government to investigate the conduct of corporations, in proceedings for breach of the federal statute to protect trade and commerce against unlawful restraint and monopolies. But the discussion is illuminating, as clearly setting forth the duties and obligations of corporations to the public, and the right of the state—and in that case the government—to exact full obedience to all reasonable regulations as to the conduct of their business, and full disclosure of all their transactions, in a proceeding in behalf of the government. Certainly, in a case like this, where no right of visitatorial powers is claimed or attempted, but the action on the part of the state is limited to requiring the production of evidence, for use in state proceedings against other persons, it cannot be held that there has been an undue assertion of authority by the state, over a corporation, which by permission of the state is doing business therein. In the above case it will be noted that, instead of the corporation being merely called as a witness in a proceeding upon a complaint against others, it was itself being investigated, and its employé who appeared refused to produce its books and papers. While, in the view we take of this case, it does not become necessary for us to decide whether a corporation has the same right in any case, as an individual, to assert a claim of privilege, as a witness, against producing its books and papers, in a criminal proceeding in behalf of the state, against other persons, we can say at least that, before deciding that such a privilege exists in a case like this, we should insist upon its being shown that the assertion of the privilege was made in strict conformity with the law.

We have a statute, regulating the admission of foreign corporations to this state for the purpose of doing business, providing in

detail for the necessary steps to be taken before admission. This statute requires a foreign corporation, before doing business here, to procure a certificate of registration from the Secretary of State that it has complied with all the requirements of the law to authorize it to do business in this state, stating the business of the corporation, and that it is such as may lawfully be carried on by a corporation incorporated under the laws of this state for such or similar business, and to file with the Secretary of State a copy of its charter, state its place of business, and stipulate upon whom service of process against it may be made, and other provisions in detail (Act No. 20, p. 14, Acts 1902), thus placing itself respecting the business done here upon the same basis as domestic corporations, as to being subject to the jurisdiction of the courts, under our laws. It has been claimed in argument that this corporation, having been chartered in the state of Maine, was not subject to the law of this state, to the extent of being compelled to produce books and papers which were not then actually in the state. It is understood from the record before us that this corporation had taken all the steps required by statute to entitle it to admission to this state, and to protection of its laws applying to all foreign corporations so admitted. No question is made that the service of the order upon it was not in accordance with our statute, relating to the service of process upon foreign corporations doing business in this state. When no question is made that they were not in state, etc.

Since the respondent was thus doing business in this state, so far as pertained to the business done here and all matters and things connected therewith, it was and is amenable to the laws of the state, and in duty bound to obey them the same as if it were a domestic corporation. If, in anticipation of being called as a witness or to produce its books and papers, in some proceeding before the grand jury, upon criminal charges against our own citizens, it saw fit to remove them from this to another state, it should not be permitted to plead its own act, taken for the very purpose of putting them beyond the jurisdiction, as an excuse for not obeying a subpoena and producing them. As a body corporate, it was in fact doing business in Vermont and Massachusetts. Taking the books into Massachusetts was merely shifting them from one hand to the other. They were as much in control of the corporation as before. That is the essential thing, and not the precise locality where they happened to be when called for. The corporation was within this jurisdiction, and the books and papers within its control. No corporation, whether foreign or domestic, can evade its testimonial duty, which rests upon it while it is here doing business, by merely sending to the home office, in another state, documents pertaining to said business which are required as evi-

dence in legal proceedings here, and refuse to produce them when required by authority of law. In contemplation of law they are still in this jurisdiction for such purpose, and in control of the corporation doing business here. They are a part of the business of the corporation which is carried on here. They constitute a record of the transactions of that business and belong here, for all legitimate purposes of evidence, when required by our courts.

The right of control and regulation of foreign corporations coming within the state to do business was fully discussed and maintained in *Cook v. Howland et al.*, 74 Vt. 393, 52 Atl. 973, 59 L. R. A. 338, 93 Am. St. Rep. 912. See, also, *Osborne & Woodbury v. Shawmut Ins. Co.*, 51 Vt. 278. At this time in the history of the progress and development of corporate interests, we should not be inclined to take a backward step as to the rights of the Legislature, exercised within proper limits, in the control and regulation of corporations, whether foreign or domestic.

In our opinion neither the statute in question nor the order of the court pursuant thereto, requiring the production of the documentary evidence mentioned in the order, violates the provision of the Constitution of this state. No claim based upon the fourth or fifth amendment to the Constitution of the United States is made in this court, nor could there be successfully, since those amendments are held to have no reference to the states.

5. The claim is also made that the statute is contrary to the fourteenth amendment of the Constitution of the United States, because it arbitrarily discriminates between artificial and natural persons, denying to the former equal protection of the laws: As before seen, prior to the passage of this act, an individual could by a subpoena duces tecum be compelled to do all, by way of producing books, etc., that a corporation can be forced to do under the provisions of the statute. This statute seems designed for requiring the corporation itself, as the responsible owner, and legal custodian, to produce the documentary evidence mentioned therein, without the necessity of calling upon bookkeepers, managers, or other servants, who may, or may not, in fact, have custody or control thereof, at the time notice to produce is given, and to place upon the corporation the responsibility of seeing that such evidence called for, if in its control, is produced. This accomplishes in a direct way the same object which might require much delay and difficulty to accomplish, without the statute, by a subpoena duces tecum served upon such individuals as might be supposed to have the evidence in their custody. The statute leaves the corporations to select such officer, agent, or employé as it may see fit, to produce the evidence in compliance with the order made. It authorizes the laying of no unjust burdens upon corporations, as distinguished from in-

dividuals, and is designed only, to compel the production of admissible testimony, to be used in court. The classification made by the statute placed all corporations, whether domestic or foreign, in one class, leaving individuals, whether acting severally, as co-partners, or as associates, in another class. The general difference existing between natural and artificial persons in this respect, without this statute, makes the classification made a proper one, one that removes the prior discrimination between them, and therefore not in violation of the equality clause of the fourteenth amendment.

6. It is also claimed that the statute in question is in conflict with the fourteenth amendment, because it authorizes the court to punish for contempt, in case of refusal to produce such testimony when ordered, as in this case, and thus deprive a corporation of its property by way of a fine, without due process of law. The question of what constitutes due process of law has been so recently and fully discussed in this state, with reference to decisions in federal and state courts, that further consideration is unnecessary. *State v. Stimpson*, 78 Vt. 124, 62 Atl. 14, 1 L. R. A. (N. S.) 1153; *State v. Hodgson*, 66 Vt. 134, 28 Atl. 1089; *Bartlett v. Wilson*, 59 Vt. 23, 8 Atl. 321; *Hurtado v. California*, 110 U. S. 516, 4 Sup. Ct. 292, 28 L. Ed. 232; *Hagar v. Reclamation Dist.*, 111 U. S. 701, 4 Sup. Ct. 668, 28 L. Ed. 569; *Turpin v. Lemon*, 187 U. S. 51, 23 Sup. Ct. 20, 47 L. Ed. 70. The respondent's contention in this respect is made upon the ground that it was justified in refusing to produce books and papers which might tend to incriminate it, and that this statute requiring their production is unconstitutional. This proposition is disposed of by what we have previously said in regard to the necessity for appearance and production of documents by a witness, and claiming the privileges when in court, and that it is not for the witness to decide, as to such documents being privileged but for the court; and as we hold that the claim of privilege was not made as required by law, but that the order was disobeyed, the respondent on common principles stood as a contemnor before the court. The proceedings against it were in accordance with the ordinary mode prescribed by law in such cases and adapted to the end to be attained, the respondent was fully heard respecting the justice of the judgment sought, and the fine imposed was within the discretion of the court. It cannot be said therefore that by the fine it was deprived of property without due process of law.

7. The further objection is made that the statute is in violation of the fourteenth amendment, because it provides no compensation for time, trouble, and expense in producing documents and papers in other states and bringing them to this state—hence a taking of property without due process of law. By statute witnesses are allowed for travel in the state, and so much a day for attendance

upon court. And in state causes extra compensation may be allowed to witnesses called from without the state when their production has been ordered by a judge of the Supreme Court, or by a judge of the county court presiding at the trial, to prevent a failure of justice; and such judge may order any necessary evidence at the expense of the state, to prevent a failure of justice, and such compensation shall be fixed by the court before whom the trial is had. V. S. 5396. In practice this statute has very properly been construed as broad enough to cover such witnesses and evidence required before a grand jury. Since the act in question contains no special provision touching the fees of witnesses coming before a court or grand jury in obedience to an order issued thereunder, the pay of such witnesses, like that of all others, is governed by the general provisions of the statute upon that subject. Whether the fees which may thus be allowed are reasonable compensation for the time, trouble, and expense necessarily involved in complying with such order, we need not inquire. That is a matter resting with the legislative branch of government, not with the judicial. Mr. Serjeant Hawkins, after speaking of the English statute governing witness' fees in civil cases, says: "But in criminal proceedings the demands of public justice supersede every consideration of private inconvenience, and witnesses are bound, unconditionally, to attend the trial upon which they may be summoned, and be bound over to give their evidence. To persons of opulence and public spirit this obligation cannot be either hard or injurious; but indigent witnesses grew weary of expensive attendance and frequently bore their own charges to their great hindrance and loss. * * * 2 Hawk. P. C. c. 46, § 168. In *West v. State*, before cited, in holding that a witness is bound to obey the process of subpoena in criminal prosecutions without payment or tender of fees, the court of last resort in Wisconsin said: "But in no sense can the requisition upon the citizen of his attendance upon the courts to testify as a witness be considered as the taking of private property for public use, within the meaning of the Constitution. The object of that provision in the fundamental law was to protect the citizen from the grasping demands of government, not to absolve him from any of those various personal duties which every good citizen owes to his country; such as the performance of militia duty, obedience to the call of the proper authority for his personal service in suppressing a riot, the apprehension of a felon, affording assistance to officers in making arrests when resisted, and the like. There are very many instances in which the citizen is required to perform personal service, or render aid to his government, without other compensation than that of his participation in the general good, and his enjoyment of the general security and advantage which result from common acquiescence in such

obligations on the part of all citizens alike, and which is essential to the existence and safety of society." Suppose it be assumed that, by reason of inadequate fees, a corporation suffers injury, by way of time, trouble, or expense, consequent on a compliance with an order to produce evidentiary documents, in its possession and control, yet its rights guaranteed by the federal Constitution are not thereby violated, since the injury is incidental to the legitimate exercise of the powers of government in the interests of public justice and for the public good. While it may be true, strictly speaking, that criminal law, a law which deals with offenses after they have been committed, does not fall within the domain of the police power, a power which aims to prevent offenses. Freund, Police Power, § 86. Yet the law governing incidental injuries to rights of private property, resulting from the exercise of governmental powers lawfully and reasonably exerted for the public good, is by analogy much in point. In *Chicago, B. & Q. R. Co. v. Drainage Com'rs*, 200 U. S. 561, 26 Sup. Ct. 841, 50 L. Ed. 596, the opinion of the court being by Mr. Justice Harlan, after a very extended examination of decisions of the federal Supreme Court, also of the courts of last resort in several of the states, it was held that "if the injury complained of is only incidental to the legitimate exercise of governmental powers, for the public good, then there is no taking of property for the public use, and a right of compensation on account of such injury does not attach, under the Constitution." Upon this same question, see, also, *Village of Carthage v. Frederick*, 122 N. Y. 268, 25 N. E. 490, 10 L. R. A. 178, 19 Am. St. Rep. 490. We hold, therefore, that the statute under consideration is not repugnant to the provisions of the fourteenth amendment in this respect.

It being conceded that the decisive question is as to the jurisdiction of the court, we hold that the court had jurisdiction, and we find no error in the proceedings.

The petition for certiorari and the petition for a writ of error are dismissed, with costs, the exceptions are overruled, with costs, and judgment that the respondent take nothing by its exceptions, and that execution be done.

(30 Vt. 1)

DROWN v. NEW ENGLAND TELEPHONE & TELEGRAPH CO. et al.

(Supreme Court of Vermont. General Term.
May 10, 1907.)

1. TORTS—JOINT AND GENERAL LIABILITY.

When a telephone company and an electric lighting company owed separate duties to a person, though differentiated by the relations they severally sustained to him, but primary and not secondary as between themselves, and each neglected to perform its duty, with no actual concert of action nor community of design between them, and their negligence concurred to produce a single injury that would not have hap-

pened without such concurrence, so that each was a proximate and efficient cause, the injury might be attributed to either or both of the causes, and the companies might be sued jointly or severally at the election of the injured party.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Torts, § 29.]

2. ELECTRICITY — NEGLIGENCE — PLEADING — RES IPSA LOQUITUR.

Where it was alleged that defendant placed and maintained its electric wires in such close proximity to the top of a telephone pole on which plaintiff had to work that he was injured by the current, the injury was prima facie evidence that the company was to blame for it, and it was not necessary to allege the fact of imperfect insulation, and the escape of electricity by reason thereof.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Electricity, § 11.]

3. NEGLIGENCE—DEFENSES.

Where defendant has been shown to have prima facie violated its duty to an injured person, in order to escape liability plaintiff must have contributed to the accident by his own negligence, or voluntarily encountered the danger.

4. ELECTRICITY — LIABILITY FOR INJURIES — CARE REQUIRED—TELEPHONE COMPANIES.

It was as much the duty of a telephone company to remedy a dangerous condition of its lines caused by the proximity of electric wires belonging to another company, as though it had brought it about in the first place.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Electricity, § 7.]

5. MASTER AND SERVANT—INJURY TO SERVANT—ASSUMPTION OF RISKS.

The danger to a telephone lineman incident to the proximity of electric wires belonging to an electric light company was an extraordinary risk, and was not assumed by him unless he knew and comprehended it, or unless it was so plainly observable that he would be taken to have known and comprehended it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 612, 614.]

6. SAME.

Where a telephone lineman, injured by an electric current while working on a pole in close proximity to a line of electric wires belonging to another company, had never worked on the pole before, had never seen anybody work on it, and had never been told, and did not know, that it was in dangerous proximity to the electric wires, the danger was not so plainly observable that he could be said to have assumed the risk.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 612, 614.]

7. SAME—CONTRIBUTORY NEGLIGENCE.

In an action for injuries to a telephone lineman owing to the imperfect insulation of electric wires, *held*, under the evidence, that it was a question for the jury whether plaintiff was guilty of contributory negligence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 1089-1132.]

Exceptions from Orleans County Court: John H. Watson, Judge.

Action by Chauncey Drown against the New England Telephone & Telegraph Company and another. Judgment for plaintiff, and defendant excepts. Affirmed and remanded.

Argued before ROWELL, C. J., and TYLER, MUNSON, HASELTON, and POWERS, JJ.

W. M. Wright, Frank D. Thompson, and John W. Redmond, for plaintiff. F. M. Al-

fred and P. F. Drew, for telephone company. Hunton & Stickney, for Consolidated Lighting Co.

ROWELL, C. J. This is case for negligence. The declaration contains two counts, and is demurred to by both defendants. The first count alleges that before and at the time in question the defendant the New England Telephone & Telegraph Company owned and operated a telephone line from Williamstown to Graniteville; that one of the poles of that line stood at the junction of two highways near Graniteville, near the top of which were two cross-pieces to which the wires were fastened; that, in order to attach the wires, and to repair them, it was necessary to climb the pole and work at the top of it; that before and at the time in question the other defendant, the Consolidated Lighting Company, was engaged in generating and selling electricity for artificial light, heat, and power; that after the construction of the telephone line, and before the time in question, the lighting company constructed an electrical line from Barre to Graniteville, consisting of three wires strung on poles, for the purpose of transmitting a powerful current of electricity, dangerous to human life; that the poles of the electrical line were placed on the same side of the highway from said junction to Graniteville as the telephone poles, and for the greater part of the way the electrical wires were strung and maintained above and directly over the poles and wires of the telephone line, and were constructed and maintained directly over the telephone pole at the junction of said highways. The count further alleges that it was the duty of the lighting company so to construct and maintain its line as not to endanger the safety of the telephone company's servants while on the poles of its line, but that the lighting company, disregarding its duty in this behalf, so carelessly and negligently constructed and maintained its line that the wires thereof were only about 27 inches from the top of the telephone pole standing at the junction of said highways, thereby greatly endangering the safety of the telephone company's servants, who had to work at the top of said pole. The count further alleges that at the time in question the plaintiff was in the service of the telephone company as a lineman, and that as such it became and was his duty to climb said pole for the purpose of attaching wires to one of the cross-pieces, and that it was the duty of the telephone company to furnish him a reasonably safe place in which to do that work, but that the top of said pole was an unsafe place "because of the close proximity of the electrical wires," as said company had reason to know, and that it was the duty of said company to render said pole a safe place, either by removing it, or by compelling the lighting company to remove its wires, neither of which it did, but

suffered and permitted said pole and the electrical wires thus to remain in dangerous proximity to each other. The count further alleges that at the time in question said last-mentioned wires were charged with a dangerous current of electricity, and that the plaintiff was wholly ignorant of the close proximity of said wires to said pole, and was wholly ignorant that said pole was an unsafe place to work, and that while at work at the top thereof, fastening wires to one of the cross-pieces, without fault or negligence on his part, but solely in consequence of the negligence of the lighting company in constructing and maintaining its line as aforesaid, and of the negligence of the telephone company in suffering said pole and said electrical wires to remain in such close proximity to each other, he came in contact with said wires, and was burned and injured.

The second count is essentially like the first, except that it omits the allegation that the telephone company had reason to know that the top of said pole was an unsafe place to work, and charges the duty of the defendants as a joint duty, and its breach as a joint breach.

It is objected that the declaration is bad for misjoinder of defendants and causes of action, and urged that the rule of the common law, formulated when almost all the cases of tort were for intentional wrongs—that tort-feasors cannot be joined unless there was concert of action or common design—is most logically applicable to negligence cases also, which have so greatly increased since the introduction of modern utilities. That a broader rule involves a very distinct departure from the original common-law conception of joint tort-feasors. That when two defendants act independently of each other, but their relations to the plaintiff are similar, so that the duties they have violated are of a similar character, and the defenses available to them rest upon the same legal principles, and in general the standard of care and the tests of negligence as against both are substantially the same, it might occasion no serious practical difficulty to try both cases in one action; but that when, as here, the duties that the two defendants are alleged to have violated are entirely different in character, when they stand in entirely different relations to the plaintiff, when the defenses available to them are distinct, and based upon entirely different legal principles, the danger of confusing the jury with evidence and instructions applicable to one case and not to the other, and the resulting risk of injustice to the plaintiff or to one or both of the defendants, constitute a sufficient objection, both theoretical and practical, to the joinder of two such causes of action in a single count of a single declaration. That the objection of duplicity in common-law pleadings, and of multifariousness in equity, applies with equal force to such a misjoinder, and the fact that the

plaintiff's damage is the same in both cases tends only to increase the confusion.

It is true that the common-law rule for joining tort-feasors, when originally formulated, was based upon the conception of concert of action or common design. And it may be true, as claimed, that this conception resulted from the fact that then almost all of the tort cases were for intentional wrongs. But the rule is not confined to intentional wrongs, but embraces unintentional wrongs as well, for all agree that it embraces cases of wrongful neglect of joint duties. The difference of opinion comes when you have wrongful neglect of separate duties; but even here that difference is not so marked when the duties are similar, as it is when they are dissimilar. In the latter case, it is more strongly urged that to impose a joint liability would be an unwarrantable departure from the rule. But it cannot be said to be a departure from the rule to apply it to cases involving elements generically the same, though specifically different; that is, elements that give you concert of action or common design within the meaning of the rule. Now, the rule does not require "actual concert" as distinguished from "passive concert," nor "actual community," as distinguished from "passive community," for, if it does, the wrongful neglect of joint duties would not be within it, for there you have only passive concert or passive community.

Although in respect of negligent injuries there is considerable conflict of opinion as to what constitutes joint liability, yet we think that the weight of authority as well as the principle of the rule sustain this proposition, namely: That when two owe to another separate duties, though differentiated by the relations they severally sustain to him, but primary and not secondary as between themselves, and each neglects to perform his duty, with no actual concert of action nor community of design between them, and their neglects concur to produce a single injury that would not have happened without such concurrence, so that each is a proximate and an efficient cause, the injury may be attributed to either of both of the causes, and each of the wrongdoers is liable for the whole damage, and therefore they may be sued jointly or severally, at the election of the party injured. This proposition is well exemplified by the numerous cases holding that when a passenger on a railroad train is injured by a collision of his train with the train of another road, caused by the concurrent negligence of both roads, the carrier and the noncarrier are jointly liable. Here the duties are different because of the different relation that each road sustains to the passenger; still, as the breach of their duties concurred in producing the injury, which would not have happened without such concurrence, they are held jointly liable. There are numerous electrical cases essentially like

the one at bar in their facts, in which the same thing is held. There are, however, cases that hold the other way. But it is unnecessary to refer to the cases on either side, as they are largely cited in the briefs. Judge Cooley favors this proposition. Cooley, Torts (3d Ed.) 246, 247. And the case in hand comes within it, for by wrongfully neglecting to remedy the dangerous condition complained of, which either could have done, the defendants passively concurred in maintaining and taking the risk of it; and as their neglects in this behalf concurred in producing the plaintiff's injury, which would not have happened without such concurrence, they passively and by community of wrong participated in its infliction, and therefore are jointly liable for it. We are not much impressed by the suggestion that the danger of confusing the jury, and thereby of doing injustice to some of the parties, constitutes a sufficient objection to the joinder, for we do not think that such danger exists to any embarrassing extent. It is true that some courts lay stress upon that, but the more part take no notice of it.

The sole negligence alleged against the lighting company is that it placed and maintained its wires in the dangerous proximity of 27 inches above the top of the telephone pole on which the plaintiff was working at the time of his injury. The company contends that this alone does not make a case of actionable negligence against it; that the question arises whether the injury was the natural and probable consequence of the negligence alleged, in the sense that a prudent man ought to have foreseen it; that that question cannot be answered in favor of the plaintiff on that allegation, for that the danger comes only when electricity escapes by reason of defective insulation, so that proof of the proximity alleged, without other evidence explaining how the injury occurred, would not be sufficient to show the company guilty of actionable negligence; that the cases uniformly set forth, as the proximate cause of injuries arising from the escape of electricity, a defect or break of the insulation, and no such defect is here alleged; that you cannot answer, *res ipsa loquitur*, for, although it may be an irresistible inference that electricity did escape by reason of improper insulation, yet it does not follow from that alone that the company is liable, for it may not have been to blame for it, and, if it was, the plaintiff may have known of the defect as well as the company, and, besides, the declaration excludes any claim of negligence on the part of the company in respect of defective or improper insulation or in any other respect, except only in placing and maintaining its wires in the proximity alleged.

It is undoubtedly an irresistible inference from what is alleged, as counsel seem to think, that electricity did escape by reason

of imperfect insulation, for otherwise the plaintiff could not have been burned and injured as alleged, and so the injury speaks for itself to this intent, and is *prima facie* evidence that the company was to blame for it, and guilty of the negligence alleged. This being so, the fact of imperfect insulation, and the escape of electricity by reason of it, sufficiently appear; the rule being that you need not allege what is necessarily implied in what you do allege. Thus, if a man plead that he is heir to such an one, he need not allege that that one is dead, for that is implied, as no one is heir to the living. Thus it appears that the proximate cause of the injury, as counsel call it, namely, the escape of electricity by reason of imperfect insulation, is not wanting, as claimed, and that the declaration does not exclude all claim of negligence in respect of it, for the doctrine of *res ipsa loquitur* is merely a rule of evidence, and, when it is evidence of the negligence alleged, the plaintiff is entitled to the benefit of it.

The suggestion that the plaintiff may have known of the imperfect insulation is no answer to the declaration, for it cannot be said that he did know; and, if he did, that alone is not enough, for mere knowledge of a risk does not necessarily involve consent to the risk, for that would be saying "*scienti non fit injuria*"; whereas the maxim is, "*volunt non fit injuria*," which applies between strangers as well as between master and servant. Hence, the company having *prima facie* violated its duty to the plaintiff, he must have contributed to the accident by his own negligence, or have voluntarily encountered the danger within the meaning of the maxim, and these are questions of fact, as the case is declared upon. *Thruswell v. Handyside*, 20 Q. B. D. 859; *Smith v. Baker* (1891) A. C. 325; *Thomas v. Quartermaine*, 18 Q. B. D. 685, 698.

The telephone company claims that the declaration is bad (1) because it fails to show negligence on its part, (2) because it shows that the plaintiff assumed the risk, and (3) that he was guilty of contributory negligence. The reasons relied upon to sustain the claim of failure to show negligence on its part are summarized as follows: (1) That the duty to provide a reasonably safe place is not absolute, but relative, requiring only reasonable care to provide a reasonably safe place in view of the nature of the business and the circumstances of the case; (2) that the nature of the telephone business, and the manner in which as a practical matter it must be conducted, render it impossible always to avoid the proximity of electric light wires; (3) that the alleged dangerous situation of which the plaintiff complains was not brought about by the company, and does not appear to have been so serious as reasonably to impose upon it the duty of relocating its line; (4) that no lack of warning is relied upon,

and it does not appear that warning was not in fact given; (5) that the danger was so obvious that warning was unnecessary; and (6) that it does not appear that the plaintiff's work required him to go within reach of the electric light wires.

But the first two reasons do not show the declaration bad in law. They are only a statement of the character and extent of the company's duty under the law, and of what should be considered in determining whether in fact it performed that duty. As to the third reason, although the alleged dangerous situation was not brought about by the company in the sense that it actively participated in creating it, yet, if dangerous, it was as much its duty to remedy it as though it had brought it about in the first place; and that it was dangerous is shown by the declaration. As to lack of warning not being relied upon, and its not appearing that warning was not given, it must be borne in mind that the danger complained of is the proximity of the electric wires to the top of the pole; and of that danger, the declaration alleges, the plaintiff was wholly ignorant. This, in effect, is a negation of warning, and a reliance upon lack of warning. As to whether the danger was so obvious that warning was not necessary is involved in assumption of risk, and will be considered in that connection. As to its not appearing that plaintiff's work required him to go within reach of the electric light wires, it is sufficient to say that the declaration alleges that it was necessary to work at the top of the pole, and this the demurrer admits, and it appears that the top of the pole was within reach of the electric wires. As to the assumption of risk: This was not an ordinary risk, and therefore assumed by the plaintiff, but an extraordinary risk, and therefore not assumed by the plaintiff, unless he knew and comprehended it, or it was so plainly observable that he will be taken to have known and comprehended it. The declaration alleges that he did not in fact know it, and the question is whether, in the circumstances alleged, the law will impute knowledge to him. We think it will not. It was the duty of the company to see to it that the electric wires were a safe distance from the pole, and the plaintiff had a right to assume that it had performed that duty, and therefore was not bound to exercise care to find out whether it had or not. *Dunbar v. Central Vt. Railway Co.*, 65 Atl. 528.

The case is not like *Sias v. Consolidated Lighting Co.*, 73 Vt. 85, 50 Atl. 554, for there the duty of inspection rested upon the plaintiff. Nor is it like *McKane v. Marr & Gordon*, 77 Vt. 7, 58 Atl. 721, for that was a case of equal knowledge. But here the plaintiff did not know, and was not bound to find out; whereas the company is charged with knowing, because it could have found out by the exercise of proper care. Nor is it like *Chis-*

(80 Vt. 99)

holm against this same company (176 Mass. 125, 57 N. E. 383), on which so much reliance is placed, for there the dangerous condition was not due to the defendant's fault, while here it was. Nor yet is it like *Anderson v. Inland Telephone & Telegraph Co.*, 19 Wash. 575, 53 Pac. 657, 41 L. R. A. 410, to which reference is made, for there the risk was regarded as ordinary, and therefore assumed by the plaintiff; while here it is regarded as extraordinary, and therefore not assumed by the plaintiff. Nor like *Carr v. Manchester Electric Co. and Union Electric Co.*, 70 N. H. 308, 48 Atl. 286, for there the plaintiff knew the risk, and therefore was held to have assumed it.

The case is more like *Morrisette v. Canadian Pacific R. R. Co.*, 74 Vt. 232, 52 Atl. 520. There the plaintiff was swept from the side of a moving freight car by a switch standing near the track. It was contended that the danger was so obvious that he assumed the risk. It appeared that he had worked for the defendant several years as brakeman on different parts of the line, and for several months next before the accident, on the part where it happened, and was acquainted with the sidings there, and knew the location of the switch, and had operated it several times. He had never passed it before on the side of a car, and had never been told, and did not know, that it was near enough to the track to sweep one from the side of a car. He had never stayed by the switch when a car passed it, and had always found the other switches on the road safe. The court said that, although the switch was dangerous only because of its proximity to the track, yet it was impossible to say as matter of law that the danger could be seen and comprehended by mere observation, unaided by measurement, seeing a car pass, or some such thing; that, if it could have been, it was fair to assume that some one whose business it was would have discovered and remedied it, for the switch had stood there several years.

So here much the same thing can be said, for it does not appear that the plaintiff ever worked upon the pole before, or ever saw any one work upon it, or ever was upon it for any purpose; and he never was told, and did not know, that it was in dangerous proximity to the electric wires. We hold, therefore, here, as there, that in the circumstances alleged the danger was not so plainly observable that the law will say that he knew and comprehended it. Obviously, fair-minded men might differ about it. Hence it must go to the jury.

It is equally clear that it cannot be said as matter of law that the plaintiff was guilty of contributory negligence. That, also, must go to the jury. It is not necessary for present purposes to inquire whether there is any difference between assumption of risk and contributory negligence.

Judgment affirmed, and cause remanded.

WATKINS v. CHILDS.

(Supreme Court of Vermont. Grand Isle. May 15, 1907.)

1. BOUNDARIES — ESTABLISHMENT — EQUITY JURISDICTION.

In order to warrant an application to a court of chancery for the appointment of commissioners to ascertain a confused boundary, there must exist some equity superinduced by the act of the party defendant or a danger of a multiplicity of suits.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Boundaries, §§ 139, 254, 255.]

2. SAME—SCOPE OF REMEDY.

The scope of the equitable jurisdiction to determine confused boundaries is not alone to ascertain the boundary in question; but, when the original location of the boundary cannot be found, it may require the defendant to make good to the plaintiff as from a common fund his proper quantity of land out of the land of which the defendant is possessed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Boundaries, §§ 139, 254, 255.]

3. SAME—FOUNDATION OF REMEDY.

The established foundations of the jurisdiction to determine confused boundaries are fraud or misconduct on the part of the defendant resulting in a confusion of the boundary, a relation between the parties which makes it the duty of one of them to preserve and protect the boundary, together with such neglect or misconduct on the part of him on whom the duty rests as results in the confusion of the boundary, and the necessity of a resort to equity to prevent a multiplicity of suits.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Boundaries, §§ 139, 254, 255.]

4. SAME—NECESSARY PARTIES.

Before a court of equity will exercise its jurisdiction to determine a confused boundary, all persons interested, whether their estates are present or future, must be made parties.

5. SAME—PLEADING—SUFFICIENCY OF DEMUR- RER.

Where, in an equitable proceeding to determine disputed boundaries, two lines were in dispute, and several persons not made parties were interested in land bounded by one of the lines, a demurrer to the whole bill failed where all persons interested in the controversy as to the other line were made parties.

6. EQUITY—DEMURRER—ADMISSIONS.

In an equitable proceeding to determine a disputed boundary, a demurrer to an allegation, upon information and belief, that the defendant removed stakes marking a line, admitted the fact that he did so.

7. BOUNDARIES—ESTABLISHMENT.

In an equitable proceeding to determine a disputed boundary, it was necessary for the plaintiff to show that some of the land in respect of which relief was sought was in the possession of the defendant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Boundaries, §§ 139, 145.]

8. SAME—EVIDENCE.

In an equitable proceeding to determine a disputed boundary, evidence examined, and held insufficient to establish a necessity for equitable interference.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Boundaries, §§ 184-188.]

Appeal in Chancery, Grand Isle County; James M. Tyler, Chancellor.

Bill by Mary L. Watkins against George W. Childs. From a judgment for defendant, plaintiff appeals. Affirmed and remanded.

See 65 Atl. 81.

Argued before ROWELL, C. J., and MUNSON, WATSON, HASELTON, POWERS, and MILES, JJ.

H. S. Peck, for appellant. Lee S. Tillotson, for appellee.

POWERS, J. These parties occupy adjoining farms in the town of Grand Isle. The farm of the oratrix, known as the "Hyde farm," lies south of the one occupied by the defendant, which is known as the "Sampson farm." A highway runs through the farms in a northerly and southerly direction. The Hyde farm originally embraced all the territory of lot No. 272, but a small piece of about eight acres out of the northeast corner of the lot now belongs to the defendant, and is occupied by him in connection with the Sampson farm. This parcel is known as the "Childs lot," and was carved out of the Hyde farm in 1867 by an instrument describing it as follows: "Beginning at the northeast corner of lot No. 272, running westerly on the north line of said lot eighty-five rods to the west side of the highway, then southerly on the west line of the highway equal to $14\frac{1}{2}$ rods due south to a stake, thence easterly parallel with the north line of said lot to the east line of the lot to a stake $14\frac{1}{2}$ rods from the northeast corner of the lot, thence northerly on the east line of the lot to the place of beginning, containing about eight acres." The north line of lot No. 272 is shown to be a straight line running from the northeast corner through to a monument on the shore of Lake Champlain. This suit concerns (1) the location of so much of this lot line as lies west of the highway mentioned; and (2) the location of the south line of the Childs lot above described.

From 1867 to 1893 (the year the defendant acquired title to the Childs lot) the two stakes mentioned in the above description remained standing; and, while there was no fence on that line, there came to be a well-defined line of cultivation extending along the south side of the Childs lot between the stakes mentioned, caused by the ploughing and tilling of the lands by their respective owners. These stakes and the line of cultivation have constituted the only visible boundary between the Hyde farm and the Childs lot from 1867 to their removal or obliteration as hereinafter set forth. Since the defendant bought the Childs lot, the two stakes have, without the oratrix's knowledge or consent, been removed, and, on information and belief, it is alleged that the defendant removed them. It is further alleged, on information and belief, that the defendant has during his occupancy of the Childs lot plowed over the true south line of his said lot, without regard to the line of cultivation alluded to, and has thereby obliterated and destroyed "for the most part, if not wholly," said line of cultivation. It is further alleged that a dispute has arisen between the parties over the location of this

line dividing the Childs lot from the oratrix's land, and that the dispute and consequent confusion and uncertainty as to where said line is was caused by the removal of said stakes and the "negligence, misconduct, willful and unlawful acts of the defendant in removing the monuments of, and otherwise effacing said true dividing line, and in plowing and otherwise tilling the aforesaid land, and obliterating the line of cultivation," without the oratrix's consent and against her protest, and "while she was otherwise in occupancy and control" of her land. Since the defendant has lived on the Sampson farm he has, unlawfully and without right, it is said, removed the fence which for many years stood on the north line of lot No. 272, dividing the farms on the west side of the highway. And, on information and belief, it is alleged that the defendant has cut a line tree and destroyed other landmarks and monuments on that line west of the highway, whereby great confusion and obscurity exists as to the true location of that line, which is now in dispute between the parties. It is also alleged that the defendant has removed the fence which formerly stood on the north line of lot No. 272 east of the highway, and that by so doing many of the old monuments and landmarks which located the original and true lot line on that side of the highway have been removed, obliterated, or destroyed, whereby confusion and uncertainty have arisen as to the location of that part of the line. The defendant has built fences along the two lines concerned in this suit, on locations "arbitrarily" fixed by him as the true ones. The bill shows that divers persons other than the defendant are interested in the Sampson farm, as part owners and otherwise, but the defendant's ownership of the Childs lot is not questioned. The prayer is for the appointment of a commission to determine the two boundaries hereinbefore referred to. The bill is demurred to for want of equity and for want of proper parties.

The appointment of commissions to ascertain confused boundaries is a very ancient branch of the jurisdiction of the court of chancery. Its origin, however, is involved in much obscurity and remains largely a matter of conjecture; and whether it originated in the equity of preventing a multiplicity of suits, as asserted by Lord Keeper Henly (afterwards Lord Chancellor and Earl of Northington) in *Wake v. Conyers*, 1 Eden, 331, or arose from cases in which the parties consented to a commission, as surmised by Lord Chancellor Thurlow in *St. Luke's v. St. Leonard's*, 1 Bro. Ch. 40, or was founded upon two ancient writs found in the Register, as was thought by Sir William Grant, Master of the Rolls, in *Speer v. Crawter*, 2 Mer. 410, or was borrowed from the civil law, as suggested in the note to *Wake v. Conyers*, 2 Leading Cas. Eq. 439, it is certain that at a very early time it came to be looked upon with

disfavor and was exercised with caution. The Lord Keeper in *Wake v. Conyers*, decided in 1759, expressed much jealousy of the jurisdiction, and said that such suits were "very far from deserving encouragement." Lord Chief Baron MacDonald said in *Atkins v. Hatton*, 2 Anstr. 386, that it was a jurisdiction "which courts of equity have always been very cautious of exercising." Lord Thurlow is said in *Godfrey v. Littell*, 2 Russ. & Myl. 630, to have concurred with Lord Northington in manifesting an inclination to narrow rather than extend the jurisdiction. Nor has there been any disposition manifested on the part of American Chancellors to extend the jurisdiction beyond the limits which came to be pretty clearly defined in England. All now agree that a controversy over the location of a boundary between independent proprietors does not of itself afford sufficient ground for equitable interference. Indeed, a confusion of boundaries alone does not. There must exist some equity superinduced by the act of the party defendant, or a danger of a multiplicity of suits, to warrant an application to the court of chancery for the appointment of commissioners. *Wake v. Conyers*, supra; *Speer v. Crawter*, supra; *Marquels of Bute v. Glamorganshire Canal Company*, 1 Ph. 681; *King v. Brigham*, 18 L. R. A. 361, 23 Or. 262, 31 Pac. 601; *Humboldt County v. Lander County*, 26 L. R. A. 749, 22 Nev. 248, 38 Pac. 578, 58 Am. St. Rep. 750. It is to be observed that the scope of this equity is not alone to ascertain the boundary in question according to its true location. It goes farther than that. And, when the original location cannot be found, it will require the defendant to make good to the plaintiff—as from a common fund—his proper quantity of land out of the land of which the defendant is possessed (*Atty. Gen. v. Stephens*, 6 De Gex, M. & G. 111; *Speer v. Crawter*, supra; *Ashton v. Lord Exeter*, 6 Ves. Jr. 288; *Leeds v. Strafford*, 4 Ves. Jr. 180), which affords a potent reason why a court of equity should proceed with caution when asked to exercise this jurisdiction.

In considering what will constitute a sufficient ground to call into exercise this jurisdiction of the court of chancery, some difficulty arises in determining what will constitute an "equity superinduced by act of the party." But it seems clear from the authorities that the established foundations of the jurisdiction are (1) fraud or misconduct on the part of the defendant resulting in a confusion of the boundary in question; (2) a relation between the parties which makes it the duty of one of them to preserve and protect the boundary, together with such neglect or misconduct on the part of him on whom the duty rests as results in the confusion of the boundary; (3) the necessity of a resort to equity to prevent a multiplicity of suits. Accordingly it is held that if the defendant gradually encroaches, as by plowing or digging too near, (*Wake v. Conyers*,

supra; *Marquels of Bute v. Glamorganshire Canal Co.*, supra), or by moving a fence (*Gulce v. Barr*, 130 Ala. 570, 30 South. 563), a court of equity will interfere. So when a tenant, whose duty it is to keep separate his landlord's land from his own, permits the boundary between the properties to become confused so that the land of the landlord cannot be distinguished from that of the tenant, equity will take jurisdiction. *Atty. Gen. v. Fullerton*, 2 V. & B. 264. But before that court will act, even in such cases, all persons interested, whether their estates are present or future, must be made parties. 4 Pom. Eq. § 1385, note 6; *Rayley v. Best*, 1 Russ. & Myl. 659. This requirement precludes the court of chancery from taking action regarding the line dividing the farms on the west side of the highway; for, as we have seen, several persons not here parties are interested in the title to the Sampson farm. But the demurrer on the ground of lack of parties is not limited to that part of the bill which seeks the establishment of that line. It is to the whole bill; and the rule is that, when the demurrer is to the whole bill and there is any relief to which the plaintiff is entitled on the case made, the demurrer falls. *Story*, Eq. Pl. § 443. The parties to the controversy on the east side of the highway, however, are complete. So it remains to consider whether the court of chancery can, upon recognized principles, proceed to determine the boundary on that side of the highway—the boundary between the oratrix's land and the Childs lot.

Does the bill show fraud or misconduct on the part of the defendant, which has resulted in a confusion of the boundary? This line was marked originally and down to the time the defendant took title to the Childs lot (1898) by a stake standing at each end of it. Between these stakes (except in the highway) had been formed a ridge or line of cultivation which marked the boundary, and was recognized by the respective owners as such. This ridge the defendant plowed and obliterated, and the plaintiff insists that this brings the case within the decisions already alluded to. But, as long as the stakes stood, no confusion could result from the plowing or any other source, for the boundary was a straight line drawn from one stake to the other. So the plowing alone, even if wrongful, confused nothing. The removal of the stakes by the defendant is charged on information and belief, and the question arises whether or not this allegation of fact, being so pleaded, is admitted by the demurrer; for, if it is not, the confusion is not shown to have been caused by the defendant. It is to be borne in mind that the allegation is not merely that the oratrix is informed and believes that the defendant removed the stakes. The oratrix says that she is informed and believes, and therefore avers, that he removed them. Under the first form of averment it is properly held

that a demurrer only admits that the complainant is so informed, and that he believes the fact so to be. This is plainly correct, for the information and belief is the only fact alleged at all. *Walton v. Westwood*, 73 Ill. 125; *Cameron v. Abbott*, 30 Ala. 416; *Messer v. Storer*, 79 Me. 512, 11 Atl. 275. This is the doctrine laid down in *Story*, Eq. Pl. §§ 241, 256. But the author goes no further; nor do the cases cited in support of the text. Yet it is held in *Trimble v. Amer. Sug. Ref. Co.*, 48 Atl. 912, 61 N. J. Eq. 340, that an allegation of fact based on information and belief is not admitted by demurrer; and the case is put solely on the text and cases of *Story* above referred to, which by no means warrant the conclusion reached in that case. There is a vast difference between a mere allegation of information and belief, and an allegation of a fact on information and belief. The New Jersey court evidently failed to note this distinction in the forms of averment. The *Trimble Case* has been followed to some extent, and it seems to have remained for the Michigan Supreme Court in the recent case of *Bates v. City of Hastings*, 108 N. W. 1005, 145 Mich. 574, to correct the error by pointing out this distinction between the two forms of averment. In that case it is said that authorities were cited in argument which assert that a demurrer does not admit a fact charged on information and belief, and that all such authorities are based upon the *Trimble Case*, which case the Michigan court declines to follow, and holds that facts charged on information and belief are admitted by demurrer. We also decline to follow the *Trimble Case*, though we are not prepared to adopt the Michigan rule without qualification. We think an allegation of fact based upon information and belief is admitted by demurrer when, and only when, it is an allegation which, according to the established rules of equity pleading, may properly be so charged. If the allegation meets this requirement, it is well pleaded; otherwise not. The rule is that a demurrer admits only facts well pleaded. *Griffing v. Gibb*, 67 U. S. 519, 17 L. Ed. 353; *Smith v. Allen*, 1 N. J. Eq. 43, 21 Am. Dec. 33; *Roby v. Cossett*, 78 Ill. 638; *Pearson v. Tower*, 55 N. H. 36; *Churchill v. Cummings*, 51 Mich. 446, 16 N. W. 805; *Matthews' Case*, 1 Maddock, 558; *Story*, Eq. Pl. § 452; *Fletcher*, Eq. Pl. § 199; *Mit. & Tyl. Eq. Pl.* 306, note 1. It is an elementary rule that all facts material to the plaintiff's case must be averred positively and with certainty; but this rule is relaxed in the case of an averment of a fact which is presumably within the personal knowledge of the defendant and presumably not within the personal knowledge of the plaintiff. It is held in *Campbell v. R. R. Co.*, 71 Ill. 611, that an allegation of a fact within the defendant's knowledge, of which discovery is sought, is sufficient though made on information and belief. The fact that

discovery is sought cannot control the sufficiency of such an allegation, and the rule is the same whether discovery is sought or not, especially under a chancery rule like ours, which requires the defendant to answer as fully, directly, and particularly to every material allegation of the bill as if he had been particularly interrogated in respect thereto. Ch. Rule, 20. In *Alken v. Ballard, Rice*, Eq. 13, it is held that when a fact essential to the complainant's case is charged to be within the defendant's knowledge only, or must of necessity be so, a precise allegation of the fact is not necessary. The allegation of such a fact is, we think, direct and positive within the rule, though made on information and belief. In *Mayor of Wilmington v. Addicks (Del.)* 44 Atl. 781, an allegation in this form, "Your orator is informed, believes and charges," etc., essentially an allegation on information and belief, was held to be admitted by demurrer, but the opinion does not discuss the question. It was alleged in that case that the defendants were in the matters complained of pretending to act as the directors of a certain corporation, the legal organization of which was, on information and belief, denied. The facts concerning the organization of the corporation would not naturally be within the knowledge of the orator, but presumably would be within that of the defendant, for they would have access to the corporate records. So we think that case is really in harmony with our views above expressed. Of the same character was the allegation in *Bates v. City of Hastings*, for it referred to the defendants' intention regarding the sale of certain bonds—a matter of which the plaintiff would be expected to know nothing, but about which the defendants would know everything. So we hold that the demurrer here admits the fact that the defendant removed the stake marking the line—a fact presumably within his knowledge, since it was his own act. The act was wrongful and done in fraud of the rights of the oratrix, and if it alone, or in connection with the other acts charged, resulted in a confusion of the boundary, in this respect a proper case is made out.

But it is necessary for a plaintiff to show that some of his lands in respect of which equitable relief is sought is in the possession of the defendant. *Atty. Gen. v. Stephens*, supra; *Godfrey v. Littell*, supra; 4 Pom. Eq. § 1385. The oratrix here wholly fails to meet this requirement. Successive trespasses are alleged, but nothing more; and she asserts that she is in possession of her land except as trespassed upon. The fence alluded to is not alleged to include any of the oratrix's land, and, for aught that appears, may stand on the true line, though the location of it was "arbitrarily" selected by the defendant. Again, it is plain that the location of a lost stake can be readily discovered in an action at law as in chancery (*Lewis v. Lewis*, 4 Or. 177), and it must clearly appear

that without the assistance of a court of equity the boundary cannot be established. *Miller v. Warmington*, 1 J. & W. 484. Said Sir Thomas Plumer, Master of the Rolls, in that case: "The bill states that there are no marks and bounds to distinguish one part (of the field) from the other; and, though there may be none that are visible and apparent to the eye, yet it does not follow that by addressing themselves to old people acquainted with the place, or by examining the tenant, they might not separate the two parts. The court would expect this to be clearly established before it would interfere." So, when the boundary is so defined on the records that it cannot be affected by the fraudulent conduct of the defendant, equitable relief will be denied. *Pendry v. Wright*, 20 Fla. 828. It is not necessary to approve what is said in *Miller v. Warmington* relative to a resort to the testimony of witnesses to show that this bill fails to establish a necessity for equitable interference. It does not appear from the bill that the original corners of lot No. 272, some or all of them, are not standing. It does not appear that all the monuments along the north line of that lot are destroyed. It must be remembered that the ascertainment of either the north line of lot No. 272 or the south line of the Childs lot will easily determine the location of the other; for, with the aid of the description of the Childs lot hereinbefore recited, it would then become a simple problem in surveying. Both these lines are straight lines, and the establishment of any two points in either of them would fix the location of the whole line and solve all difficulties. For aught that appears, enough remain of the ancient monuments and landmarks to enable a competent surveyor to establish the bound in question.

Decree affirmed, and cause remanded, with directions to the court of chancery to dismiss the bill, with costs.

(80 Vt. 84)

UNITED STATES, to Use of J. G. STRAIT & SON. v. UNITED STATES FIDELITY & GUARANTY CO.

(Supreme Court of Vermont. Chittenden. May 13, 1907.)

1. PLEADING—PLEA TO JURISDICTION—CONSTRUCTION.

A plea to the jurisdiction can derive no help from the writ or declaration, unless referred to in such a way as to make it a part of the plea.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, § 214.]

2. COURTS—STATE AND FEDERAL COURTS—PLEADING.

Where a declaration declared on a bond executed by a corporation of Maryland, doing business in Vermont, to the United States, conditioned that a certain corporation of New York, doing business in Vermont, should perform a contract between such corporation and the United States, and pay all persons furnishing materials for the work provided for by the contract, and alleged that a resident of the state of New York furnished materials at a

place in Vermont for which the contractor had not paid, it showed that the courts of Vermont had jurisdiction.

3. PLEADING—PLEAS TO JURISDICTION.

A plea to the jurisdiction must negative every fact from which jurisdiction may be presumed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, § 214.]

4. SAME—GENERAL DEMURRER.

All defects in a plea to the jurisdiction may be reached by general demurrer.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, § 445.]

5. SAME—UNITED STATES—CONTRACTOR'S BONDS—ACTION ON BOND.

Act Cong. Aug. 13, 1894, c. 280, § 1, 28 Stat. 278 [U. S. Comp. St. 1901, p. 2523], provided that any person furnishing labor or materials in the prosecution of any work provided for in a contract with the United States for which payment had not been made might bring an action on the contractor's bond in the name of United States. An amendatory act approved February 4, 1905 (chapter 778, 33 Stat. 811 [U. S. Comp. St. Supp. 1905, p. 493]), provides a remedy for creditors in the federal courts. *Held*, that the amendatory act is not retrospective, and hence did not preclude an action by a creditor in a state court on a bond given prior to the amendatory act to enforce rights acquired prior to such statute.

Exceptions from Chittenden County Court; Willard W. Miles, Judge.

Action by United States, to the use of J. G. Strait & Son, against the United States Fidelity & Guaranty Company. A demurrer to a plea to the jurisdiction was sustained, and defendant brings exceptions. *Affirmed*.

Argued before ROWELL, C. J., and TYLER, MUNSON, and WATSON, JJ.

Powell & Powell, for plaintiff. E. M. Horton, for defendant.

WATSON, J. This case is here on demurrer to the plea to the jurisdiction "that the supposed cause of action, and each and every of them (if any such have accrued to said plaintiff) accrued * * * out of the jurisdiction of this court; that is to say, in the state of Maryland, in the state of New York, and in the jurisdiction of the United States courts, and not in this jurisdiction. * * *" This plea is dilatory in character, and will be considered accordingly. The declaration is not made a part of the plea, hence not before us in that way. It is a well-understood principle of pleading that a plea in abatement (and this is analogous to a plea in abatement and governed by the same rules) can derive no help from the writ or declaration, unless referred to in such a way as to make it a part of the plea; but this is the extent of the rule. For other purposes the court may take notice of the writ or declaration; it being the same against which the plea is pleaded. As said by Judge Redfield, in *Pearson v. French*, 9 Vt. 349: "No intendment is to be made in favor of a plea in abatement, but every reasonable intendment should be made in favor of the regularity and sufficiency of the proceedings." In *Leonard v. McArthur*, 52 Vt. 439, the plea

was denominated "a plea in abatement"; but the matters of fact therein alleged were dehors the record, and the only question raised thereby was held to be one of jurisdiction. In discussing the plea (which was held defective) it is said that for any purpose of a judgment of the court upon the matters set forth in the plea the writ and declaration are not before the court; they not being recited or referred to in the plea. "When they will be so treated is indicated in *Barnet v. Emery*, 43 Vt. 178, in distinction from the cases in which it is held that a plea in abatement will derive no help from them, unless referred to in such a way as to make them part of the plea." Thus showing that what is there said regarding the writ and declaration not being before the court has reference solely to their use in aid of the plea. Moreover, the court there demonstrated the extent of the rule by its application; the writ and declaration not being considered before the court in aid of the plea, but in fact noticed in support of the proceedings. "The jurisdiction," says the court, "so far as subject-matter and parties apparent on the face of the writ and declaration is concerned, is well enough." As showing the rule to be thus limited, the case of *Slayton v. Inhabitants of Chester*, 4 Mass. 478, to which reference was made by the court in *Pearson v. French*, is directly in point. There the defendant asked that the writ abate because in service the copy was not left with the clerk, or with one of the principal inhabitants of the town. In the demurrer to the plea one cause assigned was that it appeared from the return indorsed on the writ that a copy of it was left with one of the principal inhabitants of the town, and that defendants were estopped from denying it. It was objected that the return was no part of the demurrer, and that the court could not ex officio take notice of it. It was held that the return could be noticed, and the plea was held insufficient.

The declaration is in debt, declaring in two counts on a bond alleged to have been executed and delivered by the defendant, a corporation organized and existing under the laws of the state of Maryland, and doing business in this state, to the plaintiff, dated March 24, 1903, whereby the defendant acknowledged itself to be held and firmly bound jointly and severally with the E. H. Denniston Company, a corporation organized and existing under the laws of the state of New York, and doing business in this state, unto the United States of America in the penal sum of \$50,000, etc. It is alleged in the second count that the bond was subject to the following conditions: "That if the said E. H. Denniston Company shall well and truly perform all and singular the covenants, conditions, and agreements in a certain contract entered into on the 16th day of March, 1903, between said E. H. Denniston Company and the United States of America, represented by

Capt. T. B. Lamoreaux, constructing quartermaster at Burlington, Vermont, and shall promptly make full payments to all persons supplying it, the said E. H. Denniston Company, labor or materials in the prosecution of the work provided for in said contract, then the said obligation shall be void and of no effect, otherwise to remain in full force and virtue." It is averred that the said E. H. Denniston Company has not performed its said covenants and agreements, but has broken and disregarded the same, for that J. G. Strait and W. R. Strait, of Wolcott, in the county of Wayne and state of New York, partners, etc., under the firm name and style of J. G. Strait & Son, "did furnish unto the said E. H. Denniston Company at Burlington in the county of Chittenden and state of Vermont, divers materials used in the prosecution of the work provided for in said contract entered into on the 16th day of March, 1903, between said E. H. Denniston Company and the United States of America as aforesaid, by reason of which the said E. H. Denniston Company owes unto the said J. G. Strait & Son the sum of three thousand dollars," etc.

A cause of action "consists of every fact which it is necessary for the plaintiff to prove, if traversed, in order to sustain his action. *Read v. Brown*, 22 Q. B. Div. 128; *Hutchinson v. Alnsworth*, 73 Cal. 455, 15 Pac. 82, 2 Am. St. Rep. 823; *Brull v. Northwestern Mut. Relief Ass'n*, 72 Wis. 433, 39 N. W. 529. It embraces not only the contract in the case, but the breach of it also. In this case it is something more than the contract entered into by the defendant. It includes the furnishing of the materials by J. G. Strait & Son to the E. H. Denniston Company and the latter's failure to pay for the same. Without these facts being shown, no breach of defendant's contract appears, and no right of action exists against it. As before seen, the second count alleges that the E. H. Denniston Company was doing business in this state, and that these materials were furnished it by J. G. Strait & Son at Burlington. These allegations show a contract made in this state, and one of which our courts have jurisdiction. *Osborne & Woodbury v. Shawmut Ins. Co.*, 51 Vt. 278; *Stramburg v. Heckman*, 44 N. C. 250.

The plea contains no direct and positive denial of the facts thus alleged. An inferential or argumentative denial is not sufficient. *Sumner v. Sumner*, 36 Vt. 105; *Morse v. Nash*, 30 Vt. 76. To meet the requirements of good pleading, the plea must negative every fact from which jurisdiction may be presumed. *Martin*, Civil Procedure, 209; *Diblee v. Davison*, 25 Ill. 486. The highest degree of certainty is required in pleas of this character, and all defects may be reached by general demurrer. *Gould's Pl. c. 3, §§ 57-59*; *Id. c. 9, § 12*; *Leonard v. McArthur*, 52 Vt. 439; *Diblee v. Davison*, above cited; *Landon v. Roberts*, 20 Vt. 286. In *Cunning-*

ham v. Caldbeck, 63 Vt. 91, 20 Atl. 974, it was in effect held that pleas to the jurisdiction are not required to have the same technical strictness as pleas in abatement. Clearly such is not the true doctrine of dilatory pleading, and in this regard that case is overruled.

Since part of the cause of action arose at Burlington, in this state, the county court in which this action was brought has jurisdiction of the cause of action. In *Ilderton v. Ilderton*, 2 Black. H. 145, in discussing the question of jurisdiction and of laying venue of matters transitory arising in a foreign country, Lord Chief Justice Eyre said: "Of matters arising in a foreign country, pure and unmixed with matters arising in this country, we have no proper original jurisdiction; but of such matters as are merely transitory, and follow the person, we acquire a jurisdiction by the help of that fiction to which I have alluded, and we cannot proceed without it; but if matters arising in a foreign country mix themselves with transactions arising here, or if they become incidents in an action, the cause of which arises here, we have jurisdiction. * * * In the very infancy of commerce, and in the strictest times, as I collect from a passage in *Brooke, Trial*, pl. 93, the cognizance of matters arising here was understood to draw to it the cognizance of all matters arising in a foreign country which were mixed and connected with it, and in these days we should hardly hesitate to affirm that doctrine." In *Jackson v. Spittall*, L. R. 5 O. P. 542, the contract in question was made in the Isle of Man. The breach took place in Manchester, England. There the question of jurisdiction was controlled by statute, but the proper construction of that statute was in question. In deciding this point the court, seeking aid by considering what the law was at the time the statute passed, quoted with approval the law above given laid down by his Lordship in *Ilderton v. Ilderton*, with the further statement that there was no trace of any objection ever having been maintained, on the ground that in a transitory action there was no jurisdiction, unless every fact necessary to be proved in order to support the action occurred within the jurisdiction. In *Foot v. Edwards*, 3 Blatchf. 310, Fed. Cas. No. 4,906, the action was brought in the Circuit Court of the United States for Connecticut to recover damages for an injury to the plaintiff's mill property, situate in Massachusetts, by the diversion of the stream of water upon which it stood; the act of defendant causing the diversion having been committed in Connecticut. The case stood on demurrer to the declaration. The court (*Ingersoll, J.*) said that when the action is brought in the federal court it must be tried in the state and district where the cause of action arose. It was held that the wrongful diversion of the water in Connecticut, united with the consequent damage which the

plaintiff's mill in Massachusetts sustained, constituted the cause of action; and that, as a part of it essential to the plaintiff's right of recovery took place in Connecticut, without which there would be no good cause of action, the court had jurisdiction. The same principle obtains at common law, where the cause of action includes two or more material things in several counties. Lord Comyns says: "When an action is founded upon two things in different counties, both material to the maintenance of the action, it may be brought in the one county or the other; as if a servant be retained in one county and depart into another, an action lies in the one or the other." Comyns' Dig. tit. Action, note 11. The same doctrine is laid down in *Bulwer's Case*, 7 Co. 1; *Scott v. Brest*, 2 T. R. 238; *Mayor, etc., of London v. Cole*, 7 T. R. 583; *Gregson v. Heather*, 2 Str. 727; *Barden v. Crocker*, 10 Pick. (Mass.) 383.

As far as the jurisdiction of the course of action is concerned, we might rest the case here; but another element of strength is given by considering the domicile of the plaintiff. It is true this suit was brought for the use and benefit of J. G. Strait & Son. Yet the United States was the principal party to the contract on which the action is brought, has an interest in the performance of all its provisions, and has the legal right. Hence, in actions like this, to enforce the specific obligation of the contractor contained in the bond for the protection of those who have furnished labor or materials in the prosecution of the work specified, the controversy is between the government and the contractor in respect of that matter, and the United States is not merely a nominal party, as argued by the defendant, but the real plaintiff. *United States Fidelity & G. Co. v. United States*, 204 U. S. 349, 27 Sup. Ct. 381.

Regarding the United States as a debtor, it is held that debts due from the government have no locality at the seat of government, and that the administrator of a creditor of the government, duly appointed in the state where he was domiciled at his death, has full authority to receive payment and give full discharge of the debts to his intestate, in any place where the government may choose to pay it; and that moneys so received constitute assets under that administration, to be accounted for and distributed in the same manner as other debts due the intestate in the state of his domicile. In the language of Mr. Justice Story: "The United States, in its sovereign capacity, has no particular place of domicile, but possesses, in contemplation of law, an ubiquity throughout the Union." *Vaughn v. Northup*, 15 Pet. 1, 10 L. Ed. 639; *United States v. Cox*, 18 How. 100, 15 L. Ed. 299; *Wyman v. United States*, 109 U. S. 654, 3 Sup. Ct. 417, 27 L. Ed. 1068. We think the United States as a creditor has the same ubiquitous character, and that in contemplation of law in the bringing of

this suit it was domiciled in the jurisdiction of the court to which the suit was brought. This case is distinguishable from that of *Sawyer v. North American Life Ins. Co.*, 48 Vt. 697, on which the defendant relies. There both parties to the contract resided out of this state. The contract was not made, nor was it to be performed, in the state. No part of the cause of action on which the suit was brought was within the state, and neither of the parties to the suit was situated or resident here.

The question of jurisdiction of the defendant is not within the plea; hence not considered.

The bond declared upon was given under the provisions of an act of Congress entitled "An act for the protection of persons furnishing materials and labor for the construction of public works," approved August 13, 1894 (chapter 280, § 1, 28 Stat. 278 [U. S. Comp. St. 1901, p. 2523]), the same act under consideration in *United States v. United States Fidelity & Guaranty Co.*, 78 Vt. 445, 63 Atl. 581. It was there held that, since Congress had not given the federal courts exclusive jurisdiction of actions arising by virtue of that act, the jurisdiction was not so restricted, and such actions could be tried and determined in the state courts. It is claimed, however, that by the amendatory act, approved February 24, 1905 (chapter 778, 33 Stat. 811 [U. S. Comp. St. Supp. 1905, p. 493]), the exclusive jurisdiction is given to the Circuit Courts of the United States, without any saving clause, and that thereby the jurisdiction of the state court to hear and determine the matters involved in this case is taken away. In construing the latter statute a consideration of the consequences will be had. This is allowable as a principle of construction when the meaning is doubtful. *State v. Franklin Co. Sav. Bank & Trust Co.*, 74 Vt. 246, 52 Atl. 1069; *In re Sammon*, 79 Vt. —, 65 Atl. 577. The new act does not deal with practice and procedure only, as did the one under consideration in *Murray v. Mattison*, 63 Vt. 479, 21 Atl. 532, cited by defendant, and the one involved in *Johnson v. Smith*, 78 Vt. 145, 62 Atl. 9, 2 L. R. A. (N. S.) 1000. Under the act of 1894, any person who had furnished labor or materials in the prosecution of the work provided for in the contract with the United States for which payment had not been made was authorized at any time, either before or after the completion of the work under that contract, to bring suit on the bond in the name of the United States for his use and prosecute the same to final judgment and execution, and thereby receive full payment of his claim to the extinguishment of the amount due on the bond, if necessary, without being subject by provisions of the statute to any priority of claim of the government, and without being obliged to prorate the judgment with other creditors. While under the

new enactment the creditors must take advantage of its provisions, if at all, in one of two ways: First, as interveners if suit be brought by the United States, in which case their rights are subject to priority of claim of the government, and then if the amount of liability of the surety on the bond is not sufficient to pay in full all such creditors they stand on a basis of proportional distribution among themselves; secondly, if suit be not brought by the government within six months from the completion and final settlement of the contract with it, then within one year after the performance and final settlement thereof one may be instituted on the bond by a creditor or creditors in the name of the United States, in the Circuit Court of the United States in the district in which said contract was to be performed and executed, and not elsewhere, for his or their benefit, and prosecuted to final judgment and execution—any creditor may file his claim in the suit so brought and be made party thereto within one year from the completion of the work under said contract, and not later. When the suit is by a creditor or creditors, only one action shall be brought, and if the recovery on the bond should be inadequate to pay the amounts found due to all of said creditors, judgment shall be given to each creditor pro rata of the amount of recovery.

The provisions of the law of 1894 entered into and formed a part of defendant's contract, as if they were expressly referred to or incorporated in its terms. This is so alike as to those provisions which affect its validity, construction, discharge, and enforcement. *King v. Cochran*, 76 Vt. 141, 56 Atl. 667, 104 Am. St. Rep. 922; *F. R. Patch Mfg. Co. v. Capeless* (Vt.) 63 Atl. 938; *United States v. Quincy*, 4 Wall. (U. S.) 535, 18 L. Ed. 403; *Walker v. Whitehead*, 16 Wall. (U. S.) 314, 21 L. Ed. 857. Thus whether a person who has furnished labor or materials intervenes in an action brought by the government, or institutes proceedings himself, under the amendatory act, the remedy is less adequate and efficacious than that afforded by the provisions of the former law. In addition thereto, if necessary for such person to prosecute the action, he is obliged to await the expiration of a specified time before commencing it, and is allowed a period of six months thereafter in which to do so. The former act contains no provision of this nature. Prior to the new enactment the plaintiff acquired vested rights in defendant's contract, and in the means of enforcing it according to the statute which entered into and became a part of it. Clearly, if the new act is retrospective, it is an impairment of substantial rights secured by that contract. In *Walker v. Whitehead*, before cited, in discussing the constitutional prohibition upon the states, the court, speaking through Mr. Justice Swayne, said: "Nothing is more

material to the obligation of a contract than the means of its enforcement. The ideas of validity and remedy are inseparable, and both are parts of the obligation which is guaranteed by the Constitution against impairment. The obligation of a contract 'is the law which binds the parties to perform their agreement.' Any impairment of the obligation of a contract, the degree of impairment is immaterial, is within the prohibition of the Constitution. The states may change the remedy, provided no substantial right secured by the contract is impaired. Whenever such a result is produced by the act in question, to that extent it is void. The states are no more permitted to impair the efficacy of a contract in this way than to attack its validity in any other manner. * * * It must be left with the same force and effect, including the substantial means of enforcement which existed when it was made." That case was brought in the state court of Georgia to recover on a certain promissory note. Subsequent to the giving of the note, a statute, retrospective in character, was passed, providing that, in suits founded on any debt or contract made before an earlier date named, it should not be lawful for the plaintiff to have a verdict or judgment, unless it be made to appear that the debt had been regularly given for taxes, and that all legal taxes chargeable by law upon the same had been paid for each year after the making of the debt or contract. It was held to be a clear case of law impairing the obligation of a contract. In *McGahey v. State of Virginia*, 135 U. S. 662, 10 Sup. Ct. 972, 34 L. Ed. 304, the question was whether the acts of the Legislature of that state, which required the production of the bond in order to establish the genuineness of the coupons, and prohibiting expert testimony to prove the coupons, were or were not repugnant to the federal Constitution. The court, by Mr. Justice Bradley, said: "It is well settled by the adjudications of this court that the obligation of a contract is impaired, in the sense of the Constitution, by any act which prevents its enforcement, or which materially abridges the remedy for enforcing it, which existed at the time it was contracted, and does not supply an alternative remedy equally adequate and efficacious." It was held that the requirement of the production of the bonds for the purpose named was unconstitutional; so, also, the prohibition of expert testimony to establish the genuineness of the coupons, as it took from the holder of such instruments the only feasible means in his power to establish their validity. See, also, *Polindexter v. Greenhow*, 114 U. S. 270, 5 Sup. Ct. 903, 29 L. Ed. 185; *Edwards v. Kearzey*, 96 U. S. 595, 24 L. Ed. 793; *Louisiana v. Pillsbury*, 105 U. S. 278, 26 L. Ed. 1090. These decisions are controlling that the obligation of the contract in suit was directly impaired by the amendatory act, if

retrospective; but as the express inhibition of the organic law in this respect has reference only to the states, we will consider whether to enact a statute of such character is within the power of Congress.

It has long been established that the government of the United States has no powers which are not expressly or by necessary implication granted to it by the Constitution. *Marbury v. Madison*, 1 Cranch (U. S.) 137, 2 L. Ed. 60; *Martin v. Hunter's Lessee*, 1 Wheat. (U. S.) 305, 4 L. Ed. 97. Congress has express power to enact bankrupt laws directly impairing the obligation of contracts, and it may pass laws in the execution of other powers expressly given, which incidentally have that effect. *Legal Tender Cases*, 12 Wall. (U. S.) 457, 20 L. Ed. 287; *Mitchell v. Clark*, 110 U. S. 638, 4 Sup. Ct. 170, 28 L. Ed. 279. Other than this it has no constitutional power to impair or destroy vested rights, for its power to enact laws is limited to such as "shall be necessary and proper to carry into execution" the powers of the government." Measures adopted by it which are prohibited by the Constitution, and those passed which are not within the proper attributes of legislative power, are alike opposed to the Constitution and void. *Cooley*, Const. Lim. 242-245; *McCulloch v. Maryland*, 4 Wheat. (U. S.) 316, 4 L. Ed. 579. In *Osborn v. Nicholson*, 13 Wall. (U. S.) 654, 20 L. Ed. 680, the plaintiff declared upon a promissory note made to him by the defendants, dated March 26, 1861, and payable on the 26th day of December following. A plea was interposed that the note was given in consideration of the conveyance of a negro slave, with a warrant that he was a slave for life; and that on January, 1862, the negro was liberated by the United States government, etc. The case stood on demurrer to the plea. It was held that, since the contract was good when made, it was enforceable, and that vested rights therein were not disturbed by the adoption of the thirteenth amendment of the Constitution of the United States, prohibiting the existence of slavery within the federal dominions. Thereon the court, speaking through Mr. Justice Swayne, said: "But without considering at length the several assumptions of the propositions, it is a sufficient answer to say that, when the thirteenth amendment * * * was adopted, the rights of the plaintiff in this action had become legally and completely vested. Rights acquired by deed, will, or contract of marriage, or other contract executed according to statutes subsequently repealed, substat afterwards, as they were before, in all respects as if the statutes were still in force. This is a principle of universal jurisprudence. It is necessary to the repose and welfare of all communities. A different rule would shake the social fabric to its foundations and let in a floodtide of intolerable evils. It would be contrary to 'the general principles of law and reason,' and to one of the most

vital ends of government. *Calder v. Bull*, 3 Dall. (U. S.) 388, 1 L. Ed. 648. The doctrines of the repeal of statutes, and the destruction of vested rights by implication, are alike unfavored in the law. Neither is to be admitted unless the implication is so clear as to be equivalent to an explicit declaration. Every doubt should be resolved against a construction so fraught with mischiefs." In *Farrington v. Tennessee*, 95 U. S. 679, 24 L. Ed. 558, the same learned justice, again speaking for the court, declared the doctrine of the sacredness of vested rights to have its root deep in the common law of England. In *Dash v. Van Kleeck*, 7 Johns. (N. Y.) 477, 5 Am. Dec. 291, Chief Justice Kent, discussing the principle, shows it to be ancient alike in the common and in the civil law, saying: "It is a principle in the English common law, as ancient as the law itself, that a statute even of its omnipotent Parliament is not to have a retrospective effect"—and that in the civil law it is laid down "that a lawgiver cannot alter his mind to the prejudice of a vested right." See, also, *Johnson v. Jones*, 44 Ill. 142, 92 Am. Dec. 159; *Hubbard v. Brainard*, 35 Conn. 563; *People v. Morris*, 13 Wend. (N. Y.) 825. Furthermore, vested rights are property, to take away or impair which is prohibited the government by the fifth amendment of the Constitution. *Osborne v. Nicholson*, before cited.

In view of these well-settled principles of the organic and of the fundamental law, it seems unreasonable to suppose that Congress did not intend that the amendatory act should be construed with reference to them, thereby avoiding the unjust consequences which would follow a retrospective operation. Indeed, the rule is that a statute should not be construed to act retrospectively, or to affect contracts made prior to its enactment, unless its language is so clear as to admit of no other construction. The presumption is that it was intended to act prospectively only. *City Ry. Co. v. Citizens' Street R. R. Co.*, 166 U. S. 557, 17 Sup. Ct. 653, 41 L. Ed. 1114; *Southwestern Coal & Improvement Co. v. McBride*, 185 U. S. 490, 22 Sup. Ct. 763, 46 L. Ed. 1010. In the latter case the court, speaking through Mr. Justice White, said: "While, in the absence of a constitutional inhibition, the Legislature may give to some of its acts a retrospective operation, the intention to do so must be clearly expressed or necessarily implied from what is expressed; and, assuming the Legislature to possess the power, its act will not be construed to impair or destroy a vested right under a valid contract, unless it is so framed as to preclude any other interpretation." In *City of Montpelier v. Senter*, 72 Vt. 112, 47 Atl. 302, it is said: "Retrospective legislation is not favored, * * * being highly injurious, oppressive, and unjust; and nowhere will retrospective effect be given to a statute, unless it appears that it was the intent of the Legislature that it should have such effect. When

such effect would impair a right or do a wrong, it will not be given. * * *" See, also, *Hine v. Pomeroy*, 39 Vt. 211; *Sturgis v. Hull*, 48 Vt. 302.

It does not appear from the amendatory act that it was intended by Congress to have retrospective force, nor is its language such as to admit of no other construction. We therefore hold the act not retrospective, and that it did not defeat the jurisdiction of the state court in which this suit was pending. This holding is strongly inferentially supported by *United States Fidelity & G. Co. v. United States*, before cited. That action was originally brought in the federal circuit court upon a similar bond given under the provisions of the same act of Congress, passed in 1894. The question of original jurisdiction of that court was involved; the amount of damages claimed in the declaration being only \$500. It was there said that, as the act of 1905 does not refer to cases pending at its passage, the question of jurisdiction depends upon the law as it was when the jurisdiction of the court was invoked in that action.

Judgment affirmed, and cause remanded.

(80 Vt. 129)

ROBINSON v. ST. JOHNSBURY & L. C. R. CO.

(Supreme Court of Vermont. Caledonia. May 18, 1907.)

1. PLEADING—ACCORD AND SATISFACTION—RELEASE—DOUBLE PLEAS.

Where, in an action against a railroad for personal injuries through negligence, defendant alleged that plaintiff was a messenger of an express company and received his injuries in the performance of his duties; that defendant and the express company had a contract whereby defendant undertook to transport all express matter and messengers of the express company, the latter assuming all risk of accidents to the messengers, indemnifying defendant against all claims by its messengers for injuries; and that the express company, for the purpose of settling for and procuring a discharge of plaintiff's cause of action, made a payment to him that was received in full settlement of the cause of action, plaintiff executing in consideration of such payment a release of his claim under seal—the pleas are not double, the fact of satisfaction being a matter of inducement only.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, § 203.]

2. SAME.

When the fact relied on as a gist of the defense is but the consequence of another fact, or when one of them is a necessary or proper inducement of the other, both may be pleaded without making the plea double.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, § 203.]

3. CARRIERS—TRANSPORTATION OF EXPRESS MESSENGERS—STIPULATION AGAINST LIABILITY—VALIDITY.

A contract whereby a railroad company undertook to transport the express matter and messengers of an express company, the latter assuming all risk of accidents happening to its messengers and agreeing to indemnify the railroad company against all claims made by its messengers for injuries received, was valid.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, § 1252.]

2. SAME.

An express messenger, entering the employ of an express company with knowledge of a contract between the latter and a railroad company, whereby the railroad company was to transport the express company's express matter and messengers and to indemnify the railroad company against all claims for injuries received by messengers, must be held to have assented to the contract, but such assent was not a waiver of the messenger's right to assert the liability of the railroad company for injuries resulting to him through negligence.

5. RELEASE—OPERATION—PERSONS ENTITLED TO CLAIM BENEFIT.

Where an express messenger entered the service of an express company with the knowledge of a contract between the company and the railroad, whereby the latter was to transport the company's express matter and messengers, the express company to indemnify the railroad against claims for injuries through negligence, the railroad, in an action by the messenger for injuries, was entitled to plead in bar of plaintiff's suit a discharge of the express company for the injuries received.

6. CARRIERS—INJURY TO PASSENGERS.

The fact that an express messenger on entering the service of an express company had some knowledge of an arrangement with the railroad company covering his transportation did not charge him with knowledge of anything affecting his right of recovery against the railroad for injuries through negligence.

7. MASTER AND SERVANT—ASSUMPTION OF RISK.

An express messenger accepting employment from an express company requiring him to work on the railroad's trains assumed, as regards his employer, the risks incident to transportation.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 550.]

Exceptions from Caledonia County Court.

Action by Charles H. Robinson against the St. Johnsbury & Lake Champlain Railroad Company. Judgment for defendant, and plaintiff excepted. Affirmed.

Argued before ROWELL, C. J., and TYLER, MUNSON, WATSON, HASELTON, and POWERS, JJ.

J. P. Lawson and Dunnett & Slack, for plaintiff. Harry Blodgett and Young & Young, for defendant.

MUNSON, J. The plaintiff sues to recover damages for injuries sustained through the negligence of the defendant while he was riding upon defendant's road. The pleas allege that the plaintiff was a messenger of the American Express Company, and that his injuries were received while he was in the performance of his duties as such messenger; that the two companies had a contract by which the defendant company undertook to transport the express matter and messengers of the express company, and the express company assumed all risk of accidents happening to its messengers, and indemnified the defendant company against all claims made by its messengers for injuries received; and that the express company, for the purpose of settling for and procuring a discharge of the plaintiff's cause of action, made a payment to the plaintiff, which was received in full settlement, satisfaction, and

discharge of said cause of action, and that, in consideration of said payment, the plaintiff executed to the express company a release and discharge of his claim under seal. The pleas are demurred to generally, and specially for that they are double, in that they set forth an accord and satisfaction and a release under seal.

It is true that a release is a complete defense, and that a seal imports a consideration; and, if the allegation of the payment and receipt of a certain sum in satisfaction and discharge of the claim is to be treated as the pleading of an accord and satisfaction, the pleas are double. But we think the fact of satisfaction as here presented is matter of inducement only. The pleas allege that the payment was made for the purpose of procuring a discharge and was the consideration of the release given, and conclude with an averment that the causes of action set up in the declaration are the identical causes discharged by the release. The allegations are all confined to a single transaction culminating in the release, and point to the release as the defense relied upon. When the fact relied on as the gist of the defense is but the consequence of another fact, or when one of them is a necessary or a proper inducement to the other, both may be pleaded without making the plea double. Gould, Pl. (4th Ed.) c. 8, § 12; Robinson v. Raley, 1 Bur. 316. The facts may be multifarious; yet, if they all go to make up one entire result, and require but one answer, there is no duplicity. Torrey v. Field, 10 Vt. 353, 412. The facts alleged may disclose two defenses; but, if so alleged as to show that but one is relied upon, the plea will not be double. See Raymond v. Sturges, 23 Conn. 146. The defendant claims, in the first place, that the contract between it and the express company is a valid contract, and that the plaintiff's relations to it are such that he is bound by it. The plaintiff claims that the case is controlled in this respect by Sprigg's Adm'r v. Rutland R. R. Co., 77 Vt. 347, 60 Atl. 143. It was held in that case to be against public policy for a common carrier to stipulate for indemnity against its own negligence in respect of its carriage of a passenger for hire, and that a caretaker accompanying a shipment of cattle under a contract with the railroad company, based upon the same consideration as the contract of shipment, is a passenger for hire. So the determinative inquiry here will be whether the plaintiff was a passenger for hire. The decision in Sprigg's Adm'r v. Rutland R. R. Co. is in accord with the holding of the United States Supreme Court in N. Y. Central R. R. Co. v. Lockwood, 17 Wall. (U. S.) 357, 21 L. Ed. 627. In Baltimore & Ohio, etc., R. R. Co. v. Voight, 176 U. S. 498, 20 Sup. Ct. 385, 44 L. Ed. 560, that court, while recognizing and affirming the doctrine of the Lockwood Case, held that an express messenger, occupying an express car under a contract

substantially like the one set up in these pleas, was not a passenger for hire. The plaintiff insists that the reasoning upon which the court distinguished the Voight Case from the Lockwood Case is unsound, and that this court ought not to adopt it. The discussion in the Voight Case is based upon the nature of the business done by express companies and the relations sustained by those companies to the railroad companies giving them transportation, as set forth and judicially recognized in the Express Cases, 117 U. S. 1, 6 Sup. Ct. 542, 628, 29 L. Ed. 791. It is said that railroad companies and express companies are both common carriers of the public, but that the railroad company does not sustain that relation to the express company; that the right of an express company to the kind of transportation afforded it depends solely upon private contract; that an express messenger receives transportation as an incident of his permanent employment by the express company, and not by virtue of any right which he or his employer is entitled to demand. Any brief summary of the opinion would be inadequate, and the case should be referred to for the full discussion. The same position has been taken by several of the state courts. *Bates v. Old Colony R. R. Co.*, 147 Mass. 255, 17 N. E. 633; *Louisville, etc., Ry. Co. v. Keefer*, 146 Ind. 21, 44 N. E. 796, 33 L. R. A. 93, 58 Am. St. Rep. 348; *Blank, Jr., v. Illinois Central R. R. Co.*, 182 Ill. 332, 55 N. E. 332. We are not disposed to reject the theory of the United States Supreme Court as to the relation which the companies sustain to each other; and, if we proceed upon that theory, the points of difference between the Sprigg Case and this are manifest, and of controlling significance. If the drover were not the shipper of his own cattle, but one recognized by the law as a common carrier of the cattle of others; if he provided special cars and servants of his own for the transportation and care of the cattle of all persons who desired to ship them, and had an established schedule for the regular and constant service of the cattle-owning public; if the railroad companies had yielded to him all that part of their business as common carriers of freight, and had undertaken by special contract to draw his cars, giving them the special advantages required by the nature of the business as thus established, and it were then held that the drover's servant was a passenger for hire—it could be urged with greater force that the holding should control a case like this. It is evident that an express messenger cannot be classed with the caretaker of a private shipper. He receives, holds, and delivers express matter in the performance of his employer's duty as a common carrier for the public. His business and his relations to the train service are substantially the same as those of the railroad baggage master. The two are under different employers, and doing a divided

work, because in the development of transportation facilities a certain field of service has been divided between two classes of common carriers. We think the distinction made between the Lockwood and Voight Cases stands upon good ground, and that the same distinction should be made between the Sprigg Case and this. It follows that this case is not within the rule which forbids a railroad company to stipulate against its liability, and that the contract between the two companies is a valid one.

We are next to inquire what bearing this contract has upon the rights of the plaintiff. None of the pleas allege in terms that the plaintiff assented to the contract, and only part of them allege that he had knowledge of it. The plaintiff contends that his rights cannot be affected by an agreement to which he did not assent. But we think the plaintiff must be held to have assented to the contract when he accepted the service with knowledge of its provisions. It is not to be assumed, however, that this knowledge and assent amounted to a waiver of the plaintiff's right to assert the liability of the railroad company. There is nothing in the terms of this contract that imports a waiver of the messenger's right to compensation. In most of the cases involving contracts of this character there was a further agreement on the subject between the messenger and the express company, and the question was whether the messenger could recover notwithstanding this agreement. Here the question is whether the right of recovery has been cut off by a release, and the plaintiff's knowledge of the contract is important only for its bearing on the effect of the release. We think the defendant can plead the plaintiff's discharge of the express company in bar of the plaintiff's suit because of this contract. Under the contract the ultimate liability for any damage sustained by the plaintiff through the negligence of the defendant rested upon the express company. So payment by the express company, even if that company was in no way liable to the plaintiff, would not be payment by a stranger, but by one who had the right to pay in behalf of the defendant for its own protection. This being the situation, the action of the plaintiff in obtaining satisfaction from and discharging the express company must be held to have been taken in view of the relations subsisting between the two companies, and to have inured to the defendant's benefit. The first, third, fifth, and seventh special pleas are held sufficient on this ground.

It remains to consider the pleas which contain no averment of knowledge. It was held in *Brewer v. New York, etc., R. R. Co.*, 124 N. Y. 59, 26 N. E. 324, 11 L. R. A. 483, 21 Am. St. Rep. 647, that an express messenger cannot be deprived of his remedy against the railroad company by an agreement of his employer made without his knowledge or assent. The Indiana court reviewed this case

in Pittsburgh, etc., *R. R. Co. v. Mahoney*, 148 Ind. 196, 46 N. E. 917, 47 N. E. 464, 40 L. R. A. 101, 62 Am. St. Rep. 503, and reached a different conclusion. It was there considered that the express company's rights upon the train were measured by the contract, and that the rights of the messenger could be no greater than those of the company; that the messenger could not avail himself of the right of transportation without accepting the conditions upon which it was granted; that, inasmuch as the contract was the basis of his right, it was his duty to inform himself of its terms; and that he was thus charged with knowledge of the provision limiting the railroad company's liability. We are not willing to adopt this view. It may well be said that the messenger of an express company, who rides without paying fare or having any arrangement of his own, must understand that he is carried under some arrangement between his employer and the railroad company. But it by no means follows that this charges him with the duty of inquiring what that arrangement is. He had no reason to suppose that his personal rights are involved in the doing of his employer's work in the place where his employer has put him. There is nothing connected with his presence upon the train that is inconsistent with the status of one entitled to the benefit of the law of negligence. He is rightfully there, rendering for his employer a service from which the railroad company derives a benefit, under some contract which might as easily have provided for his transportation by an allowance to the company as by a release from liability for damages. He may well suppose that his transportation is covered by some provision which bears only upon the rights of the contracting parties. He is not called upon to inquire whether his employer, in adjusting its relations with the railroad company, has undertaken to limit his individual rights. So the understanding that there is some arrangement covering his transportation does not charge him with knowledge of anything affecting his right of recovery. It follows that the second, fourth, and sixth special pleas are not sustainable on the ground considered. The eighth, although not alleging knowledge, sets up a direct release of the defendant, and is not specially questioned.

We have taken up these questions in the order in which they are presented in defendant's brief, and have passed upon them as presented, although the disposition of other points made by the defendant may render the decision of these unnecessary. The examination of the remaining questions will require a further reference to the pleadings.

The discharge set forth in the first six special pleas is, in substance, that the plaintiff, in consideration of a sum paid him by the American Express Company, released and discharged that company from every cause of action he had against it, and particularly

from a claim on account of injuries received in the accident at Greensboro. It is also alleged, in substance, that the plaintiff demanded compensation from the express company for the injuries described in the declaration before such payment was made, and that the cause of action mentioned in said release is the one declared upon. The declaration sets up an undertaking and duty of the defendant, to transport the plaintiff in one of its cars, and a negligence in the performance thereof, causing a collision between the car in which the plaintiff was riding and another car of the defendant, whereby the plaintiff was thrown upon the floor of the car and an iron safe cast upon him. The defendant claims, further, that the release to the express company discharged both companies because the two were joint tortfeasors. It is argued that it was the duty of the express company to furnish the plaintiff a safe place in which to work, and that, as the plaintiff's work was to be done in a moving car, this duty included the providing of safe transportation, so that the express company was chargeable with negligence if there was a shortage of duty in this respect on the part of the defendant. But the safe-place doctrine is not applicable when the duty of the employé requires him to work in a place which is not in the possession and control of his employer. *Channon v. Sanford Co.*, 70 Conn. 573, 40 Atl. 462, 41 L. R. A. 200, 66 Am. St. Rep. 133. The express company had no control of the tracks or trains of the defendant. In accepting an employment which required him to work on defendant's trains, the plaintiff assumed, as regards his employer, the risks incident to the transportation. It is claimed in conclusion that if the express company was not liable, or if the express company and the defendant company are not joint tortfeasors, the effect of the discharge will nevertheless be the same. This claim is based upon the theory that satisfaction is a bar, from whatever source it comes. The rule that a discharge of one discharges all, as applied to cases of joint liability, is of ancient origin and universal recognition. A few instances of its application are found in our own cases. A release to one of several joint debtors or joint trespassers is a release of all. This is upon the ground that there is one demand against all, and that that demand is satisfied. *Brown v. Marsh*, 7 Vt. 320. Full payment by one who is jointly liable with others in a discharge of all; and a release, being an instrument under seal, conclusively imports full payment. *Eastman v. Grant*, 34 Vt. 387. One injured by the concurrent negligence of two may recover against either; but can have only one satisfaction. *Dufur v. Boston & Maine R. R.*, 75 Vt. 165, 53 Atl. 1068. In the case last cited the declaration disclosed a joint liability of the defendant and one Allen, and it was pleaded that plaintiff had given Allen a release of the cause of action. It is said

in the opinion: " * * * To defeat the action, the defendant must allege facts showing that it was not liable, or that it and Allen were jointly liable, and that the plaintiff released Allen from such liability. If Allen was never liable, then the release given him did not affect the defendant's liability. In that case the payment by Allen would be the act of a stranger to the cause of action." This statement in the Dufur opinion is entirely consistent with our previous cases, and with the great majority of cases decided elsewhere; for their holding is based on the relations which those connected with the affair in question sustained to the transaction and to each other, which impliedly excludes the act of a stranger from the scope of the decisions. But the effect of a payment by or release to a stranger has not been directly considered in this state. The statement in the Dufur Case, although the basis of the argument, was not essential to the decision. So the question presented is an open one; and, as we shall see upon further inquiry, the trend of recent decision invites a careful examination of the authorities. The inquiry will include cases of contract, as well as cases of tort, for it is held that the effect of a release is the same in both. 1 Pass. Can. 28; Mathews v. Lawrence, 1 Denio (N. Y.) 213, 43 Am. Dec. 665; Turner v. Hitchcock, 20 Iowa, 310, 323. Cases of payment, accord and satisfaction, and release are all material to the inquiry; for all are cases of satisfaction in different forms. Payment is full satisfaction, an executed accord involves the acceptance of something as satisfaction, and a release is a conclusive acknowledgment of satisfaction. Note, 100 Am. St. Rep. 391; Ayer v. Ashmead, 31 Conn. 447, 83 Am. Dec. 154; Eastman v. Grant, 34 Vt. 387. It was held in Grymes v. Blofield, 5 Cro. Elliz. 541, that a satisfaction of the condition of a bond by a stranger to the obligation was no bar. The authority of this case was questioned by counsel in Edgecombe v. Rodd, 5 East, 294, but was clearly recognized by the judges, although the decision was mainly put on another ground. The case in Croke was followed by the Supreme Court of New York in Clow v. Borst, 6 Johns. (N. Y.) 37, decided in 1810, and several cases in that jurisdiction have since been disposed of on the same ground. Mathews v. Lawrence, 1 Denio (N. Y.) 212, 43 Am. Dec. 665; Bleakly v. White, 4 Paige (N. Y.) 654; Daniels v. Hallenbeck, 19 Wend. (N. Y.) 408; Atlantic Dock Co. v. Mayor, 53 N. Y. 64. The same view of the matter has been taken in other states. Stark v. Thompson, 8 T. B. Mon. (Ky.) 296; Armstrong v. School District, 28 Mo. App. 169, 180; Wardell v. McConnell, 25 Neb. 558, 41 N. W. 548; Missouri, etc., Ry. Co. v. McWhorter, 50 Kan. 345, 53 Pac. 135; Sieber v. Amaunson, 78 Wis. 679, 47 N. W. 1126; Thomas v. Central R. R. Co., 194 Pa. 511, 45 Atl. 344. The doctrine has been promulgated in various text-books as settled law.

It is said in the American note to *Cumber v. Wane*, in 1 Smith's Lead. Cas. 325 (3d Am. Ed.), in giving the essentials of a good accord and satisfaction, that one rule, "of no great practical value, is that the matter received in satisfaction must be given by the debtor, and not by a stranger." It is said in a note to 3 Bl. Com. 16 (Shars. Ed.), that "the satisfaction should proceed from the party who wishes to avail himself of it; for, when it proceeds entirely from a stranger, it will be a nullity." The present standing of the doctrine will be seen from a reference to further cases. In *Jones v. Bradhurst*, 9 C. B. 173, the accuracy of the reports and the subject-matter of the decisions were critically examined, but without passing upon the question. In *Belsham v. Bush*, 11 C. B. 191, a payment made and received for and on account of the defendant, and afterwards ratified by the defendant, was held a bar. In *James v. Isaacs*, 12 C. B. 791, satisfaction from a stranger, without authority or ratification, was held insufficient. These cases were finally reviewed in *Simpson v. Eggington*, 10 Exch. 844, where it was concluded that payment or satisfaction by a third person, not himself liable as a co-contractor or otherwise, is not sufficient to discharge a debtor unless it is made by such third person "as agent for and on account of the debtor, and with his prior authority or subsequent ratification." In *Leavitt v. Morrow*, 6 Ohio St. 71, 67 Am. Dec. 334, the court disregarded the precedents, and held that an accord and satisfaction accepted in discharge of a debt, although coming from a stranger, is available in defense of an action against the debtor. In *Wellington v. Kelly*, 84 N. Y. 547, the court referred to *Grymes v. Blofield* as a case followed in that jurisdiction and not authoritatively overruled, and said: "We need not now determine whether it should any longer be regarded as authority."

The cases cited by defendant in support of its position are *Tompkins v. Clay Hill St. R. R. Co.*, 66 Cal. 163, 4 Pac. 1165; *Seither v. Philadelphia Traction Co.*, 125 Pa. 397, 17 Atl. 338, 4 L. R. A. 54, 11 Am. St. Rep. 905; *Hubbard v. St. Louis & Meramec River R. Co.*, 173 Mo. 249, 72 S. W. 1073; *Leddy v. Barney*, 139 Mass. 394, 2 N. E. 107. The first two are cases of crossing collisions between the cars of different companies. The third was a case of collision between an express delivery wagon and a street car. In these cases the injury resulted from an impact of forces controlled by two parties, and the situation afforded the basis of an honest claim against either. Neither was a stranger to the occurrence, and it could not be said without an inquiry that either was a stranger to the cause of action. These cases have generally been treated as within the joint tort-feasor doctrine, and the Pennsylvania case seems to have been so treated by the court which decided it; for it was cited in support of the defendant's contention in

Thomas v. Central R. R. Co., 194 Pa. 511, 45 Atl. 344, and it was nevertheless held that the court properly excluded the release of one not shown to have been liable. With these cases may be classed *Metz v. Soule*, 40 Iowa, 236, where an inmate of the state prison was injured by defective machinery furnished by the contractors entitled to his service while he was working near it, after protest, under compulsion of an agent of the state; and *Brown v. Cambridge*, 3 Allen (Mass.) 474, where a waterworks company made and left an excavation in a street which the city was bound to keep in repair. In neither case was the releasee a stranger to the situation that caused the accident. In this connection reference may be had to *Chapin v. Chicago, etc., R. R. Co.*, 18 Ill. App. 47, where the injury resulted from a collision between the trains of two roads, and it was considered that the question whether the companies were joint tort-feasors was not important, inasmuch as the circumstances were such that an action would have lain against either. See, also, in further presentation of the subject, *Hartigan v. Dickson*, 81 Minn. 284, 83 N. W. 1091; *Western Tube Co. v. Zang*, 85 Ill. App. 63; *Kentucky, etc., Bridge Co. v. Hall*, 125 Ind. 220, 25 N. E. 219; *O'Shea v. New York, etc., R. R. Co.*, 44 O. O. A. 601, 106 Fed. 559. In *Leddy v. Barney*, 189 Mass. 294, 2 N. E. 107, the remaining case cited by the defendant, the parties were fellow employes—the plaintiff as a common laborer and the defendant as superintendent—and the evidence tended to show that the plaintiff was injured in the moving of a derrick by the carelessness of the defendant. The defense was a release taken by the employer. Of the cases cited this is most like the one at bar, for in both these cases the releasee was, in a sense, involved in the occurrence, but was not connected with the injury. In the *Leddy Case* the releasee employed the defendant as superintendent, but there was no evidence tending to show that he was negligent in selecting the defendant for that position, or that the defendant was in fact incompetent. Here the express company was the occupant of the car; but, if any circumstance in the occurrence as presented permits a supposition that the plaintiff's injuries may have been due in part to the negligence of the express company, there are no allegations to give it that effect. The instructions in the *Leddy Case* made the release a bar if it were found that the payment was made in settlement of the same claim, upon a demand made by the plaintiff, and to avoid a threatened suit; and the verdict for defendant was sustained. In disposing of the case it was said that the effect of releasing a cause of action does not depend upon the validity of the claim, and that the rule that a release to one of several persons liable releases all applies to a release given to one against whom a claim is made, although he may not be in fact

liable. It is doubtless true that a discharge will not be made ineffective by proof that the party procuring it was not in fact liable. But this is not equivalent to saying that the release of an entire stranger to the transaction will bar a suit against persons who are liable. One may be a stranger to the cause of action as disclosed by the pleadings or determined by the inquiry, and not be a stranger to the occurrence out of which the cause of action arises. A claim against one whose connection with the affair is such that he may be liable is not the same as a claim against one whom there is no ground for claiming to be liable, and the effect to be given to a payment in the two cases is not necessarily the same.

The defendant also cites the remark of Judge Miller in *Lovejoy v. Murray*, 3 Wall. (U. S.) 1, 18 L. Ed. 129, that "when the plaintiff has accepted satisfaction in full for the injury done him, from whatever source it may come, he is so far affected in equity and good conscience that the law will not permit him to recover again for the same damages." It may also be noted that in *Dufur v. Boston & Maine R. R. Co.*, before cited, it is said that the injured party can have but one satisfaction. The same statement may be found in a great number of cases which were reasoned out and disposed of on the joint tort-feasor doctrine, the argument and learning of which were entirely superfluous if payment by one who is a stranger in the broader sense is a satisfaction. The explanation seems to be that payment by a stranger has not been considered a satisfaction, but a payment regarding which questions of fraud, duress, voluntary payment, liability of repayment, and equitable relief might arise after suit brought or collection enforced against the one upon whom rested the duty of payment. *Bleakly v. White*, 4 Paige (N. Y.) 654; *Stark v. Thompson*, 3 T. B. Mon. (Ky.) 296. Manifestly the effort of recent decision has been to bring the parties in these anomalous cases into the relations which have always been considered necessary to support a recovery by finding in their acts certain elements not recognized by the earlier adjudications. The making of a demand is treated as giving the payor the necessary status as far as the claimant is concerned. It is considered that in acceding to the demand the payor puts himself in the position of one who is liable or who assumes to act for one liable. The pleading of the release by one subsequently sued is treated as a seasonable ratification of the settlement. If these views regarding the settlement and the parties are accepted, the satisfaction does not come from a stranger. The case of *Jackson v. Pennsylvania R. R. Co.*, 66 N. J. Law, 319, 49 Atl. 730, 55 L. R. A. 87, a case not cited by defendant, merits special attention. The facts were almost identical with those before us. The plaintiff had acknowledged the receipt from the express company

of certain sums in full satisfaction and discharge of all claims for injuries received in a certain accident. There was a contract between the express company and the defendant, not disclosed to the plaintiff, by which the express company agreed to protect the defendant from all claims for damages sustained by its employes. It was considered that the payment was made for and on account of the defendant, that the settlement was recognized and adopted by the plea, and that the plaintiff was bound by the receipt and retention of the money.

Upon the case before us, the payment was made on plaintiff's demand, in settlement of the cause of action, by one who was in fact an indemnitor of the defendant, and whose act the defendant has ratified by pleading it. We hold all the pleas good on this ground. Nothing said in the previous discussion is to be taken as deciding more.

Judgment affirmed and cause remanded.

(30 Vt. 152)

TAYLOR v. VAIL

(Supreme Court of Vermont. Washington.
May 18, 1907.)

1. PRINCIPAL AND AGENT—TRANSACTIONS BETWEEN—VALIDITY—BURDEN OF PROOF.

Where defendant had the possession and management of testatrix's entire estate, and was her trusted adviser in all matters, his relation to her was confidential, and the burden is upon him to show, in order to sustain the validity of her assignments to him, that she was mentally competent, and did what she did without undue influence and with full knowledge of her property and of the nature and effect of her act.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Principal and Agent, § 172.]

2. SAME—ACCOUNTING BY AGENT—FINDINGS OF MASTER—VALIDITY OF TRANSFER TO AGENT BY PRINCIPAL.

In a proceeding where the validity of certain assignments executed by testatrix is questioned, the finding of the master that she was a person of strong mind, in possession of her faculties, and that the transaction was fully and particularly explained to her, amounts to a finding that she understood the nature and effect of the transaction and the amount and condition of her property.

3. ATTORNEY AND CLIENT—RIGHT OF ATTORNEY TO ACT FOR BOTH PARTIES.

Where defendant occupied a confidential relation toward testatrix, it was allowable for the lawyers who acted as advisers for her in a transaction with defendant to also act for defendant in drawing the necessary papers to effect their purpose, and in giving him the necessary advice for his protection.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 5, Attorney and Client, § 27.]

4. APPEAL—REVIEW—PRESUMPTIONS—ALL EVIDENCE CONSIDERED.

Where defendant occupied a confidential relation toward testatrix, in order to sustain the validity of a transaction between them, the master must affirmatively find, against the presumption to the contrary, that there was no undue influence on the part of defendant; but, where there is nothing to indicate that he did not consider the presumption in reaching his conclusion, it will be presumed on appeal that

he did, and the burden is on the excepting party to show that he did not.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3763.]

5. PRINCIPAL AND AGENT—ACCOUNTING BY AGENT—FINDINGS BY MASTER—CONSTRUCTION.

Where the validity of assignments from testatrix to defendant is questioned on the ground that the relations between the parties were confidential, and the master weighed the presumption of undue influence in favor of the contestant, a finding that "no undue influence was had or exercised is equivalent to a finding that the transaction was not the result of undue influence, and does not negative merely the direct employment of undue influence, without taking into consideration the effect of the influence naturally arising from testatrix's reliance on defendant's protection and her appreciation of his kindness.

6. EVIDENCE—PAROL EVIDENCE.

Where a bill charged the invalidity of assignments executed by testatrix to defendant and which defendant was required to sustain, since he occupied a confidential relation toward the testatrix, it was necessary to prove that they were not procured by undue influence; and he was entitled to show by parol any fact from which it could be argued that the action of the testatrix was consistent with her previous tendencies and purposes.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 1969-1974, 2009.]

7. PRINCIPAL AND AGENT—TRANSACTIONS BETWEEN—VALIDITY.

A gift to defendant by testatrix was properly held valid where it appeared that she was a woman of strong mind and quick apprehension, with an adequate knowledge of her property; that she acted free from undue influence, was fully advised as to the effect of the instruments she executed, did the business through her own attorney, reviewed her situation with him in the absence of defendant, acted in concert with her husband, provided for him to his satisfaction, and had no surviving issue and no near relatives in need of her bounty, even though defendant occupied a confidential relation toward her.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Principal and Agent, § 139.]

8. GIFTS—LAW GOVERNING.

Where the share of testatrix in a portion of an estate was being held by the executors by her permission, subject only to a burden imposed by her own act, in determining the validity of a gift of this fund the rule regarding the transfer of expectancies did not apply.

9. ASSIGNMENTS—MODE AND SUFFICIENCY—NECESSITY OF DELIVERY.

Where an assignment of property was for a valuable consideration, although conferring an important benefit on the assignee, and was under seal, the question of delivery of the subject-matter was not material.

10. SAME—OPERATION AND EFFECT—RIGHTS PASSING.

Testatrix made two assignments of property to defendant, one of all her interest in the estates of her brother and his wife, and the other of all her personal property possessed at that date. *Held*, that these did not convey the proceeds of an annuity from a fund provided by her daughter and by herself.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 24, Gifts, § 22.]

11. GIFTS—INTER VIVOS—PERSONAL PROPERTY.

Where the assignment of household goods and chattels was made upon a consideration of gratitude for services rendered and was not under seal, it should be treated as a gift.

12. SAME—DELIVERY—NECESSITY.

Where a gift of household goods and personal chattels was not accompanied by any delivery of the same, either actual or constructive, and the giver continued to use them until her death, the gift was ineffectual.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 24, Gifts, §§ 29, 31.]

Appeal in Chancery, Washington County; Loveland, Chancellor.

Suit by W. H. Taylor, administrator, against H. Douglass Vail. From an adverse decree, the orator appeals. Reversed and remanded with mandate for an accounting and decree.

Argued before ROWELL, C. J., and TYLER, MUNSON, WATSON, HASELTON, and POWERS, JJ.

Taylor & Dutton, for appellant. Zed S. Stanton and Geo. W. Wing, for appellee.

MUNSON, J. At the time of the transactions in question Mrs. Hobart, the orator's testatrix, was about 80 years old. She and her husband were people of small means and limited business experience, inclined to narrow views and economical in their dress and living, but greatly interested in religious and missionary work, and liberal in its support. Their only daughter had lived with them much of the time, and had expended considerable sums in improving their place. Shortly before her death, realizing that her parents would be left without any near friend to care for and assist them, and acting with the knowledge of her mother, she requested Mr. Vail, the defendant, to see to them after her death, and he consented to do so. Vail was a merchant, living and doing business in the testatrix's neighborhood, and active in town and church affairs. After the daughter's death, which occurred in October, 1887, he looked after and assisted the testatrix and her husband, both of whom had unbounded confidence in his ability and integrity. Early in 1889 Mrs. Hobart inherited over \$35,000 from the estates of her brother and his wife, residents of Ohio, whose deaths occurred at about the same time. The husband died first, and both died testate, but the wills were such that the property passed as though there were none. Mrs. Hobart was one of four heirs entitled to share alike, and there was a half-brother, who took nothing under the laws of Ohio. Representatives of the estates, including Mr. Burton, an attorney, visited Mrs. Hobart in March, and arrangements were made for a further meeting at Montpelier. The defendant and Mr. Hiram A. Huse were present at this meeting. On this occasion Mrs. Hobart said she considered herself incapable of taking care of the property, and asked what she could do about it. Some one other than Vail or Huse suggested that, as Mr. Vail was already looking after her affairs to some extent, he might undertake the care of this property. This seemed satisfactory to Mrs. Hobart, and

Mr. Vail was asked if he would do it, and said that he would if it was Mrs. Hobart's request. Mr. Burton then drew up a power of attorney, authorizing Vail to receive, invest, and manage all the funds in question. At this interview, on the suggestion of representatives of the estate, Mrs. Hobart consented to an arrangement by which the half-brother was to have an equal share in the property. There was also some provision or arrangement by which the sum of \$13,420 of the estate was retained to provide an annuity for Annie A. Strickland during her life. Mrs. Hobart's share, under the arrangement including the half-brother, and exclusive of her interest in the Strickland fund, was \$25,600. Five hundred dollars of this was left in Cleveland as a gift. The remainder came in a series of payments, beginning in March, 1889, and continuing until September, 1892. Mrs. Hobart gave receipts for the several remittances and indorsed the checks, but all further business connected with the fund was done by the defendant. In June, 1889, Mrs. Hobart made her will, giving nearly all her estate to certain societies after the death of her husband, and giving \$200 to the defendant, and appointing him her executor. In December, 1891, she made a codicil, giving the defendant an additional legacy of \$1,000, and the gold watch formerly her brother's. The orator is the administrator with the will annexed. In December, 1892, Mr. Huse and Mr. Howland went to Worcester for the purpose of making some disposition of the property of Mr. and Mrs. Hobart. A conversation was had between Mr. Huse and the Hobarts, mainly conducted on the one side by Mrs. Hobart, in which Mrs. Hobart's purpose and wishes were stated, and the effect of what she proposed was explained by Mr. Huse. The main part of the conversation was taken down in shorthand by Mr. Howland, and the conversation is found to have been as shown by his minutes, a copy of which is incorporated in the report. After this conversation Mr. and Mrs. Hobart executed deeds conveying their real estate to Vail, and Vail executed a life lease of the same to the Hobarts, which lease the master says was delivered to and kept by Mrs. Hobart's attorneys, Dillingham, Huse & Howland. Messrs. Huse and Howland visited Worcester again on the 27th of January, 1893; and on this occasion Mrs. Hobart gave Vail an assignment of all her interest in the estates of her brother and his wife, including her interest in the Annie A. Strickland fund, and signed a discharge of a mortgage which Vail had given her October 8, 1891, to secure an existing indebtedness and any that might afterwards accrue. At the same time Vail gave Mrs. Hobart a writing by which he agreed to render to Mrs. Hobart, while he lived and was capable of doing it, such personal service as he had performed for her the previous year, and to pay her in

each year of her life \$600 as it might be demanded; and also made a will by which he gave her, in case she survived him, the sum of \$15,000. It appears, further, that at or about this time Vall had his life insured for \$15,000 for Mrs. Hobart's benefit. On the 10th of March following, Vall executed a mortgage to Mrs. Hobart covering the premises deeded him by the Hobarts and other lands, and conditioned to secure the performance of his agreement of January 27th, which mortgage was recorded March 21st. On the 1st day of April Vall delivered this mortgage and a certificate from the town clerk to Dillingham, Huse & Howland, and received from them the discharge of his mortgage of 1891, which Mrs. Hobart had signed January 27th, and the notes secured by said mortgage. A few weeks later the Hobarts gave Vall a bill of sale covering all their personal chattels of every description. The master finds that at the time these papers were executed both Mr. and Mrs. Hobart were in good health, and in possession of their mental faculties; that Mrs. Hobart had always been a person of strong mind and will, with strong likes, dislikes, and prejudices, and was at this time bright and keen; that Mr. Huse fully and particularly explained all these matters to Mr. and Mrs. Hobart, and discussed the details of them with great care; that the value of the personal estate was talked over, and the amount called \$17,000; and that no undue influence was had or exercised to procure the transfers.

The orator excepted to the use of evidence tending to show any understanding not covered by the papers, and now insists that the nature of the transaction is to be derived from the papers alone, and that the arrangement evidenced by the papers was merely a contract, and that, being a contract, its validity will depend largely upon the adequacy of the consideration. The master has left the construction of these papers, and the nature of the transaction evidenced by them, to the determination of the court. The master has incorporated in his report, not as a finding of fact, but as an admission, for whatever bearing it may have upon the subsequent acts of the parties, a statement in the answer, which is, in substance, that about December 1, 1892, the testatrix and her husband proposed to give the defendant what property they then had, if he would furnish them a stipulated sum annually, and allow the testatrix to make such donations as she desired out of the property, and maintain a home for them, and care for them during their lives as he had done for several years previous, and that he accepted the proposition, and that the writings above described were drawn to effectuate this agreement. The master finds, independently of the papers, if permissible to find it from the above statement and from the conduct and statements of Mrs. Hobart and the defendant subsequent to the execution of the papers, that

Mrs. Hobart always understood that she would be allowed by the defendant to make such donations as she desired to out of the personal property and out of any of the real estate she had deeded him. It appears that Mrs. Hobart continued to contribute liberally for missionary and charitable purposes long after the deeds and assignments were made, and that funds for this purpose were furnished by the defendant. It also appears that she once contemplated making a gift of some of the real estate conveyed to the defendant, and that the defendant consented to this in writing, but that nothing further was done about it. The report was submitted to counsel for their suggestions before filing, and, in view of certain requests made by the orator the master reported further, that there was no direct evidence upon the question of undue influence, that the orator claimed the burden was on the defendant to show that the execution of the papers was not procured by undue influence, and that he did not pass upon the question of law, but made his finding that there was no undue influence upon a consideration of certain facts, circumstances, and evidence thereafter stated, in connection with other evidence not referred to. The master then refers to the daughter's request in contemplation of her death, the suggestion of the defendant's name in the conference at Montpelier, the conversation at the time the papers were made as shown by Mr. Howland's minutes and his evidence in respect thereto, the relations existing between Mr. and Mrs. Hobart and the defendant, the service the defendant rendered and Mrs. Hobart's appreciation of it as shown by the testimony of witnesses referred to, and Mrs. Hobart's strength of mind and will; and says that, if any of these tend to show that no undue influence was exercised, he finds that fact by a fair balance of evidence. Upon the filing of the report the orator excepted to it because the master had not considered the presumption existing, upon the facts shown, that Vall used undue influence. The master also reports, upon the orator's request, that so far as appeared before him Dillingham, Huse & Howland were the only attorneys either Mr. or Mrs. Hobart or the defendant consulted, and that they acted for both parties in making the papers referred to.

It is unnecessary to consider the questions discussed as to the precise relation which the defendant sustained to Mrs. Hobart before the transfers. It was unquestionably a confidential relation, and such as cast upon the defendant the burden of showing that Mrs. Hobart was mentally competent, and did what she did without undue influence, and with full knowledge of her property and of the nature and effect of her act. He had the possession and management of her entire estate, and was her trusted advisor in all matters. The rule invoked by the orator applies in every case where a confidence has been reposed which gives the per-

son confided in an advantage over the one reposing the confidence. Note to Richmond's Appeal (Conn.) 21 Am. St. Rep. 101, 103; Fisher v. Bishop, 108 N. Y. 25, 15 N. E. 331, 2 Am. St. Rep. 357; Reed v. Peterson, 91 Ill. 288; Van Epps v. Van Epps, 9 Paige (N. Y.) 237; Shipman v. Furniss, 69 Ala. 555, 44 Am. Rep. 528; Pironi v. Corrigan, 47 N. J. Eq. 135, 20 Atl. 218; Willson v. Mitchell, 101 Pa. 495.

It is true, as urged by the orator, that the master has not found in terms that Mrs. Hobart understood the nature and effect of the deeds, assignments, and agreements, or the amount and condition of her property; but he has found that she was a person of strong mind, in possession of her faculties, and that the transaction was fully and particularly explained to her. This amounts to a finding of the necessary understanding. And we think it sufficiently appears that she had an adequate knowledge of her property. Her connection with and knowledge of the real estate into which a part of the money had been converted is apparent from the report. There is nothing in the report to impeach the substantial accuracy of the sum mentioned as the amount of the personal property. Her interest in the Annie A. Strickland fund, not then in hand, cannot have been overlooked, for it is specifically mentioned in the assignment. If it be considered that the circumstances were such as required that she have the benefit of independent and disinterested advice, the facts bearing upon the matter are fully presented. No question is made as to the capability and integrity of her advisor. But the orator claims that the relations of Mr. Huse to Vail were such that his advice did not meet the requirement. It appears plainly enough from the report that Dillingham, Huse & Howland were the attorneys of Mrs. Hobart, except so far as that relation was modified by their acting for both parties in making the necessary papers. We think that relation to Mr. Vail was not one that deprived the advice of Mr. Huse of the quality which the law requires. The position of an attorney who acts for both parties, to the knowledge of each, in the preparation of papers needed to effect their purpose, and gives to each the advice necessary for his protection, is recognized by the law as a proper one. It is evident that Mr. Huse was fully aware of the nature of that relation, and sensible of the obligation it imposed. As a result of the taking of the conversation in shorthand, we have before us what was said to Mrs. Hobart with a fullness and certainty seldom attainable. Referring to Mrs. Hobart's expressed intentions as regards Mr. Vail, Mr. Huse said to her: "It would be my duty to make out any papers that you want made out, * * * but I should think I was derelict in my duty to you if I came as your lawyer, to execute papers giving Mr. Vail a possible benefit, when there was any possibility that

the reason of that was because he had overpersuaded you to it." And, after further conversation, Mr. Huse said: "This ought not to be left in such shape that Mr. Vail would * * * be blamed for appropriating what is intended for him, and, on the other hand, it should be guarded so that he wouldn't appropriate for himself what is intended for some one else." Several questions are raised regarding the finding that there was no undue influence. The master makes this finding, if any of certain matters hereinbefore stated tend to support it. It is clear that some of them do. The master does not say upon whom the burden of proof rests as matter of law; but he makes an affirmative finding that there was no undue influence, which is a sufficient finding if the burden was on the defendant. The finding is made by a balance of evidence. It is not claimed that anything more is required; but the fact must be affirmatively found against the presumption to the contrary. The report is excepted to because the master did not consider this presumption in reaching his conclusion. There is nothing to indicate that he did not consider it. The most that can be said is that it does not affirmatively appear that he did. The orator made requests for further findings upon this subject, but was silent as to this particular. It may be questioned whether as a matter of practice such an exception should be considered when the report has been submitted to the inspection of counsel before filing, and they have availed themselves of the opportunity to make such requests upon the subject as they desired. But it is not necessary to pass upon this question of practice. A majority of the court are clear that this matter is within the rule that the proceedings of special masters are presumed to be correct, and that the burden is on the excepting party to see that the claimed error affirmatively appears. It is also argued that the finding that "no undue influence was had or exercised" to procure the transfers must refer to the direct employment of undue influence, and that it does not negative the effect of the influence naturally resulting from Mrs. Hobart's reliance upon the defendant's protection and her appreciation of his kindness. But, when it is considered that the master weighed the presumption of undue influence in favor of the orator, a finding in these terms can mean no less than that the transfers were not the result of undue influence. We have seen that the finding of Mrs. Hobart's understanding regarding her right to make gifts notwithstanding the conveyances is based upon a statement in the answer and upon the conduct and statements of Mrs. Hobart and the defendant after the conveyances were executed. It is urged that parol evidence could not be used to show an agreement not embraced in the writings, and that, if Mrs. Hobart's understanding in this respect

was material in any way, it could not be found from the evidence above stated. This finding will not be essential in classifying the transaction, but it may have affected other conclusions of the master, and it will therefore be necessary to consider the objections to the evidence on which it is based. It is clear that parol evidence was admissible to show an understanding of this nature not disclosed by the papers. The bill charged the invalidity of certain instruments which the defendant was required to sustain. To establish their validity, it was necessary to prove that they were not procured by undue influence. This entitled the defendant to show any fact from which it could be argued that Mrs. Hobart's action was consistent with her previous tendencies and purposes. We think the conduct and statements of Mrs. Hobart and the defendant subsequent to the execution of the papers could properly be considered in ascertaining what Mrs. Hobart's understanding in this respect was at the time of their execution. It seems clear that the acts and declarations of two parties, concurring in the continued recognition and execution of a course of dealing involving the interests of both, are evidence tending to establish a previous understanding to that effect. The statement in the answer of the agreement which led to the execution of the papers, taken as a whole, must be regarded as a development of the ground of the defense, and not as an admission. The finding, however, is not coextensive with the averment, but is merely that Mrs. Hobart always understood that she would be allowed to continue her donations. This finding might be given an effect unfavorable to the defendant in reaching further conclusions from all the evidence; and, if it was to be so used, the clause supporting it might properly be treated as an admission. The master, in finding the ultimate facts reported, must have given this subsidiary fact, found in part from the clause referred to, a bearing favorable to the orator; for in the findings made subsequent to the requests he says: "In finding the facts hereinbefore reported I have not treated the defendant's answer as evidence in his favor; but in so far as it supported any claim of the orator I have treated it as an admission in the orator's favor."

So we have all the findings necessary to establish the validity of a gift to one who sustained a confidential relation to the giver. It is not necessary to consider the transaction with reference to the nature and value of the obligations assumed by the defendant. The transaction was not wholly a contract. It was a contract in so far as it provided for the future support of Mr. and Mrs. Hobart and secured that support on some of the property transferred. It was an intended and completed gift of her property as against the right of inheritance and of testamentary transmission. It was a transfer made upon

an understanding that she could still avail herself of the property as a fund for charitable donations, but with her full knowledge that this privilege depended solely upon an unenforceable agreement, and that what remained in the defendant's hands at her death would be his absolutely. It appears plainly enough from her conversation with Mr. Huse that she expected that the arrangement would result in a substantial benefit to the defendant. She spoke of disposing of some of the property herself if she wanted to, and said she wanted he should have the real estate any way. The conversation shows that her family connections were in mind when she determined upon this course. Her nearest relatives were her half-brother and his children. She had readily assented to an arrangement by which this half-brother received nearly \$30,000, one-fourth of which was her own gift. She made the transfers in question to one whom her daughter had chosen to look after her, whose kindness she had experienced before the property was acquired, and who continued until her death to treat her with a kindness so constant and complete that it has been characterized as excessive, and urged as proof of a previous sinister design. The fact that she evidently expected that a part of the property left in the defendant's hands at her death would ultimately be devoted to charitable purposes and that this expectation may fall of fulfillment cannot avail to defeat the gift. It is not necessary to review the many cases brought to our attention in which gifts made to persons sustaining a confidential relation to the donor have been held invalid. It is clear that this case is well within the rule under which such gifts are sustained. A woman of strong mind and quick apprehension, with an adequate knowledge of her property, free from undue influence, fully advised as to the effect of the instruments she executes, doing the business through her own attorney, and reviewing her situation with him in the absence of the intended beneficiary, acting in concert with her husband and providing for him to his satisfaction, having no surviving issue and no near relatives in need of her bounty, may well be suffered to dispose of her property as she sees fit.

It remains to dispose of some questions raised as to certain classes of property that are claimed to stand differently from the bulk of the estate. It is said that Mrs. Hobart's interest in the Annie A. Strickland fund was property of a character that could not be transferred, and that in any event there was a want of sufficient delivery. The report shows that the Strickland estates passed as though there were no wills. Then the fund from which the annuity was derived must have been provided by an agreement among the heirs. So Mrs. Hobart's share in this fund had in effect been made over, and was being held by the executors by her permission, subject only to a burden imposed by

her own act. It is therefore unnecessary to inquire as to the nature and application of the rule regarding the transfer of expectancies. The question of delivery is not important, for this transfer was for a valuable consideration, although conferring an important benefit. In any event the assignment under seal was sufficient to pass the property. *Connor v. Frawick*, 37 Ala. 230, 79 Am. Dec. 58. Mrs. Hobart received an annuity of \$240, which passed into the hands of the defendant. This was derived from a fund of \$2,500, provided by her daughter, and from \$1,000 paid in by herself in April, 1896. The report contains nothing that requires us to distinguish between these funds. This annuity is not within the terms of either assignment. The first is confined to her interest in the estates of her brother and his wife. The second is of all the assignor's personal property, enumerating a great variety of personal chattels, and closing with the statement, "meaning to convey * * * all personal property * * * possessed at this date." This language cannot be held to cover the proceeds of the annuity. The defendant must account for all moneys received from this source.

Mrs. Hobart had a life lease of both the village property and the farm. There were two houses on the village lot, one of which she occupied. Whatever income the defendant may have received from the tenant house and the farm is to be accounted for. The conveyance of the household goods and other personal chattels is not under seal. It cannot well be sustained on the consideration disclosed by the earlier transaction. So the transfer must be treated strictly as a gift. Mrs. Hobart continued to use the property until her death, after which the defendant took possession of it. No facts appear bearing upon the question of a constructive delivery by one party or the assertion of any control by the other. The intended gift was ineffectual for want of delivery, and the defendant must account for the value of this property as of July 4, 1902, the date of Mrs. Hobart's death.

Pro forma decree reversed, and cause remanded, with mandate that an accounting be had of the matters stated, and that a decree be thereupon entered in accordance with this opinion.

(74 N. H. 230)

MINOT v. BOSTON & M. R. R.

(Supreme Court of New Hampshire. Merrimack. May 7, 1907.)

1. WITNESSES—CREDIBILITY.

Though in an action for the death of one crossing a railway track plaintiff's witnesses were mistaken or did not recollect the customary movements of the locomotive, the jury might find they were entitled to credit in other particulars.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, §§ 1079, 1081-1083.]

2. RAILROADS — PERSON CROSSING TRACK — QUESTION FOR JURY.

Whether decedent was guilty of contributory negligence, barring recovery for her death caused by being struck by a railway train while crossing the track, *held* a question for the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, §§ 1377-1380.]

3. TRIAL — INSTRUCTIONS — REFUSAL—PROMINENCE TO TESTIMONY.

In an action for death to one while crossing a railway track, an instruction that upon the undisputed evidence decedent was familiar with the movement of the trains at that point, and walked onto the track without attempting to learn whether the train which struck her was moving, and in so doing was negligent, preventing recovery unless an ordinarily prudent person would have understood there was no danger of the train backing when she undertook to cross, that a person of ordinary prudence could not so understand unless the train customarily stood on a siding at that time, and that hence, if the train did not customarily pull onto the siding after arriving and remain there for considerable time, verdict must be for the company, was properly refused as giving undue prominence to testimony.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 577-581.]

4. SAME—ARGUMENTATIVE.

The instruction was also properly refused as being argumentative.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 561.]

5. RAILROADS — PERSONS CROSSING TRACK — ACTION FOR DEATH—INSTRUCTION.

The instruction was also properly refused for diverting attention from the proposition that if her knowledge of the customary movements of the train was such as to reasonably induce the belief the train had gone onto the siding to remain for some time, and the bell was not rung as the locomotive was about to start, she might reasonably be regarded as without fault for failing to observe the train's approach.

6. SAME.

In an action for the death of one while crossing a railway track near a station, an instruction that, if the movements of a train at that point at that time of day were variable and uncertain, decedent was not justified in stepping upon the track without looking to see whether the train was in motion, was properly refused for diverting attention from testimony as to the company's rules requiring warning to be given when the locomotive was about to be moved and as to its control while in motion, and the probable knowledge acquired by decedent regarding those matters from her habitual observations.

7. SAME—LICENSEES.

One killed while crossing a railway track along a footpath which had been used by the public and the defendant's employes for many years was not a trespasser.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, §§ 1228-1234.]

8. SAME—EVIDENCE—ADMISSIBILITY.

Where, in an action for the death of one crossing a railway track, decedent's knowledge of the movement of trains at that point was material, it was not error to admit evidence that the train's movements for four or five years prior to the accident had been the same as at that time, since the uniformity of custom probably impressed decedent, who resided near the station and habitually observed the train's movements; whether the testimony should have been limited to a briefer period being a ques-

tion within the trial court's discretion and not subject to review.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3849-3851.]

9. APPEAL—REVIEW—HARMLESS ERROR—ADMISSION OF EVIDENCE.

In an action for the death of one crossing a railway track on cross-examination of the conductor and the engineer of the train causing decedent's death, the company was not prejudiced by plaintiff, while attempting to show that certain of the company's rules applied where a train was backed as in this case, reading the rules in the jury's hearing and asking questions as to their application, where the witnesses testified that two of the rules did not apply to backing trains and neither was offered in evidence, where one of the rules was in substance the same as another put in evidence by plaintiff and obviously applicable and the other was immaterial.

Exceptions from Superior Court, Merri-mack County; Pike, Judge.

Action by James Minot, administrator, against the Boston & Maine Railroad. Verdict for plaintiff, and defendant brings exceptions. Exceptions overruled.

The decedent, a woman 63 years old and in full possession of her faculties, was run over and killed about 1 o'clock in the afternoon of August 7, 1902, while crossing the tracks in the defendants' yard at Cherry Mountain by a train that was backing over a siding. The passenger station at Cherry Mountain is located northerly of the defendants' main line running from Whitefield Junction in an easterly direction to Berlin, in the angle formed by this line and their branch line running from it in a northeasterly direction to Jefferson Hill. The station is surrounded by a platform elevated slightly above the level of the rails and extending to the main track on the south, the branch track on the north, and nearly to the junction of the two tracks on the west. A side track runs from a point in the branch line north of the station in a westerly direction, northerly of the branch track, to a point in the main line 1,000 to 1,200 feet distant, with a slightly descending grade toward the station. There are side tracks southerly of and connected with the main line. A footpath leads from a point southerly of all the tracks, in a northerly direction across the tracks and the platform westerly of the station, to a point northerly of the branch siding. The plaintiff's testimony tended to prove the following additional facts: The footpath had been used by the public and the defendants' employes for many years. The decedent resided some 200 feet southerly of the Cherry Mountain station and habitually observed the movements of trains there. She was accustomed to use the footpath, and had used it on previous occasions when the Jefferson Hill train stood on the branch siding. A passenger train was due to arrive at the station from Jefferson Hill 10 minutes before 1 o'clock in the afternoon of each week day. This train, consisting of a locomotive numbered 807 and a combination passenger and baggage car, custom-

arily pulled onto the branch siding after its passengers had alighted, and remained there until some time between 4 and 5 o'clock, when it returned to Jefferson Hill by backing up the branch line. The train or its locomotive did no shifting or other service in the meantime. Five witnesses produced by the plaintiff testified, in substance, to these facts, representing that they had opportunities for observing them. One of them testified that before returning to Jefferson Hill a Pullman car was added to the train. On the day of the accident the decedent promised to go to the house of a neighbor residing northerly of the branch siding as soon as the Jefferson Hill train had run upon the siding out of the way. The train came in a little before 1 o'clock. After its passengers had alighted at the station, it backed up the branch line and pulled in on the branch siding, where it stopped long enough to permit the coupling of the forward end of the locomotive to a freight car loaded with ties there standing and the releasing of the car brake, and then it backed down the siding; the combination car being ahead, the locomotive next, and the freight car in the rear. No warning was given before or as the train began to back, and there was no one upon the combination car. The decedent started from her house about 1 o'clock and walked toward the neighbor's house in the footpath. She walked from a point on the platform to the branch siding without stopping or looking to the right or left, and was there struck by the backing train and was killed. When she stepped from the platform, the train was 35 to 45 feet distant. It began to back about that time, and moved with little noise at the rate of four to six miles an hour. There was no time after the decedent left the house when she could not see the train and observe whether it was at rest or in motion. One of the defendants' rules required all trains and engines at that station to run "very carefully and under control within yard limits." Another rule required the engine bell to be rung when the engine was about to move. The defendants introduced in evidence their train dispatcher's orders relating to the movements of locomotive 807 between June 24 and August 7, 1902, during the hours of the day between 1 and 5 o'clock in the afternoon, the train sheets kept in the regular course of business showing such movements, and the record of the movements made by the conductor as they occurred. It appeared from these orders, etc., that the locomotive was engaged in service away from the Cherry Mountain station during these hours, from half an hour to an hour on 15 days, from 1 to 2 hours on 6 days, and from 2 to 3 hours on 6 days—leaving the station between 1 o'clock and 20 minutes past 1 on 13 days, between 20 minutes past 1 and 50 minutes past 1 on 6 days, and later than 2 o'clock on the other days. The defendants also produced as witnesses the trainmen of the Jefferson Hill train

and the station agent at Cherry Mountain, whose testimony tended to prove the following facts: Locomotive 807 did more or less shifting of cars in the yard at Cherry Mountain. It never went on the branch siding to remain until after it had done its extra work and shifting. Whenever the combination car was set on the branch siding, a passenger car was with it. These cars were sometimes placed on this siding and sometimes on a siding south of the main line. They and the locomotive were placed and remained on the branch siding many times during the summer of 1902, both on days when the locomotive did extra work and when it did none. They were usually placed on that siding when no cars were in the way, and were backed onto it from its westerly end. The locomotive and car never backed up the branch line and pulled in on the siding from its easterly end before the day of the accident. Whether the cars and locomotive were set upon this siding during the hours of the day above mentioned so frequently that it could properly be said they were set there customarily was doubtful. As soon as the locomotive was coupled to the freight car on the day of the accident, the fireman looked back and saw the decedent standing about midway of the station platform, facing across the Jefferson Hill branch and siding. Upon starting, he struck the bell and turned around toward the freight car to see if it was coming, and did not look back again before the decedent was struck. The engineer was on the side of the locomotive farthest from the decedent, and did not see her. The train backed 100 feet or more before striking the decedent at such rate of speed that it could have been stopped within 20 feet. It was 20 to 30 feet from the middle of the station platform to the place of collision. It appeared as if the decedent did not see the train and was not conscious of its approach. When she stepped on the siding, she turned so as to face from the train. Some portions of the defendants' other evidence conflicted more or less with the plaintiff's evidence. At the close of the testimony the defendants moved for an order directing a verdict in their favor. The motion was denied, and they excepted. They raised the same question by exceptions to the denial of their requests for similar instructions to the jury in the charge. They also excepted to the denial of their requests for other instructions, and to certain rulings relating to the testimony and examination of witnesses. These exceptions and the facts pertaining to them appear in the opinion.

Sargent, Remick & Niles, for plaintiff.
Mitchell & Foster and Streeter & Hollis, for defendants.

CHASE, J. The defendants, in their argument in support of the exception to the denial of their motion for an order directing a verdict in their favor, place much reliance upon the character and weight as testimony

of the orders, train sheets, and records put in evidence by them, relating to the movements of the locomotive of the Jefferson Hill train. They say that this testimony demonstrates the falsity of the plaintiff's testimony relating to the customary movements and location of the train during the afternoon hours, and consequently the falsity of the proposition that the decedent was exercising ordinary care in attempting to cross the tracks as she did. In their brief they freely admit that, "if * * * the testimony of the plaintiff's witnesses were opposed merely by the testimony of the defendants' trainmen, the conflict would be for the jury to determine"; that it would then be "the common case of one set of men contradicting another, and, so far as the court could see, either might be right, and reasonable minds could conceivably differ as to which was right." In the consideration which they have given to these orders, etc., they seem to have overlooked the fact that they specifically relate to the locomotive alone. Assuming, for the purposes of the argument, that this testimony, by reason of its character, inherently and conclusively implies verity, it proves only that the locomotive moved about as shown by it. It does not prove that the combination car, alone or in connection with another car, was taken with the locomotive while performing outside service, or that it did not customarily stand upon the branch siding during the afternoons. It does not prove that the locomotive was used in shifting cars in the yard at Cherry Mountain after its arrival there. Indeed, the testimony introduced by the defendants themselves tended to prove that the cars and the locomotive, one or all of them, so frequently stood upon this siding during portions of the afternoons that it was doubtful whether it could not properly be said that they customarily stood there. The defendants were at liberty to argue to the jury that they had shown by conclusive testimony that the plaintiff's witnesses were not entitled to credit; but the jury were not obliged to find, because the witnesses were in error as to some particulars, that they were false or in error as to all. They were at liberty to find, if upon a consideration of all the testimony such appeared to them to be the fact, that the plaintiff's witnesses were mistaken or misrecalled as to some of the movements of the locomotive, but were entitled to credit as to other matters. They might reasonably believe that there would be more or less unintentional errors in the testimony of witnesses—whether called by the one side or the other—given after the lapse of four years from the time when the transactions occurred as to which they testified. Furthermore, the question of the decedent's care did not necessarily depend upon the fact that the Jefferson Hill train, without change in its make-up, pulled onto the branch siding immediately after its passengers alighted, and

stayed there during the remainder of the afternoon. If the train, with or without the additional passenger car, was frequently placed on the siding at some time during the afternoon and usually remained there after being so placed until 4 or 5 o'clock, a jury might reasonably find that the decedent, familiar with such custom, would not be wanting in due care if she assumed that the train which caused her death, having gone onto the siding, would not back out immediately. *State v. Railroad*, 52 N. H. 528. As was said in *Smith v. Railroad*, 70 N. H. 53, 85, 47 Atl. 290, 293, "familiarity with the manner in which the railroad is operated and the times when trains pass over it might excuse a traveler, under some circumstances, from looking or listening for a train when about to pass over the crossing." The plaintiff's testimony on the question of the decedent's care was certainly as full and definite as it was at the former trial, which, it has been decided, was sufficient to require the submission of the question to a jury. *Minot v. Railroad*, 73 N. H. 317, 61 Atl. 509. The defendants' testimony, while conflicting with the plaintiff's in some particulars, tended to confirm it in other particulars. There was no such certain and conclusive verity and preponderance in it as would enable one to say with confidence that reasonable and impartial men, upon considering and weighing it in connection with the plaintiff's testimony, would not differ in their judgments, but must unanimously come to the conclusion that the decedent's death was due, in part at least, to her own want of due care. *Deschenes v. Railroad*, 69 N. H. 285, 46 Atl. 467; *McGill v. Granite Co.*, 70 N. H. 125, 129, 46 Atl. 684.

The defendants cite *Gahagan v. Railroad*, 70 N. H. 441, 50 Atl. 146, 55 L. R. A. 426, and urge the proposition that this case is on all fours with it. That case was taken from the jury, "because upon the evidence there is no disputed question of fact to be determined." 70 N. H. 446, 50 Atl. 149, 55 L. R. A. 426. *Gahagan* "walked upon a railroad crossing within a railroad yard, over which he knew trains and shifting engines were frequently passing." 70 N. H. 445, 50 Atl. 148, 55 L. R. A. 426. According to the plaintiff's evidence in this case, Mrs. Fitzgerald's knowledge as to the use of the defendants' railroad yard was that no shifting was done in it during the afternoon hours; or, in other words, the fact within her knowledge was the direct opposite of that which was within *Gahagan's* knowledge. This case also differs essentially from *State v. Harrington*, 69 N. H. 498, 45 Atl. 404, and *Boston & Maine R. R. v. Sargent*, 72 N. H. 455, 57 Atl. 688, cited by the defendants. In the first case there was no conflict in the testimony upon the point as to which the verdict was ordered; and, in the second case, there was an estoppel arising from a prior judgment which entitled the plaintiffs as a mat-

ter of law to a verdict upon the point as to which it was ordered. Nor does *Arnold v. Prout*, 51 N. H. 587, support the defendants' position. In that case the court, after noting that there was no evidence tending to prove that the delivery of the ale in suit was to be in this state under the contract for its sale—the point on which the verdict was ordered—said: "The counsel for the defendant are right in their position that if there was any evidence, though slight, tending to rebut the position that the delivery was in New York, the question ought to have been submitted to the jury." The defendants' exceptions to the denial of their motion for an order directing a verdict in their favor and to the denial of their request for similar instructions to the jury stand no better than their exception to the denial of their motion for a nonsuit upon the former transfer of the case, and, like that exception, they must be overruled. *Minot v. Railroad*, 73 N. H. 317, 61 Atl. 509.

The defendants also excepted to the denial of their requests for certain other instructions to the jury. These requests were made in several different forms, but the following may be taken as a sample of one class of them: "Upon the undisputed evidence Mrs. Fitzgerald was familiar with the course of business at Cherry Mountain station, and she walked from the platform onto the Hill siding without taking any precautions to learn whether the train was moving. In so doing she was guilty of negligence which prevents a recovery, unless an ordinarily prudent person, familiar with the course of business at that station, would have understood that there was no danger of this engine and car backing at the time she undertook to cross. A person of ordinary prudence could not so understand, unless it was the usual practice for the engine and combination car to pull onto the Hill siding at this time of day and remain there for a considerable time. Unless, therefore, you find that it was the usual practice for the engine and combination car to pull onto this particular siding when they arrived from the Hill at 12:50 and had discharged the passengers, and to remain upon this siding for a considerable time before again moving, your verdict must be for the defendant railroad." In determining the question of the decedent's care, an important fact to be taken into consideration was the state or character of her knowledge as to the movements of the Jefferson Hill train, etc., in the Cherry Mountain yard. Would her habitual observations of these movements naturally produce (1) the impression upon her mind that the locomotive and car of the train customarily pulled onto the branch siding immediately after its passengers had alighted and remained there until late in the afternoon; or (2) the impression that whenever in the afternoon they pulled in there they usually remained until 4 or 5 o'clock; or (3) the impression that the loco-

motive alone, or in connection with the car, was usually engaged for a time immediately after its arrival at the station in shifting cars about the yard, including the branch siding, and did not go upon the siding to remain, if at all, until later in the afternoon; or (4) the impression that whenever the locomotive was about to move in shifting cars or other service its bell was rung, and it moved very carefully and under control; or, summarizing these matters in a more general form, was the decedent's knowledge such as reasonably to induce a belief that the locomotive and car pulled onto the siding to remain at this particular time, or a belief that it was engaged in shifting cars or other service? If it was such as reasonably to induce the former belief, the decedent might well be regarded as in the exercise of due care in going upon the siding as she did; but, if it was such as reasonably to induce the latter belief, the jury would probably have no difficulty in finding that her conduct was wanting in the element of due care, provided they found that the bell was rung before the locomotive started. The defendants' request for instructions above quoted, besides being objectionable because it gives undue prominence to portions of the testimony and is argumentative (*Spalding v. Brooks*, 58 N. H. 224; *Phoenix, etc., Co. v. Clark*, 59 N. H. 345; *Fogg v. Moulton*, 59 N. H. 499; *Rublee v. Belmont*, 62 N. H. 365; *Davis v. Railroad*, 68 N. H. 247, 252, 44 Atl. 388), is objectionable because it ignores, or, rather, decidedly diverts attention from, the proposition that if the decedent's knowledge was such as is referred to in the first or second of the alternatives above enumerated, and the bell was not rung as the locomotive was about to start, she might reasonably be regarded as without fault. This request and the others of the same class were properly denied.

Another of the defendants' exceptions was to the denial of their request for an instruction to the jury as follows: "If you find that the course of business was such that the movements of the engine and car, at the time of day when the accident happened, were variable and uncertain, Mrs. Fitzgerald was not justified in stepping upon the track without looking to see whether they were in motion, and the plaintiff cannot recover." An instruction of this kind would be faulty, because it would divert the jury's attention from the testimony relating to the defendants' rules as to the giving of a warning when the locomotive was about to move and its control while in motion, and the probable knowledge acquired by the decedent regarding these matters from her habitual observations. *Davis v. Railroad*, 68 N. H. 247, 44 Atl. 388. The request for this instruction was also properly denied.

The request for an instruction that the decedent was a trespasser, and the plaintiff was not entitled to a verdict unless her peril

was discovered by the defendants' employees in season to prevent injury to her by an exercise of ordinary care, was properly denied, for the reasons stated in the former opinion in this case. *Minot v. Railroad*, 73 N. H. 317, 321, 61 Atl. 509. One of the witnesses called by the plaintiff was allowed to testify, subject to the defendants' exception, that the 1 o'clock Jefferson Hill train for four or five years prior to the summer of 1902 was handled just the same as it was that summer. The defendants say this testimony was irrelevant and calculated to mislead the jury. It had the same relevancy to the questions on trial that the testimony had relating to the movements of the train during the summer of 1902. The uniformity of the custom for four or five years would be likely to impress the decedent, who resided near the station for some years and habitually observed the movements. It had a natural tendency to make her knowledge definite and certain. Whether the testimony should have been limited to a briefer period than four or five years was a question that was within the discretion of the court to determine, and is not open to consideration here.

The defendants' exception to the declaration of the court to limit the testimony regarding the custom as to the movements of the Jefferson Hill train to the time of day immediately following its arrival at Cherry Mountain is also overruled, for the reasons above stated.

The plaintiff, upon the cross-examination of the conductor and the engineer of the Jefferson Hill train, attempted to show that certain of the defendants' rules applied to the situation as the train backed down the siding, and required certain precautions. In doing so, he read the rules to the witnesses in the hearing of the jury, and asked questions concerning their application. The defendants excepted to this course. It was a dangerous course for the plaintiff to take, but it does not appear that it could possibly result in any harm to the defendants in this instance. As to two of the rules read, the witness testified, in substance, that they had no application to the situation of the backing train, and neither of them was offered in evidence. One of them was, in substance, the same as another rule that was put in evidence by the plaintiff and obviously applied to the situation, and the other was entirely immaterial and harmless. A third one was put in evidence without objection.

Exceptions overruled. All concurred.

(74 N. H. 260)

DUGGAN v. BOSTON & M. R. R.

(Supreme Court of New Hampshire. Hillsborough. May 7, 1907.)

1. RAILROADS—CROSSING ACCIDENT—DEATH OF CHILD—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

Where plaintiff's intestate, a child of nine, was killed by being struck by a railroad train as

she was crossing the tracks at a crossing, she was not chargeable with negligence as a matter of law, though she saw the train when she started to cross in front of it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, §§ 1029-1036, 1167.]

2. SAME—PROXIMATE CAUSE.

Plaintiff's intestate, a child of nine, was killed while crossing defendant's railroad tracks. She came into the engineer's field of vision when the engine was more than 300 feet from the crossing. If the engineer had put on the brakes, the train could have been stopped in time to have avoided the accident; but nothing was done until the train was within a few feet of the crossing. *Held*, that defendant's negligence in failing to sooner stop the train was the proximate cause of the accident.

Exceptions from Superior Court, Hillsborough County; Pike, Judge.

Action by Joseph H. Duggan, as administrator, etc., against the Boston & Maine Railroad. A verdict was rendered in favor of the plaintiff, and the case was transferred on defendant's exception to the denial of a motion for a directed verdict in its favor. Exception overruled.

A highway in East Manchester, known as the "Hall Road," crosses the defendants' railroad at grade. The highway runs north and south. The railroad is built on a curve, but its general direction is east and west, and its grade is descending in both directions from the crossing. On the east side of the highway and north of the railroad is a large building known as the "wrapper factory"; its southwest corner being 41 feet north of the northerly rail. The south line of the building, if produced, would intersect the center of the railroad 436 feet east of the crossing; but at a point 11 feet nearer the track there is an unobstructed view of the railroad toward the east for more than 500 feet. For a long time a large number of small children had been accustomed to play on and near the crossing. The plaintiff's intestate either had joined or was about to join in a game of hide and seek at the crossing when she was killed. She was 9½ years old, of average size and intelligence, but very nervous when near a moving train. She left her home, which was located north of the crossing, about 7 o'clock in the evening of May 30, 1903, and went directly to the northwest corner of the factory, where she stopped a few minutes and ate some bread and butter. She was next seen at the southwest corner of the factory, where she looked down the railroad toward the east, and then, stepping a few feet nearer to the crossing, she looked down the railroad toward the west. She then started to run across the tracks, looking straight ahead, but was struck by a train from the east and killed when nearly over the crossing. At the time she was seen looking toward the east, the engine was from 500 to 600 feet from the crossing, and approaching it at a speed of from 40 to 50 miles an hour. Nothing was done to notify the child of the approach of the train, nor was any effort made

to check its speed until it was within a few feet of the crossing. If the brakes had been applied when the engine was 250 feet distant from the crossing, the accident would not have happened. The engineer had an unobstructed view of the crossing, and the space between it and the factory, from the time the engine was within 400 feet of the crossing until the child was struck.

Burnham, Brown, Jones & Warren, for plaintiff. Branch & Branch, for defendant.

YOUNG, J. As the plaintiff's intestate was but nine years old, it cannot be said as a matter of law that she was guilty of contributory negligence, even if she saw the train when she started to run over the crossing. *Warren v. Railway*, 70 N. H. 352, 47 Atl. 735; *Bisailon v. Blood*, 64 N. H. 565, 15 Atl. 147; *Napurana v. Young* (N. J. Err. & App.) 65 Atl. 1052; *McLarty v. Railroad* (Ga.) 56 S. E. 297. It will not be necessary to consider whether she was rightfully or wrongfully on the crossing; for, if she was wrongfully there, that would not prevent the plaintiff from recovering, if "at the time of the accident she was in the exercise of ordinary care, and they knew of her presence in a dangerous situation, or failed to exercise due care to discover her presence in such a situation when circumstances existed which would put a person of average prudence upon inquiry" (*Brown v. Railroad*, 73 N. H. 568, 573, 64 Atl. 194); and it could be found from the fact that small children were in the habit of playing on the crossing that such circumstances existed (*Mitchell v. Railroad*, 68 N. H. 96, 34 Atl. 674). So the question whether there was any evidence from which it could be found the defendants were negligent resolves itself into the question whether or not it can be said as a matter of law that the ordinary man is accustomed to run a train at a speed of 50 miles an hour, over a grade crossing on which he knows small children may be playing, without doing anything to determine whether there are any children on it, until he is so close to it that he can do nothing to prevent an accident; for it could be found that that was what the defendants did, on the view which they concede may be taken of the evidence. According to that view, the train was moving seven times as fast as the little girl. So she came into the engineer's field of vision when the engine was more than 300 feet from the crossing, namely, seven times 45 feet, the distance from the southwest corner of the factory to the point where she was killed. If he had seen her at that time and put on the brakes, or if he had put them on when the engine was 50 or even a 100 feet nearer the crossing, it could be found that the accident would not have happened. Consequently it could be found that the defendants were negligent, and that their negligence was the cause of the accident.

Exception overruled. All concurred.

(102 Me. 296)

FARNSWORTH et al. v. WHITING et al.
(Supreme Judicial Court of Maine. Dec. 18, 1906.)

1. WILLS—CONSTRUCTION—LAPSED LEGACY.

It is the general rule that a legacy or devise will lapse when the legatee or devisee dies before the testator. A testator, however, may by express provisions in his will, or by language from which a clear implication may be drawn that such was his intention, prevent a lapse of the devise in case of the death of the legatee or devisee before the testator.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, § 1997.]

2. SAME—PARTICULAR PHRASES.

But it is also well settled that the use of mere words of limitation will not prevent the lapsing of a devise, and that the phrases, in different forms frequently and commonly used in a devise, such as "and his heirs," or "and his heirs or assigns," are words of limitation merely, descriptive of the nature of the estate devised, and do not create a substituted devise.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Wills, §§ 1061-1064, 1202.]

3. SAME.

In the case at bar, the first and second clauses of the will of the deceased testator read as follows:

"First. I give, devise and bequeath unto my wife Helen A. Farnsworth and her heirs, one half of all my estate, both real and personal, in whatever it may consist or wherever situated at the time of my decease.

"Second. I give, devise and bequeath unto my wife, Helen A. Farnsworth the remaining one-half of all my said estate, both real and personal, to be by her used and disposed of during her natural life, precisely the same as I myself might do were I living; and giving my said wife full power to sell, exchange, invest and reinvest the same, in the same manner I might do if living, but if any of the said remaining one-half of my said estate shall remain undisposed of, by my said wife at the time of her decease, and my mother, Mary C. Farnsworth, shall then be living, then I give, devise and bequeath all such residue and remainder of said remaining one-half of my estate unto my mother, Mary C. Farnsworth, but in the event that my wife shall survive my mother then, on the decease of my mother, I give, devise and bequeath all said residue and remainder of said one-half of my estate, unto my wife Helen A. Farnsworth and her heirs, it being my intention herein, that on the decease of my mother, all of my estate, real and personal shall become the property of my wife, she to have full power to dispose of the same, by will or otherwise, as she may think proper."

The testator died on May 9, 1905. His wife, Helen A. Farnsworth, one of the beneficiaries named in his will, died May 5, 1905, four days prior to the death of the testator. The testator and his wife left no issue. Mary C. Farnsworth, the mother of the testator, to whom, by the will, a remainder in a portion of the estate was given in case she survived the wife, is still living.

Held: (1) That the devise of one half of the testator's estate under the first clause of the will lapsed by the death of the devisee prior to that of the testator, that there was no devise by substitution, and no other testamentary disposition of this one half of the testator's estate upon the decease of the testator. Therefore this one half of his estate descended as intestate property according to the statutes of descent and distribution. (2) That to the other half of the testator's estate, mentioned in the second clause of the will, the death of the life tenant merely accelerated the taking of the remainder by the mother. Upon the death of

the testator his mother took under the will this one half of the estate in fee simple.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, § 2003.]

4. SAME—STATUTORY PROVISION.

The common-law rule that a devise to a devisee, who dies prior to the death of the testator, will lapse, has been modified under certain conditions in this state by Rev. St. c. 76, § 10, wherein it is provided: "When a relative of the testator, having a devise of real or personal estate, dies before the testator, leaving lineal descendants, they take such estate as would have been taken by such deceased relative if he had survived." But this statutory provision in no way changes the rule in the case at bar, for two reasons, viz.: The deceased devisee, the wife of the testator, was not a relative of the testator within the meaning of the statute; and she did not leave any lineal descendants. See *Farnsworth v. Whiting*, 66 Atl. 833.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, §§ 1191-1197.]

(Official.)

Report from Supreme Judicial Court, Knox County, in Equity.

Action by Mary C. Farnsworth and others against George F. Whiting and others. Decision on report. Decree for defendants.

Bill in equity asking for the construction of the will of James R. Farnsworth, late of Rockland, deceased. Heard on bill, answer, and evidence at the April term, 1906, of the Supreme Judicial Court, Knox county. At the conclusion of the evidence the cause was reported to the law court and "upon so much of the evidence as is legally admissible" that court "to enter such judgment as the legal rights of the parties require." See *Mary C. Farnsworth et al., Appellants, v. George F. Whiting et al.* (next following this case), 66 Atl. 833.

All the material facts appear in the opinion.

Argued before WISWELL, C. J., and EMERY, SAVAGE, POWERS, PEABODY, and SPEAR, JJ.

Orville Dewey Baker, for plaintiffs. D. N. Mortland and Rodney I. Thompson, for defendants.

WISWELL, C. J. Bill in equity asking for the construction of the will of James R. Farnsworth, late of Rockland, deceased.

The two clauses of the will to be construed, are as follows:

"First. I give, devise, and bequeath unto my wife, Helen A. Farnsworth and her heirs, one half of all my estate, both real and personal, in whatever it may consist or wherever situated at the time of my decease.

"Second. I give, devise and bequeath unto my wife, Helen A. Farnsworth the remaining one-half of all my said estate, both real and personal, to be by her used and disposed of during her natural life, precisely the same as I myself might do were I living; and giving my said wife full power to sell, exchange, invest and reinvest the same, in the same manner I might do if living, but if any of the said remaining one-half of my said estate

shall remain undisposed of, by my said wife at the time of her decease, and my mother, Mary C. Farnsworth, shall then be living, then I give, devise and bequeath all such residue and remainder of said remaining one half of my estate unto my mother, Mary C. Farnsworth, but in the event that my wife shall survive my mother then, on the decease of my mother, I give, devise and bequeath all such residue and remainder of said one-half of my estate, unto my wife Helen A. Farnsworth and her heirs, it being my intention herein, that on the decease of my mother, all my estate, real and personal shall become the property of my wife, she to have full power to dispose of the same, by will or otherwise, as she may think proper."

James R. Farnsworth died on May 9, 1905. His wife, Helen A. Farnsworth, one of the beneficiaries named in his will, died May 5, 1905, four days prior to the death of the testator. The testator and his wife left no issue. Mary C. Farnsworth, the mother of the testator, to whom, by the will, a remainder in a portion of the estate was given in case she survived the wife, is still living. The parties to the bill are Mary C. Farnsworth, mother of the testator, Lucy C. Farnsworth and Josephine Farnsworth Rollins, both sisters of the testator, complainants, and George F. Whiting and Isabella F. Martin, the brother and sister and only next of kin of Helen A. Farnsworth, defendants.

If the testator's wife had survived him, the construction of these two clauses of the will would have been very simple. Under the first clause she would have taken an estate in fee simple in one-half of all the testator's property at the time of his decease. Under the second clause she would have taken an estate for life, with full power of disposal, in the remaining one-half of her husband's property, with a remainder to the testator's mother in fee simple, if the latter survived the wife, of all that remained of this half undisposed of at the time of the wife's decease, and in the event of the death of the mother, leaving the wife surviving, the latter would have then taken an estate in fee in this remaining one-half of the testator's property.

How were these results affected by the fact that the death of the wife occurred before that of the testator? The contention of the defendants, the heirs of Mrs. Farnsworth, is that they, as her heirs, took the first one-half of the property devised, as substituted devisees, in her place; that the devise in the first clause was equivalent to a devise to her, if living at the time of the testator's death, if not, to them described as her heirs; that by the use of the words in the devise to the wife, "and her heirs," the testator evinced an intention, by implication, at least, that the devise should not lapse, upon her death prior to his, but that they should take under the will as substituted devisees.

The general rule is that a legacy or devise will lapse when the legatee or devisee dies be-

fore the testator. A testator may by express provisions in his will, or by language from which a clear implication may be drawn that such was his intention, prevent a lapse of the devise in case of the death of the legatee or devisee before the testator. But it is equally well settled that the use of mere words of limitation will not prevent the lapsing of the devise, and that the phrases, in different forms frequently and commonly used in a devise, such as "and his heirs," or "and his heirs or assigns," are words of limitation merely, descriptive of the nature of the estate devised, and do not create a substituted devise. Numerous cases from many jurisdictions in support of these general rules may be found in 18 A. & E. Encyc. of L. (2d Ed.) 749 et seq.

This rule of interpretation has been adopted in a very clear and emphatic language in this state in *Keniston v. Adams*, 80 Me. 290, 14 Atl. 203, followed by *Morse v. Hayden*, 82 Me. 227, 19 Atl. 443, and *Stetson v. Eastman*, 84 Me. 367, 24 Atl. 868. A leading case in Massachusetts upon the subject is that of *Kimball v. Story*, 108 Mass. 384, wherein it is said: "The general rule, prevailing in equity as at law, that if a legatee dies after the making of the will and before the death of the testator, the legacy lapses, is not affected by the insertion, after the name of the legatee, of the words 'his heirs, executors, administrators and assigns,' unless a declaration that the legacy shall not lapse is superadded, for those words, according to their uniform and well-established interpretation, only express the intention of the testator to pass the absolute property in the estate real or personal to the legatee." This case has been followed in three recent Massachusetts cases. *Wood v. Seaver*, 158 Mass. 411, 33 N. E. 587, *Bryson v. Holbrook*, 159 Mass. 280, 34 N. E. 270, and *Horton v. Earle*, 162 Mass. 448, 38 N. E. 1135. In all of which cases it was held by the court that similar expressions were only words of limitation, descriptive of the estate devised; that, the death of the devisee or legatee having occurred prior to that of the testator, the legacy lapsed; and that the words did not show an intention upon the part of the testator to create a devisee by substitution.

It is true courts have not infrequently held that the addition of the words "or heirs," instead of, as in this case, "and heirs," implies a substitution so as to prevent a lapse of the devise upon the death of the devisee. As said by this court in *Keniston v. Adams*, supra: "Although a very refined interpretation, it has been resorted to in instances where justice can be best administered only by its application." It is also true, as remarked in that case: "But courts have in some instances gone so far as to bring under the same rule devises running to a person named 'and' his heirs, by making the word 'and' read as if it were the word 'or'; but

this has never been done unless the other provisions in the will require such a construction, and we can find no case where it has been permitted, if the devise runs to assigns as well as to heirs." As expressed in the case of *Gilmore's Estate*, 154 Pa. 523, 26 Atl. 614, 35 Am. St. Rep. 835: "Courts will transpose the clauses of a will, and construe 'or' to be 'and' and 'and' to be 'or' only when absolutely necessary to do so in order to support the evident meaning of the testator."

There is nothing in this will which would require or permit the substitution of the word "or" for that used, and there can nowhere be found in the will the slightest intimation of any intention upon the part of the testator to make the heirs of his wife his beneficiaries in case her death should occur before his. It is argued upon the part of the wife's heirs that such an intention may be discovered from the fact that the testator divided his estate into two halves, making a different disposition of each; but his purpose in doing this seems to us perfectly apparent. He desired that his wife should have one half of the estate absolutely. As to the other half, he desired to make a provision for the benefit of his mother in the contingency that she should outlive his wife, but that, if the wife outlived the mother, then his purpose was that the wife should have the whole of his estate absolutely and in fee simple. And this obvious purpose was carried into effect by appropriate language.

This common-law rule that a devise to devisee, who dies prior to the death of the testator, will lapse, has been modified under certain conditions in this state by Rev. St. c. 76, § 10, wherein it is provided: "When a relative of the testator, having a devise of real or personal estate, dies before the testator, leaving lineal descendants, they take such estate as would have been taken by such deceased relative if he had survived." But this statutory provision in no way changes the rule in this case for two reasons: The deceased devisee, the wife of the testator, was not a relative of the testator within the meaning of the statute. *Keniston v. Adams*, *supra*. And she did not leave any lineal descendants. *Morse v. Hayden*, *supra*.

The parol testimony offered in this case is utterly useless as affording any assistance in the construction of the will. Much of it was inadmissible, and the rest of it of no value. In the construction of a will, parol testimony is frequently of some assistance for the purpose of identifying the beneficiary, or the subject-matter of the devise, or explaining the situation and circumstances surrounding the testator at the time of making the will to be construed, or for the purpose of throwing some light upon the sense in which words of doubtful and ambiguous meaning were used; but, the testator's "declarations of intentions, whether made before or after the making of the will, are alike inadmissible." 1 Greenl. on Evidence, § 290.

As to the first clause, then, the devise lapsed by the death of the devisee prior to that of the testator, there was no devisee by substitution, and no other testamentary disposition of this one-half of the testator's estate. Upon his death, that one half of his property therefore descended as intestate property according to the statutes of descent and distribution. As to the other half of his estate, mentioned in the second clause of the will, the death of the life tenant merely accelerated the taking of the remainder by his mother. Upon the death of the testator his mother took this one-half of the estate in fee simple, under the will.

A decree may be made in accordance with the opinion, and at that time an order may be made for the allowance of reasonable counsel fees for both sides, to be paid out of the estate.

So ordered.

(102 Me. 308)

FARNSWORTH et al. v. WHITING et al.
(Supreme Judicial Court of Maine. Dec. 18, 1906.)

ADMINISTRATOR — RIGHT TO APPOINTMENT — STATUTORY PROVISIONS.

A certain person, who was not of the next of kin, was appointed administrator with the will annexed of the estate of James R. Farnsworth, by the probate court of Knox county. From this decree an appeal was taken to the Supreme Court of Probate. After hearing in the Supreme Court of Probate, the presiding justice made the following order: "That the appeal be sustained, and the decree of the probate court appealed from be reversed; that the cause be remanded to the probate court below for further proceedings in accordance with this decision; and the judge of the probate court below is hereby directed to appoint the said Lucy C. Farnsworth [one of the next of kin] administratrix, with the will annexed on said estate, if she shall be found by said judge to be qualified and suitable for the trust, as requested by all those interested in said estate as heirs, devisees or legatees. If for legal and substantial reasons the said Lucy C. Farnsworth is adjudged by him to be unsuitable for said trust, the said judge of probate shall commit administration of the estate with the will annexed to another of the said next of kin, or two of them, as he thinks fit, if qualified for the trust; but if none of said next of kin are qualified and suitable for said trust, he shall commit the administration on said estate with the will annexed to such person as he deems suitable."

Held, that this order of the Supreme Court of Probate was in accordance with the provisions of the statutes.

See *Farnsworth v. Whiting*, 66 Atl. 831.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 22, Executors and Administrators, § 44.]
(Official.)

Exceptions from Supreme Judicial Court, Knox County.

From the decree of the probate court made upon petition of George F. Whiting and another, appointing Joseph E. Moore administrator with the will annexed of the estate of James R. Farnsworth, deceased, Mary C. Farnsworth and others appealed to the Supreme Court of Probate. To the ruling of

the Supreme Court of Probate, reversing the decree of the probate court, and the order made by the Supreme Court of Probate, Whiting and another alleged exceptions. Exceptions overruled.

Appeal from the decree of the probate court, Knox county, appointing an administrator with the will annexed of the estate of James R. Farnsworth. This case is an outgrowth of the controversy involved in the preceding equity case. *Mary C. Farnsworth et al. v. George F. Whiting et al.*, 66 Atl. 831.

The case fully appears in the opinion.

Argued before WISWELL, C. J., and EMERY, SAVAGE, PEABODY, and SPEAR, JJ.

Orville Dewey Baker, for plaintiffs. D. N. Mortland and Rodney L. Thompson, for defendants.

WISWELL, C. J. This case, an appeal from the appointment of an administrator by the probate court, is an outgrowth of the controversy involved in the preceding one.

Upon the petition of George F. Whiting and Isabella A. Martin the next of kin of Helen A. Farnsworth, the deceased wife of James R. Farnsworth, Joseph E. Moore, Esq., was appointed administrator with the will annexed of James R. Farnsworth by the probate court of Knox county, apparently upon the assumption that these petitioners were interested in his estate as beneficiaries under his will. This assumption was erroneous, as we have seen in the preceding case. From this decree the mother and two sisters of James R. Farnsworth, the deceased, appealed to the Supreme Court of Probate.

After a hearing in that court, the justice presiding made the following order: "That the appeal be sustained, and the decree of the probate court appealed from be reversed; that the cause be remanded to the probate court below for further proceedings in accordance with this decision; and the judge of the probate court below is hereby directed to appoint the said Lucy C. Farnsworth administratrix, with the will annexed on said estate, if she shall be found by said judge to be qualified and suitable for the trust, as requested by all those interested in said estate as heirs, devisees or legatees. If for legal and substantial reasons the said Lucy C. Farnsworth is adjudged by him to be unsuitable for said trust, the said judge of probate shall commit administration of the estate with the will annexed to another of the said next of kin, or two of them, as he thinks fit, if qualified for the trust; but if none of said next of kin are qualified and suitable for said trust, he shall commit the administration on said estate with the will annexed, to such person as he deems suitable." To which ruling and order the appellees alleged exceptions.

There can be no question as to the propriety of this order. By Rev. St. c. 66, § 22, "If there is no person whom the judge can appoint executor of any will according to

section eight; or if the only one appointed neglects to file the required bond within the time therein allowed, he may commit administration of the estate, with the will annexed, to such person as he might appoint if the deceased had died intestate." As Helen A. Farnsworth, whose death occurred prior to that of the testator, was the sole executrix named in the will, section 8, referred to in the section quoted, is not applicable. It therefore became the duty of the judge of probate to appoint "such person as he might appoint if the deceased had died intestate." By section 18 of the same chapter, administration should have been granted to the next of kin, or to two or more of them, "if the applicants are more than twenty-one years old and are in other respects qualified for the trust." There was no adjudication by the probate court that the next of kin of James R. Farnsworth, the deceased, were unsuitable for the trust. The order of the Supreme Court of Probate was in accordance with the provisions of the statutes. As no order in relation to costs was made by the Supreme Court of Probate, none will be made upon these exceptions.

Exceptions overruled.

Decree of Supreme Court of Probate affirmed.

MCKENNA v. HOULIHAN et al.

(Supreme Court of Rhode Island. Dec. 31, 1906.)

EQUITY—AMENDMENT OF BILL.

An amendment seeking to treat the agreement as a mortgage, and asking to redeem it after the debts secured thereby are barred, is properly refused, where the bill as originally framed sought specific performance of an agreement to reconvey, alleging payment of the consideration for the reconveyance, though the prayer was that the bill of sale be delivered up and canceled as void for want of delivery.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Equity, §§ 561, 562.]

Appeal from Superior Court, Providence County.

Suit by Thomas McKenna against Michael J. Houlihan and others. From an adverse decree, complainant appeals. Appeal dismissed, and decree affirmed, and the cause is remanded to the superior court for further proceedings.

James M. Gilrain, for appellant. Gardner, Pierce & Thornley, for appellees.

PER CURIAM. We find no error in the conclusions of the superior court. The bill as originally framed sought for the specific performance of the defendant's agreement to reconvey, alleging that the consideration for the reconveyance had been paid, although the prayer for relief was that the bill of sale be delivered up and canceled as void for want of delivery. The evidence does not sustain either of these claims. The proposed amendment seeks to treat the agreement as a

mortgage, and asks to redeem it after the debts which it was given to secure have been barred by the statute of limitations. Such an amendment was properly refused. The appeal is dismissed, the decree of the superior court is affirmed, and the case is remanded to the superior court for further proceedings.

LEE v. RHODE ISLAND CO.

(Supreme Court of Rhode Island. Oct. 15. 1906.)

NEW TRIAL—MISCONDUCT OF JURY—AFFIDAVITS OF JURORS.

The affidavits of jurors as to what took place in the jury room cannot be received to impeach their verdict.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, New Trial, § 290.]

Exceptions from Superior Court, Providence County.

Action by Frederick J. Lee against the Rhode Island Company. Defendant's motion for new trial was denied, and it excepted. Exceptions overruled.

Lewis A. Waterman, for plaintiff. Henry W. Hayes, Frank T. Easton, Lefferts S. Hoffman, and Alonzo R. Williams, for defendant.

PER CURIAM. This cause comes before us upon exceptions to the decision of the superior court upon the defendant's motion for a new trial, which decision is embodied in the following rescript:

"Sweetland, P. J. At the hearing on this motion the reasons for a new trial urged by the defendant were: (1) The verdict is contrary to the evidence. (2) The amount of the damages awarded was excessive. (3) The jury were tampered with. (4) The circumstances attending the deliberations of the jury tended to the prejudice of the defendant.

"To consider the last reason first, the defense seeks to show the nature of the jury's deliberations and to impeach the verdict by affidavits of certain jurors. The rule in Rhode Island is that the affidavit of a juror 'as to what took place in the jury room * * * must be rejected.' *Tucker v. Town Council*, 5 R. I. 558. This is a rule adopted in most jurisdictions; but the defendant cites a number of decisions, showing an exception to this rule, where affidavits have been received to show any matter occurring in the jury room which does not essentially inhere in the verdict itself, as that the verdict was determined by aggregation and average, etc. That such exception to the rule is not favored by our court is apparent from its language in *Luft v. Linganle*, 17 R. I. 420, 22 Atl. 942. After some discussion of the question as to whether the amount of the verdict in that case was obtained by aggregation and average, the court says: 'But it is not worth while to discuss the point. It is well settled, and this court has held, that the affidavits of jurors as to what took place in the jury room cannot be received for the purpose of impeaching their verdict; and, if the affidavits offered by the defendants are not considered, we have

no knowledge concerning the jury's deliberations.

"With regard to the alleged attempt to tamper with the jury the court has simply the statement of the juror Gardiner that a stranger, claiming to represent the defendant, sought to induce him to favor the defendant in the consideration of the verdict. There is nothing to show that this attempt was made by the party in whose favor the verdict was rendered, or that it was made by any one in his behalf; and there is no cause to set the verdict aside on that ground.

"There was sufficient testimony to warrant the jury in finding the defendant liable. The court cannot say that the amount of damages awarded was excessive, if the jury believed the testimony of the plaintiff as to his condition, and the testimony of Dr. McGuirk and Dr. Smith.

"Motion denied."

For the reasons therein expressed, we affirm the conclusions of the superior court.

The defendant's exceptions are overruled, and the case is remanded to the superior court for judgment upon the verdict.

LEE v. RHODE ISLAND CO.

(Supreme Court of Rhode Island. Oct. 15, 1906.)

NEW TRIAL—NEWLY DISCOVERED EVIDENCE.

A new trial for newly discovered evidence will be denied; it not appearing to be of such a character as would be likely to change the result.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, New Trial, § 228.]

Action by Frederick J. Lee against the Rhode Island Company. On petition for new trial. Denied.

Lewis A. Waterman, for plaintiff. Henry W. Hayes, Frank T. Easton, Lefferts S. Hoffman, and Alonzo R. Williams, for defendant.

PER CURIAM. The newly discovered evidence presented by the defendant does not seem to the court of such a character as would be likely to change the result upon a new trial, and it does not appear to the court that justice requires a revision of the case.

The petition is therefore denied.

CHARRON v. THIVIERGE.

(Supreme Court of Rhode Island. Oct. 22, 1906.)

ABATEMENT AND REVIVAL—TROVER—PENDENCY OF ACTION FOR TRESPASS.

A finding for defendant in trover for goods in plaintiff's store entered and occupied by defendant is proper on conflicting evidence as to whether defendant exercised any dominion over, or made any claim to, the goods, except as he held them by trespassing on the store, and an action involving the trespass, in which damages for any incidents thereof are recoverable, being pending.

Exceptions from Supreme Court, Providence County.

Action by Leon Charron against Elzear Thivierge. Finding for defendant. Plaintiff excepted and petitions for new trial. Petition denied.

Pegram & Cooke, for plaintiff.

PER CURIAM. This case is an action of trover for certain goods contained in the plaintiff's store which was entered and occupied by the defendant. The evidence is conflicting as to whether the defendant exercised any dominion over or made any claim to these goods, except as he held them by trespassing upon the store. As there was an action pending between these parties involving the trespass and in which damages might be recovered for any incidents of the trespass, we think the court properly found for the defendant in this action.

The plaintiff's petition for a new trial is denied, and the case is remitted to the superior court for judgment for the defendant.

SIMMONELLI v. WHITE STAR LINE.

(Supreme Court of Rhode Island. Nov. 21, 1906.)

MONEY RECEIVED—EVIDENCE.

Evidence that plaintiff bought of one who had been acting as agent of defendant carrier to sell its tickets documents purporting to be passage tickets of defendant, without anything in the circumstances to give notice of any revocation of the agency, that tickets exactly like them had been accepted by defendant, and that the company repudiated the act of its agent and notified plaintiff that the tickets were worthless, entitled plaintiff to recover for money had and received.

Exceptions from Supreme Court, Providence County.

Action by Serafino Simmonelli against the White Star Line. There was a nonsuit, and plaintiff excepted. Exception sustained, and case remanded.

James A. Williams, for plaintiff. William J. Brown, for defendant.

PER CURIAM. We feel compelled to call attention to the carelessness with which the exceptions are drawn. The bill makes the absurd recital that a verdict was rendered for the defendant for costs by nonsuit. The first and fifth exceptions are identical and complain of a nonsuit. All the others are based upon a supposed verdict which we have searched the record for in vain, although the bill is allowed by the judge who presided at the trial. Following the record, we have considered the case as a judgment of nonsuit, and we conclude that the nonsuit was erroneously granted.

We think there was sufficient evidence to sustain the count in the declaration for money had and received. It appeared that the plaintiff bought of a person who had been acting as an agent of the defendant to sell its tickets certain documents purporting to

be passage tickets of the defendant. So far as appears, there was nothing in the circumstances when the tickets were bought to notify the plaintiff that the defendant had revoked the agency of the seller, if it had done so, and tickets exactly like those in question had been accepted as valid by the defendant. Having paid his money to the agent of the defendant for valid tickets, he is entitled to recover it from the company, since the company have repudiated the act of their agent and have notified the plaintiff that the tickets are worthless. The suit is not brought on the contract printed on the ticket, and hence the conditions made thereby are immaterial.

The plaintiff's first exception is sustained, and the case is remanded to the superior court for a new trial.

HILL v. UNION R. CO.

(Supreme Court of Rhode Island. Nov. 9, 1906.)

NEW TRIAL—NEWLY DISCOVERED EVIDENCE.

New trial will not be granted for newly discovered evidence, it not appearing that it might not have been obtained by cross-examination at the trial or by diligent inquiry in the preparation of the case, and it not being of a decisive nature.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, New Trial, § 203.]

Action by Ida Hill against the Union Railroad Company. Finding for plaintiff. Defendant petitions for new trial. Petition denied.

See 57 Atl. 374.

Alfred S. Johnson, Arthur P. Johnson, and John P. Beagan, for plaintiff. Henry W. Hayes, Frank T. Baston, Lefferts S. Hoffman, and Alonzo R. Williams, for defendant.

PER CURIAM. It does not appear to the court that the evidence offered as newly discovered might not have been obtained by cross-examination of the plaintiff's witnesses at the trial or by diligent inquiry in the preparation of the case. It is not in its nature decisive, nor, considering the modifications of some of the witnesses and the suspicion raised as to others, is it entitled to great weight. On the whole, we are not persuaded that justice requires a re-examination of the case.

The petition is therefore denied and dismissed.

(104 Md. 170)

ALEXANDER v. MARYLAND TRUST CO.

(three cases).

(Court of Appeals of Maryland. May 15, 1907.)

1. COMPROMISE AND SETTLEMENT—CONSIDERATION.

To support a compromise, it is sufficient that the parties entering into it thought at the time that there was a bona fide question between them, though it may eventually turn out that there was, in fact, no such question.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Compromise and Settlement, §§ 37-40.]

2. SAME.

An individual and a trust company, having had dealings with each other with respect to the procurement of funds for the construction of a railroad, entered into a contract for the settlement of their respective claims. The individual transferred a large amount of common stock of the company organized to operate the railroad for the purpose of having the stock, together with other securities transferred to the trust company, disposed of to pay the trust company what was due it and to the individual a specified sum, with interest. The individual surrendered a claim of over \$500,000 for commissions besides the stock. *Held*, that the settlement was supported by a sufficient consideration.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Compromise and Settlement, §§ 35-50.]

3. SAME.

A. and M. became jointly interested in a Mexican government railway concession, and entered into an agreement which gave to A. four-ninths of the profits retained by M., whether in bonds or stocks of the company to be organized to operate the railroad. A trust company, with knowledge of the agreement, agreed to see to it that A. received his share of the profits. Subsequently a receiver was appointed for the trust company, and he and A. entered into a contract for the settlement of A.'s claims on A. surrendering his right to stock of the railway company deposited by M. with the trust company. *Held*, that the settlement was supported by a sufficient consideration.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Compromise and Settlement, §§ 35-50.]

4. RECEIVERS—MANAGEMENT OF ESTATE—SETTLEMENT OF CONTROVERSIES.

An individual, asserting a right to an interest in corporate stock in possession of a trust company in the hands of a receiver, entered into an agreement with the receiver for the settlement of his claim. By the agreement, the individual surrendered his right to the stock, in consideration that he should receive so much of the distribution on a sum supposed to be due to a third person as would not have to be paid to the third person by reason of counterclaims against him. *Held*, that the individual was entitled to a dividend on such sum, whether the supposed claim in favor of the third person was valid or not.

5. SAME.

Where an agreement executed in good faith by the receiver of a trust company and an individual claiming an interest in corporate stock in possession of the company, whereby the individual surrendered his interest in the stock in consideration of his receiving a dividend on a certain claim, was for the benefit of the estate in charge of the receiver because it enabled him to more readily dispose of securities forming the assets of the company and was approved by the court, the agreement was valid as being within the power of the receiver to make.

6. SAME.

Where, in a suit for the appointment of a receiver of a trust company and for a sale and distribution of its property, the trust company expressly assented to the granting of the relief prayed for, it was not necessary to give the trust company notice of a proposed contract between the receiver and a claimant for the settlement of the claim entered into with the approval of the court, especially where the trust company knew of the claim before the receivership, and permitted counsel for the claimant to appear in its name in support of the claim.

7. SAME—CLAIMS—ESTABLISHMENT.

It is within the discretion of the court in receivership proceedings to refuse to permit a third person to intervene and take testimony after the court has acted on a claim.

8. SAME.

Where a claimant in receivership proceedings has been misled by the conduct of the other parties, and for that reason has failed to take testimony in support of his claim, the court must see to it that he is not prejudiced thereby.

Appeal from Circuit Court No. 2 of Baltimore City; John J. Dobler, Judge.

Suit by John S. Gittings & Co. against the Maryland Trust Company for the appointment of a receiver. From decrees dismissing the petitions of John S. Alexander and Archibald A. Alexander praying for leave to take testimony to establish claims against the trust company and from order denying relief prayed for by John S. Alexander, he and Archibald A. Alexander appeal. Appeals in two of the cases dismissed, and the decree reversed in the third case, and remanded, with instructions.

Argued before BOYD, PEARCE, BURKE, and SCHMUCKER, JJ.

C. McH. Howard, Rich. B. Tippet, and John S. Wise, for appellants. C. Baker Clotworthy and J. Southgate Lemmon, for appellee.

BOYD, J. There are three appeals in this record—two by John S. Alexander and one by Archibald A. Alexander—but it will be unnecessary to discuss them separately, in view of the conclusions we have reached. Although the record contains nearly 500 pages and the briefs over 200, the principal questions in controversy are comparatively simple, after they are separated from those which have no bearing on these appeals. It will, however, be well to state at some length the facts leading up to the order and decree appealed from, as they will tend to explain and throw light upon the true situation and rights of the respective parties, so far as necessary for the purposes of this case.

The Mexican government granted a concession for the building of the Vera Cruz & Pacific Railroad, by which, in addition to the right to construct and operate the road, a subsidy in bonds of the government was granted at the rate of \$16,000 (Mexican) per kilometre payable in installments as the road was completed. The length of the road as projected was 350 kilometres (about 220 miles). Messrs. Reed & Campbell originally held the concession. John S. Alexander entered upon negotiations for the control of it, and Alfred Bishop Mason became jointly interested with him in the project, upon the representation of the latter that he would procure the assistance of the Maryland Trust Company in constructing the road. Prior to May 3, 1898, whatever understanding existed between Mason and Alexander was in parol, but on that date an agreement in writing was entered into between them. It recited that Mason had purchased from V. R. Reed a concession, bearing date February 28, 1898, issued to him by the government of the United

States of Mexico, which concession had been assigned to Mason and Henry J. Bowdoin, and which Mason had agreed to assign to the Vera Cruz & Pacific Railroad Company. It further recited that Alexander aided in the promotion of the undertaking, and had agreed to render such services thereafter, under the direction of Mason, as he might request, upon an agreement for compensation out of the net proceeds of the undertaking. It was then agreed by Mason that, upon the completion of the contracts of subscription and construction, he would pay Alexander for such services "four-ninths of such part of the net profits accruing from said contracts as the said Mason may retain for his own use and benefit, which payment shall be made by the transfer and delivery of four-ninths of such net profits in the form in which they may be when ascertained; * * * that is to say, in stocks, bonds, or notes of said company or in cash profits." Alexander agreed to accept the four-ninths, "and does not and will not claim any interest in said concession or any interest in, nor control over, the undertaking, except the right to receive the four-ninths of the net profits as above provided." It was provided that nothing in the contract should prevent Mason from dealing with the undertaking as his own property, or from canceling existing contracts with the railroad company and with others, or from making such other contracts as he might see fit. The agreement was also stated to be in full settlement of all questions existing between them prior to that date, and in final determination and definition of their respective rights. That agreement was drawn by Henry J. Bowdoin, who was vice president of the Maryland Trust Company, and was executed in triplicate; each of the parties and the trust company retaining a copy. Alexander testified that Bowdoin "undertook to give" him notice of any changes in the contract between the trust company and the railroad company that might be made at any time thereafter. On January 17, 1900, J. Bernard Scott, secretary of the trust company, wrote to the counsel for Alexander: "Should there remain in our hands to the credit of Mr. Mason any net profits, as defined and set forth in the agreement of May 3rd, 1898, we will, before turning same over to Mr. Mason, notify Mr. Alexander and give him an opportunity to assert his claim for his share in the same." In the petition of the receiver, to be hereinafter more particularly referred to, asking of the court authority to settle with Alexander, he said, in speaking of the contract of May 3, 1898: "The Maryland Trust Company was notified of this contract between Alexander and Mason and Mr. Henry J. Bowdoin, the vice president of said trust company, and, acting on its behalf, promised the said Alexander that the trust company would see that four-ninths of any profits that might be coming to Mason should be retained for his bene-

fit." Certain arrangements were made between Mason, the railroad company, and the trust company, and the latter advanced from time to time large sums of money. Alexander claims to have been kept in the dark, and evidently was not fully informed as to what was being done between those parties. The railroad company was organized under the laws of West Virginia, and in April, 1901, a new arrangement was entered into between the trust company, the railroad company, and Mason without the knowledge of Alexander. An agreement was entered into between the trust company and Mason on April 11, 1901, which recited the holdings of stock and promissory notes of the railroad company by Mason, which were held by the trust company as collateral security for the indebtedness of Mason, and by which it was agreed that the trust company should vote the stock as the agent and attorney of Mason at the meetings of the railroad company, in order that new contracts between Mason and the railroad company could be entered into. On the next day (April 12, 1901) another agreement was made between the trust company and Mason which recited that by the agreement of April 11th it was provided that the railroad company was to be capitalized at \$5,000,000 first mortgage 5 per cent. American gold bonds, \$2,500,000 first preferred stock, \$2,500,000 second preferred stock, and \$5,000,000 common stock, to be issued under the terms of a contract to be entered into between Mason and the railroad company. Mason then covenanted to deliver to the trust company the bonds, the first and second preferred stock and \$3,750,000 of the common stock, in consideration of which the trust company agreed to release him from all indebtedness or liability to the trust company, together with interest thereon existing at that date, as well as all indebtedness to the associates of the trust company under syndicate agreements entered into with Mason. That agreement provided for the sale by the trust company, or hypothecation as collateral security, of the subsidy bonds of the government of Mexico, issued on account of the reconstruction and equipment of the Motzorongo Road, and the construction and equipment of the Vera Cruz & Pacific Railroad and its branches, and it was agreed that Mason should receive a salary as president of the railroad company of \$20,000 in gold for the 12 months succeeding the 1st day of April, 1901. That the \$1,250,000 of common stock was allotted to Mason as his share of the profits is shown by what is called "Declaration of Trust and Agreement," which was executed by the trust company, through its attorney Mr. Marbury, and by Mason on March 14, 1902. That is also so stated in the petition of the receiver, which said that he was advised that Alexander was not notified by the trust company that said allotment had been made. The declaration of trust is quite a lengthy instrument. It

recites that, in addition to the proceeds of sales of the subsidy bonds, the trust company had made large advances towards the construction, operation, and maintenance of the railroad, and might advance additional amounts for the same or similar purposes; that Mason claimed to be a creditor of the railroad company in the sum of \$55,000 gold for money advanced by him at various times, also in the sum of \$584,122.94 (Mexican) for commissions for money secured by him for its use, and in a sum equal to the difference between the cost of repairs of the "Ferrocarril Agrícola de Motzorongo" and the amount of the proceeds realized from the sale of bonds granted by the Mexican government to aid in such repairs. It further stated that it was the object and purpose of the parties to that instrument "to provide for the final adjustment, settlement, and extinguishment of all claims existing between them, and to secure the repayment to them respectively of their said advances"; and, after stating the capitalization of the railroad company and that Mason owned the \$1,250,000 of common stock which was allotted to him "as his sole share in the profits" of the railroad enterprise, under the agreement of April, 1901, various covenants and agreements were entered into. Mason agreed to transfer and deliver the shares of the common stock to the trust company to be held by it for the purposes and uses of the agreement. The trust company declared that it held, and would hold, all the stocks and bonds of the railroad company which it already owned and held and those to be transferred to it by Mason as security for the repayment to itself and to Mason, *pari passu*, and without preference of one over the other, of their respective claims against the railroad company, to wit, the claim of the trust company for moneys advanced or to be advanced by it in furtherance of the construction, maintenance, and operation of the railroad, including certain expenses mentioned, with interest at 6 per cent. per annum upon each of said advances from the date thereof, less such amounts as the trust company may have received upon said claims from sales of subsidy bonds or other sources "and the claim of said Mason against said Vera Cruz & Pacific Railroad Company for the sum of fifty-five thousand dollars (\$55,000.00) gold, advanced by him as aforesaid, with interest at six per cent. (6 per cent.) per annum." It is then agreed, after the payment of all said claims in full, with interest at 6 per cent. per annum, to apply the balance, if any, remaining of the proceeds of the sale of securities, to pay 15 per cent. to Mason and the remainder to the trust company. Provision was made for the sale, exchange, etc., of the securities, and article 7 of the agreement provided as follows: "Notwithstanding anything in this agreement to the contrary, it is expressly understood that the trust company shall have the right to de-

liver to John S. Alexander four-ninths of the common stock of the Vera Cruz & Pacific Railroad Company to which said Mason was entitled as his share of the profits of the Vera Cruz & Pacific Railroad enterprise, provided the same be accepted by said Alexander in settlement and satisfaction of all his claims to share of said profits, and he give a proper release to said Mason, or his representatives."

Mason released the trust company and the railroad company, and each and every officer of those companies, from all claims of every description, acknowledged that he was fully satisfied, ratified, approved, and confirmed all corporate acts heretofore taken by the directors and stockholders of the railroad company, and especially those relating to the issue of the securities, and the execution and recording of the mortgage securing the bonds. He further covenanted to cause proper entries to be made upon the books of the railroad company to show the settlement and satisfaction of all his claims against the company. He continued to be president of the railroad company until November 7, 1902. Alexander testified that Mason never called on him for any services after December, 1898, refused to answer his letters, and neither he nor the trust company gave him any information. On October 19, 1903, John S. Gittings & Co. filed a bill in equity against the trust company, alleging that they were creditors of it, that the company was indebted in large amounts, was greatly embarrassed and unable to meet the demands of its creditors and depositors; that it had a large amount of assets, consisting of securities of various kinds, which had great value, but were not marketable; that the creditors and depositors were demanding payment of the funds due them, and the company did not have sufficient funds to meet the demands, and was, in fact, insolvent; that there was great danger that the assets of the company would be wasted and sold at great sacrifice, etc. They then prayed, first, that the court fully administer as a trust fund all the property of said company and marshal the assets, ascertain the liens and priorities existing thereon, and enforce and decree the rights, liens, and equities of the creditors and stockholders as the same might be fully ascertained and decreed by the court; second, that a receiver or receivers be appointed to take possession and management of the assets, books, and papers of the company, collect all debts due it and administer the same subject to the further order of the court, until such time as it may be just and proper to sell said property, etc.; third, that at such time as may be found just and proper the property of the defendant company be required to be sold and the proceeds distributed; and for further relief. The trust company filed an answer, admitting the matters and facts

set forth in the bill, referring especially to the stocks and bonds of the railroad in Mexico, consenting to the appointment of a receiver or receivers, with authority to administer the property and affairs of the defendant until an advantageous sale and disposition of its property and assets could be affected, and consenting to the granting of such other relief as was prayed for in the bill. An order was passed the same day (October 19, 1903) appointing Allan McLane receiver with power and authority to take charge and possession of the goods, wares, and merchandise, books, papers, and effects of or belonging to the company, and to collect the outstanding debts due it, and the company, its agents and attorneys, were required to yield up and deliver to said receiver the goods, wares, and merchandise, books, papers, and effects of said company, subject, nevertheless, to the further order of the court.

On December 18, 1903, the receiver filed a petition, referring to the bonds and stocks of the railroad company which were held subject to the declaration of trust of March 14, 1902, and quoting from it and asking for authority to purchase the securities. That petition also stated that Mason was indebted to the trust company in a sum far in excess of the \$55,000 with interest provided for in said declaration of trust; that amount of indebtedness having been incurred since the execution of said declaration of trust. An order was passed according to the prayer of the petition. On January 25, 1904, the receiver reported that Mason was willing to relinquish his rights under article 4 of the declaration of trust, requiring notice to him before sale, and to allow the trust company, or the receiver, to dispose of or borrow money upon the securities at any time without notice to him, and asked authority to execute an agreement with him which was filed with the petition. The court so ordered, and an agreement was made reserving the rights of Mason in the securities and the proceeds of sale as they existed prior to the application of the receiver for authority to purchase the securities, providing that the receiver should account to Mason for the proceeds as provided in the declaration of trust, apply the proceeds to the reimbursement of the trust company, or its receiver, for advancements made, "and at the same time and equally and without preference to the reimbursement of said Mason, his heirs, personal representatives, or assigns, of the sum of fifty-five thousand dollars (\$55,000), with interest, as provided in said declaration of trust," etc. After the appointment of the receiver Alexander obtained access to the papers and was asserting his claim for his share of the stock allotted to Mason, and which was purchased by the trust company with knowledge of Alexander's rights. The receiver was anxious to sell the securities of

the railroad company, and negotiations were carried on with the appellant for his interest in the stock. On April 15, 1904, the receiver filed a petition, in which he referred to the agreement between Mason and Alexander of May 3, 1898, and stated that the trust company was notified of it, and that Mr. Bowdoin, its vice president and acting on its behalf, promised Alexander that the company would see that four-ninths of any profits that might be coming to Mason should be retained for his benefit, that the declaration of trust showed that 25 per cent. of common stock had prior to the date of its execution been allotted to Mason as his share of the profits, of which Alexander had not been notified; that the whole of said 25 per cent. of stock was in the hands of the receiver, and that Alexander had presented his claim for four-ninths of said stock, alleging that he was entitled to it by virtue of the agreement between him and Mason, and the promise of the trust company to see that he received his share called for in the agreement. The receiver then stated that, after conferring with the various creditors of the trust company through their counsel, he was advised that it would be "most desirable" to have undisputed title to the entire capital stock of the railroad company in case of negotiation for a sale, and was advised to secure the relinquishment of Alexander's claim; that he had agreed with Alexander that, if he would relinquish any claim he might have to the stock, he would transfer to him the claim which the trust company and he, as receiver, had against Mason. The petition then states: "This balance due from said Mason on that account as shown by the reports of the experts is about \$200,000, but said Mason will be entitled to some credits on said account, and, so far as your receiver is advised, said Mason has no property from which said claim could be collected, except his interest under said declaration of trust and agreement of March 14, 1902." The same day the court authorized the receiver to execute an agreement with Alexander, in accordance with the recommendations contained in the petition. The docket entries in the record also show that on that day (April 15, 1904) the receiver reported a sale of all the securities of the Vera Cruz & Pacific Railroad, and the court ratified and confirmed the sale, although it is stated by counsel that the report of sale and order of court were not filed until a later period. On April 22, 1904, an agreement was executed between Alexander and the receiver by which Alexander released his claim to interest, ownership, or title in and to any stock of the railroad company, and the receiver (who, the agreement stated, was authorized by order of the court to make the agreement, and thereby bind the trust company) agreed that the company would in its own name, but at the expense of Alexander, set up any and

every claim which the trust company or the railroad company had, or might have, against Mason against any claim which Mason might have against the trust company or railroad company by reason of the contract of May 14, 1902, to the sum of \$55,000 and the interest thereon, and any profits thereunder which may be distributable or distributed to said Mason, "and, so far as said claim against said Mason may be adjudged to set off or extinguish said claims made by him, the party of the second part [the receiver] agrees to pay to the party of the first part [Alexander] a sum or sums equal to or representing said set-off or extinguishment out of the amount received by him from the sale of the securities of the Vera Cruz & Pacific Railroad Company or the sale of any securities which he may receive in exchange therefor." It then provides that in the event said Mason did not intervene in the suit and make claim to the \$55,000 and interest, or to any profits, he may claim under the agreement of March 14, 1902, and the trust company set up the counterclaim thereinbefore agreed to be set up, "then such sum as the court may adjudge to be payable out of the said fifty-five thousand dollars and interest and said profits to the Maryland Trust Company by reason of said counterclaims shall be paid to the said party of the first part." The agreement concludes by saying that it is made on the express understanding that Alexander claims title to a portion of the stock of the railroad company under agreement and understandings prior to March 14, 1902, and not under that agreement; "he not knowing of said agreement until some time after said agreement and never having acquiesced in or accepted the same, nor does he by this agreement release any claim he has or may have against said Mason."

The sale reported and confirmed on April 15, 1904, of the securities of the railroad company was, so far as we can understand, to the Mexican government for \$5,000,000, payable in first mortgage $4\frac{1}{2}$ per cent. gold bonds of the railroad company and guaranteed by the Mexican government, less certain deductions. The order of court of September 29, 1904, speaks of a sale for \$8,000,000 to Speyer & Co. and the purchase money as \$5,493,600, but the auditor's report shows the amount of sales to have been \$5,000,000, and refers to the order of September 29, 1904, and other papers. So we understand the amount to be the latter sum and that the bonds were sold at 91.56, realizing, including interest, \$4,838,750 which was received by the receiver October 5, 1904, as shown by the testimony of Mr. Marbury. From that there was deducted the sum of \$1,013,862.58, including amounts which the receiver was required to pay under the agreement with the Mexican government and various expenses.

On August 31, 1904, Mason intervened in this case by filing a petition demanding an

accounting with the trust company, etc. The trust company and the receiver filed a joint answer, setting up their claims against Mason, and alleging that the accounts of the experts showed that he had already received the entire \$55,000, and was not entitled to any dividend, but was indebted to the company. On January 7, 1905, the matter was referred to the auditor. Testimony was taken, and the auditor's report and account were filed April 9, 1906. The accounting was conducted largely by counsel for Alexander, though under the supervision and direction of the counsel for the receiver and trust company. At the conclusion of the examination of Mason, a stipulation was entered into, by which it was agreed, amongst other things, that the trust company should make no claim against Mason for any money advanced prior to April 12, 1901 (when he was released as above stated), and he agreed to make no claim against the trust company or railroad company for disbursements made by him prior to that time. It was agreed, however, that those stipulations should not be construed as depriving Mason of his right to claim the \$55,000 and the profits on the Metzorong improvements as mentioned in the agreement of March 14, 1902, or to affect his waiver of any claim for commissions or his right to claim 15 per cent. profits, as set forth in that agreement. It was also stipulated that certain accounts against Mason should be admitted as prima facie correct, subject to his right to show that any of the items were incorrect. The auditor distributed in part 1 of the account to Mason \$87,945.69, being a fraction of over 49 per cent. on the \$55,000, with interest from March 1, 1898, to October 5, 1904, when the money was received from the bonds, and charged him in part 2 with \$84,977.24, and made a note that the interest should be added from October 5, 1904. In part 3 the auditor stated an account between Alexander and the receiver, by which he distributed to Alexander the dividend on the \$55,000 and interest, with interest thereon at 2 per cent. (being the rate the receiver was getting) from October 5, 1904, to April 5, 1906, less unpaid costs of the proceedings, making \$38,025.26, and also the amount due and owing the trust company by Mason (over the above sum) on October 5, 1904, together with interest from that date to April 5, 1906, and also certain costs paid by Alexander. Exceptions were filed to the audit by Mason, the trust company, and John S. Alexander. In those filed by the trust company no objection was made to the distribution on the principal of the \$55,000, but the interest was excepted to. Apparently no objection was made at the hearing by the trust company to this claim. Indeed, it was said in the opinion of the court that it "does not press its exception beyond a protest against the allowance of interest upon the sum of \$55,000; contending that interest should only be computed upon actual money advanced by

Mason at various times, and not upon a bogus claim, though recognized to some extent in the declaration of trust," dated March 14, 1902. The court stated in the opinion that it would not allow that claim, and the trust company then filed, with leave of court, amended exceptions, objecting to its allowance. That was the first time during these proceedings the company questioned Alexander's right to the principal of this fund. Alexander then filed a petition, alleging that in the course of the proceedings, up to the time of the hearing of the exceptions, the validity of the claim as entitled to a dividend under the agreements was undisputed and unquestioned by counsel for any of the parties to the cause, and for that reason he did not take testimony in his own behalf before the auditor. He then set out his claim at length, and prayed that the cause be remanded to the auditor with leave to the parties to take testimony. The trust company and Mason answered the petition, objecting to the remanding of the cause, and on August 21, 1903, the petition was dismissed. From that action of the court an appeal was taken, which is one of those now before us.

Archibald A. Alexander then filed a petition, alleging that his brother had assigned his claim to him as collateral security, asking leave to intervene as claimant and take testimony to establish the claim, etc. On November 18, 1903, the court passed a decree dismissing the petitions of the two Alexanders, overruling the exceptions filed by John S. Alexander and Mason, and sustaining the amended exceptions of the Maryland Trust Company. The court further decreed that the claim of Mason for the \$55,000 be disallowed and stricken out; that the amount allowed by way of dividends on said sum and subsequently transferred to John S. Alexander be disallowed, and that the amount be paid over to the trust company, less the unpaid costs; that Mason pay to John S. Alexander, assignee of the claim of the trust company, the amount ascertained to be due by him, without crediting him with the said dividend, to wit, \$132,959.08, with interest from April 5, 1906, and that the audit in other respects be ratified and confirmed. The decree recited, amongst other things, that the contract between Alexander and the receiver "was heretofore fully authorized and approved by this court, and is hereby expressly ratified and confirmed," but declared Alexander was not entitled to the dividend, but was entitled to the claim of the trust company against Mason. Both of the Alexanders appealed from the decree, and those two appeals, together with that of John S. Alexander from the order of August 21, 1906, are now before us.

We have thus stated at such great length the material facts, because, when thus collected from the record, they seem to us to conclusively answer the main questions presented for our consideration. It must be borne

in mind that this is a controversy between Alexander and the trust company, and not between Mason and that company. If we were merely called upon to determine whether Mason or the company was entitled to this dividend, an important inquiry would be whether he had been paid the \$55,000 since the 14th of March, 1902, when it was admitted to be due. It would, to say the least, be very doubtful whether we could refuse to allow him a distribution on it merely because we reached the conclusion that it was originally a bogus or invalid claim. The agreement of March 14, 1902, not only shows that the object and purpose of the parties to that instrument were to make a final adjustment and settlement of all claims existing between them, but Mason transferred \$1,250,000 of common stock of the railroad company to the trust company, in trust for the very purpose of having that stock, together with the other securities, used or disposed of to pay the trust company what was due it and to Mason this sum of \$55,000, with interest, "pari passu, and without preference of one over the other of their respective claims against" the railroad company. It may be that the common stock had little or no market value, but it was apparently of considerable value to the trust company, as with such a large block of stock outstanding a sale of the other securities of the railroad company might have been prevented. Mr. Marbury, who succeeded in making the settlement, went to Mexico for the very purpose of settling this claim and others. He said in reference to it: "For purposes of settlement, I was willing to concede the claim, but what the claim was for or the items of it, or anything of that kind, I never inquired about. It was not material for the purposes of that settlement." As Mason also surrendered a claim of over \$500,000 for commissions, besides the \$1,250,000 of stock, it would seem that Mr. Marbury might well have regarded this claim of \$55,000 of comparatively little importance, if he accomplished a settlement. He was then acting for the company, and after the receiver was appointed we have seen that he was advised that "it would be most desirable to have undisputed title of the entire capital stock." It was said in *Hartle v. Stahl*, 27 Md. 157, that, "to support a compromise, it is sufficient that the parties entering into it thought at the time there was a bona fide question between them, though it may eventually turn out there was in fact no such question." A mere forbearance to sue would present a different question, and in this case the agreement with reference to the \$55,000 was for a valuable consideration.

But, without pursuing that inquiry further, there can be no doubt that Alexander had a bona fide claim for four-ninths of the stock issued to Mason. The trust company not only knew of his claim, but its vice president drew the contract which was the basis of

it, and its officers promised to keep him informed of any changes made. There was ample consideration to support the settlement between Alexander and the receiver, and there is nothing to show that Alexander was attempting to take any undue advantage of the receiver or the interests he represented. The equities were on his side. He had spent his time and money in aiding in the promotion of the enterprise, and according to his brother's petition, which was sworn to and filed in the case (although we do not accept it as evidence), he used large amounts of money furnished by his brother. Whether that be true or not, the record shows beyond question that John S. Alexander not only asserted his claim as a bona fide one, but it was so regarded by the receiver and others connected with the trust company. When the receiver filed his petition with the court on April 15, 1904, and the court authorized the agreement to be made in accordance with its recommendation, it cannot be doubted that it was understood that the distribution to Mason, in accordance with the declaration of trust of March 14, 1902, was to be paid, and that Alexander was to get the benefit of it. The receiver said in his petition that he was advised that Mason had no property out of which the claim due by him could be collected, except his interest under the declaration of trust. It cannot be supposed that Alexander would have been willing, or the receiver expected him, to surrender his interest in the stock for an indefinite amount against a man from whom it could not be collected. The agreement between Alexander and the receiver clearly meant that Alexander should receive so much of the distribution on the \$55,000 as would not have to be paid to Mason by reason of the counterclaim against him, or the extinguishment of this claim—that is to say, if the distribution was, for example, \$37,000 and the claim against Mason was adjudged to set off or extinguish that amount, the whole of that sum was to be paid to Alexander; if less be so adjudged, then that much was to be paid to Alexander and the balance to Mason, if he was still entitled to it. The claims of the trust company and the railroad company against Mason were also agreed to be assigned to Alexander.

The validity vel non of the \$55,000 claim cannot affect Alexander. When the agreement of April 22, 1904, was made, the receiver unquestionably regarded it as valid, but he also believed from the reports of the experts that there were valid counterclaims against Mason; and, as he believed they could not be made out of Mason, excepting to the extent of the dividend on the \$55,000 claim, he doubtless deemed it proper and "most desirable" to agree to pay that to Alexander, in order to get rid of his claim for the four-ninths interest in the stock. The learned judge who decided the case below was satisfied that the contract was a proper

one, and by his decree not only confirmed it, but undertook to enforce it in favor of Alexander to the extent of the claim against Mason, but, being of the opinion that the claim of \$55,000 was "invalid, unwarranted, and fictitious," disallowed it. From what we have already said it will be seen that we are of the opinion that he was in error in reference to that. The dividend on that sum with interest, however the claim itself be now regarded, was the real compensation for Alexander's surrender of his claim to the stock, and not merely a personal decree against Mason, which is apparently worthless, and could probably be settled by a sum of money sufficient to obtain his discharge in bankruptcy.

We have no doubt about the power of the receiver to enter into the agreement with Alexander. The decree appealed from expressly recognized it. As we have already indicated, we think that the petition of the receiver of April 15, 1904, shows that it was the intention of the receiver and Alexander that the latter was to have the benefit of so much of the dividend on the \$55,000 claim as could be set off, or extinguished, and the court expressly authorized the execution of an agreement in accordance with that petition. The decree of the court now under review, which was passed by the same judge who passed the order of April 15, 1904, shows that he so understood the power given the receiver, as it says, "Which contract was heretofore fully authorized and approved by this court." But, if there could be any doubt about that, this decree ratified and confirmed it and the court undoubtedly had that power. 23 Am. & Eng. Ency. of Law, 1064. The agreement was executed in good faith by the receiver and Alexander, and it was unquestionably for the benefit of the estate in the charge of the receiver; for, if it had not been made, it was possible that the sale of the securities of the railroad company could not have been consummated, or at least would have been so delayed as to cause the trust company, its creditors, and all interested parties great loss. It is now too late to undo what was done by virtue of that agreement, as the stock was set free and doubtless delivered several years ago. There can be no question about the right of a receiver, with the sanction of the court, to make such a contract. 23 Am. & Eng. Ency. of Law, 1066. If he could not, it would oftentimes cause great sacrifice to the interests he represented. The right of a receiver to compromise claims and suits with the sanction of the court is very generally recognized. 23 Am. & Eng. Ency. of Law, 1080; Alderson on Receivers, § 365, etc.; Beach on Receivers, § 278.

Nor was it necessary, as contended by the appellee, to give the trust company notice of the proposed contract. We have stated above the prayers of the bill and the answer of the company. The court undoubtedly had the right to authorize and confirm a sale of the stock, bonds, etc., and, if every time a

question such as that presented by Alexander's claim was raised it was necessary to give the company notice and await its consent, or hear its objections, great loss to the estate would ensue. The company had by its answer consented to the sale of the securities and a distribution of the proceeds, as it expressly assented "to the granting of such other relief as is prayed in said bill of complaint," and one of the prayers of the bill was for the sale and distribution of the proceeds. Indeed, it is difficult to understand how the trust company could have any standing in a court of equity to make such an objection, under the circumstances disclosed by the record. It was not only acquainted with Alexander's claim before the receiver was appointed, and promised to keep him advised, but it permitted counsel for Alexander to appear in its name in support of this claim, which was doubtless done in pursuance of the agreement between the receiver and Alexander. Indeed, the company was represented and taking active part throughout the proceedings, and made no objection to the allowance of the principal of this claim until the intimation came from the court that it ought not to be allowed. We are therefore of the opinion that the distribution to Alexander on the \$55,000 should have been allowed and confirmed. Without deeming it necessary to discuss the question, we think the report of the auditor gives sufficient reasons to justify the allowance of interest on that sum from March 1, 1898—the time fixed by the auditor.

It was in the discretion of the court below to refuse to permit Archibald A. Alexander to intervene and take testimony when he applied for leave to do so, and we will dismiss his appeal. If we had entertained it, we would have affirmed the action of the court, as a party should not be permitted to remain out of the case of which he has knowledge until after it is decided against him, and then become a party and delay the final settlement of it, unless he can show better reasons for so doing than this petition furnishes.

It is not necessary to determine whether the petition of John S. Alexander to remand the cause should be reviewed by us. Ordinarily such questions are in the discretion of the court; but if a party to a cause (either of record or appearing through another) is misled by the conduct of the other parties, and for that reason failed to take testimony, or do other acts which he would otherwise have done, the court should see that he is not prejudiced thereby. In this case the court was doubtless of the opinion that nothing could be accomplished by remanding the cause, by reason of the conclusion he had reached as to the \$55,000 claim. But, as it was not necessary to take two appeals to protect his rights, we will dismiss the first one of John S. Alexander, assuming that to be the one taken from the order of August 21,

1906. We will direct the costs in this court, including the transcript and printing of the record and the briefs filed by John S. Alexander and the Maryland Trust Company, to be taxed in No. 51 (office docket), and to be paid by the appellee, the costs in Nos. 50 and 52 (office docket) to be paid by the respective appellants. We understand the costs below connected with this contest to have been disposed of by the audit, but, if not, the court below can direct how they shall be paid. We will reverse the decree of the lower court in so far as it changes the audit in reference to the claim of \$55,000 and interest, and remand the cause, in order that a decree be passed ratifying and confirming the audit as filed.

Appeals in Nos. 50 and 52 (office docket) dismissed, and decree reversed in No. 51 (office docket) in so far as it changed the audit in reference to the claim of \$55,000 and interest, and cause remanded, in order that the audit may be ratified and confirmed as stated by the auditor, the costs of transcribing and printing the record and of the briefs filed for John S. Alexander and the trust company to be taxed in No. 51 (office docket) and the costs in that case in this court to be paid by the appellee, those in Nos. 50 and 52 (office docket) to be paid by the respective appellants.

(217 Pa. 565)

LOCKNEY v. POLICE BENEFICIARY ASS'N.

(Supreme Court of Pennsylvania. April 22, 1907.)

1. BENEFICIAL ASSOCIATIONS—NOTICE OF ASSESSMENT—EVIDENCE OF CUSTOM.

By-laws of a police benefit society provided for assessments on the second Monday of the month against members of the police force, while ex-members were to pay within 30 days after notice. Notice of assessment was read to all the policemen, and a copy posted on the bulletin board in the station house. There was no provision as to notice to an ex-member. The evidence showed that the posting of notice on the bulletin board was the usual method of informing ex-members. An ex-member was expelled for nonpayment of an assessment. *Held*, that the question as to whether a custom as to notice had been established was for the jury.

2. SAME—QUESTION FOR JURY.

In an action against a benefit society, question whether notice of an assessment given was sufficient was for the jury.

3. CUSTOMS—EVIDENCE TO ESTABLISH.

To establish the validity of a custom, it must have existed so long as to have become generally known, and must be distinctly proven.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Customs and Usages, § 3.]

Court of Common Pleas, Philadelphia County.

Action by Annie Lockney, known as Annie Loughney, against the Police Beneficiary Association. Judgment for plaintiff, and defendant appeals. Affirmed.

The defendant presented, *inter alia*, the following points:

"(2) If the jury find and believe that John Lockney, on August 1, 1898, became a member of the police beneficiary association, and was a police officer connected with the police district station at Twentieth and Federal streets, and continued to be connected with that station as an officer until he severed his connection with the police department in February, 1899, and that all notices for payments of assessments for the said John Lockney, as well as for the other members of the police beneficiary association connected with that station, were sent to the said station during the whole of that period, and continued so to be sent thereafter, that being the adopted manner and custom of sending notices of assessments to the members of the police beneficiary association, and the said John Lockney and the other members receiving all of their notices in that way, and all payments of assessments that were made being paid to delegates at the said station, the notice for the payment of assessment of \$4, sent on November 28, 1900, to the said station, was a notice to the said John Lockney, and, the said assessment not having been paid on or before January 10, 1901, the plaintiff cannot recover, and the verdict must be for the defendant. Answer: It is pretty hard to answer that point. If all the matters which are involved in that point are believed by you to be true, and particularly if you believe, as I have said before, that there has been an established, understood custom, or practice, that the notice to be given to the members and ex-members of that association that assessments were made was by reading them out from the desk in the station house or by posting them there, then I affirm that point.

"(3) When the said John Lockney severed his connection with the police department, if he desired notices for payment of assessments to be sent to an address other than that in the adopted and accustomed place and manner, viz., to the police district station, Twentieth and Federal streets, where he had always been notified from the commencement of his membership in August, 1888, to February, 1899, when he ceased to be a police officer, he should have requested the proper officer of the police beneficiary association to send his notices to the other or new address; and if the jury find and believe that the said John Lockney did not request his notices to be sent to an address other than the accustomed address, viz., the said station at Twentieth and Federal streets, then a notice sent to the said station was a sufficient notice to the said John Lockney, and the assessment levied for November, 1900, of \$4, not having been paid on or before January 10, 1901, the plaintiff cannot recover, and the verdict must be for the defendant. Answer: I affirm that, just as I did the second point, if you believe that the testimony shows that there had been an established, understood way of giving notice at

the station house, which would be exclusive of other notices.

"(4) If the jury find and believe that the said John Lockney paid all of his assessments at the district station at Twentieth and Federal streets that were made upon his membership certificate sued upon in accordance with notices sent to the said station, and the said John Lockney neglected to pay the sum of \$4, being assessment for the month of November, 1900, notice of which was sent to said station on November 28, 1900, then there can be no recovery by the plaintiff, and the verdict must be for the defendant. Answer: I decline that point."

Verdict and judgment for plaintiff for \$2,059.20. Defendant appealed.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

Frederick A. Sobernheimer, for appellant. Joseph H. Taulane and Ernest M. Prevost, for appellee.

ELKIN, J. John Lockney, the husband of appellee, was a police officer in the city of Philadelphia, and became a member of the Police Beneficiary Association in 1888. He was discharged from the police force in 1889, but under the by-laws of the association he then became an ex-member. The right of the appellee, his wife, the beneficiary named in his certificate of membership, to receive the amount named therein, was in no way impaired by the fact that he was discharged from the police force, provided, however, that he was in good standing in the association at the time of his death. The principal question for determination in this case is whether proper notice of an assessment had been given to the husband of appellee. It appears from the evidence that when a death occurs in the association an assessment of 50 cents is made upon each member, and the secretary of the association transmits, by telegraph, a notice to the lieutenant or superintendent in charge of the various police stations to collect from each member the amount of the assessment so levied. When this notice is received at the police station, it is read over the desk to all the policemen, and a copy of the same is posted on the bulletin board in the station house. The only notice given to the husband of appellee of the assessment of December, 1900, was by reading and posting on the bulletin board in the station house as above described, which, it is contended, was all the notice required under the circumstances of this case. It must be conceded that, if proper notice was given to appellee's husband, his failure to pay the assessment within 30 days after such notice made him liable to expulsion, and the act of the association in expelling him at their meeting on January 14, 1901, was within the power of the association under its by-laws. On the other hand, if proper notice was not given him, his expulsion was illegal, and not

withstanding the same he continued in good standing until the time of his death, and the beneficiary named in the certificate of membership would be entitled to recover from the association the amount due her under the terms thereof.

The by-laws of the association, relating to the question of notice, provide: "Any member of the department failing to pay his annual dues or assessments on the second Monday of the month, shall be expelled, and his beneficiary certificate shall be null and void: provided, that this does not apply to ex-members of the department who shall have 30 days from date of notice to make payments." It will be observed that the by-law does not specify the kind of notice, nor the manner in which it is to be given an ex-member; but it does expressly provide that ex-members shall have 30 days after notice to pay the assessment, and it is therefore incumbent on the association to give ex-members notice of the assessments levied upon them, in order that they may be informed thereof, and have an opportunity to pay the same within the 30-day limit. The by-law clearly contemplates a different method of dealing with members and ex-members. Members pay on the second Monday of the month, while ex-members pay within 30 days after notice. It is perfectly clear that an ex-member is not liable to pay an assessment until he has notice of the same, either actual or according to the by-laws and regulations of the association. In the case at bar the husband of appellee did not receive actual notice, the by-laws of the association are silent on the subject of the kind of notice to be given to an ex-member, and the only attempt to prove notice consisted in showing that the call for an assessment had been read to acting policemen and posted on the bulletin board in the station house. It cannot be said, however, that the notice given by reading aloud the call for an assessment in the station house was a sufficient notice to ex-members; for it could not be expected that ex-members, no longer members of the police force would be present when the notice was read, and they could not, therefore, be charged with notice in this respect. Nor can it be said as a matter of law that the posting on the bulletin board of the fact that an assessment had been called charged an ex-member with notice to pay the assessment. It is true that evidence was introduced on behalf of the appellant tending to show that for a number of years the posting of the notice on the bulletin board was the customary and usual method of informing ex-members that an assessment had been levied.

It is argued by the learned counsel for the appellant that Lockney had knowledge of this custom while he was a member of the police force, and must be held to be bound by it, and the fact of the notice having been posted being undisputed, it is contended the court should have withdrawn the case from

the jury and directed a verdict for the defendant. This position loses sight of the fact that the posting of the notice upon the bulletin board in the station house was primarily intended to give notice to members, and the evidence does not so conclusively establish the fact as to warrant the court in holding as a matter of law that this was a proper and sufficient notice to the husband of the appellee. Whether or not, under the evidence in this case, a custom was sufficiently and clearly established, so as to charge the appellee's husband with notice of the assessment, was left by the learned court below for determination by the jury; and in this we see no error. *McMasters v. Pennsylvania Railroad Company*, 69 Pa. 374, 8 Am. Rep. 284. In order to establish the validity of a custom or usage, it must have existed so long as to have become generally known, and it must be clearly and distinctly proved. *Adams v. Pittsburg Insurance Company*, 95 Pa. 348, 40 Am. Rep. 662. In the absence of a stipulation in the charter or by-laws of the association providing the method of giving notice to ex-members, it was for the jury, and not for the court, to determine, under all the facts of this case, whether or not the notice given was sufficient. The instructions of the learned trial judge fairly and properly left this question to the jury where it belonged.

The argument of the learned counsel for appellant relating to the question whether Lockney had been properly expelled from the association may be conceded to be sound. It is clear that, if Lockney had proper notice of the assessment and failed to pay the same within 30 days, the association had a right to expel him, and if he had been regularly expelled he would lose all his rights as a member, and his beneficiary would have no claim against the association upon his death. This question however, need not be given any further consideration, because we have already held that the whole case depends upon the question whether proper notice of the assessment had been given, and, if he did not receive proper notice of the assessment, his attempted expulsion was illegal.

Judgment affirmed.

(217 Pa. 618)

TILBURG v. NORTHERN CENT. RY. CO.
(Supreme Court of Pennsylvania. April 22, 1907.)

1. CARRIERS—EXPULSION OF PASSENGER—DAMAGES.

A carrier is liable for expulsion of a passenger at a dangerous time or place, not only for the injuries directly suffered, but also for subsequent injuries proximately due thereto.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, § 1483.]

2. SAME—QUESTIONS FOR JURY.

In an action to recover for the death of a passenger expelled from a train at a flag station and on a stormy night for failure to produce his ticket, where he was afterwards found

dead, apparently having been killed by a locomotive, whether the servants of the carrier were guilty of negligence and whether deceased exercised due care were questions for the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, § 1495.]

Appeal from Court of Common Pleas, Lycoming County.

Action by Mary Tilburg against the Northern Central Railway Company. From an order refusing to take off a nonsuit, plaintiff appeals. Reversed.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, and STEWART, JJ.

Otto G. Kaupp and M. C. Rhone, for appellant. Seth T. McCormick, for appellee.

MESTREZAT, J. This is an action of trespass to recover damages for the death of Robert D. Tilburg, the plaintiff's husband. In the afternoon of January 3, 1905, he and his son Edward purchased tickets at Williamsport, Lycoming county, over the defendant's road for Cogan Valley station. At the same time one Charles Stamets purchased a ticket for Haleeka, a flag station about one mile beyond Cogan Valley, and the three parties entered and took seats together in a coach of the same train. Soon after the train left Williamsport the conductor asked Tilburg for his ticket, who, after searching his pockets, informed the conductor that he had a ticket for Cogan Valley, but was unable to find it. The conductor then told Tilburg to look for his ticket and he would return, which he shortly did, after taking up the tickets of the other passengers. He again asked Tilburg for his ticket, and was again informed by Tilburg that he had a ticket, but could not find it. The conductor then made inquiry of Stamets, who was present when Tilburg purchased his ticket, and was informed by Stamets that Tilburg had purchased a ticket from Williamsport to Cogan Valley. The son, Edward Tilburg, also gave the conductor the same information. About that time the brakeman announced Cogan Valley station. Edward Tilburg arose from his seat to leave the train and went to the door of the coach and on the platform. At the same time his father got up from his seat, but the conductor stood at the entrance to the seat with his hand on Tilburg's shoulder, demanding the ticket or the fare, and would not permit Tilburg to leave the coach, telling him that he, the conductor, must have the ticket or the fare before they came to the next stop, "or he would take care of him." The train stopped only a minute at Cogan Valley. Edward Tilburg alighted, but his father was still on the train. The conductor continued to demand the ticket or payment of his fare until the train arrived at Haleeka, where it stopped. Here the conductor put Tilburg off the train. Stamets, who was present and also alighted from the

train, says that the conductor shoved Tilburg "down off the step." This was at 5 o'clock in the evening, and it was dark. Edward Tilburg testified that "it was storming when the train left Williamsport, and that in the evening it was snowing and blowing terrible cold, very cold, the coldest day we had last winter"; that it had been storming since the day before; and that there were four inches of newly fallen snow on the ground. Stamets testified: "Q. Standing at the Haleeka flag station, at the point where Robert Tilburg was ejected, at the time that you say that he was ejected, what could you see of the surrounding country? A. Couldn't see anything. Q. Why? A. It was dark and stormy, and the wind was blowing very hard, and you couldn't see anything." Stamets says there was no house or place of shelter at the station. Tilburg was a stranger in that community, and had never been at the station before. The conductor gave him no information as to where he could find shelter or how he could return to Cogan Valley. After he had been ejected from the coach, Tilburg asked Stamets if he knew how he could get back to Cogan Valley station, and Stamets told him "the only way I knew was to go back down the railroad, because I didn't know any more about it than he did." The evidence does not disclose that there was any station house or other buildings at Haleeka in which Tilburg could secure shelter or protection from the storm, or in which he could remain during the night. Nor did it appear whether there were any roads in that vicinity, or that there was any other practicable or safe way than the railroad by which Tilburg could have returned to Cogan Valley. After Tilburg had been ejected from the train, he started to return to Cogan Valley by way of the railroad. He was not again seen until his body was found along the railroad track the next morning about a quarter of a mile from Haleeka station. The ticket he had purchased at Williamsport for Cogan Valley was in his pocket. Fifteen or twenty minutes after Tilburg's ejection from the train a freight train passed towards Williamsport, the direction in which Tilburg was walking. The evidence tended to show that he was killed by being struck by a locomotive. Upon these facts, the learned trial judge granted a nonsuit, which he subsequently refused to take off.

The nonsuit was granted solely on the ground that the plaintiff had failed to show affirmatively that the deceased could not have returned to Cogan Valley except by walking on the railroad track. The learned court, in its opinion refusing to take off the nonsuit, held "that it was the duty of the plaintiff to affirmatively show the necessity of the deceased to follow the railroad track towards his place of destination, and, having totally failed so to do, we granted the compulsory nonsuit now under consideration." We cannot agree with the learned trial judge

in the disposition he made of this case. Having purchased the ticket and having taken his place in the coach of the defendant's train, Tilburg became a passenger, and it was the duty of the defendant's servants to treat him as such. The conductor was informed by Edward Tilburg and Stamets that Tilburg had purchased a ticket which entitled him to be carried from Williamsport to Cogan Valley. It was his duty, when requested, to deliver his ticket, and, after being given a reasonable time to find it and failing to produce the ticket or pay his fare, the conductor could have expelled him from the train. This could have been done at Cogan Valley station, Tilburg's destination, which the train at the time was approaching, and at which it subsequently stopped. Tilburg desired to leave the train at that station, but was prevented by the conductor. This action on the part of the conductor was a clear misapprehension of his duty and an infringement of the rights of Tilburg. The train stopped at the station but a moment, hardly giving Tilburg an opportunity to alight if he had not been prevented from doing so. The train moved on, and the next station is a flag station. Here the conductor exercised his authority, and, if the only testimony submitted is believed, forcibly ejected Tilburg from the train at a time and place and under circumstances which a jury would have been fully justified in finding endangered the life of the passenger. If the case had been submitted, and the jury had so found, it would clearly have been negligence on the part of the carrier company. 2 Hutchinson on Carriers (3d Ed.) §§ 1082, 1084. In 6 Cyc. 563, it is said: "The servants of the carrier should not expel a passenger (or even a trespasser) at a time or place which is dangerous, and the carrier will be liable in such a case, not only for injuries directly suffered in connection with such expulsion, but also for subsequent injuries proximately due thereto, such as injury from other trains which the ejected person could not reasonably avoid, the probable consequences of improper exposure, and the like." Under the facts disclosed by the evidence it was, therefore, a question for the jury to determine whether the conductor had exercised the care required of him in expelling the passenger from the train at Haleeka flag station. 2 Hutchinson on Carriers (3d Ed.) § 1083. As said by Mr. Justice Gordon in delivering the opinion of the court in *Arnold v. Pennsylvania Railroad Co.*, 115 Pa. 135, 8 Atl. 213, 2 Am. St. Rep. 542: "In the case in hand, the duty of the conductor in expelling the plaintiff from the cars at the time and place selected for that purpose was certainly one that was not strictly defined. It may be admitted that as a faithful officer he was obliged to eject Arnold from the train; but then the very important question arises: Did he, as the company's employe, properly discharge this obligation in dismissing the plaintiff from the

car between the tracks of the railroad, on a very dark night, at a way station that, from the want of light in or about it, could not be seen? As everything in this proposition depends upon facts and circumstances, its solution was for the jury."

In the case at bar, while it is true the expulsion took place, at 5 o'clock in the afternoon, it was a January evening, and the uncontradicted evidence shows that it was dark. The lights were shining at Cogan Valley as the train passed. There were no lights at Haleeka station. A fierce storm was at the time, and had been since the previous day, prevailing in that community. The weather was extraordinarily cold, and the country was covered with snow to an extent which rendered it difficult to see any paths or roads which might exist at that place or might lead in the direction of Cogan Valley station. Under these circumstances, the duty of the conductor towards a passenger, or even a trespasser upon his train, certainly could not be determined as a matter of law by the court, so as to justify the conductor's action in expelling Tilburg from the train. If it had clearly appeared by the evidence of the plaintiff, and there is no other evidence in this case, that the passenger had been ejected in daylight and under circumstances which gave him an opportunity to protect himself from danger in returning to Cogan Valley, we would have another and an entirely different question before us. The plaintiff has shown the place where her husband was ejected, and the conditions under which he was ejected, and the facts as disclosed by her testimony are clearly sufficient to go to the jury on the question of the negligence of the defendant's servants in expelling the deceased from the train. If, as contended by the defendant company, the deceased was expelled from the train at a safe place and under conditions which did not make the expulsion unsafe, those facts must be made to appear by testimony. It was not the province of the court to surmise whether there were roads leading from or to Haleeka station, or whether there were highways leading from that station to Cogan Valley, or whether there was a station house at Haleeka, or whether there was a clubhouse or other houses in that vicinity. These were matters which were not shown by the testimony, and which, therefore, did not justify the court in withdrawing the case from the jury.

After Tilburg had been expelled from the train, he was required to use reasonable and ordinary prudence in seeking shelter and in attempting to return to Cogan Valley. Under the circumstances, it was not negligence per se for him to walk on the railroad in going from Haleeka to Cogan Valley. As said in *Ham v. Delaware & Hudson Canal Co.*, 155 Pa. 548, 26 Atl. 757, 20 L. R. A. 682, the cases cited by appellee which hold that a man who steps his foot on a railroad track, except

at a public crossing, does so at his peril, have no application to the facts presented here. If, as alleged by the plaintiff, her husband was put off the train at Haleeka station at a time and under circumstances which imperiled his life, he was not guilty of negligence if, in escaping from the position in which he had been placed, he acted as a reasonably prudent man in walking on the defendant company's tracks. As pertinent and applicable to the facts of this branch of the case, we may here quote the language of the present Chief Justice in *Ham v. Delaware & Hudson Canal Co.*, 155 Pa. 548, 553, 26 Atl. 757, 758, 20 L. R. A. 682: "The substantial controversy in this case is upon the standard of conduct required of a man who, like Ham, is wrongfully put on a railroad track, as to the time and manner of getting off. The learned judge below told the jury concisely, in affirming the plaintiff's thirteenth point, that 'all the care that was required of Ham, after being put off the car, was simply the ordinary care and diligence of a reasonably prudent man under the circumstances,' and again, in affirming the defendant's twenty-second point, that 'when Ham was placed upon the track it was his duty to leave the same at the earliest practical [practicable] moment, and if he did not do so, he was guilty of contributory negligence. * * * That this was the proper rule for the guidance of the jury does not admit of question. Ham, as already noted, was put in a place of danger without fault of his own. He was bound to use care, diligence, and judgment to get out at the first opportunity; but, using these, he was not chargeable with responsibility for the result, and the standard of the care, diligence, and judgment he was bound to use was the common standard of the ordinary prudent and careful man.' What avenue or avenues of escape were presented to Tilburg that night, and whether he exercised prudence and care in selecting the railroad as the way for reaching his destination after his ejection from the train, were questions for the jury. He was a stranger there, and the darkness prevented him from seeing the real conditions as they existed. Snow covered the earth and hid from his view what lay beneath. Would a reasonably prudent man, under the circumstances, have started out into the darkness and the storm to hunt roads or paths unknown to him, and which might have existed, and thus subject himself to the dangers of the holes and pitfalls which might have been open to receive him? Or would he have taken the direct route, which lay along the defendant's tracks, to travel the mile required to reach his destination?"

Again we may be permitted to quote as pertinent in this connection what was said in the *Ham Case* (page 555 of 155 Pa., page 759 of 26 Atl. [20 L. R. A. 682]): "Whether a safe road was there, or not, was only a part of the question. There still remained

whether Ham with ordinary diligence and prudence could have seen it, and, seeing, ought to have taken it. A man familiar with the locality may take an uninviting path, knowing it will lead him aright, while a careful man, not knowing how it may turn out, nor even whither it may lead, may well be exonerated from negligence in not making the experiment, though it would in fact have been the best thing to do. The elements of prudent conduct on the part of Ham were too many and too varied to be determined except by the jury, and the rule laid down for the jury's guidance was in accordance with the settled law." *Malone v. Pittsburg & Lake Erie Railroad Co.*, 152 Pa. 390, 25 Atl. 638, was an action for personal injuries by a woman who was wrongfully ejected from a train upon which she was a passenger at a regular stopping place, where there was no station house, but only a box car used temporarily as a station. A storm was prevailing at the time she was ejected. She started to walk back to the station from which she had started, and on the way was overtaken by a storm which injured her health. In affirming a judgment for the plaintiff, the present Chief Justice says (page 393 of 152 Pa., page 638 of 25 Atl.): "We start with the fact established by the verdict that plaintiff was wrongfully put off the train, at a regular station to be sure, but one where she was a stranger, and where there was at the time no regular station house. She was in no fault herself, and, being thus put in a position of embarrassment and difficulty, she was not bound to use the best judgment, but only to good faith and reasonable prudence. *Penna. R. R. Co. v. Werner*, 89 Pa. 59." Whether the servants of the carrier company were guilty of negligence in carrying Tilburg beyond Cogan Valley station, or in putting him off at Haleeka station, which in either case proximately resulted in his death, and whether he exercised the care required of him after he had alighted at Haleeka station, are questions which should, under proper instructions, have been submitted to the jury. The nonsuit was improperly granted, and the judgment must be reversed.

The assignments of error are sustained, the judgment is reversed, and a procedendo is awarded.

(217 Pa. 636)

WETHERILL et al. v. GALLAGHER et al.
(Supreme Court of Pennsylvania. April 22, 1907.)

1. BAILMENT—LEASE OF PERSONALTY—DEFAULT—RIGHT OF REMOVAL.

A tenant took out boilers from the premises which were owned by his landlord, and placed them on a neighboring lot and installed other boilers which he had leased. Subsequently, on default in rent, the lessors of the boilers declared the lease terminated and asserted their right to the boilers. The lessee was thereafter declared a bankrupt before the landlord

had distrained for rent. *Held*, that the owners of the boilers could resume possession of their property without restoring the old boilers to their former place.

2. LANDLORD AND TENANT—LIEN.

Where tenant removes boilers owned by landlord from premises and installs leased boilers, and thereafter becomes insolvent, the owners of the boilers can remove the same without paying the arrears of rent due by the tenant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Landlord and Tenant, § 996.]

Appeal from Court of Common Pleas, Philadelphia County.

Bill by Robert and Richard Wetherill against Francis G. Gallagher and others. Decree for plaintiffs, and defendants appeal. Affirmed.

The following are the findings of fact and conclusions of law of Martin, P. J., of the court below:

"Findings of Fact.

"On March 25, 1902, Francis G. Gallagher became selsed of a manufacturing property at Thirty-First and Locust streets, in the city of Philadelphia, subject to a mortgage of \$21,000, held by the Fidelity Trust Company, surviving executor of the will of Henry Gibson, deceased. On July 10, 1902, a written communication was sent to the Downing Paper Company by Emma R. M. Love, stating that the title to this property was held by Francis G. Gallagher in trust to secure the payment of moneys advanced for its purchase, and upon payment thereof for her benefit, and offering to rent the property to the Downing Paper Company for 25 years for a consideration of \$25,000 in stock of the company, \$3,000 per annum, payment of the water rent and part payment of fire insurance premium. On the same day Gallagher executed a lease to the Downing Paper Company for the premises, 'together with the building thereon erected, machinery, fixtures, tools, and implements contained therein.' The lessee agreed to make such ordinary repairs to the buildings, machinery, and plant as might be required in order to use and operate the same; and it was provided that all betterments in the nature of permanent improvements or additions to the machinery contained in the premises at the date of the agreement, and thereafter placed upon the premises by the lessee, not in the nature of repairs, should belong to and be the property of the lessee, and might at any time during the continuance of the agreement be removed by the lessee, provided in so doing the buildings and remaining portion of the machinery should be left in good and proper order and condition. On December 21, 1903, the Downing Paper Company entered into an agreement to lease from Robert Wetherill & Company two 250-horse power boilers to be erected upon the leased premises. The paper company agreed to build subfoundations, provide buildings properly protected for installing the boilers, and to keep the

boilers insured for the benefit of Wetherills until the expiration of the lease of the boilers, and to pay Wetherills for the use of the boilers \$1,000 in cash, and \$250 rent every 30 days, not to sublet or dispose of the boilers during the continuance of the lease without the consent of Wetherills, or remove them from the leased property, and to surrender them to Wetherills, unless purchased by the company, upon the termination of the lease, at the price stipulated upon the contract. In the event of the failure to pay the rent, Wetherills reserved the right to declare the lease ended, and take immediate possession of the boilers. S. Arthur Love, the husband of Emma R. M. Love, was treasurer of the Downing Paper Company, and instrumental in securing the company as tenants for the property, and in obtaining the boilers from Wetherills.

"On February 19, 1903, Emma R. M. Love executed a general power of attorney authorizing him to act for her. There was a battery of eight boilers in the plant, two of which were removed and the two Wetherill boilers put in the place. The Wetherills made the drawing and supervised the location, but had nothing to do with the removal of the old boilers or erection of the foundation for the new ones. No notice was given by them to any one of the terms upon which the paper company obtained the boilers. Wetherills thought the paper company owned the building. The agreement between Wetherill & Co. and the Downing Paper Company was executed by S. Arthur Love, treasurer. On March 20 and April 20, 1904, the monthly rental due for the boilers was not paid. On May 20, 1904, the paper company was adjudged a bankrupt and J. I. Lineaweaver, Esq., was appointed receiver and subsequently became trustee. On May 31, 1904, demand was made upon him for payment of the rent due for the boilers. On June 20, 1904, the Downing Paper Company and the receiver were notified that by reason of the nonpayment of the rent Wetherills had exercised their right to declare the lease terminated and take possession of the boilers. On June 21, 1904, Gallagher executed a declaration in which it was stated that the purchase money for the property at Thirty-First and Locust streets belonged to an estate of which S. Arthur Love and Sally L. Love were trustees, under the terms of a trust which provided that Sally L. Love should have the benefit from the estate during her life, and Gallagher declared that he held title to the premises in trust for the estate and under agreement with said trustees to convey the premises to Emma R. M. Love, wife of S. Arthur Love, or her appointee upon payment of \$10,500 with interest and legal charges. On June 24, 1904, Mr. Lineaweaver, the receiver, executed an order directing the watchman upon the premises to admit the representatives of Wetherill & Co. for the purpose of removing the boilers. On the same

day Wetherills received a communication from counsel for Gallagher alleging that the boilers were obtained by the Downing Paper Company for the purpose of replacing other boilers which were part of the building rented to them as a whole, and claiming that the new boilers were part of the real estate and stating that he would retain the boilers, and hold Wetherills liable in damages if they attempted to enter the premises. The boilers can be removed by opening the wall of the building in which they are set. On June 25, 1904, a member of the firm of Wetherills and one of their employés endeavored to gain admission to the building. They presented the order from the receiver to the watchman in charge employed by Gallagher, who refused to permit them to enter.

"A bill in equity was filed by Robert Wetherill and Richard Wetherill, copartners, trading as Robert Wetherill & Co., against Francis G. Gallagher, S. Arthur Love, Emma R. M. Love, the Fidelity Trust Company, surviving executor under the will of Henry Gibson, deceased, and the Downing Paper Company, and James I. Lineaweaver, trustee in bankruptcy of the Downing Paper Company, praying that the complainants be declared exclusive owners of the boilers, and that respondents be required to deliver up possession; for an injunction to prevent the sale of the boilers; for discovery by Gallagher, S. Arthur Love, and Emma R. M. Love as to the ownership of the real estate; and for an injunction to prevent the sale or disposition of the real estate, including the boilers as part thereof; and for a decree restraining respondents from preventing complainants from removing the boilers, and requiring the Downing Paper Company and Lineaweaver, as trustee in bankruptcy, to specifically perform the terms of the agreement of lease of the boilers and to surrender them to complainants; and for general relief. A joint and separate answer was filed by Gallagher, S. Arthur Love, and Emma R. M. Love, admitting the material averments in the bill, but alleging that the boilers in question had been substituted for others removed from the premises, and stating that the Downing Paper Company were in default in the payment of rent due to Gallagher. Lineaweaver, the trustee in bankruptcy, in his answer admitted certain allegations of the bill of complaint, required proof of others, and denied certain conclusions of law.

"The Fidelity Trust Company filed no answer and a decree pro confesso was entered.

"Conclusions of Law.

"The agreement between Wetherill & Co. and the Downing Paper Company established a bailment, and under its terms the title to the boilers remained in the bailors. Edwards's App., 105 Pa. 103. Where personal property is attached to land for purposes of trade, the intention of the parties is the

determining factor in ascertaining whether it is a fixture and part of the realty. Hill v. Sewald, 53 Pa. 271, 91 Am. Dec. 209. In the agreement made by Wetherill & Co. they were authorized to terminate the lease and take possession of the boilers, if the paper company failed to comply with its terms. While between the landlord and tenant of the land it might appear inequitable to permit the latter to remove the boilers in question before provision is made for the restoration of those formerly on the premises, which they took out, and requiring payment of the rent in arrear for the building, the complainants do not claim the boilers under any of the terms of the lease made by Gallagher to the paper company, but as owners' title of the bailee having been terminated.

"There was no provision in the lease of the building providing that the property of the tenant should be forfeited for noncompliance with the terms of the lease (Wick v. Bredin, 189 Pa. 83, 42 Atl. 17), nor was there any provision which would entitle the landlord to hold Wetherill & Co. or their property liable for breaches of covenant by the tenant. The boilers were placed upon the premises as trade fixtures, and complainant should be permitted to remove them (Lemar v. Miles, 4 Watts, 330), and should be required to close up the wall and restore the building to its present condition without expense to the landlord. Under the prayer for general relief, compensation is claimed for deterioration in the value of the boilers since the date when complainants made demand for them. Gallagher, the landlord, held the property as trustee and was advised by counsel to retain possession of the boilers. Complainants received the sum of \$1,000 at the beginning of the bailment, which was to be applied to the purchase if the agreement had been consummated, but the diminution in the value of the boilers is a much smaller sum. This claim is not allowed.

"The prayers of the bill of complaint praying that the boilers be delivered to complainants are granted."

Argued before MITCHELL, C. J., and FELL, MESTREZAT, POTTER, and STEWART, JJ.

El. O. Michener, for appellants. Edward Brooks, Jr., Frederick J. Geiger, and Edgar Dudley Fairies, for appellees.

MESTREZAT, J. Notwithstanding the numerous assignments of error and the very elaborate brief of the learned counsel for the appellant, he has discussed the law involved in the case under two heads. The trial judge has found and stated the material facts in his adjudication, and on those facts the decree may well be affirmed.

1. Under all our authorities the contract between the plaintiffs and the Downing Paper Company was a bailment of the boilers, and they continued to be the personal prop-

erty of the plaintiffs. They were trade fixtures, and such as a tenant may remove during the continuance of his term. *Hey v. Bruner*, 61 Pa. 87. On failure to comply with any of the covenants of the bailment, it was stipulated that the plaintiffs, who were the bailors, should have "the right to declare this lease void * * * and to take immediate possession of said property wherever they may find the same." The paper company, the bailee, failed to pay the stipulated rent for the boilers as it became due, and on June 20, 1904, the plaintiffs exercised their right to declare the termination of the lease and take possession of the property. One month prior to this date, the paper company was adjudged a bankrupt, and the plaintiffs' property was then in the possession of the receiver. A few days after the bailment had been terminated, the receiver directed the watchman on the premises to admit the plaintiffs for the purpose of removing the boilers. On the same day Gallagher, the paper company's lessor of the premises, notified the plaintiffs "that the boilers were obtained by the Downing Paper Company for the purpose of replacing other boilers which were part of the building rented to them as a whole, and claiming that the new boilers were part of the real estate, and stating that he would retain the boilers." The defendants' first contention is that the plaintiffs had no right to remove their boilers without replacing the old boilers in the place they originally occupied in the manufacturing plant. The paper company secured the new boilers because it desired and needed additional steam-producing capacity for its paper manufacturing plant. The plaintiffs had nothing whatever to do with removing the old boilers. This was done by the paper company which removed them to an adjoining lot on the same premises. Neither did the plaintiffs erect their boilers in the paper manufactory. It is true they supervised the location of them, but the paper company built the subfoundation, provided the building to inclose them, and erected the boilers on the foundation. Why, then, should the plaintiffs replace the old boilers in the manufacturing plant? They did not remove them, nor did they receive them as part payment for the new boilers. They committed no waste of the premises, nor did they do any injury to the premises as they did not detach and remove the old boilers. In a word, they had nothing to do with the old boilers or with removing them from the manufacturing plant. Under the circumstances, therefore, the plaintiffs were not required to restore the old boilers to their former place in the plant, before they could annul the lease with the paper company and resume possession of the new boilers, the title to which remained in them.

2. The other contention of the appellants is that the plaintiffs had no right to remove their boilers without paying the rent and re-

storing the property to its original condition. The learned judge correctly found that "the [new] boilers can be removed by opening the wall of the building in which they are set," and in the decree the court has directed "that the said complainants be required to restore any portion of the premises which may be affected by the removal of the said boilers to its present condition." Of this contention, therefore, the remaining cause of complaint is that, before retaking their property, the plaintiffs should have paid the arrears of rent. But, as we have held, the paper company held this property as bailee, and the bailment was, for sufficient cause and within its terms, declared by the plaintiffs at an end on June 20, 1904. The premises were then in the hands of a receiver in bankruptcy who properly conceded the title to be in the plaintiffs and also their right to remove the property. At that time there was \$1,000 of rent in arrear, but the landlord had not distrained, and hence the tenant could have removed his personal property from the premises, and it would not then have been subject to distress, unless fraudulently removed. It is, however, different with the property of a stranger which may be distrained while on the demised premises, but cannot under any circumstances be followed and made subject to payment of arrears of rent. Here there was no privity between the landlord of the premises and the plaintiffs, and, after the annulment of the bailment, the boilers were the property of a stranger who could remove them, unless a distress had previously been levied for the rent. In order to subject personal property to the payment of rent due for the demised premises, the landlord may distrain the property, or, where the property of the tenant has been taken in execution or has been assigned for the benefit of creditors, the landlord is, under present legislation, entitled to be paid one year's rent out of the proceeds of sale. Neither of these conditions existed here at the time the plaintiffs declared the termination of the lease and were entitled to the possession of their property. If the paper company had then been in possession, it could have been compelled to deliver the property to the plaintiffs. As it was, the property was in custodia legis, and the receiver became the trustee of the plaintiffs and held the property for them. It was then beyond the grasp of the landlord of the premises, and he could not follow and subject it by legal process to the payment of his rent.

We fail to see that the plaintiffs have done or are doing anything inequitable in this litigation. They are simply insisting upon their rights under the contract with the paper company. The property in controversy belongs to them, and neither the paper company nor the landlord of the demised premises has title to it or the right to retain it. The plaintiffs did not get the old boilers nor the value of them, and are not responsible, either in

law or equity, if the paper company removed and disposed of them. That is a matter between the owner of the premises and his lessee, the paper company, and with which the plaintiffs have no concern. The latter have done equity and therefore have a right to ask equity.

We think that, under the undisputed facts of the case, the learned trial judge reached the proper conclusion, and therefore the decree of the court below is affirmed.

(218 Pa. 18)

SPERRY v. SEIDEL.

(Supreme Court of Pennsylvania. April 22, 1907.)

1. LANDLORD AND TENANT—PROCEEDINGS TO DISPOSSESS.

Where a complaint in a proceeding to dispossess a tenant, under Act March 21, 1772 (1 Smith's Laws, p. 370), fails to aver the essential jurisdictional facts required by statute, an eviction is illegal, and a landlord is liable in trespass.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Landlord and Tenant, § 1179.]

2. TRIAL—REMARKS OF COURT.

In trespass for wrongful eviction under invalid proceedings, it is not reversible error for the court to refer to the eviction as an abuse of legal process.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Trial, §§ 80-84.]

3. TRESPASS—EXEMPLARY DAMAGES.

In trespass, where there is evidence of the violation of the rights of plaintiff or circumstances of aggravation, exemplary damages are recoverable.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trespass, § 144.]

Appeal from Court of Common Pleas, Berks County.

Action by William H. Sperry against Henry J. Seidel. Judgment for plaintiff, and defendant appeals. Affirmed.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

Isaac Hiesler, Dunn & Schaeffer, and D. E. Schroeder, for appellant. E. H. Deysher and C. H. Ruhl, for appellee.

ELKIN, J. It must be conceded that the question raised by this appeal is a close one, and not free from difficulty. There can be no doubt, however, that if the complaint filed in a proceeding to dispossess a tenant under the landlord and tenant act of March 21, 1772 (1 Smith's Laws, p. 370), fails to aver the essential jurisdictional facts required by the statute, the proceedings are coram non iudice, and without legal effect. An eviction of the tenant in such a case is illegal, and the landlord may be held liable for damages in an action of trespass. Indeed, as we understand the contention of the learned counsel for appellant, this view of the law is not seriously questioned. It is argued, however, with much force, that the original complaint in the proceedings to dispossess

the tenant did contain a sufficient averment of facts to confer jurisdiction, and that the landlord cannot be held liable in damages for a wrongful eviction which resulted from errors that may have been committed by the inquisition in its findings of fact relating to the date when the term of the lease ended. The difficulty with this position is that it is not supported by the record. In the original proceedings for recovery of possession of the demised premises, the learned court below on certiorari held that the complaint on which it was founded, as well as the inquisition which acted on it, failed to show jurisdiction to entertain it. On appeal to the Superior Court the judgment of the court below was affirmed. Seidel v. Sperry, 26 Pa. Super. Ct. 649. In the per curiam opinion of the learned Superior Court it is suggested as a reason for affirming the judgment of the court below that the inquisition was defective on the ground of uncertainty, and it is now strongly urged that the question of jurisdiction was not decided in that case, and that the judgment entered therein cannot be set up by appellee here to sustain his contention that the proceeding under which he was evicted was without warrant of law, and therefore utterly void. As we read the opinion of the court below on the certiorari proceedings and of the Superior Court in reviewing them, there is no escape from the conclusion that the question of jurisdiction was the vital one involved and decided in that case. The Superior Court approved the reasoning of the "exhaustive and satisfactory" opinion of the learned court below and rested its decision largely upon that opinion. The court below in that case based its ruling on the ground that the necessary jurisdictional facts did not appear to sustain the proceedings, and when that judgment was affirmed by the Superior Court, and no appeal taken, the question of want of jurisdiction was finally determined and is not now before us.

On the other questions raised by the assignments we do not agree that any reversible error was committed by the learned trial judge. If the inquisition proceedings were lacking in the jurisdictional facts required by the act of assembly, they were utterly void. *Blashford v. Duncan*, 2 Serg. & R. 480; *McGee v. Fessler*, 1 Pa. 128; *Graver v. Fehr*, 89 Pa. 460. In such a case the landlord is in precisely the same position as if there had been no proceedings to dispossess at all, and the eviction of the tenant under such circumstances is a trespass for which the landlord may be held liable in damages. *Baird v. Householder*, 32 Pa. 108; *Kramer v. Lott*, 50 Pa. 496, 88 Am. Dec. 556; *Kennedy v. Barnett*, 64 Pa. 141; *Boyd v. Snyder*, 207 Pa. 330, 56 Atl. 924.

The fourth assignment seeks to convict the learned trial judge of error in charging the jury, in substance, that if they found from the evidence that the tenant was actu-

ated by a disposition to oppress the plaintiff, to take a wrongful advantage of him by a willful or reckless abuse of legal process, then it would be permissible to impose exemplary damages. The use of the phrase "abuse of legal process" in the charge was technically inaccurate, for the reason that the action was based on the ground that the proceedings under which the landlord attempted to evict the tenant were void for want of jurisdiction, and the eviction was secured not by an "abuse of legal process," but without any "legal process" to justify it. It was therefore technically an error to speak of it as an "abuse of legal process." We do not see, however, how this inaccuracy did the defendant any harm, and it certainly does not amount to reversible error. The whole case was tried on the theory that the landlord was liable for damages because he had wrongfully and oppressively dispossessed his tenant without warrant of law. It has been frequently held that for wanton and intentional violation of the rights of others, or under circumstances of aggravation or oppression, exemplary damages may be recovered. *McBride v. McLaughlin*, 5 Watts, 375; *Hulling v. Henderson*, 161 Pa. 553, 29 Atl. 276. The instructions to the jury on this question were as favorable as the appellant under the facts of the case had a right to expect.

Assignments of error overruled, and judgment affirmed.

(217 Pa. 626)

In re ROYER'S ESTATE.

Appeal of HARRINGTON.

(Supreme Court of Pennsylvania. April 22, 1907.)

1. EXECUTORS AND ADMINISTRATORS—CLAIMS AGAINST ESTATE—EVIDENCE.

Where a claim is presented against decedent's estate on a note, checks of decedent dated prior to the making of the note are inadmissible as evidence of payment thereof.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 22, Executors and Administrators, § 902; vol. 39, Payment, § 212.]

2. SAME.

On presentation of claim against decedent's estate on a note, evidence held insufficient to show want of consideration.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 22, Executors and Administrators, § 903.]

3. APPEAL—REVIEW—FINDINGS OF FACT.

Finding of fact by an orphans' court that a note given by a decedent was without consideration will be reversed, where there is no evidence to sustain it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3979-3982.]

Appeal from Orphans' Court, Montgomery County.

In the matter of the estate of Lewis Royer, deceased. From decree overruling exceptions to adjudication, Fanny Harrington appeals. Reversed.

Argued before MITCHELL, C. J., and

FELL, BROWN, MESTREZAT, and STEWART, JJ.

Charles F. Linde and Henry I. Fox, for appellant. Montgomery Evans and John M. Dettra, for appellees.

BROWN, J. The claim of the appellant which was disallowed was on a promissory note made by the decedent on August 9, 1903, for \$2,000, payable to her order one year after date, with interest. The execution of the note was established, and it was admitted in evidence without objection. When asked by the court what the nature of the defense to it was, the reply was that it was without consideration, and, if there was a consideration, it had been paid.

By no one of the witnesses called by the estate was it shown that the note, or any portion of it, had been paid. The adjudicating judge admitted in evidence a number of decedent's checks produced by the appellees, stating that he assumed they were offered to show payments on the note. One of the offers embraced eight checks. In only two of them was the appellant the payee, and they, with five others, had been drawn before the execution of the note. Four of them had been drawn in 1901, two in 1902, and one in May, 1903. The only one drawn after the execution of the note was dated October 1, 1903, and was payable to the order of James McCarter, who received it from the appellant in payment of rent for a house. Another offer included thirteen checks, all of which were payable to the order of Strawbridge & Clothier, and only two of them were drawn after August 9, 1903. These checks, of course, ought not to have been admitted as evidence of payments on the note, and when counsel for the estate closed their testimony they did not pretend that any proof of payment had been submitted, but relied upon what they regarded as proof offered by them of want of consideration, and called upon the appellant to prove consideration for the obligation held by her. The claim was not disallowed because the note had been paid, but solely on the ground of want of consideration.

What is said of the failure of the executors to prove payment of the note is equally true of their failure to submit any evidence showing want of consideration. Nothing at all was shown by them going to the consideration. They offered no evidence as to why or under what circumstances the note was given, and, when they closed their case, there was nothing before the court on the subject of consideration, except what was before it when the note was received in evidence, bearing on its face prima facie evidence of consideration. The maker stated he had given it "for value received." The burden of rebutting consideration was upon the appellees. *Comey v. Macfarlane*, 97 Pa. 361. This they have not rebutted. The appellant, in rebuttal, needlessly called a witness, T. H. Moore,

to prove the circumstances under which the note was given, and, on the oral argument before us, counsel for appellees contended that, if they had failed to show want of consideration, it had been shown by the appellant herself through this witness. The court below seems to have been of this opinion, but in it we cannot concur. The testimony of Moore was as follows: "We were playing cards, Dr. Royer, Miss Harrington, and myself, in the dining room. The clock struck 9. Dr. Royer said, 'You will excuse me now. I am not quite as young as I used to be. I always make it a point to go to bed at 9 o'clock.' He started out of the room, came back again, put his hand in his pocket, and said: 'Here is something for you, Fanny.' I think that is what he called her. He said: 'I would give you the money for this, but my financial affairs are somewhat tied up now. It will suit me a great deal better to give you this. Will it do just as well?' She took it over to the light, looked at it, threw it on the table, and said, 'That is quite nice,' in a laughing way. I took it and saw it was that note. I handed it back to her, and said, 'Yes.'" This testimony, instead of being consistent only with the theory that the note was without consideration, is entirely consistent with the execution and delivery of it for a valuable consideration, and nothing said by Moore can be regarded as evidence overcoming the presumption of such a consideration. If the note was a mere gift from the decedent, he would hardly have felt himself called upon to make excuse for not having the money to give to her in its stead. He said just about what is frequently said when a debtor, not having ready funds at his disposal, asks his creditor to take his obligation, and her reply in accepting it, in view of the admittedly friendly relations existing between them, is not to be construed as an admission by her that she received it as a gift. On a theory unsupported by evidence that the note was a gift, it was disallowed, and, in disallowing it, the court said: "The decedent at the time was a man of means, the president of a national bank. He was not engaged in active business, and it would seem his situation did not require him to borrow money. We conclude that there was no consideration for the note, and that it was a gift of the decedent to claimant." Men of means, presidents of national banks, not engaged in active business, at times borrow money, though their situations do not seem to require it, and, when they do, it is their own business, and their obligations are no more to be suspected as mere gifts than are the obligations of those who are naturally expected to borrow.

The adjudicating judge apparently did not have very great confidence in his conclusion that the testimony of Moore indicated that the note was a gift, for he further held that from the facts and circumstances shown by the appellees he was led to the conclusion

that the relation between the claimant and the decedent at the time the note was given were meretricious and unlawful, and that the burden was therefore cast upon her to prove its consideration, and "to explain away all suspicion of illegality concerning the transaction." In the testimony, which is not voluminous, we can find nothing justifying the conclusion that the relation existing between the decedent and the claimant was of such character as to cast upon her the burden of explaining away all suspicions of the illegality of the note. There is no evidence of its illegality. The decedent was an old man between 70 and 80 years of age. His wife was dead, and none of his immediate family were around him. It was but natural that he should take some one into his home on his farm to board him and to look after him, and that the claimant there rendered these services to him, that he subsequently, when she moved to Philadelphia, stopped with her, and at times over night, and may have therefore helped to contribute to the expense of her housekeeping, are not circumstances from which the conclusion should follow that he was living in illicit relations with her, and that the note which he gave her resulted from them. There is no presumption that their relations were meretricious. The presumption is always in favor of innocence. The finding that this old man and the claimant were living together unlawfully was based, not upon evidence, but upon suspicion. One of the findings is that he was "susceptible to the wiles and influences of a young woman." There is not a line in the testimony to justify this, or that the claimant, if she was wily, ever attempted to exert any undue influence over him. No fact developed, from the time the old man took the claimant into his home on his farm down to the time that he died, showed their relations to have been unlawful.

Findings of fact by a lower court are rarely set aside. This is so because facts are rarely found without some evidence to support them. If there be evidence to support them, they are not to be set aside because we might have found differently; but, when there is no evidence to support an alleged material fact the finding of it must be set aside.

The decree of the court below is reversed, and the record remitted, with direction that the claim of the appellant be allowed.

(217 Pa. 464)

CHAUVENET v. PERSON et al.

(Supreme Court of Pennsylvania. April 1, 1907.)

1. MINES AND MINERALS—LEASE—CONSTRUCTION—FORFEITURE.

Where a mining lease provides for the payment of a minimum royalty, the acceptance of such royalty is not a waiver of the right to forfeit the lease for ceasing to mine for one year, according to the terms of the lease.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Mines and Minerals, § 190.]

2. SAME—FAILURE TO WORK MINE—FORFEITURE.

A mining lease gave the lessee one year to explore for ore, and provided that immediately thereafter mining operations should commence, and that if the lessee failed to prosecute the operations, and during the remaining term failed to mine, for a continued period of one year, and raise the ore on which royalty was payable, the lease should be void at the option of the lessors, except as to the liability of the lessee therein. The lease also provided that after one year from the date of the lease the lessee must mine at least 1,000 tons of ore annually, or pay the royalty on that amount. *Held*, that after one year the lessors could avoid the lease on the lessee's failing at any time to prosecute the mining operations for one year.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Mines and Minerals, §§ 188, 189.]

Elkin, J., dissenting.

Appeal from Court of Common Pleas, Berks County.

Action by S. T. Chauvenet against M. J. Person and others. Judgment for plaintiff, and defendants appeal. Affirmed.

The trial judge charged, in part, as follows: "By the terms of the lease, the action in declaring it null and void did not interfere with the liability of the lessees up to the time of serving the notice. The lessors had a right to collect and receive any royalties so due. The receipt of such royalty was not, therefore, a waiver of any right of forfeiture. The minimum royalty was all that the lessees were liable to pay. The payments of \$200 on April 6, 1905, and of \$50 on July 13, 1905, respectively, were due and payable, regardless of any question of forfeiture of the lease, as the minimum royalties then due. When the lease was executed, the lessees entered into possession of the premises. Although executed, it appears the lease was not acknowledged until July 13, 1905. This acknowledgment was simply supplying an omission to do so when the lease was executed, and can only be construed to be an acknowledgment and reaffirmation of the provisions therein contained. The formal acknowledgment before the officer was simply an act of justice to both parties, preventing any dispute as to its terms and preserving their respective rights. By so doing no rights thereunder were surrendered or waived by either party. The lease was in full force until the lessors exercised their option to terminate it. The acknowledgment of it was no waiver of lessors' right to exercise any option they possessed. I therefore say that if the testimony is believed by the jury, and the facts as to the breach of the lease therein set forth are fully made out, the plaintiff would be entitled to a verdict in his favor for the land described in the writ and six cents damages and costs."

Argued before MITCHELL, C. J., and BROWN, MESTREZAT, ELKIN, and STEWART, JJ.

Edward Harvey and C. H. Ruhl, for appellants. Jefferson Snyder, for appellee.

MESTREZAT, J. This is ejectment to enforce the forfeiture of a mining lease. Sarah A. Spang was the owner in fee of a tract of land containing about 118 acres in Berks county, and she and Jacob K. Spang, her husband, "the lessors," by an agreement dated April 20, 1903, assigned, granted, bargained, and sold to Allen C. Smith, "the lessee," for the term of 20 years, the exclusive right to all the iron ore and other minerals in the land, with the right to mine and remove the same. The consideration was 20 cents a ton, payable quarterly, on all merchantable iron ore mined and taken from the premises. The lease contained the following provision: "It is further understood and agreed that the said lessee shall have the privilege for a period of one year from the date hereof of exploring and digging for ore upon the said demised premises, and that immediately thereafter mining operations must actively commence; and in case the said lessee shall immediately upon the expiration of one year from this date fail to prosecute his mining operations, and shall at any time during said remaining term of this agreement, for a continuous period of one year, fail to dig for, mine, raise and wash iron ore upon which royalty is payable as provided in this agreement, with the view of fully working said lands, then, in that case, these presents and everything contained herein shall, at the option of the lessors, cease and be forever null and void, excepting as to the liability of the lessee herein. It is further understood and agreed that, after the expiration of one year from the date of this lease, the lessee must mine and take away at least one thousand tons of iron ore annually or pay the royalty on that amount. It is also agreed and understood that any and all payments made by the lessee to the lessors of royalty upon iron ore not mined as above provided shall be considered as payment in advance, and that the lessee may deduct all such amounts or payments from iron ore subsequently mined and taken away by the lessee and on which royalty is payable under this lease."

The lessee entered into possession of the premises and made some explorations, but failed to commence and prosecute mining operations upon the premises. On April 6, 1905, he paid to the lessors \$200, "being the minimum royalty due from April 20, 1904, to April 20, 1905." On July 13, 1905, the lessee paid to Jacob K. Spang \$50, "quarterly royalty due under lease July 20, 1905." On the same day, the lessors acknowledged the execution of the lease and had it recorded in the recorder's office of Berks county. By a notice in writing dated August 19, 1905, the lessors notified the lessee "that mining operations were not actively commenced after the year set from the date of said agreement for exploring and digging for ore; and in view of the fact that you have failed to prosecute mining operations within a year from the date of the agreement, as well as

that for a continuous period of one year you have failed to dig for, raise and wash iron ore, the undersigned lessors, according to the option given them under said lease, hereby desire to notify you that they now avail themselves of said option, whereby said agreement, and everything contained therein, shall cease and be forever null and void; and now here notify you of their desire forthwith to repossess themselves of the said premises, * * * and that the agreement entered into April 20, 1903, between you and the undersigned, cease and be null and void from the date thereof." By deed dated October 11, 1905, Sarah A. Spang and her husband conveyed the premises in fee to S. H. Chauvenet, the plaintiff, who shortly thereafter brought this action to enforce the forfeiture of the lease. On the trial of the cause in the court below, the learned judge was of the opinion that the lessors had a right to exercise their option in declaring the lease void, and directed a verdict for the plaintiff. The defendants have taken this appeal.

The correctness of the judgment of the court below and the rights of the parties depend upon the contract of April 20, 1903. We must interpret the agreement so as to carry out the intention of the parties, if it can be gleaned from the instrument with the assistance of the law. 2 Snyder on Mines, § 1281. In such cases, the lease presupposes that the lessee will work the mine, and gives him the entire control over the premises. Koch's Appeal, 93 Pa. 484. Here, the purpose of the lessors in leasing the ore unquestionably was, as shown by the lease, "with the view of fully working said lands." It was not with the intention of securing a small rental or royalty on the ore and leaving it in place, but for the purpose of having the lands fully developed and realizing as speedily as possible on all the ore in the lands at the royalty named in the lease. Best, J., in Doe v. Bancks, 4 B. & Ald. 401, speaking of a forfeiture-bearing covenant in a mining lease, uses the following language, which is pertinent and applicable here: "The rent was to depend upon the number of tons of coal raised. In order to derive any benefit from the mine, it was the object of the landlord, by introducing this clause, to compel his tenant to work it. The clause therefore was introduced solely for the benefit of the landlord, to enable him in case of a cesser to work, to take possession of the mines, and either work them himself, or let them to some other tenant. That, therefore, being the object of the parties in introducing this clause, I think it will be fully answered, by holding the lease to be void at the option of the landlord."

We have quoted at length the forfeiture-bearing clause of the lease involved in this controversy. It gives the lessee one year to explore the premises for ore, and contains a covenant that immediately thereafter min-

ing operations shall actively commence, and that if the lessee fail to prosecute the operations, and shall at any time during the remaining term of the agreement for a continuous period of one year fail to mine and raise ore upon which royalty is payable, "with the view of fully working said lands, everything contained herein shall, at the option of the lessors, cease and be forever null and void, excepting as to the liability of the lessee herein." This language is plain and comprehensive, and leaves nothing in doubt. The duty of the lessee is clearly pointed out, and the rights of the lessors, on his failure to perform that duty, are plainly declared. During the first year after the execution of the agreement, the lessors had the privilege of exploring the premises. Then active mining operations were to commence and to be duly prosecuted. To enforce the covenant requiring the lessee to operate the mines, the stipulation was inserted authorizing the lessors to avoid the lease on the lessee's failing "at any time" to prosecute the mining operations for a continuous period of one year. It is manifest, therefore, that under this clause of the contract the lessors could forfeit the lease on failure to prosecute the work actively for one year. It is equally clear that, as the lessee has never commenced nor carried on mining operations, the lessors were at liberty to declare the lease forfeited, and resume possession of the premises at the time notice to that effect was given, unless another part of the contract prevented the lessors from enforcing the forfeiture.

It is contended by the learned counsel for the appellants that a forfeiture is prevented by reason of the clause providing "that, after the expiration of one year from the date of this lease, the lessee must mine and take away at least one thousand tons of ore annually or pay the royalty on that amount." It is claimed that payment under this clause of the contract relieves him from the duty of commencing or prosecuting mining operations upon the demised premises. It is urged by the appellants that this clause gave the lessee the privilege of paying a minimum royalty in lieu of prosecuting the mining operations, and that a compliance with it relieves him from his covenant to work the mines. We think this contention is wholly untenable. It overlooks the manifest purpose of the parties in entering into the lease, as well as the explicit language of the instrument itself. It reads the minimum royalty clause as an alternative provision of the forfeiture-bearing clause. In other words, the appellants' contention is that the lessors can declare a forfeiture of the lease only if the lessee fails to prosecute mining operations at any time for the period of a year, or fails to pay the royalty on 1,000 tons of ore annually. The position would be correct if the contract had provided that the failure to prosecute the mining operations should cause a forfeiture, unless the lessee paid the

minimum royalty. Such clauses are frequently inserted in oil and gas leases, and then, of course, the payment of the royalty relieves the lessee from the penalty of forfeiture; but this contract is not susceptible of that interpretation. The forfeiture-bearing clause was inserted expressly for the benefit of the lessors, and is enforceable at their option whenever the lessee fails to observe his covenant to prosecute mining operations "for a continuous period of one year." If he failed to prosecute the mining operations "with the view of fully working said lands," as required by the contract, the lessors then were authorized to declare a forfeiture of the lease. This gave them, at their option, authority to compel the lessee to develop or surrender possession of the mines. If, however, we are to read the minimum royalty clause, as contended by the appellants it should be read, then the provision inserted in the lease to enable the lessors to compel the lessee to observe his contract by "fully working said lands" is annulled, and the latter may remain in possession of the lessors' mines by simply paying a small annual rental or royalty, and thereby depriving the lessors of having their mines fully developed and realizing upon the ore. That such was not the intention of the parties we think is too clear for argument. After the expiration of one year from the time in which the lessee had the right to explore the land, the lessors might at any time exercise their option to declare a forfeiture on failure of the lessee to prosecute the mining operations. They could, however, permit the lessee to remain in possession of the premises without carrying on the mining operations, and if they did so the lessee was required, as a consideration for the forbearance, to pay the minimum royalty provided in the contract; but the payment of that royalty did not prevent their exercising the option to declare a forfeiture of the lease. As said in a standard work on the subject, the right of forfeiture was not abridged by the addition of a covenant to pay fixed damages for delay. *Barringer & Adams on Mines*, 149. The minimum royalty clause was simply a provision for the payment of a rental during the time the lessee failed to carry on mining operations until the forfeiture should be declared, and was clearly not a covenant requiring the lessee to do a certain amount of mining or pay a minimum royalty, and imposing the penalty of a forfeiture on failure to do one or the other. It should be observed that the contract does not authorize the lessors to forfeit the lease for refusing to pay royalty, but only for failing to prosecute mining operations for a continuous period of one year. The neglect to pay the minimum royalty was a breach of the lessee's covenant, but not a cause for forfeiting the lease. The payment of the royalty, therefore, has no bearing whatever upon the right of the lessors to declare a

forfeiture of the lease. The right to forfeit the contract is wholly disconnected with the payment of the royalty, and is not affected by its payment or nonpayment. The right to exercise the forfeiture depends entirely upon another and different default by the lessee.

We do not agree with the contention of the appellants that the payment and receipt of the minimum royalty was a waiver of the forfeiture-bearing clause of the contract. So long as the lessee neglected to commence and carry on the mining operations, he was required, under the contract, to pay the royalty, and as often as it became due and payable the lessors could enforce its payment without affecting their right to subsequently declare a forfeiture of the lease. It was a consideration for the exercise by the lessors of forbearance to annul the lease, and became due at the times stipulated, "during said remaining term of this agreement." If, at any time after the expiration of two years from the date of the lease, there had been any of the minimum royalty due, the lessors could have declared a forfeiture of the lease, and also collected the amount of the arrears of royalty, as the lease specifically provides that at the option of the lessors it shall become void, "excepting as to the liability of the lessee herein." It is therefore clear that the act of the lessors in declaring the lease void at any time would not, by the express stipulation of the contract, relieve the lessee from the payment of arrears of minimum royalty, or from the performance of any other duty or act required of him by the agreement. The right and the authority to annul the lease were exclusively for the benefit of the lessors, and the lessee could in no way derive any advantage or be relieved from any duty imposed by the contract by the exercise of the lessors' option to nullify the lease. The royalty on the ore mined was, as we have seen, payable quarterly, and the minimum royalty was payable in the same way. This was so understood by the lessee, as appears by the receipt accepted by him, for the \$50 paid on July 13, 1906, as "the quarterly royalty due under the lease." This was the second payment made on the minimum royalty, and it was all due when paid.

The conditions permitting a forfeiture existed on August 19, 1905, when the lessors exercised their option, and, by a notice in writing addressed to the lessee, declared the lease void. Until this declaration was made, and for a year immediately prior thereto, the lease was in full force and effect, and hence the lessors were acting in strict compliance with the contract in declaring it void at that time. The English courts have passed upon this very question and sustained the view here taken. In *Doe v. Bancks*, 4 B. & Ald. 401, in the King's Bench, a lease of coal mines reserved a royalty rent for every ton of coal raised, and contained a proviso that the lease should be void, to all intents and

purposes, if the tenant should cease working at any time for two years. After the working had ceased more than two years, the lessor received rent which, it was claimed, was a waiver of the forfeiture. It was held, however, "that a tenancy from year to year was not thereby created, for the lease was not absolutely void by the cesser to work, but voidable only at the option of the lessor, and that he might avoid the lease upon any cesser to work commencing two years before the day of demise in the ejectment." Abbott, O. J., said (page 406): "There is no distinction between the very day after the receipt of the rent and the period of a week or month. I am of opinion that the legal effect of this instrument is that it is voidable only at the election of the landlord, and that he is at liberty to make the lease void at the end of any two years, during which two years there had been a continued cesser to work." The same doctrine was announced in *Doe v. Baker et al.*, 5 Welsby, Hurlst. & Gordon, 498, where it was held that the receipt of rent is no waiver of a continuing breach of covenant. In that case, a lessee was bound under penalty of forfeiture to repair within a reasonable time. After breach the lessor accepted rent, but it was held that the reasonable time for reparation did not commence afresh after such acceptance of rent. In *Taylor's Landlord & Tenant*, § 500, the learned author, citing numerous cases sustaining the doctrine, says: "Where there is a continuing cause of forfeiture, the landlord will not be precluded from taking advantage of it by receiving rent which accrued after the breach was originally committed."

Here the cause of forfeiture continued until the declaration by the lessors. So long as the lease remained in force and the lessee failed to prosecute the mining operations, the cause of forfeiture continued, and the lessors had the option of declaring it void. The receipt of the rent in the meantime did not affect this right, and the only way that the lessee could prevent the lessors from annulling the lease was to observe the contract on his part and prosecute mining operations with the diligence contemplated by the agreement.

The appellants in this case have no equity to support their position. It tends to obstruct and prevent the development of the mineral resources of the state. The lessee is not acting in good faith in not proceeding to prosecute mining operations as was contemplated by both parties when they executed the lease. In *Munroe v. Armstrong*, 96 Pa. 307, an ejectment to enforce a forfeiture-bearing clause in a lease, this court said (page 310): "Holding on to a lease after ceasing search is often for purposes of speculation, the thing which a prudent landowner guards against. Forfeiture for nondevelopment or delay is essential to private and public interests in relation to the use and alienation of property. In such cases as this equity follows the law. In general, equity abhors a

forfeiture, but not when it works equity and protects a landowner from the laches of a lessee whose lease is of no value until developed, except for a purpose foreign to the agreement." In the recent case of *Steel-smith v. Gartlan*, 45 W. Va. 27, 29 S. E. 978, 44 L. R. A. 107, the Supreme Court of West Virginia, in disposing of a controversy over a lease, quotes with approval this language of *Munroe v. Armstrong*. In discussing the conduct of a lessee in a mining lease, the Court of Appeals of New York, in *Genet v. Delaware & Hudson Canal Company*, 136 N. Y. 593, 32 N. E. 1078, 19 L. R. A. 127, said (page 133 of 19 L. R. A., page 1082 of 32 N. E., page 611 of 136 N. Y.): "The conduct of the defendant has been entirely subversive of the spirit of the contract, and of the object and purpose for which it was entered into. The execution of the contract in good faith was fully contemplated. The defendants have acted as if a minimum rent was in the nature of an annual bonus paid to the plaintiffs merely to keep the property out of the market, or to prevent it falling into the hands of a rival. They certainly have no right to make any such use of the contract, as that would be to ignore its essence and destroy its life."

The remarks of the court in the cases cited are pertinent to the facts of the case in hand. The learned trial judge correctly interpreted the lease involved in this suit, and committed no error in directing a verdict for the plaintiffs.

The assignments of error are overruled, and the judgment is affirmed.

ELKIN, J., dissents.

(117 Pa. 518)

REBMAN v. GENERAL ACCIDENT INS. CO.

(Supreme Court of Pennsylvania. April 22, 1907.)

1. INSURANCE — ACCIDENT INSURANCE — VOLUNTARY EXPOSURE TO DANGER.

A provision in an accident policy that it should not apply where death or disability resulted from voluntary exposure applies where insured is injured by doing something voluntarily which ordinary prudence would forbid.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Insurance, § 1180.]

2. SAME—EVIDENCE.

A man 66 years of age, and with an umbrella under his arm, attempting to get on a train running six or eight miles an hour is guilty of a voluntary exposure to unnecessary danger, relieving the insurance company from liability for his death resulting from the attempt.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Insurance, § 1180.]

Mestrezat and Stewart, JJ., dissenting.

Appeal from Court of Common Pleas, Allegheny County.

Action by Catherine Rebman, administratrix of Mary W. Rebman, against the General Accident Insurance Company of Phila-

delphia. From an order refusing to take off a nonsuit, plaintiff appeals. Affirmed.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, ELKIN, and STEWART, JJ.

Willis F. McCook, for appellant. Wm. W. Wishart, for appellee.

FELL, J. This action was on an accident insurance policy which contained, among others, these provisions: "Nor does this contract extend to nor insure against death or any kind of disablement resulting wholly or partly, directly or indirectly, from voluntary exposure to unnecessary danger." "The certificate holder is required to use all due diligence for personal safety and protection." The insured had frequently taken the 1:02 p. m. train of the Pittsburg & Lake Erie Railroad at a station near his home for Pittsburg. Several days before the accident that resulted in his death orders had been given not to take on passengers at this station, but mail was received and discharged there. The insured did not know of this order. He went to the station expecting the train to stop. He saw it approach the station with steam off and at reduced speed. While it was running six or eight miles an hour, he took hold of the rail at the front platform of the last car with his left hand, placed his left foot on the lower step, and was in the act of raising his body when his hold was broken, and he fell backward and was killed. He was nearly 66 years of age, 5 feet 5½ inches high, and weighed 184 pounds. He had an umbrella under his left arm. When he seized the hand rail of the car with his left hand, the train was passing to his right. He did not move with it, but stepped directly on, as a person would step on a standing car. The speed of the train was accelerated about the time he took hold of the rail, but the contention that he was thrown off by a sudden jerk or jar of the train after he was safely on the step is not sustained by the testimony. He did not succeed in getting on the step, but was in the act of doing so, with his knee bent and his body inclined toward the car, when he fell.

Under this state of facts, was a judgment of nonsuit properly entered? The question is not strictly whether the insured was negligent, but whether he exposed himself to a risk not covered by the policy. The words "voluntary exposure to unnecessary danger," in the clause exempting from liability, have been construed by this court, and generally, as an intentional and unnecessary exposure to danger so obvious that a prudent person exercising reasonable foresight, would have avoided it. *Burkhard v. Travelers' Insurance Co.*, 102 Pa. 262, 48 Am. Rep. 205; *De Loy v. Travelers' Insurance Co.*, 171 Pa. 1, 32 Atl. 1108, 50 Am. St. Rep. 787. In the case last cited, it was said by Sterrett, C. J.: " * * * If a man acts so recklessly and carelessly that he shows an utter dis-

regard of a known danger, then he may be said to have exposed himself voluntarily to danger. Or, if the risk of danger is so obvious that a prudent man, exercising reasonable foresight, would not have done the act, then he may be said to have voluntarily exposed his person to danger." The clause of the policy must be held to apply whenever the insured is injured in a manner that should have been anticipated, while voluntarily doing something that ordinary prudence would forbid. No other construction would give effect to the intention of the parties to the policy.

An attempt to board a moving train is always dangerous. An attempt by a man of the age and weight of the insured, with an umbrella under his arm, to board a train running six or eight miles an hour, is so obviously dangerous that a prudent person would not make it. It is so universally regarded as dangerous that it must be considered as within the class of risks excepted in the policy. The fact that the insured may have believed that the train would stop at the station does not strengthen the plaintiff's case. If he acted on that belief, he attempted to get on a moving train which he expected would come to a full stop in a few seconds. This was the needless assumption of a manifest risk. If he observed that it was not to be stopped, he intentionally exposed himself to a still greater danger. In either event there was a "voluntary exposure to unnecessary danger," within the meaning of the contract, and a failure to "use all due diligence for personal safety and protection." His act was not the less voluntary because it may have been on a sudden impulse without reflection. He intended to do what he did, and the words of the policy admit of no distinction between premeditated acts and impulsive acts, springing from a fully formed intention. The danger cannot be considered as not obvious because he may not at the moment fully have understood and appreciated it. He could have seen it and would have seen it and comprehended it if he had given to what he was doing the reasonable attention that ordinary prudence required.

The judgment is affirmed.

MESTREZAT and STEWART, JJ., dissent.

(217 Pa. 636)

NORTH PENN IRON CO. v. INTERNATIONAL LITHOID CO.

(Supreme Court of Pennsylvania. April 22, 1907.)

1. EVIDENCE—PROOF OF SIGNATURE.

The signature to a paper witnessed by two subscribing witnesses cannot be proven by a person familiar with the handwriting, where no effort was made to secure the testimony of such witnesses.

2. ASSIGNMENT — NOTICE — PAYMENTS TO ASSIGNEE.

Where a debtor receives written notice of an assignment of a chose in action, he may make payments thereunder, though the assignment has not been served on him.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 4, Assignments, § 159.]

3. FRAUDULENT CONVEYANCES — ASSIGNMENT OF DEBT.

Where the licensor of a patent notifies the licensee of an assignment of his license to a named person, and that royalties are to be paid to her, plaintiff in execution against the licensor must show that the assignment of the royalties was in fraud of the creditor's rights.

Appeal from Court of Common Pleas, Philadelphia County.

Action by the North Penn Iron Company against the International Lithoid Company. Judgment for plaintiff, and defendant appeals. Reversed.

The court charged in part as follows: "This is an issue raised under an attachment and arose as follows: The plaintiff got a judgment against one Edward C. Brice, and a little before the attachment was issued and the rights of Brice in the garnishee company were held by virtue of it, they got a paper from Brice, who had then fled from this jurisdiction, or from a person called Sally Brice, who either does or does not exist, and who, if she exists, so far as we know, is his wife, saying that the interest in this royalty no longer belongs to him, but belongs to her. The evidence of the making of that paper is in my judgment not adequate to establish it, but, if it were, when a man who is indebted gives his property to his wife, the first presumption of the law is that he gets nothing for it, and that in effect it remains within his own control and for his own use, and, if that presumption is not to operate, positive evidence to the contrary must be produced. No such positive evidence has been forthcoming. Therefore, it becomes very immaterial whether Sally Brice does or does not exist, because, if she does exist, she is only in effect in this proceeding another name for the defendant himself. Holding his view, it becomes my duty to instruct you to find a verdict for plaintiff for the amount claimed, a statement of which will be handed to you by plaintiff's counsel."

Verdict and judgment for plaintiff for \$1,534.37. Defendant appealed.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

Lewis Lawrence Smith, for appellant. Clifton Maloney, for appellee.

BROWN, J. In this foreign attachment the plaintiff, a creditor of the defendant, Edward C. Brice, attached moneys in the hands of the garnishee alleged to be due to him as royalties under a license agreement executed by him on June 29, 1901. By this agreement he is to receive a minimum

royalty of \$1,500 every six months. On December 3, 1903, he wrote the garnishee a letter in which he stated: "I take this opportunity of notifying you that on October 5, 1903, I transferred and sold by good and sufficient deed of assignment all my right, title, and interest in and to the license issued by me to the International Lithoid Company, on the 29th day of June, 1901, to S. M. Brice. All moneys that become due and payable to me, will hence become due and payable to her. S. M. Brice has instructed her attorney, Mr. Joshua Pusey, to serve notice of revocation of the license issued to the International Lithoid Company by me, at the proper time. If you desire to anticipate this notice, kindly make check to the order of S. M. Brice, and mail same to the above address." After the receipt of that letter the royalties accruing under the license agreement were paid to S. M. Brice, the first payment having been made in December, 1903, and the last one in January, 1904. At the trial the garnishee produced what purported to be the assignment by the defendant to S. M. Brice, referred to in his letter, the same having been handed to it by Joshua Pusey. After proving the defendant's signature to the assignment by a witness familiar with his handwriting, it was offered in evidence, but objected to on the ground that its execution had not been properly proved, the two subscribing witnesses not having been called. This objection was sustained and the assignment excluded. The witnesses to it lived in New York, where it purports to have been executed, and, as it did not appear that proper effort had been made to procure their testimony, the court cannot be said to have committed error in not permitting proof of its execution by secondary evidence. But why should the letter of the defendant of December 3, 1903, to the garnishee have been excluded? The genuineness of his signature to it was properly established by the testimony of a witness familiar with his handwriting, and, if the garnishee had never seen the assignment to which it refers, it would have been sufficient notice and authority from him to pay the royalties to another. He could not recover them if paid in pursuance of such notice, and what he cannot recover his attaching creditor cannot get, provided that his direction to pay them to another was not in fraud of its rights as one of his creditors. Under no condition could he recover what has been paid S. M. Brice, even if the royalties were a gift to her; but, if a gift to her at a time when he was indebted to the appellee, such gift would be void as to it. In his charge to the jury, directing a verdict in favor of the plaintiff, the learned trial judge said that, even if the execution of the assignment had been properly established, it was to a person, if in existence, who was the wife of the defendant, and that the presumption of the law was that it was a gift to her and void as to creditors. The

assumption of the fact by the court that S. M. Brice is the wife of E. C. Brice was not justified by the evidence. She may be, but it was not so proven. The plaintiff offered no testimony on the subject, and from that of the two witnesses called by the garnishee who were asked about Sally Brice it does not appear that she was his wife. On the contrary, William D. Yarnall testified that he had lived near the defendant, that he knew his wife, and that her name was Maud C. Brice. Albert S. Barker, the other witness, testified that Sally M. Brice was said to have been the wife of E. C. Brice, but that he did not know what his wife's name was.

The letter of December 3, 1903, being in itself full authority to the garnishee to pay and full protection from any further claim by the defendant that the royalties be paid to him, it must have the same effect against the claim of the appellee, whose rights rise no higher than his, unless it can show either that the direction to pay was to one who was his wife and she cannot show that it was not in fraud of creditors, or, if the payee was not his wife, that she was one to whom he assigned the royalties in fraud of his creditor's rights.

The garnishee is a mere stakeholder of the royalties due under the license agreement and ought not to be subjected to the liability to pay them twice. Such liability may be incurred if this judgment on a verdict directed by the court is allowed to stand. The right of the appellant was to have the case go to the jury on the letter.

The second, fourth, and fifth assignments are sustained, and the judgment is reversed with a venire facias de novo.

(217 Pa. 522)

KELLER v. COHEN.

(Supreme Court of Pennsylvania. April 22, 1907.)

1. BILLS AND NOTES—AGREEMENT AS TO PAYMENT.

An agreement that a note shall be paid from profits derived from the sale of certain manufactured articles is valid.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 7, Bills and Notes, § 52.]

2. SAME—DEFENSES.

In an action on a note, defendant may set up a contemporaneous written agreement providing for the payment of the notes out of a particular fund.

Appeal from Court of Common Pleas, Philadelphia County.

Action by Joseph S. Keller against Andrew J. Cohen. From an order making absolute rule for judgment for want of a sufficient affidavit of defense, defendant appeals. Reversed.

The defendants relied upon the following papers:

"Philadelphia, Sept. 8th, 1898.

"Mr. A. J. Cohen, Philadelphia, Pa.—Dear Sir: The writer, J. S. Keller, will, in con-

sideration that you transfer to me 20% of your one-half interest in umbrella tubing and receipt of like amount from Mr. Seymour's interest, obligate myself to provide all the necessary cash funds to build one complete set of machines to make the above mentioned tubing. I will agree to advance to A. J. Cohen the sum of fifteen hundred dollars (\$1,500), same to be secured by Mr. Cohen transferring me his present life insurance policy as collateral. The amount advanced to be paid back to me from the immediate proceeds of profits derived from the sale of umbrella tubes made. The above is respectfully submitted for your convenient consideration.

"Yours very truly, J. S. Keller."

"Be it known that I, Andrew J. Cohen, in consideration of a loan of two thousand dollars (\$2,000), which is hereby acknowledged, do hereby assign, transfer and set over to Joseph S. Keller of 3515 Hamilton street, Philadelphia, Pa., my policy, No. 76,894 (amount \$15,000), dated June 22, 1896, in the Home Life Insurance Company. Said policy to be held by the said Joseph S. Keller as collateral security for the specific loan of two thousand dollars (\$2,000), premiums to be paid on said policy by me, in further acknowledgment of which I have given the said Joseph S. Keller my notes as follows: First note, dated November 14th, 1898, for one thousand dollars (\$1,000), at five years. Second note, dated ———, 1898, for one thousand dollars (\$1,000), at five years.

"Witness my hand and seal at Philadelphia this 29th day of November, 1898.

"Andrew J. Cohen. [L. S.]"

The court made absolute rule for judgment for want of a sufficient affidavit of defense.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

Albert B. Welmer, James D. Evans, William E. Stokes, and Frederick M. Leonard, for appellant. John Stokes Adams, for appellee.

ELKIN, J. This is an appeal from the order of the court below making absolute a rule for judgment for want of a sufficient affidavit of defense. The action is brought on two promissory notes made payable in five years from the date thereof, without interest. No question is raised as to the execution of the notes, but the affidavits of defense, among other things, set up that the appellant was induced to accept the loan, sign the notes, and execute and deliver the assignment on the faith of the representation made by the appellee that the loan should be paid out of the immediate proceeds of profits derived from the sale of umbrella tubes made, and not otherwise, without which assurance and inducement Cohen would not have accepted the loan, signed the notes, or executed the assignment. It appears from

the averments contained in the affidavits of defense that some months prior to the execution of the notes the appellant, with one Seymour, applied for a patent for an improvement in umbrella tubes, which was afterwards granted. The appellee was desirous of obtaining an interest in the patent, and opened negotiations with appellant for the purpose of effecting an arrangement for the manufacture of umbrella tubes by the patent process. As a result of these negotiations appellee on September 8, 1898, submitted to appellant a proposition in writing, setting out, in substance, that he would provide all the necessary cash funds to build a complete set of machines for the manufacture of umbrella tubes on the condition that appellant and Seymour transfer to him twenty per cent. of their respective holdings in the patent. He also proposed to advance Cohen the sum of \$1,500, afterwards increased to \$2,000, and agreed that the amounts so advanced should be paid back out of the immediate proceeds of profits derived from the sale of umbrella tubes made. The affidavit further avers "that neither at the time of said proposal and its acceptance, nor at any time since, was there ever any agreement or understanding between defendant and plaintiff that said sum so advanced was to be paid from the proceeds of said insurance policy; but it was always understood and agreed between plaintiff and defendant that said sum so advanced was to be repaid from the profits derived from the sale of umbrella tubes made, said insurance policy having been assigned as collateral for the purpose of securing to plaintiff the performance by defendant of his part of the agreement, namely, to assign to plaintiff twenty per cent. of defendant's interest in said patent, and to repay said sum so advanced out of the immediate proceeds of profits derived from the sale of umbrella tubes." It is further averred that in pursuance of the agreement and understanding between the parties to this transaction the Pennsylvania Tube Company was incorporated for the purpose of manufacturing umbrella tubes; that the appellee is the president and principal stockholder of said company, and has had the management of its business, and has failed to render an account to appellant for any profits derived therefrom, or to show that said profits had not been applied on account of the moneys advanced. In the supplemental affidavit of defense it is further averred that the contract consisted of four concurrent elements, to wit, the proposal of September 8, 1898, the execution of the notes in question, the advance of the said \$2,000, the assignment of the insurance policy as collateral, and that without the concurrence of all these elements appellant would not have received the money advanced, executed the notes in question, and entered into the transaction.

The legal effect of the averments contained

in the affidavits of defense is that the inducement which caused the appellant to accept the loan, execute the notes, and make the assignment was the agreement by appellee that the loan should be repaid out of the immediate profits derived from the sale of umbrella tubes. It is clearly competent for parties to contract for the payment of an obligation out of a particular fund and in a particular manner. *Chambers v. Jaynes*, 4 Pa. 39; *Sartwell v. Wilcox*, 20 Pa. 117; *Creery v. Thompson*, 26 Pa. Super. Ct. 511; *Wharton on Contracts*, § 598.

There can be no doubt that a good defense is made out by the facts stated in the affidavits, unless the rule contended for by appellee is held to be applicable; that is to say, appellant cannot take advantage of the alleged contemporaneous agreements in writing because they in effect contradict the notes upon which suit is brought. *Wharton v. Douglass*, 76 Pa. 273; *Lee v. Longbottom*, 173 Pa. 408, 34 Atl. 436, and *Fuller v. Law*, 207 Pa. 101, 56 Atl. 338, are relied on to support this contention. We do not question the correctness of the rule laid down in these cases, but the facts relied on to sustain it are entirely different from those in the case at bar. As was stated by Mr. Justice Williams in *Coal & Iron Company v. Willing*, 180 Pa. 165, 36 Atl. 737: "The existence of a contemporaneous parol agreement between the parties, under the influence of which a note or contract has been signed, may always be shown when the enforcement of the paper is attempted." To the same effect is *Keough v. Leslie*, 92 Pa. 424; *Martin v. Kline*, 157 Pa. 473, 27 Atl. 753; *Martin v. Fridenberg*, 169 Pa. 447, 32 Atl. 429.

In the case at bar, however, the appellant does not rely on a parol agreement, but sets up an agreement in writing in support of his contention that the notes were to be paid out of a particular fund. The notes in question and the written agreements providing the manner of payment make up the whole contract between the parties, if the averments in the affidavits of defense are true, and we must so treat them in the disposition of the question raised on this appeal. This is not in conflict with the cases cited by appellee, because the agreement set up is not wholly inconsistent with the terms of the notes. The execution of the notes is acknowledged, the amount advanced admitted, but it is averred that "the amount advanced [is] to be paid back to me from the proceeds of the profits derived from the sale of umbrella tubes made." This only affects the manner of payment and specifically designates a source from which a fund is to be derived for the payment of the notes. If this was the agreement of the parties, they are bound by their own covenants. Certainly the facts averred are sufficient to put the parties to their proof on a trial before the jury.

Judgment reversed with a procedendo.

(217 Pa. 574)

WINTERBOTTOM et al. v. PHILADELPHIA, B. & W. R. CO.

(Supreme Court of Pennsylvania. April 22, 1907.)

RAILROADS — ACCIDENTS AT CROSSING — EVIDENCE.

In an action for injuries to a boy run over at a crossing, where the evidence of witnesses for defendant that the proper signals were given was contradicted by witnesses for the plaintiff, the court will not say as a matter of law that the negative testimony for plaintiff was insufficient to overcome the positive testimony for defendant.

Appeal from Court of Common Pleas, Delaware County.

Action by Jane E. Winterbottom, in her own right, and Francis Maurice Winterbottom, by his mother, Jane E. Winterbottom, against the Philadelphia, Baltimore & Washington Railroad Company. Judgment for plaintiffs, and defendant appeals. Affirmed.

Argued before MITCHELL, C. J., and FELL, MESTREZAT, POTTER, and ELKIN, JJ.

J. B. Hannum, for appellant. A. B. Geary, for appellees.

ELKIN, J. The assignments of error raise three questions: First, was there sufficient evidence to go to the jury on the question of the failure to give proper signals before approaching the crossing? Second, even if it be conceded that the signals were not given, was the failure so to do the proximate cause of the accident? and, third, was the boy making such an unlawful use of the crossing as to relieve defendant company from its duty to give proper signals? The appellant relies on what is termed the negative testimony of the witnesses for appellees to support its contention that there was not sufficient evidence of negligence to go to the jury. *Hauser v. Central Railroad of New Jersey*, 147 Pa. 440, 23 Atl. 766, *Urias v. Pennsylvania Railroad Company*, 152 Pa. 326, 25 Atl. 566, *Knox v. P. & R. Ry. Co.*, 202 Pa. 504, 52 Atl. 90, and *Keiser v. Railroad Company*, 212 Pa. 400, 61 Atl. 908, 108 Am. St. Rep. 872, are relied on to support this position. It is true the court has said in these and other cases that, where the negative testimony produced by plaintiff only amounts to a scintilla, it cannot prevail over the positive and conclusive testimony of a large number of witnesses which clearly establishes the fact that the signals were given. In such cases it is the duty of the court to say as a matter of law that the negative testimony produced by the plaintiff is not sufficient to overcome the positive and conclusive testimony of the defendant bearing on this question. It may also be conceded that in some of the cases it is difficult to determine whether it is a question of law for the court or of fact for the jury.

The opportunity of the witness for hearing the signals, the place where he was located at the time, whether he was on the lookout for the train and listening for the signals, are all important matters to be taken into consideration by the trial judge when he is called on to pass upon this question. In every such case it is possible to produce witnesses who can very truthfully testify that they did not hear the signals. Such testimony is of very little value unless the witnesses were in such a location as would make it highly improbable that the signals could have been given without being heard by them. In the case at bar, however, the appellees produced a witness who was seated at a window in her house, near the railroad station, waiting for a friend who was coming on the train, for which she was on the lookout, and who was listening for the signals. Another witness was produced who was standing at the station waiting for the train and listening for the signals. Both of these witnesses testified positively that they did not hear the signals. There were other witnesses to the same effect. Under all the circumstances we think it was a question for the jury to determine. We cannot say under the facts of this case that the failure to give the signals was not the proximate cause of the accident. The boy made the best effort he could to get out of his peril, even without hearing the signals, and we cannot say as a matter of law that he could not have entirely extricated himself if he had heard the signals in due time. This was also a question for the jury.

On the question of the boy making an unlawful use of the crossing, the court below said that the evidence did not disclose clearly just what he was doing there, and the facts were not sufficient to justify him in saying as a matter of law that the boy was a trespasser. We do not feel like disturbing the ruling of the court in this respect under the facts of this case.

Judgment affirmed.

(217 Pa. 501)

HALLOWELL et al. v. WILLIAMS.

(Supreme Court of Pennsylvania. April 15, 1907.)

RECEIVERS — ACTIONS AGAINST — AFFIDAVIT OF DEFENSE.

Where plaintiff sued the receiver of a corporation for loss because of inability of the receiver to complete deliveries on an executory contract for future delivery of goods without the fault of the receiver, an affidavit of defense is insufficient, which fails to show equities in favor of others superior to those of a purchaser, and especially where the receiver has not applied, as provided by Act Cong. Aug. 13, 1898, c. 886, § 1, 25 Stat. 433 [U. S. Comp. St. 1901, p. 508], for equitable relief to the federal court which appointed him.

Appeal from Court of Common Pleas, Philadelphia County.

Action by Eli B. Hallowell and Ralph Souder against Horace G. Williams, receiver of Beaver Creek Lumber Company. From an order making absolute rule for judgment for want of a sufficient affidavit of defense, defendant appeals. Affirmed.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

Albert B. Welmer and Frederick M. Leonard, for appellant. Frank P. Prichard, for appellees.

BROWN, J. In determining whether this judgment for want of a sufficient affidavit of defense was properly entered, we first turn to the averments in plaintiffs' statement. The defendant was sued as the receiver of the Beaver Creek Lumber Company. He was appointed receiver of this company by the Circuit Courts of the United States for the Northern District of West Virginia and the Eastern District of Pennsylvania. On December 19, 1904, he entered into a contract with the appellees to sell them 1,000,000 feet of hemlock lumber at prices fixed in their proposal to him to furnish it to them. In accepting this proposal, on the same day it was made, he acknowledged the receipt of \$2,000 advanced to him on account. Subsequently the appellees advanced \$4,000 more to him and received shipments of the lumber contracted for. Nearly six months after the contract was entered into, the appellant notified the appellees that he could not deliver any more lumber to them, having at that time delivered to them a little more than one-third of what he had agreed to furnish them. In admitting his default and averring his inability to furnish the balance of the lumber, he, in writing, unqualifiedly, unambiguously, and without condition authorized the appellees to purchase from other parties 639,325 feet, the quantity which they still were entitled to receive under the contract. The statement further avers that in pursuance of this direction by the appellant, or by his agreement that they should do so, the appellees purchased the balance of the lumber which he had failed to deliver to them, and for the excess over the contract price which they were to pay him for it he is indebted to them. This indebtedness is the principal item set out in the statement, and as to it nothing in the affidavit of defense can be found that would avail against judgment if the suit were against the appellant as an individual, on a contract entered into by him in that capacity. He does aver that he signed the authority authorizing the appellees to purchase the lumber from other parties under a distinct understanding and agreement that the authorization would be used to cover only such lumber as the plaintiffs were obliged to purchase up to the quantity which he had failed to furnish to fill existing orders which they had from their cus-

tomers and could not induce them to cancel, and that they would induce their customers to cancel as many of the existing orders as possible. As stated, the authority to the appellees to purchase was unqualified, and it is not averred that any condition was omitted from it by accident or mistake. But a further answer to this averment is that, without such authority from the appellant, the appellees had a right, under their contract, to purchase the lumber which he was not able to furnish to them, and he would be liable for any loss sustained by them in purchasing from others.

The second item for which the court directed judgment was \$244.07, for excess freight due under the agreement set forth in plaintiffs' statement of claim. There is an averment that it was agreed between the plaintiffs and defendant, at the time of the making of the contract, that the lumber was to average in weight three pounds to the foot, and that the defendant would pay the freight on all excess weight over that amount. This agreement is not denied in the affidavit of defense, nor is it averred that the amount claimed under it is incorrect, if such agreement was made. There is a denial of any liability of the appellant on this item, followed by an averment that the written contract did not call for lumber of any specific weight, but only that the driest stock should be shipped, and that such stock had been shipped. But, as stated, there is no denial of the oral agreement set forth in the statement.

Counsel for appellant do not contend that the affidavit of defense, if this suit were against him as an individual, would be sufficient, but insist that he cannot be held as receiver for the nonperformance of an executory contract, if the same was found by him to be "unfair and burdensome to the trust estate." This is a purely equitable defense. Whether a receiver may make it in a proper case is not the question to be determined, for, even if he may, nothing can be discovered in this affidavit justifying it. The contract entered into with the appellees was within the express powers conferred upon the appellant by the courts of the United States. This he admits, and he further admits that at the time it was entered into it "was thoroughly valid, provident, and reasonable." In the second paragraph of the affidavit, he admits that the hemlock lumber which he had on hand in the yard and the logs and standing timber when cut into lumber "would have produced a very large amount of lumber, viz., an amount estimated to be considerably in excess of 1,000,000 feet." The order of the court to him was: "Such receiver shall sell said lumber to the best advantage, either at private or public sale, and shall haul and saw into lumber the trees now cut and still remaining in the woods upon said land, converting the same into

lumber, and shall likewise sell it." A further order to him was to operate the mill of the company for the purpose of "sawing and marketing whatever timber and lumber may now be upon the mill yard, and the logs in the ponds of the said defendant, the Beaver Creek Lumber Company, or upon the lands, whether cut or uncut."

The affidavit of defense does not even aver that the Beaver Creek Lumber Company is insolvent, and it would hardly be pretended that this defense ought to avail for stockholders any more than if the corporation itself, and not through its receiver, had made the contract with the appellees. But, conceding the insolvency of the company, whose equities superior to the legal rights of the appellees under their contract with the receiver ought to be protected at their expense? As to this, the affidavit of defense is silent. Nothing appears in it showing that the allowance of this legal claim of the appellees will interfere with any equities that ought to be protected by denying them their judgment. It cannot, therefore, be withheld from them.

The act of Congress of August 13, 1888, c. 866, § 1, 25 Stat. 433 [U. S. Comp. St. 1901, p. 508], provides: "Every receiver or manager of any property, appointed by any court of the United States, may be sued in respect of any act or transaction of his in carrying on the business connected with such property, without the previous leave of the court in which such receiver or manager was appointed; but such suit shall be subject to the general equity jurisdiction of the court in which such receiver or manager was appointed, so far as the same shall be necessary to the ends of justice." Under this act the receiver was sued in respect of "an act or transaction of his in carrying on the business connected with" the property under his control. The suit against him was, from the time it was instituted, subject to the general equity jurisdiction of the court in which he was appointed; but that court has not interfered with it. If the contract with the appellees ought to have been annulled, either of the courts of the United States in which the appellant was appointed receiver might, for good cause shown, have declared it annulled, and the suit in the state court could have been stayed; but no application was made by the appellant to either of those courts for relief from his contract, and while he may not have been bound to make such application, and may set up an equitable defense in our own courts recognizing such defenses in proceedings at law, it would have been better had he asked for relief from the courts appointing him, if he was entitled to be relieved from his contract.

As no equitable defense that ought to be recognized appears in the affidavit of defense, the judgment for its insufficiency is affirmed.

(217 Pa. 652)

LEISTER v. PHILADELPHIA RAPID TRANSIT CO.

(Supreme Court of Pennsylvania. April 22, 1907.)

STREET RAILROADS—COLLISION WITH TRAVELER—CONTRIBUTORY NEGLIGENCE.

In an action against a street railway company to recover for personal injuries by collision with a street car, evidence held to establish such contributory negligence on the part of the driver of the wagon in which plaintiff was riding as to require direction of verdict for defendant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Street Railroads, § 257.]

Appeal from Court of Common Pleas, Philadelphia County.

Action by Edna L. Leister, by her next friend, Stewart S. Leister, against the Philadelphia Rapid Transit Company. Judgment for plaintiff. Defendant appeals. Reversed.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

Thomas Leaming and T. Truxton Hare, for appellant. Edmund W. Kirby and Robert J. Bryon, for appellees.

POTTER, J. The defendant company in this case was charged with negligence in failing to preserve a free and unobstructed passage along the public highway. The plaintiff was a young girl, riding in a pony carriage, at the invitation of the driver, along the Old York Road. At the point of the accident the defendant was shifting the position of one of its tracks, and one-half the road was obstructed; but the west half of the highway was untouched, leaving a space sufficient for two vehicles to pass, or drive abreast. By a coincidence a trolley car and a cart happened to be at this point at the same time, so that the space was temporarily filled. The driver of the carriage in which the plaintiff was riding permitted his horses, a team of spirited ponies, to get beyond his control, so that when he approached the point in question he was unable to stop them; but, instead of running into the car or cart, they turned aside and ran into the excavation, upsetting the carriage, and seriously injuring the plaintiff and the driver. The accident occurred in broad daylight, and the approach to the place was slightly upgrade for a distance of several hundred feet. The evidence discloses no reason whatever for the failure of the driver to observe the condition of the highway or to control his team. He testifies that his horses were not frightened, and declares that they were not running away. If his statement is true, his failure to stop in time to avoid the accident is inexplicable.

We can find nothing in the evidence to justify any charge of negligence against the defendant company. It had the right to shift its track, and the evidence is undisputed

that, while this was being done, one-half the road was left undisturbed for the use of the public. This was an ample space under all ordinary circumstances, and the fact that for the moment it happened to be occupied by a trolley car and a dump cart is of no significance. Both the car and the cart were lawfully there at the time. Whether the car was in motion at the time does not appear; but, if it had stopped, there is no suggestion that the delay was unduly prolonged. It is perfectly obvious that the driver of the carriage should have checked his team as he approached the spot, and, if necessary, stopped until the car had passed, when the passage-way would have been clear for him. Instead of keeping his team well in hand, he permitted the horses to get beyond his control, and the result was that they dashed into the obstructed portion of the highway, with most serious consequences to himself and his guest. These results can only be imputed to the lack of skill or knowledge in the management of his team upon the part of the driver. The responsibility for the accident cannot be justly or lawfully placed upon the defendant company.

If any vehicle driving ahead of this carriage had met, at the point in question, another one coming from the opposite direction, exactly the same result would have been produced in so far as constituting an obstruction in the highway was concerned. No one can be permitted to allow any vehicle in his charge upon the public highway, whether it be carriage, motor car, or trolley car, to get beyond control, or to attain excessive speed, without being held responsible for the consequences. Neither can he shift upon another the responsibility for the result of his own carelessness or bad management. There is nothing in the evidence which justified the submission of this case to the jury. The claim of the plaintiff is unsupported, in so far as it charges the defendant with negligence. The trial judge should have assumed the responsibility by instructing the jury as requested by counsel for the defendant in the third and fourth points for charge.

The judgment is reversed, and is here entered for the defendant.

(217 Pa. 537)

COMMONWEALTH ex rel. STEWART et al.
v. BOWDITCH.

(Supreme Court of Pennsylvania. April 22, 1907.)

1. PAUERS — RELIEF — OFFICERS — NATURE OF OFFICE.

Act June 20, 1839 (P. L. 337), provides for the election of a board of managers for the relief and employment of the poor, and makes them a body politic and corporate in law, with all the powers of such a body. *Held*, that they are officers of a distinct and separate corporation created by statute, having special corporate powers and duties, and are not township officers.

2. SAME—ELECTION OF OFFICERS.

Act March 10, 1875 (P. L. 6), providing dates on which township officers shall be elect-

ed, does not repeal or modify Act Jan. 20, 1839 (P. L. 337), relating to the election of managers for the relief and employment of the poor in township of Germantown.

3. QUO WARRANTO—TITLE TO OFFICE.

Four of the managers for the relief and employment of the poor in the township of Germantown, elected under Act Jan. 20, 1839 (P. L. 337), have sufficient interest to maintain quo warranto against another, claiming to be a manager, and such proceeding need not be on the relation of the Attorney General.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Quo Warranto, §§ 40, 41.]

Appeal from Court of Common Pleas, Philadelphia County.

Quo warranto by the commonwealth, on the relation of Frank B. Stewart and others, against Walter Bowditch. From an order quashing the writ, plaintiffs appeal. Reversed.

The relators were members of the board of managers for the relief and employment of the poor of the township of Germantown. The respondent claimed membership in the board by virtue of an election under Act March 10, 1875 (P. L. 6). The respondent moved the court to quash the writ of quo warranto for the following reasons: "(1) The relators have no such interest in the title of the respondent to the office of member of 'the board of managers for the relief and employment of the poor of the township of Germantown' as to enable them to question it in the above proceeding. (2) No relator claims title to the office of the respondent. (3) No relator shows title, prima facie or otherwise, to the office of the respondent. (4) There is no allegation in the suggestion for the writ that any other person claims or hold title to the office in question, except the respondent. (5) The office of the respondent, is a public one, the title to which can only be called in question at the instance of the Attorney General of the commonwealth, or his deputy, or by some citizen claiming title thereto." The court quashed the writ.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

Paul Reilly, for appellants. M. Hampton Todd and Owen B. Jenkins, for appellee.

ELKIN, J. While the controlling question involved in this appeal is whether the relators have such an interest in the title of the respondent to the office of member of the board of managers for the relief and employment of the poor in the township of Germantown as to enable them to institute a proceeding by quo warranto to inquire into his right to hold said office, it is related to, and in some degree dependent upon, other questions that must necessarily be considered. Act Jan. 20, 1839 (P. L. 337), provides, among other things, for the election of members of the board of managers for the relief and employment of the poor in said township for a term of three years from the time of their election. It is

further provided that said managers shall be a body politic and corporate in law, with all the rights, privileges, powers, and faculties of a body politic and corporate, and may take, hold, and immediately upon the organization of the board shall be vested with, all the estate, real, personal, and mixed, whatsoever, now vested in or held by the managers for the relief and employment of the poor of the township of Germantown, in trust or otherwise, and may also hold, to them and their successors, any other real or personal estate conveyed to them by grant, bargain, or sale, or by gift, bequest, or other alienation; may sue or be sued, plead and be impleaded, in any court of record, or in any place whatever; may have a common seal, and make such laws, rules, and orders as shall appear to them or a majority of them useful, necessary, and proper for the government of said corporation, its officers, estates, property, funds, and the business and affairs in general of the same. The number of managers was increased by Act May 1, 1861 (P. L. 590), from six to nine, but their general powers, privileges, and duties remained unchanged.

Under these circumstances, are the said managers township officers, within the meaning of the law, or are they officers of a distinct and separate corporation created by statute, having special corporate powers, privileges, and duties? A question almost analogous has been passed upon by the Superior Court in *Nissley v. Lancaster County*, 27 Pa. Super. Ct. 405, wherein it was held that the directors of the poor and of the house of employment of the county of Lancaster, created by the act of February 27, 1798 (3 Smith's Laws, p. 306), are not county officers, and that their compensation as fixed by the special act of April 14, 1864 (P. L. 422), is not affected or changed by the act of July 2, 1895 (P. L. 424), which fixes the salaries of county directors of the poor in counties containing over 150,000 inhabitants. The force of this opinion is conceded by the learned counsel for appellee, but it is contended that it was predicated upon the fact that the framers of the Constitution omitted such officers from the list of county officers specifically designated therein, and that this fact distinguishes that case from the one at bar. We do not agree with this position. The opinion in that case did not rest upon the fact that the directors of the poor were omitted from the list of county officers in the Constitution, although this was suggested as an additional reason why the position of the appellant in that case was not tenable; but the clear reasoning therein set forth conclusively shows that the special act of 1798 created the directors of the poor and of the house of employment of the county of Lancaster into a corporation, with all of the powers conferred and duties imposed thereby. The principle therein announced is fully supported in *Township of Cumru v. Directors of Poor*, 112 Pa. 264, 3 Atl. 578, and *Com. ex*

rel. v. Coyle, 185 Pa. 198, 39 Atl. 814. We hold, therefore, that the act of 1839, above referred to, created the managers for the relief and employment of the poor of the township of Germantown into a body politic and corporate, with all the powers, privileges, and duties conferred or imposed by said act, and that the managers of said corporation are not township officers, within the meaning of the various acts of assembly relating thereto.

The act of 1839 provides that it shall be the duty of the managers so elected to take the oath prescribed in said act at the first meeting of the board, which shall be held within 10 days after such election. There can be no doubt that, unless by subsequent legislation these provisions of the act of 1839 have been repealed or modified, the term of each manager begins on the date of his election and continues for a period of three years from that date. It is true the date for holding these elections has been changed from time to time, because it is provided in said act that the election of managers shall be held at the time and place appointed by law for the election of supervisors in said township. The date for the election of supervisors at the present time is the third Tuesday of February, so that, if the provisions of the act of 1839 are yet in force as to the date on which the term of office begins, it follows that the term of office of all the managers who were elected on the third Tuesday of February, 1806, began on that date. It is earnestly contended, however, that these provisions of the act of 1839 have been repealed by the act of March 10, 1875 (P. L. 6), which provides the date on which township officers shall be elected, and fixes the beginning of the term of the officers so elected on the first Monday of April following. It is necessary, therefore, to decide the question whether the act of 1876 repealed or modified the act of 1839 to the extent, at least, of fixing the beginning of the term of the office of manager for the relief and employment of the poor of said township on the first Monday of April, as provided in the latter act, instead of the date of their election as fixed by the former act. This question has been substantially answered in what has been said in reference to the first question discussed in this opinion. We have already held that said managers are not township officers within the meaning of the law, and it necessarily follows that the provisions of the act of 1876 did not repeal the act of 1839, and have no application to the present case. *Commonwealth ex rel. v. Brown*, 210 Pa. 29, 59 Atl. 479; *Melvin v. Summerville*, 210 Pa. 41, 59 Atl. 483.

The only remaining question to be considered is whether the relators have a standing to institute a proceeding by quo warranto to raise the questions involved in this controversy. It is contended by the appellants that they represent a corporation with definite and fixed corporate powers, and that they

have authority under paragraph 3 of section 2 of the act of June 14, 1836 (P. L. 623), to proceed by quo warranto to have determined the question of the right of the appellee to be an officer in said corporation. On the other hand, it is contended for appellee that the office of manager is a township office, and that the proceeding by quo warranto must be instituted, if at all, under paragraph 1, § 2, of said act, on the relation of the Attorney General or his deputy. It is a sufficient answer to this position to refer to what has been heretofore said, to wit, that a manager under the act of 1839 is not a township officer within the meaning of the acts relating thereto, and it necessarily follows that the argument so ably made by the learned counsel for appellee cannot be sustained. It is not necessary, however, in order to sustain the position of the relators, to hold that the proceeding must be instituted under paragraph 3, instead of paragraph 1, because the question has been practically ruled in *Commonwealth v. Fletcher*, 180 Pa. 456, 36 Atl. 917, in which case an action by quo warranto was instituted on the relation of four school directors to test the right of one respondent to act as a school director and of three others to act as president, secretary, and treasurer of the board. The learned counsel for appellee recognizes the force of the rule therein laid down, but insists that what gave the relators standing in that case was the fact that they were, man for man, rival claimants with the respondents for the same office. This does not necessarily follow from the facts of that case, because the four relators instituted the proceeding against the four respondents, without any suggestion that any particular relator was proceeding to contest the office of any particular respondent. The relators were treated in their joint capacity as school directors, having such an interest as warranted them in instituting a proceeding to determine whether the respondent had the right to act as school director, and that, in principle, is exactly what the relators in the present case have undertaken to do. It is conceded in the case at bar that the relators have been duly elected managers for the relief and employment of the poor in the township of Germantown. As members of the board of managers, with all the duties and obligations involved by reason thereof, they certainly have such an interest as in contemplation of law they are required to have in order to sustain a proceeding by quo warranto to determine whether a member, asserting his right to sit with them as a fellow manager, has a right so to do. Taxes are to be levied, moneys collected

and distributed, property rights protected, and many other responsibilities involved; and it is a matter of no small importance to all of the managers, as well as the inhabitants of the district, to have the question determined whether the board has been legally constituted. The right of the relators to proceed in the present case comes reasonably within the rule of *Commonwealth v. Commissioners of Philadelphia*, 1 Serg. & R. 382, *Commonwealth v. Meeser*, 44 Pa. 341, *Commonwealth v. Meanor*, 167 Pa. 292, 31 Atl. 552, *Commonwealth v. Stevens*, 168 Pa. 582, 32 Atl. 111, and *Commonwealth v. Stevenson*, 200 Pa. 509, 50 Atl. 91.

Decree reversed, and suggestion for writ of quo warranto reinstated, with the right of respondent to answer over, in order that all parties may be heard on the merits, so that the questions involved may be determined in accordance with this opinion.

(217 Pa. 584)

COMMONWEALTH v. ROOP et al.

(Supreme Court of Pennsylvania. April 22, 1907.)

Appeal from Court of Common Pleas, Philadelphia County.

Quo warranto by the commonwealth, on the relation of certain parties, against Charles O. Roop and others. From an order quashing the writ, relators appeal. Reversed.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

Paul Reilly, for appellants. M. Hampton Todd and Owen B. Jenkins, for appellees.

ELKIN, J. The learned court below on motion quashed the suggestion for a writ of quo warranto filed by the relators, requiring the respondents to show by what warrant they claim the right to have, use, and enjoy, respectively, the offices of president, treasurer, tax collector, delinquent tax collector, solicitor, and undertaker, being managers and officers for the relief and employment of the poor of the township of Germantown. For the reasons stated in the opinion just handed down in *Com. ex rel. v. Bowditch*, 217 Pa. —, 66 Atl. 867, the assignments of error are sustained.

Decree reversed, and suggestion for writ of quo warranto reinstated, with leave to the respondents to answer over, in order that the parties may have a hearing on the merits, so that all the questions involved may be determined in accordance with the opinion handed down in that case.

(217 Pa. 506)

CHESTNUT STREET TRUST & SAVING FUND CO. v. HART.

(Supreme Court of Pennsylvania. April 15, 1905.)

1. BANKS AND BANKING—TRUST COMPANIES—POWERS OF PRESIDENT.

The trust officer of a trust company made a note to a large amount, payable to the trust company, as an accommodation for the president of the company, on his assurance that he would never be asked to pay for it. The maker of the note had but a small salary. *Held*, that he was liable on the note, unless the trust company itself agreed that he should not be held on it.

2. PAYMENT—APPROPRIATION.

The president of a trust company, after its insolvency, caused by his appropriation of its funds, assigned to the assignees of the company a fund, without any direction as to its appropriation. *Held*, that the assignees could apply the funds to any claims against the president, and that they applied it to the payment of debts other than an accommodation note made to the company for the benefit of the president is no defense to the accommodation maker.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Payment, § 104.]

Appeal from Court of Common Pleas, Philadelphia County.

Action by the Chestnut Street Trust & Saving Fund Company, to the use of George H. Earle, Jr., and Richard Y. Cook, against Henry G. Hart. From a judgment dismissing objections to the report of a referee, defendant appeals. *Affirmed*.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, and STEWART, JJ.

J. H. Gendell, for appellant. P. F. Rothermel and John G. Johnson, for appellee.

BROWN, J. On March 22, 1892, the Chestnut Street Trust & Saving Fund Company, of which William M. Singerley was president, lent him \$50,000 on his promissory note, taking as collateral security for its payment an assignment of a bond and mortgage for \$100,000, given by him to H. G. Hart. They were executed to secure the payment of this note, but, instead of being given directly to the trust company, were given to Hart, its title officer. This was evidently a device of Singerley's to avoid the record evidence of his indebtedness to the institution of which he was president. On the maturity of the note, March 22, 1893, it was renewed by Singerley for another year. On March 22, 1894, when the renewal matured, he continued the loan by substituting for his own note that of H. G. Hart, the appellant. From that time the loan was carried on the books of the company against Hart, although the entries show it was the same one that had been made to Singerley. Hart's note was renewed in March, 1895, for a year, and, when it matured, he renewed it for six months. Thereafter he renewed it every six months, the last renewal coming due March 23, 1898, and it is the note now in suit. The interest upon Hart's original note and all of the renewals, except the one in suit, was paid by Singerley.

The change in the name of the maker of the note from Singerley to Hart was made at the instance of Singerley, that his name might not appear as being too large a borrower on the books of the company. This fact was known to its secretary and treasurer from the time the note was given until it executed to the appellees a deed of assignment for the benefit of creditors. Payments have been received on account of the principal of Hart's note from the sale of the real estate on which the mortgage was given to him, reducing the amount to \$34,450.37, with interest from October 4, 1901. Suit having been brought for this balance, the case was referred, under the act of May 14, 1874 (P. L. 166), and upon the report of the referee, judgment was entered for the amount claimed by the appellees.

Four defenses were set up in the court below: (1) The defendant acted as the agent of William M. Singerley, and the plaintiffs, having pursued him for the payment of the debt, have acknowledged the agency and are restricted to the principal for payment; (2) there was an understanding between the trust company and the defendant that either he was not to be held liable in any event upon the note, or that his liability was to be restricted to the collateral pledged; (3) the defendant received no consideration for the note; and (4) the note has been paid in the eye of the law, although not actually paid, on account of an erroneous application by the appellees of assets of William M. Singerley to the payment of other debts instead of to the one in suit.

As to the first defense, it is sufficient to say that the finding of the referee is that Hart was an accommodation maker of the note, and did not sign it as agent or surety for Singerley. The only witness as to the circumstances attending the making of the note was Hart himself, and there is nothing in his testimony to show that he signed it as agent; but, on the contrary no other interpretation can be put upon what he says than that he signed it as an accommodation maker for Singerley. His own words are: "Mr. Singerley, for his own purposes, asked me to make the note." As to the second defense, there is no evidence of any understanding or agreement between the trust company and the appellant that he was not to be held liable upon the note, or that his liability was restricted to the collateral pledged. He does testify that Singerley stated to him at the time he asked him to sign the note: "Of course, Hart, you understand this is my debt. You will never be asked to pay it." But he does not testify that the trust company ever agreed he should not be held upon it. He relied upon Singerley to relieve him from liability, for he says: "Knowing Mr. Singerley as a wealthy man, such a thing as my ever having to pay the note, or ever being asked to pay it never occurred to me." He further said that he acted upon the faith of

Singerley's statement that he would never be asked to pay the note. His confidence, unfortunately for him, was misplaced, as it often is by an accommodation maker of a note; but the holder takes it on the promise of the maker to pay it, and it is no defense against the holder that he for whose accommodation it was made will not or cannot pay it. It was, as the appellant says, Singerley's debt, and was so viewed by the trust company; but there is nothing in his testimony to show that the company, or any one authorized to speak for it, ever said to him that his liability would in any manner be different from that of the ordinary accommodation maker. He testified that at the time he gave the note he was an employé of the institution, receiving a salary of but \$1,800 a year, and was worth but about \$2,000, and from this his counsel argue for him that it is not conceivable that the company accepted his obligation for \$50,000 with any intention or expectation of holding him on it. In the absence of any valid agreement that he was not to be held, or of legal reasons why his liability did not attach when he gave it, the law cannot countenance as a defense the theory of the improbability of the trust company's acceptance of the note as a valid and enforceable obligation.

He did not become accommodation maker at the instance of the trust company and for its own purposes. If he had, he could now successfully defend. *Tasker's Estate*, 182 Pa. 122, 37 Atl. 924. He gave the note for the accommodation of one of its customers, to whom it surrendered his note when it received appellant's in its place, which was an absolute promise in writing that he would pay the indebtedness of his friend. That Singerley continued to acknowledge his liability to the institution, and that it continued to look to him for payment, was only in probable relief of the appellant, and not in discharge of his absolute liability, voluntarily assumed. He lent his credit to his friend, and his friend's creditor accepted it. This is the whole case boiled down. It is a hard one, as all such cases are; but we can find nothing in it to relieve the appellant from the rule of the law that "he who chooses to put himself in the front of a negotiable instrument for the benefit of his friend must abide the consequences." *Lord v. Ocean Bank*, 20 Pa. 384, 59 Am. Dec. 728. Under the circumstances, his defense of no consideration cannot avail him.

On February 10, 1898, Singerley being deeply involved financially, executed to George H. Earle, Jr., receiver of the Chestnut Street National Bank, as collateral security for his indebtedness to it, an assignment, subject to prior assignments, of all his interest in the stock and bonds of the Record Publishing Company. On the same day, subject to the assignment made to the receiver, he assigned to the appellees the balance of his interest in these Record securi-

ties, to secure his indebtedness to the trust company. He died February 27, 1898, hopelessly insolvent. In a proceeding in the Circuit Court of the United States for the Eastern District of Pennsylvania, instituted for the purpose of having the pledged securities sold, the amount due to the appellees was fixed in the decree ordering their sale. The indebtedness included the balance due upon this note, and it was decreed that the payment of Singerley's debts, including this one, but not specially mentioning it, should be paid out of the proceeds of the sale of the securities. They were sold, and, after paying to the holders of the prior assignments the indebtedness due to them, the sum of \$552,505.95 was paid to the appellees, the assignees of the trust company. When Singerley assigned to them the balance of his interest in the securities, he gave no direction as to the appropriation of their proceeds. He might have done so, and his direction that they should be appropriated to any particular indebtedness could not have been disregarded. When he failed to direct an appropriation to any particular item or items of indebtedness, his creditor, through its assignees, had the right to apply the proceeds to any claim against him, and upon their failure to do so the law would make the application in their interest. The payment to them of the balance of the proceeds of the sale of the stock and bonds must be regarded as having been made by Singerley himself, for the proceeding in the Circuit Court of the United States was not to compel him to pay his debts, nor to distribute the proceeds of the sale of the stock to any particular items of indebtedness. It was to ascertain the amounts of the three respective interests in them: (1) Those who had special pledges of them; (2) the receiver of the Chestnut Street National Bank, as trustee for the creditors of the bank; and (3) the appellees, trustees for the creditors of the trust company. In the decree ordering the sale of the securities, the amount due to each of these three interests was fixed. The creditors of the first class were paid in full, the receiver of the bank was paid in full, and the balance that remained was paid to the appellees, just as if Singerley had paid it himself. By the decree of the Circuit Court there was no distribution to any particular items of indebtedness due by Singerley to the appellees, but it was simply determined that they should get the balance remaining after the sums found due to the holders of the prior assignments had been paid, and the sum awarded to the appellees was received by them, just as if they had received it directly from Singerley. They were therefore at liberty to distribute it as if they themselves had sold the stock and there had been no intervention of the court. This being the case, Hart can make no objection to any appropriation of the proceeds made by the appellees, so long as they were appropriated to

Singerley's indebtedness to the trust company, for Singerley himself could make no objection if he were living. When he assigned the collateral, without specifying what appropriation should be made of the proceeds of it, the appropriation made by the creditor could not be questioned by him. *Logan v. Mason*, 6 Watts & S. 9. In the comparatively recent case of *Risher v. Risher*, 194 Pa. 184, 45 Atl. 71, a debtor assigned to creditors his interest in a mortgage; the preamble reciting that he was indebted to them in a sum of money exceeding his interest in the mortgage. The express purpose of the assignment was to secure to the assignees payment of his indebtedness to them; but he indicated in his assignment no purpose to appropriate the amount assigned by him to any particular item or items of his indebtedness. The creditors appropriated it to certain items of his indebtedness, and subsequently he objected to the appropriation as made by them, and we said, in sustaining the court below in its ruling that the appropriation made by the creditors could not be questioned by the debtor: "The rule in this state, as held by the referee and court below, is that a debtor may appropriate his payments as he sees fit at the time he makes them; if he makes none, the creditor can make such appropriation on one or more of several obligations; if neither, at the time of payment, make such appropriation, then the law will make one to the debts oldest in point of time. *Souder v. Schechterly*, 91 Pa. 83; *Pardee v. Markle*, 111 Pa. 548, 5 Atl. 38, 56 Am. Rep. 299, and many other cases. Where the debtor makes no appropriation, and the creditor does so, the latter may apply it to that item of debt which to him seems least secure. *Reed v. Ward*, 22 Pa. 144; *Hollister v. Davis*, 54 Pa. 508." This is just the situation here, and it does not lie in the mouth of the appellant to question the appropriation made by the appellees.

The assignments of error are all overruled, and the judgment is affirmed.

(218 Pa. 1)

BROOKS v. PHILADELPHIA & R. RY. CO.
(Supreme Court of Pennsylvania. April 22, 1905.)

1. CARRIERS—DUTIES—CARRIAGE OF PASSENGERS.

It is the duty of a carrier to announce the name of the station as the train approaches it, and to afford a passenger sufficient time and opportunity to alight in safety.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, § 1073.]

2. SAME—INJURIES TO PASSENGER.

In an action against a railroad company by a passenger to recover damages for personal injuries in alighting from a train, evidence held to require submission of question of defendant's negligence to the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, § 1315.]

Appeal from Court of Common Pleas, Philadelphia County.

Action by Edward Brooks, Jr., administrator of George W. Hamilton and Clara Amelia Hamilton, against the Philadelphia & Reading Railway Company. From an order refusing to take off a nonsuit, plaintiffs appeal. Reversed.

Argued before MITCHELL, C. J., and FELL, MESTREZAT, POTTER, and STEWART, JJ.

Edward Brooks, Jr., Frederick J. Geiger, and Edgar Dudley Faries, for appellant. Gavin W. Hart, for appellee.

MESTREZAT, J. On January 1, 1903, Clara Amelia Hamilton, one of the plaintiffs, was a passenger on the defendant company's train leaving the Reading terminal in the city of Philadelphia about 6 o'clock in the evening. Her destination was Lafayette station, at which the train was due about 6:30 that evening. After the train left the station, the plaintiff surrendered her ticket to the conductor. The train did not stop at Lafayette station, and, as it was passing, the plaintiff stepped to the door of the coach in which she was riding and told the brakeman that she desired to alight at that station. He replied that the train had not yet arrived at the station, which she insisted was not true. While they were talking, the conductor came running through the car and said that he had forgotten to notify the brakeman to stop the train at Lafayette station, and that the train would then stop, which it did, about 100 yards beyond Lafayette station. It was then dark, and plaintiff told the conductor and brakeman that she preferred being let off at the platform; but the brakeman said he would assist her to alight there. She then attempted to alight from the train, and testified that, "when getting down, in some manner my left limb twisted, and caused a rupture, for which I have suffered ever since." At the time of the accident, Mrs. Hamilton was 65 years of age, and was a large woman. The brakeman was a tall, stout man, and stood on the ground, and assisted Mrs. Hamilton to alight. In her testimony she describes the manner in which she left the coach as follows: "Well, his [brakeman's] head, I suppose, was on a level with my knee about, and I had to lean over this way and put my hands on his shoulder to get down. It was all of four feet that I had to jump—four feet and one-half." This action was brought to recover damages for the injuries sustained by Mrs. Hamilton by reason of the alleged negligence of the defendant company. The plaintiff alleges that the servants of the carrier company were negligent in not stopping the train and permitting her to alight at Lafayette station, her destination, and in causing the train to stop beyond the station and compelling her to alight at an improper and unsafe place, and that her injuries were the direct result of such negligence. At the conclusion of the

plaintiff's testimony the learned trial judge, on motion of defendant's counsel, entered a nonsuit; and the reason therefor was stated as follows: "I will enter a nonsuit in this case. The plaintiff says in getting down she twisted herself somehow. There is no evidence whatever as to how she twisted herself, or what caused her to twist herself."

The contract of a passenger with a railroad company, as evidenced by his ticket, requires the company to carry him safely to his destination and to give him an opportunity to alight at the usual stopping place. It is the duty of the carrier to announce the name of the station as the train approaches it, and on the arrival of the train at the station to afford the passenger sufficient time and opportunity to alight in safety. The passenger's contract does not terminate until he has alighted from the cars. *St. Louis, etc., Ry. Co. v. Finley*, 79 Tex. 85, 15 S. W. 236. At the end of the journey the relation of the carrier and passenger continues until the passenger has had a reasonable opportunity to depart from the train or car in safety. 6 Cyc. 541. In the very recent (third) edition of *Hutchinson on Carriers* (section 1122) the duty of railway carriers of passengers is defined as follows: "As has already been shown, railway carriers of passengers must provide safe platforms and other necessary facilities for access to and for alighting and egress from their trains by their passengers, and their duty in this regard has been indicated, as far as it can be done, from the adjudicated cases. Having provided such platforms, they are required to be careful to bring their coaches up to them in such manner that their passengers may be afforded the opportunity safely to alight upon them; and if the passenger be called upon to leave the coach before this has been done, or if he is reasonably induced to believe, from the circumstances or from the conduct of those in management of the train, that it has been halted in order that the passenger may there alight, and that no other or better opportunity will be given him to do so, and in undertaking to leave the conveyance, with due care and discretion, he receives an injury from the want of the proper facilities for doing so, or by reason of the dangerous character of the ground, the carrier will be held responsible for its negligence." And in a subsequent section (1126) it is said: "Carriers must be equally careful not to pass beyond the alighting platform or station, and thus to require or make it necessary for the passenger to alight without returning to it." In *Englehaupt v. Erie Railroad Co.*, 209 Pa. 182, 58 Atl. 154, it is said: "It is the duty of a carrier, not only to exercise the strictest vigilance in receiving and conveying a passenger to his destination, but also to set him down safely at a station at the termination of his journey." And in *Case v. Delaware, Lackawanna & Western Railroad Co.*, 191 Pa. 450, 43 Atl. 319, where, as here, the train

passed the station and the plaintiff alighted some distance beyond the platform, Chief Justice Sterrett, in reversing a judgment for the carrier company, said (page 456 of 191 Pa., page 320 of 43 Atl.): "The duties of common carriers of passengers, under circumstances such as the evidence in this case tends to establish, are too plain to require either comment or citation of authorities. If the failure of the defendant to perform its duty to the plaintiff as a passenger was the proximate cause of the undoubtedly serious injury which she sustained in attempting to reach the station platform, she is entitled to recover adequate compensation in damages, unless she was guilty of negligence which contributed to her injuries."

From these authorities, defining the duty of a railway carrier towards its passengers, it clearly appears that it was the duty of the defendant company, under its contract with Mrs. Hamilton, not only to carry her from Philadelphia to Lafayette station, but to announce the name of the station as the train approached, and to stop at the station and give her sufficient time and opportunity to alight in safety. Having failed to perform this well-defined duty, the carrier was guilty of negligence and responsible for any injury which proximately resulted from that failure of duty. This was a nonsuit in the court below, and the plaintiff is entitled to have the facts, as shown by her testimony, taken as verity, together with all the reasonable inferences to be drawn therefrom. The station was not announced as the train approached, nor did the train stop at the station; the reason presumably being that the conductor, as he said, had forgotten to direct the brakeman to stop it. The plaintiff did not request to be let off at the place where the train stopped. On the contrary, she suggested to the conductor and the brakeman that she preferred to be put off at the platform. To this the brakeman said that he would assist her to alight at that place. Leaving the coach at the place where the train stopped, therefore, was not her voluntary act, but was done after at least an implied request and a refusal by the company's servants to return the train to the station. So far as the evidence discloses, this was her only opportunity for alighting from the train so as to reach her destination. The train was halted there for the express purpose of permitting her to alight, and her attempt to do so, under the circumstances disclosed by the uncontradicted testimony, involves no wrong or want of care on her part.

We are told, however, by the learned trial judge, that a recovery cannot be permitted because she has not shown "how she twisted herself, or what caused her to twist herself." In the language of Mr. Justice Strong in *Milwaukee, etc., Ry. Co. v. Kellogg*, 94 U. S. 469, 24 L. Ed. 256, "such refinements are too minute for rules of social conduct." The plaintiff has described the succession of events

from the time of the carrier's negligent act in carrying her beyond the station until she was injured in alighting from the train. She described minutely, as will be observed, how and where she left the coach and how she was injured in doing so. There was sufficient evidence to warrant the jury in finding that the place the carrier's servants required her to alight was unsafe and dangerous. There was no platform or other appliances there to enable a passenger to alight safely. She placed her hands upon the shoulders of the brakeman, and then stepped or jumped to the ground, which was a distance of from 4 to 4½ feet. This act, it is shown, resulted in her serious injury, described by the physician as inguinal rupture. The physician testified that "anything that produced an extraordinary strain on the contents of the abdomen, or weakens the walls of it, or distends it, will produce rupture," and that her condition could undoubtedly have been produced by such an accident as she described on the witness stand. The twist of the limb occurred while she was alighting from the train, and, if that caused the rupture, then the fact that the limb was twisted was sufficient, without any further description of how it was done. It is not alleged that she did not use care in stepping from the car, or that her limb was twisted by the failure to observe care in the act of stepping from the coach. She says: "When getting down, in some manner my limb twisted, and caused a rupture." We think this was sufficient, in view of the fact that she detailed the manner of her leaving the coach. Common experience teaches that, under such circumstances, it is often difficult to describe in greater detail what produced the results of the accident. In this case the testimony, if believed, shows that the accident to the plaintiff, caused by being required to alight from the train at an improper place, resulted in rupture, and we think the learned court was clearly in error in requiring as a condition precedent to a recovery, a minute description of each move and twist of the plaintiff's body resulting in her injury.

The assignments of error are sustained, and the judgment is reversed, and a *procedendo* is awarded.

(217 Pa. 610)

In re FLEMING'S ESTATE.

(Supreme Court of Pennsylvania. April 22, 1907.)

1. WILLS—ELECTION OF HUSBAND—ASSETS OF HIS ESTATE.

Act May 4, 1855 (P. L. 430), provides that any surviving husband may, against her will, elect to take such share and interest in the wife's estate as she can, when surviving, elect to take against his will in his estate, or otherwise take only her real estate as tenant by the curtesy. *Held*, that the power of election is not an asset for the discharge of the husband's debts.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, §§ 2036, 2038.]

2. SAME—COMPELLING ELECTION.

Where the wife of an insolvent trustee creates by will a spendthrift trust for her husband, the beneficiaries of the trust estate cannot by attachment against the person of the husband compel him to elect to take against his wife's will.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, §§ 2036-2038.]

Appeal from Orphans' Court, Allegheny County.

In the matter of the estate of John Fleming, deceased. From a decree awarding an attachment, Cochran Fleming appeals. Reversed.

Argued before FELL, BROWN, MESTREZAT, ELKIN, and STEWART, JJ.

J. M. Swearingen and Fleming Nevin, for appellant. Watson B. Adair and Arthur L. Over, for appellees.

MESTREZAT, J. As suggested by the learned judge of the court below, the real question in this case is whether or not a power of election to take under the intestate law is an asset for the discharge of trust liabilities.

John Fleming died in 1870, leaving a will, in which, *inter alia*, he bequeathed \$20,000 to his brother, Cochran Fleming, in trust to pay the income to James P. Fleming for life and then the principal to the latter's children, the petitioners in this proceeding. James P. Fleming having died, Cochran Fleming filed his account, and on December 16, 1904, a decree was entered by the orphans' court of Allegheny county that he pay to James Pressley Fleming and John L. Fleming, the children of James P. Fleming, each the sum of \$10,000, the legacies bequeathed them in the will of John Fleming, deceased. Having failed to comply with this decree by paying the legacies, a citation was awarded against Cochran Fleming on November 18, 1905, at the instance of the legatees, to show cause why an attachment should not be issued against him "for contempt for failure to comply with the decree of distribution heretofore made in this case." Subsequently, on May 8, 1906, on petition of the legatees praying the court for the reasons therein set forth "to make an order refusing said attachment," the court entered a decree that the prayer of the petition asking that the attachment be refused "is granted and the attachment refused." On August 9, 1906, Sarah A. Fleming, the wife of Cochran Fleming, died leaving an estate of \$50,000, and by her will, duly admitted to probate, bequeathed the estate to her executor in trust to pay the interest thereon to Cochran Fleming during life, without liability for his debts. Shortly thereafter, John L. Fleming and James Pressley Fleming presented their petitions to the court below, reciting the fact of the death of Cochran Fleming's wife and the bequest to him in her will, also the decree of the court directing him to pay their legacies, and praying the court to "allow a writ of

attachment whereby the interest of said Cochran Fleming in the estate of said Sarah A. Fleming may be attached in satisfaction of said decree in accordance with the acts of assembly." An attachment was awarded, to which the executor of Sarah A. Fleming answered that Cochran Fleming was not entitled to any interest under the will of the said Sarah A. Fleming which was subject to attachment in his hands. On October 8, 1906, John L. Fleming and James Pressley Fleming presented their petitions to the court below, reciting the bequests to them in the will of John Fleming, deceased, the failure of Cochran Fleming to pay the legacies, the death of Cochran Fleming's wife, and the legacy bequeathed him in her will, averring that Cochran Fleming has no interest in his deceased wife's estate subject to attachment, but that he had the right under the law to elect to take against her will the one-third part of the personal estate of his wife, and averring further that, should he die prior to making such election, the right to make the same might be lost, and they would take nothing from the attachment executions; "and further showing that said Cochran Fleming has it within his power to secure the payment now or in the near future of a substantial part of said decree, and that he has refused to exercise said power, pray your honorable court to issue an attachment against the said Cochran Fleming for his noncompliance with the decree of your honorable court." A citation was granted to show cause why the attachment should not issue as prayed for, and subsequently, on January 15, 1907, the court entered a decree awarding the attachment. From that decree we have this appeal.

This statement of the facts is sufficient for an intelligent understanding of the proceedings and the final decree entered in the court below. The view we take of the case renders it unnecessary to determine the power of the court to issue successive attachments to enforce its decrees for the payment of money, as we are clearly of the opinion that the learned court below was in error in awarding the attachment against Cochran Fleming on the ground that his power of election to take against the provisions of his wife's will is an asset for the discharge of the legacies bequeathed to the petitioners. It was solely upon this ground that the attachment was awarded, and, if that reason is not sufficient, the decree awarding the attachment must be reversed. In doing so, however, we must not be regarded as holding that the court below could not have entered a decree granting an attachment to enforce obedience to the primary decree directing the payment of the legacies. That question does not arise here, under the view we take of the case.

The question involved in this controversy is a very narrow one and of first impression in this state, and we have been referred to no decision in any other jurisdiction that dis-

cusses or determines it. We, however, have no difficulty in reaching a conclusion on the question presented. By the act of April 8, 1833 (P. L. 315; 1 *Purd.* [12th Ed.] 1067), that part of the real and personal estate of a decedent remaining after the payment of his debts, "which shall not have been sold or disposed of by will, or otherwise limited by marriage settlement," is directed to be divided among his widow and children in the proportions named in the statute. The act of June 8, 1893 (P. L. 344; 2 *Purd.* [12th Ed.] 2101), authorizes a married woman to dispose of her property "in the same manner as if she were unmarried," saving to her husband his right as tenant by the curtesy and to take against her will. By section 15 of the act of 1833 (2 *Purd.* [12th Ed.] 2103), it is provided that a devise or bequest by a husband to his wife shall be in lieu of her dower, but shall not deprive the widow of her choice, either of dower or the estate devised or bequeathed to her. The power of a married woman to dispose of her property by will is so restricted by the act of May 4, 1855 (P. L. 430; 2 *Purd.* [12th Ed.] 2104), "that any surviving husband, may, against her will, elect to take such share and interest in her real and personal estate, as she can, when surviving, elect to take against his will in his estates, or otherwise to take only her real estate as tenant by the curtesy."

The learned court below held that the right of election under the statute is assets of Cochran Fleming's estate, and that he was required to exercise the right and take his share of his wife's estate under the intestate laws, so that it might be applied in discharge of the legacies bequeathed by John Fleming to John L. Fleming and James Pressley Fleming, and that, by failing to exercise the right accorded to him by the act of assembly, he was in contempt of court and could be compelled by an attachment against his person to elect to take against his wife's will. With this position we do not agree. The word "assets" is derived from the French "*assez*," meaning sufficient, and originally signified a sufficiency of property to pay the decedent's debts. 11 *Am. & Eng. Ency. of Law* (2d Ed.) 828. Its meaning has been enlarged, and it now signifies any property available for the payment of debts, as the assets of a partnership, of a corporation, of a decedent, or of a bankrupt. The word represents something over which a man has dominion and can transfer with or without a consideration, and may be reached by execution process. It has been held that a general power of appointment is not an interest in property which can be transferred to another, or sold on execution, or devised by will, or a chose in action, and hence does not constitute assets of a bankrupt which passes to an assignee. *Jones v. Clifton*, 101 U. S. 225, 230, 25 L. Ed. 908. It has also been ruled that a bankrupt, seised for life, with a general power of appointment, with remainder in default of appointment, to

the heirs of his body, cannot be compelled by decree in equity to execute the power for his creditors. *Thorpe v. Goodall*, 17 Ves. Jr. 388. Lord Eldon, delivering the opinion in the last case, said: "If the ground of relief is that upon principles of equity the bankrupt is to exercise his power, upon those principles the creditors have nothing to do with the power, unless the party chooses to execute it. They cannot compel him to do so."

Turning now to our statutes which declare that an intestacy exists only as to such property as a decedent died seised of and has not disposed of by will, and which give to the husband the interest he has the right to take in the estate of his wife who dies testate, we see that *Cochran Fleming*, his wife having died testate, "may, against her will, elect to take such share and interest in her real and personal estate" as the laws in cases of intestacy provide. An election, says Mr. Bispham (*Principles of Equity* [5th Ed.] p. 408), is a choice which a party is compelled to make between the acceptance of a benefit under a written instrument, and the retention of some property already his own, which is attempted to be disposed of, in favor of a third party, by virtue of the same paper. The husband and wife are on a par with each other as to the power of each to will away property from the other (*Clarke's Appeal*, 79 Pa. 376), and we have distinctly ruled in numerous cases that the right given by the statute to a widow to elect not to take under her husband's will is purely personal, so much so that, in the event of her death without having exercised the right, her heirs or personal representatives cannot make the election. *Crozier's Appeal*, 90 Pa. 384, 35 Am. Rep. 666; *Jackson's Appeal*, 126 Pa. 105, 17 Atl. 535; *Anderson's Estate*, 185 Pa. 174, 39 Atl. 818. We have also held that the right of a widow to retain real or personal property of her deceased husband's estate to the value of \$300 is a personal privilege, which she may waive. *Davis' Appeal*, 34 Pa. 258.

We think that the right of the husband to elect to take against the provisions of his wife's will is simply a personal privilege, and is not an asset for the payment of his debts, or a right which he can be compelled to exercise so as to discharge his trust liabilities. Every sane person of lawful age in this commonwealth has a right to dispose of his property by will, and the policy of the law is to encourage the exercise of that right. A married woman has now the same right as her husband to devise her property, and that right should not be curtailed by the court compelling an unwilling husband to defeat it by an election to take against her will. His action in the premises is optional with him; but if he wishes to respect the last wishes of his wife, as well as carry out the manifest policy of the law, he refuses to interfere with the disposition which she makes of her property. Aside from any sentimental feeling in

the matter, the husband should permit the will to stand, thereby recognizing the right of his wife to determine the disposition of her own property.

If the court may compel the husband to take under the intestate laws and against his wife's will, it may, with the same reason and by the exercise of the same authority, compel him to elect to take under the will. The action of the court would then depend in each case upon the interest of the creditor or other party to whom the husband was liable, and would deprive him of his statutory right to make the election. If the husband's interest in his wife's estate under the intestate law was greater than his interest under the provisions of her will, the court at the instance of the creditor would compel the husband to elect to take against the will. If, on the contrary, the interest of the husband under the will should be greater than his interest under the intestate laws, the court would at the instance of the creditor compel the husband to accept the provisions of the will. The election therefore would not be a personal privilege of the husband, which this court has declared it to be, but would be a right which the husband's creditor could control as his interest should demand. This would not be an election by the husband, but by his creditor. Such was certainly not the intention of the Legislature in conferring upon the husband the right of election. Under the act of 1855, the power of the husband and wife to take against each other's will is the same, and we think the right of the court to control the husband's action is inferentially negatived by the fact that the Legislature, by the act of March 29, 1832 (P. L. 190; 1 *Purd.* [12th Ed.] 708), authorizes the orphans' court, on application of any interested party, to cite the widow to make her election. While this authority is conferred on the orphans' court and is frequently exercised, it has never even been suggested that the court has authority, on such application, to direct whether the election should be made to take under the will or against it. The court will compel the widow to elect whether she will accept the provisions of the will or the interest which the intestate laws give; but the statute does not authorize the court to decree which of the two alternatives the widow must select. If, however, the position of the appellees be correct, the court can on such application direct not only that an election shall be made, but also which of the two alternatives must be selected by the widow. In other words, the position of the appellees here is that the husband may be deprived of his personal right to make an election, and may be compelled to elect to take under or against his wife's will solely as his creditor or his cestui que trust may determine; and that, if the husband refuses to obey such command, the court will require him to do so or be deprived of his liberty. Such are the consequences of the contention of the ap-

pellees and of the position assumed by the orphans' court. It clearly overlooks the property rights of both husband and wife, their unquestioned right, subject to statutory limitations, to dispose of their property by will, and the language as well as the plain intent of the statutory provisions regulating the rights of each in the property of the other when he or she has made a testamentary disposition of it.

It is true, as argued by the appellees, that the husband has an absolute legal right to take against his wife's will, but that is a right, the exercise of which cannot be controlled by a creditor or a cestui que trust or by the court at their instance. It is not, as argued by the appellees, the same right as an option to buy real estate, or an interest in a partnership, or a seat or membership in a stock exchange or board of trade, or any property right acquired by contract. The right thus acquired puts the party in possession of something which is tangible, and which by legal or equitable process may be reached and subjected to the payment of the party's indebtedness. It is more nearly analogous to a general power of appointment, which, as we have seen, is not an asset for the payment of debts. In the case at bar, it is conceded that no writ, legal or equitable, can grasp the thing or interest in question and utilize it for the benefit of a creditor or a cestui que trust.

We think it was error for the learned court below to award an attachment, for the reasons set forth in its opinion, and therefore the seventh assignment of error is sustained, and the decree is reversed, at the costs of the appellees.

(218 Pa. 7)

COMMONWEALTH v. VALVERDI et al.
(Supreme Court of Pennsylvania. April 22, 1907.)

1. CRIMINAL LAW—EVIDENCE—OTHER OFFENSES—ELECTIONS—ILLEGAL REGISTRATION.

On trial of indictment of election assessors for illegal registration of nonresident voters, the commonwealth may, after having shown the offense charged, show that defendant also procured to be placed on the list a large number of unnaturalized persons.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 830-832.]

2. NEW TRIAL—MISCONDUCT OF JURY.

The grant or refusal of a new trial on the ground that the jurors heard improper oral evidence, or read unauthorized newspaper statements, is a matter within the discretion of the trial court which will not be disturbed unless abused.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, §§ 2134, 3067-3071.]

3. CONSPIRACY—EVIDENCE.

On trial for conspiracy, the commonwealth need not establish that all the persons had been guilty of the unlawful conspiracy; but it is sufficient if it is shown that any two of them have been guilty.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Conspiracy, §§ 90, 103.]

Mitchell, C. J., dissenting.

Appeal from Superior Court.

James McCartney, Phillip Valverdi, and Edward H. Wood were convicted of election frauds in the court of quarter sessions for Philadelphia county. From the judgment of the Superior Court, affirming the conviction, Valverdi and Wood appeal. Affirmed.

The following is the opinion of Porter, J., in the Superior Court:

"The indictment charged the defendants with conspiracy to unlawfully and fraudulently assess and place, and cause and procure to be assessed and placed, upon the assessor's list of voters of the Thirteenth election district of the First Ward of the city of Philadelphia the names of a large number of, to wit, fifty and more persons, as voters of said Thirteenth election district of the first ward aforesaid who did not reside in the said Thirteenth election district of the said First Ward and were not then and there qualified to vote therein. Upon the trial McCartney was acquitted, and Valverdi and Wood were found guilty and have now taken these appeals.

"The first and fourth specifications of error refer to evidence to the admission of which no exception was taken in the court below, and for that reason cannot be considered. The defendants took no general exception to the charge of the court, and upon that ground the tenth, eleventh, and thirteenth specifications of error are dismissed. The commonwealth, having proved that a large number of persons had been assessed and their names placed upon the list of voters of the election district who in fact did not reside in the district and were not qualified voters therein, and that the appellants were active in causing and procuring the names of such persons to be placed upon said list of voters, introduced evidence which tended to establish that the appellants caused and procured to be placed upon said list of voters the names of a large number of persons who, although they resided in the district, were not qualified to vote therein, because they were foreign born and had never been naturalized, and that the appellants knew that fact. There was no exception taken to the admission of the evidence as to the registration of unnaturalized persons, but the defendants subsequently moved to strike out this evidence and requested the court to charge the jury that they were not to take it into consideration. The court refused to strike out the evidence and declined to charge as requested, which rulings are the foundations of the second, third, and seventh specifications of error. These specifications raised but one question—the relevancy of the testimony as to the registration of unnaturalized persons to the issue being tried. The indictment charged a conspiracy to cause the registration, as voters of the district, of persons who did not reside in said district and were not then and there qualified to vote

therein. The offense as charged referred only to voters of a particular class, and, having thus been limited by the indictment, the burden was upon the commonwealth to establish a conspiracy to cause the unlawful registration of persons who came within the class. Had the evidence been insufficient to justify a finding that there had been a conspiracy to cause an unlawful registration which embraced persons falling within the particular class, the conviction could not be sustained. The commonwealth having proved, however, that the names of a large number of persons who were not residents of the district, and for that reason not voters, had been placed upon the list of voters and that the appellants had been active in causing this to be done, their motives and intentions in so acting became material to the inquiry as to their guilt or innocence of the offense actually charged. Were they misled by innocent mistakes, or acting in pursuance of a corrupt combination? For the purpose of throwing light upon their motives and intentions, it was competent for the commonwealth to prove all that they did at the time of the offense charged in the indictment in dealing with the same subject-matter and which contributed to the same specific purpose. The evidence in question directly tended to establish that the placing upon the list of voters of the names of persons who did not reside in the district was not an innocent mistake, but was but a part of a general scheme, to which the appellants were parties, to cause the registration of a large number of persons who were not voters of the district, and for this reason it was relevant to the issue as to the intentions of the appellants. *Commonwealth v. Bell*, 166 Pa. 405, 31 Atl. 123; *Goersen v. Commonwealth*, 106 Pa. 477, 51 Am. Rep. 534; *Commonwealth v. Johnson*, 133 Pa. 293, 19 Atl. 402; *Friend v. Hamill*, 34 Md. 298; *Penn Mutual Life Insurance Company v. Mechanics' Savings Bank & Trust Co.*, 72 Fed. 413, 19 C. C. A. 286, 38 L. R. A. 33, 70; *Commonwealth v. White*, 145 Mass. 392, 14 N. E. 611; *Regina v. Francis*, L. R. 2 C. C. R. 128; *Blake v. Assurance Society*, L. R. 4 C. P. D. 94. The second, third, and seventh specifications of error are dismissed.

"The fifth specification of error refers to the refusal of the court below to grant a new trial, 'in view of the inflammatory, prejudicial, and untruthful publications in the newspapers of Philadelphia concerning the trial of the said cause.' The depositions taken in support of the motion for a new trial indicated that a number of the jurors had, during the trial, read newspaper accounts of the proceedings, and that publications in question were offered in evidence in support of the motion. The granting or refusing of a new trial in a criminal case, upon the ground that during the trial jurors have heard improper oral or have read unauthor-

ized printed statements concerning the case, is a matter within the discretion of the court below, and the conclusion of that court will only be reversed where there is a clear abuse of discretion. *Alexander v. Commonwealth*, 105 Pa. 1; *Commonwealth v. Chauncey*, 2 Ashm. 90; *Commonwealth v. Haines*, 15 Phila. 363; *Commonwealth v. Strlepeke*, 32 Pa. Super. Ct. 82. We have carefully considered the publications in question, and are of opinion that, as the articles did not refer to any previous misconduct of the defendants, or discredit any material witness, or misstate the evidence, it is by no means clear that they could have affected the verdict. The learned judge of the court below, in his opinion refusing a new trial, referring to the publications, says: 'They narrate incidents of the trial which had already happened in the presence of, or within the hearing of, the jurors themselves, nor do they make false statements of such incidents.' The matter was one peculiarly within the discretion of the court below, to be conscientiously passed upon in view of all the circumstances surrounding the trial, and we cannot say that the conclusion arrived at involved an abuse of discretion. The fifth specification of error is dismissed, as is also the twelfth for the same reason.

"The sixth specification of error refers to the refusal of the court to arrest the judgment, upon the ground that the acquittal of *McCartney*, the assessor, is a finding that no crime had been committed by him, and therefore the other two defendants could not have conspired with him to commit a crime. Nothing is better settled than that it is not necessary for the commonwealth to establish that all the persons charged in the indictment had been guilty of an unlawful conspiracy. If the evidence establishes that any two have been guilty of the conspiracy charged, they may be convicted, although all the others are acquitted. If these appellants conspired to cause to be placed on the list of voters the names of persons who were not residents of the district they were guilty of the offense charged in this indictment, even if the assessor was not a party to the conspiracy and was the victim of the deception of those who were carrying out the purpose of the unlawful combination. The offense charged was one which affected all the people of the commonwealth, its purpose and effect, if successful, was to corrupt a public election, and it was indictable at common law, independently of the provisions of the act of January 30, 1874 (P. L. 31). The sixth specification is dismissed.

"There was evidence which, if believed, warranted the conviction of both the appellants, and the court properly overruled the motion to discharge them, respectively, upon the ground that there was no evidence to connect them with the conspiracy. The eighth and ninth specifications of error are dismissed.

"The judgments in the appeals Nos. 165 and 166, October term, 1905, are affirmed, and

it is ordered that the appellants Philip Valverdi and Edward H. Wood, appear in the court below, to the end that they, respectively, be committed to serve such part of their respective sentences as had not been complied with at the time their respective appeals were made a supersedeas.

"There were no dissenting opinions."

Argued before MITCHELL, C. J., and FELL, MESTREZAT, POTTER and STEWART, JJ.

William W. Porter, H. A. Mackey, and J. Jos. Murphy, for appellants. Joseph H. Taulane, Asst. Dist. Att., and Samuel P. Rotan, Dist. Att., for the Commonwealth.

MESTREZAT, J. These are appeals from the judgments of the Superior Court affirming the judgments of the court of quarter sessions of Philadelphia county, in which the appellants were convicted of a conspiracy to unlawfully and fraudulently assess and place upon the assessor's list of voters of the Thirteenth election district of the First Ward of Philadelphia the names of persons as voters of the district who did not reside in the district and were not qualified to vote therein. The appellants were jointly indicted with one James McCartney, the assessor of the district, who was acquitted by the jury.

There is nothing in these appeals which require our special attention. The case was tried with the greatest care by the learned trial judge to whose charge no exception was taken. Numerous points for charge were presented on the trial by counsel for appellants, and all were answered by the court. A motion for a new trial was made for which 12 reasons were assigned. The learned trial court below refused this motion in an exhaustive and convincing opinion in which it reviewed the errors alleged to have occurred on the trial, and supported its legal conclusions by the citation of numerous authorities. Appeals were taken to the Superior Court. There the cases were presented and heard on 13 assignments of error which were the same as we have here, except an additional assignment which formally complains of the affirmance of the judgment of the trial court by the Superior Court. There, as here, more than one-half of the assignments were not supported by exceptions taken by appellants in the trial court, and under our uniform rulings were properly dismissed by the Superior Court without consideration. The other assignments were considered in an elaborate opinion by Porter, J., in which he discussed at length the questions raised there and here by the assignments and conclusively shows that they are wholly without merit. The judgment of the trial court was unanimously affirmed by the six judges of the Superior Court who heard the case.

We have considered this record with great care, and we find nothing whatever to justify

us in interfering with the judgment of either the trial or Superior Court. Each and every material question presented for our consideration was raised and fully considered by the learned Superior Court, whose opinion amply justifies its conclusions. If we attempted to support its judgment, we would simply be repeating its arguments and the authorities it cites.

The offense charged is a grave one. As said in the opinion of the Superior Court, it "was one which affected all the people of the commonwealth, its purpose and effect, if successful, was to corrupt a public election, and it was indictable at common law independently of the provisions of the act of January 30, 1874 (P. L. 31)." The evidence clearly discloses that the two appellants were the chief conspirators to commit this heinous offense, although the jury would have been fully justified in also convicting McCartney. He was manifestly unfit for the official position he occupied, and, speaking charitably through age and weakness permitted the appellants, evidently adepts in the business, to use him to further their criminal and corrupt designs. As well said by the learned assistant district attorney in his brief: "Had the assessor been a free agent, and not under the absolute control and dictation of the appellants, no one will deny that he was guilty of a most flagrant offense against the election laws, and his acquittal by the jury was a gross miscarriage of justice." Under the law the three parties were all principals in the crime charged in the indictment, and the jury exercised their undoubted authority and convicted the appellants, and acquitted McCartney, the assessor. The discretion exercised by the trial court in refusing a new trial on the ground that the jurors had read certain newspaper articles was not abused, as is clearly shown in the opinions filed by the trial judge and by the Superior Court. The learned trial judge said: "They [the articles] narrate incidents of the trial which had already happened in the presence of, or within the hearing of, the jurors themselves, nor do they make false statements of such incidents." The Superior Court said on the same subject: "We have carefully considered the publications in question, and are of opinion that, as the articles did not refer to any previous misconduct of the defendants, or discredit any material witness, or misstate the evidence, it is by no means clear that they could have affected the verdict." An examination of the articles in question will show that they contained nothing which would have warranted the court in granting a new trial. They disclosed nothing to the jurors who, if attentive to the testimony, were not fully cognizant of all the articles contained. If, as urged by appellants' counsel, the facts contained in the articles were to the disadvantage of their clients, it is sufficient to say they were fully supported by evidence which the appellants

did not, if they could, meet by contradictory testimony.

A careful consideration of the evidence in the case leaves no doubt whatever of the guilt of the appellants of the crime charged against them in the indictments. From the beginning of his duties in making the list of voters, and without the shadow of authority they took charge of the assessor, and, as it were, led him from house to house, until the list was completed. They absolutely controlled and directed him in every step in making the list of voters. They not only determined what names should go on the voting list, but one of the two wrote nearly, if not all, the names entered on the list. By this means they succeeded in placing on the voter's list of that election district the names of 169 persons who were disqualified as legal voters. The appellants were with the assessor and dictated his action when he sat at the polling place in September to hear applications for striking off the list the names of persons who were not legal voters. They and the assessor, being then notified that these persons were disqualified as voters and requested to strike their names from the list, struck off 109 names, which, with knowledge of the disqualification, they had placed upon it; but the appellants persisted in their criminal conduct by openly and defiantly refusing to permit the assessor to further correct the list by striking from it the other 60 names. A more bold, determined, and persistent assault upon the rights of the legal voters of an election precinct than that disclosed by this record is seldom, if ever, brought to the attention of a court of justice. The statutory penalty is wholly inadequate to the offense.

The judgment of the Superior Court and of the trial court in each of the appeals at Nos. 165 and 166, October Term, 1905, is affirmed, and it is ordered that the appellants, Philip Valverdi and Edward H. Wood, forthwith appear in the court below, to the end that they, respectively, be committed to serve such part of their respective sentences as had not been complied with at the time their respective appeals were made a supersedeas.

MITCHELL, C. J. (dissenting). Guilty or innocent the appellants were entitled to a fair trial according to law, and that they did not get.

They were indicted for one offense, and convicted on evidence of another. The indictment charged conspiracy to put on the registry of voters names of persons who did not reside in the election district. The evidence was that the persons whose names were put on the list did reside in the district, but for want of naturalization or other reasons were not entitled to vote. Both were grave crimes, alike in that they were offenses against the election laws, and would affect the purity of the ballot. But they were not the same, either legally or in fact, and evidence of one was in no sense proof of the other. The admission of much of the testimony is attempted to be justified on the ground that the commission of similar offenses is competent to show motive and intention as to the offense charged. This principle, dangerous at all times, admissible only as an adjunct and collateral fact, and requiring the strictest judicial control, cannot justify making such evidence the main body of the proof offered as was done here. And especially in a case like the present, where the jury were liable to allow indignation at the offense charged to becloud the crucial question of proof of the guilt of the alleged offender. Secondly, even if the incompetent evidence had not been received, the proper exercise of judicial discretion should have sustained the motion to withdraw a juror on account of the outrageous comments of the newspapers, which went directly into the jury box during the trial. The public mind, already inflamed on the subject, was directed particularly to these parties and the fact harped upon that others indicted with them had pleaded guilty but these "elected to take a chance of getting off, and stood trial." The jurors were warned what the public expected of them, and at least one was assailed by name and threatened with the consequences to himself that would follow an acquittal.

A verdict rendered under such compulsion is not what the impartial administration of justice requires.

(80 Conn. 68)

SNOW v. COE BRASS MFG. CO.

(Supreme Court of Errors of Connecticut.
June 7, 1907.)1. APPEAL—REVIEW—FINDINGS OF COURT ON
WRONG THEORY OF LAW.

The conclusions of a trial court on the question of contributory negligence may be reviewed on appeal if the facts from which due care was inferred show that a lower degree of care was required of plaintiff by the trial court than that imposed by law.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3323.]

2. NEGLIGENCE—CONTRIBUTORY NEGLIGENCE.

In determining whether a plaintiff in an action for personal injuries was guilty of contributory negligence, it is necessary to consider his conduct prior to the accident as well as at the time of the injury, and, if with the knowledge of which he was possessed, and with which he was chargeable, he was not justified in doing as he did, he was negligent.

3. SAME—KNOWLEDGE OF DANGER.

In an action for an injury to plaintiff's foot caused by one of defendant's wagons running over it, where plaintiff sat on a box on the wheel guard rail of a bridge and did not move away, though he knew that two of defendant's teams were approaching from opposite directions and were likely to pass near him, and he should have known that his position was dangerous if they passed at that point, he was guilty of contributory negligence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, § 86.]

Appeal from Superior Court, New Haven County; George W. Wheeler, Judge.

Action by Charles H. Snow against the Coe Brass Manufacturing Company. From a substantial judgment for plaintiff, defendant appeals. Reversed and remanded.

Frederick W. Holden and Edward A. Hariman, for appellant. George E. Beers and Carl A. Mears, for appellee.

HALL, J. The complaint alleges that on August 3, 1905, the plaintiff was "licensed, invited, and permitted" in going to and from the factory of the Farrell Foundry & Machine Company, where he was employed, to cross a certain bridge over the Naugatuck river, known as the "Brass Mill Bridge," and owned and used by the defendant, in connection with its manufacturing business in Ansonia, and that "on said day, while the plaintiff in the exercise of due care was upon said bridge and crossing it, he was suddenly and without warning struck and run over by one of the wheels of a wagon driven by one of the servants of the defendant negligently and carelessly, and his right foot was crushed and severely injured." In rendering judgment for substantial damages the trial court reached the conclusion upon the facts found "that the plaintiff acted as an ordinarily prudent man similarly situated," that the defendant was guilty of active negligence, and that the defendant failed to sustain the burden of proof imposed upon it by the default.

The following facts were found upon substantially uncontradicted evidence: The bridge in question has for many years been owned and operated by the defendant. Its principal use is for the passage over it, in connection with the defendant's business, of its one, two, and three horse trucks. The employes in the defendant's factory, and in other factories, including that in which the plaintiff was employed, and other persons, are permitted to pass over the bridge on foot. The bridge is of iron, and known as a "bar truss construction" bridge, and has a planked driveway its entire length. On each side of the driveway is a wooden stringer or wheel guard rail and upon the inner face of the upright trusses upon each side of the bridge is an "iron channel guard rail." The bridge extends nearly east and west; is 151 feet long, 17 feet and $3\frac{1}{2}$ inches wide measured from the inner faces of the trusses, and 16 feet and $11\frac{1}{2}$ inches wide, measured from the inner faces of the iron channel guard rail. The driveway is 16 feet and $\frac{1}{2}$ an inch wide measured from the inner faces of the wheel guards. The wheel guards are $5\frac{1}{2}$ inches high and $7\frac{1}{2}$ inches wide. The channel guard rails are 6 inches wide measured perpendicularly, and are 2 feet $4\frac{1}{2}$ inches above the top of the wheel guard rail, and extend inward from the inner faces of the trusses 2 inches. A gatehouse 7 feet wide facing the bridge, and 5 feet wide on its east and west sides, is suspended 18 feet from the westerly end of the bridge, the south side of it being $2\frac{1}{2}$ inches north of the north face of the wheel guard rail; the door on the south side on a level with the wheel guard rail being 2 feet and 5 inches wide. A foot west of the gate house are suspended sliding gates by which the entrance to the bridge may be closed. Just before the accident, the gates being open, one Cooper, an employe of the defendant, drove a two-horse team drawing a heavily loaded four-wheel truck upon the east end of the bridge, and proceeded to cross the bridge, going westerly. At the same time another three-horse team, also drawing a heavily loaded four-wheel truck, driven by one Kefford, an employe of the defendant, approached the bridge from the west. Both Cooper and Kefford were engaged in the defendant's business. The following are some of the measurements of the two trucks: The distance between the outer ends of the whiffletrees and eveners of the Cooper truck was 6.84 feet and of the Kefford truck 9.10 feet. The distance between outer edges of the hubs of the rear wheels of the Cooper team was 6.55 feet, and between the outer edges of the tires 5.55 feet. At about 5 o'clock in the afternoon of the day of the accident the plaintiff, who had for some years been employed in the Farrell Foundry Company, working nights, while on his way to his work stopped at the invitation of the defendant's watchman and gate

tender, who sat in a chair in the doorway of the gatehouse, and engaged in conversation with him. The plaintiff had been accustomed to cross the bridge on his way to and from his work, and was familiar with the use of the bridge. He had many times seen two-horse teams pass upon the bridge, but had never seen a two and three horse team pass each other. While so talking with the gateman, the plaintiff sat upon a small box, which stood on end, upon the top of the wheel guard rail, in front of the gatehouse, about two feet east of the door, and which had before been used by the gate tender and others as a seat. The plaintiff's face as he sat upon the box was turned toward the gate tender; his right shoulder and side being against the gatehouse. He turned and saw Cooper's team coming onto the bridge from the east, and then resumed his conversation with the gate tender, paying no further attention to the team, although he heard it as it approached on the bridge. He did not see it again until Cooper's horses were upon him as hereafter stated. He also heard Kefford's team as it approached the bridge, and saw it when it reached the westerly end of the bridge but paid no attention to it thereafter. Cooper drove onto the bridge at about the middle of it and so proceeded until he reached about the center of it when he turned to the north into the ordinary wheel tracks on that side. When he was within about 13 feet of the plaintiff, he turned his horses suddenly to the north, almost against the wheel guard rail in order to pass the three-horse team, and when his horses were opposite the plaintiff, and Kefford's horses were opposite Cooper's, the latter turned his horses up to the guard rail so far and so suddenly that the plaintiff was unable to get out of the way. The plaintiff thereupon threw his left foot which was resting on the floor of the bridge, up onto the guard rail, and extended himself toward the gatehouse, and this, as the trial court finds, was the best he could have done in the exercise of ordinary care in the situation in which he was placed when he saw the horses upon him. The hub of Cooper's front wheel struck his knee and he cried out, but neither Cooper nor Kefford heard him. The hub of the hind wheel struck him and knocked him off the box and the hind wheel ran over his right foot. Cooper then hearing him cry out, stopped his horses within three or four feet. Cooper had seen the plaintiff seated on the box, but when he was within about 13 feet from him he gave his entire attention to passing Kefford's team without colliding with it, and his attention was not again called to Cooper until he heard him cry out.

The trial court says in its finding that "there was room enough for these teams to pass without driving in upon the plaintiff"; that "there was no danger to the plaintiff where he sat, provided Cooper had kept in

the ordinary course of travel upon the north side of the bridge and had not swung his team in close to the guard rail, and that there was no necessity for his doing that"; that "the plaintiff could have seen the approach of both teams and known that they might meet on the bridge had he looked in time"; that "he could readily have changed his position to one of safety after he first saw Cooper's team and heard Kefford's team approaching before the teams met each other upon the bridge, and could so have avoided any injury to himself"; and in a paragraph of the draft finding marked "proven" that "the plaintiff could readily have seen the approach of both teams if he had taken the trouble to look." Accepting as conclusive the decision of the trial court that, when the plaintiff saw Cooper's horses upon him, he did everything to protect himself from injury that could reasonably be expected of a person of ordinary prudence under similar circumstances, the facts found lead us to conclude that the proper test could not have been applied to the plaintiff's conduct prior to that time. If the facts from which due care was inferred by the trial court show that it required of the plaintiff a lower degree of care than that imposed by law, there was an error of law, and the conclusion of the trial court upon the question of contributory negligence may be reviewed by this court. *Morrissey v. Bridgeport Traction Co.*, 68 Conn. 215-217, 35 Atl. 1126. And in inquiring whether a proper degree of care was required of the plaintiff we must not only consider what he did at the last moment when the horses were upon him, but also his conduct before that time in sitting upon the box on the guard rail in the position he did, with the knowledge which he had of the danger to which he was thus exposing himself.

In *Morrissey v. Bridgeport Traction Co.*, supra, we held that the trial court failed to require a proper degree of care of the plaintiff's servant, in holding him free from contributory negligence when he continued to drive along on a street railway track until the car overtook and struck him, which he knew was approaching from behind at a greater rate of speed than his own. We said in that case that it was the duty of the plaintiff's servant, under the circumstances, to drive off the track without loss of time, and that his failure to do so was negligence. In *Rowell v. Stamford Street R. Co.*, 64 Conn. 376-380, 30 Atl. 131, in which the trial court found that the plaintiff was not guilty of contributory negligence, it was held that there was error in ruling that certain stones, tools, and fresh dirt left on the side of the street did not indicate, to one who had previous knowledge, that workmen were digging a trench at this place, that there was danger in driving upon the defendant's track. In speaking of one situated as the plaintiff in that case was, this court said: "He must use

his senses to avoid danger. He must not shut his eyes. If he has knowledge that a dangerous place exists, there can be no presumption in his favor. He must exercise care not to fall into it, and he is bound to make use of all the means of knowledge which are reasonably open to him." The failure of a person to use and act upon his knowledge of the perils to which he is exposed, when there is nothing to prevent or excuse him from doing so, is negligence. *Nugent v. New Haven St. Ry. Co.*, 73 Conn. 139-143, 46 Atl. 875. A person standing upon a sidewalk is bound, for the purpose of avoiding injury, to exercise some degree of care with reference to what he knows to be the traffic in the roadway. *Hayden v. Fair Haven & W. R. Co.*, 76 Conn. 355-362, 56 Atl. 613. One has no right to calculate close chances of avoiding injury and throw the risk of failure on the other party. *McCarthy v. Consolidated Ry. Co.*, 79 Conn. 73-76, 63 Atl. 725.

In the case before us the plaintiff was permitted to cross the bridge on foot in going to and from his work, but that did not amount to an invitation or a license to sit on this box on the top of the seven and a half inch wide guard rail, and chat with the gate tender. The bridge belonged to the defendant, and was for the use of teams. There was no footpath on it, and persons who were permitted to cross it on foot were required to walk in the roadway used by teams. The measurements of the bridge and of the tracks show that there was no place on the bridge where a person could sit without occupying some part of the driveway, and that there was no place outside of the gatehouse where even the gate tender could sit without liability of being struck when a two-horse and a three-horse team truck were passing each other opposite him. As the plaintiff was familiar with the bridge and its use, all these facts were known or apparent to him. The fact that he knew that one and two horse teams had passed each other on the bridge without danger to one in his position, or that it was barely possible, from the dimensions of the bridge and the two trucks, for these two teams to have passed each other at the point they did, without striking the plaintiff, does not relieve the plaintiff from the charge of negligence. He knew that these were not the ordinary teams he had seen pass each other. He is also presumed to have known what is a matter of common knowledge, that drivers of such teams in passing each other under

such circumstances as those described in the finding are not to be expected to be able from their seats to so perfectly control and guide their horses and so accurately direct their heavily loaded trucks, that they will not deviate at least several inches from a desired course, and that drivers when their teams pass each other under such circumstances must give their attention not only to the motions of their own horses, but those of the other team.

With the knowledge of which the plaintiff was possessed, and that with which he was chargeable, he would not have been justified in remaining seated upon the box where he was, upon the belief that these two teams would pass each other without hitting him, if they met at the point where he sat. Apparently he did not entertain such a belief, but remained where he was engaged in conversation without thinking that the teams would meet there and without considering where they would meet. He was negligent in so acting. He was in the full possession of his faculties. He saw Kefford's team come onto the bridge from the west some time after he saw Cooper's coming onto it from the east, and while he heard the latter team approaching him on the bridge. He knew, if the two teams continued to advance, they must meet on the bridge, and a glance or a moment's thought would have shown him that they would probably meet near him. Instead of using his senses, as he should have done, to learn his danger and avoid it while he could, he turned his back to the teams, and continued his chat with the gate tender and gave the teams no further attention. In determining whether he was negligent, he must be held to have been required to act as well upon what he should have known, as upon what he knew. The facts show that the trial court failed to require him to do so, and that it erred in not holding that the plaintiff's negligence essentially contributed to his injury.

Having reached this conclusion, we are not required to discuss the defendant's claim that in finding Cooper guilty of negligence the trial court evidently assumed the existence of certain distances in stated situations between parts of the tracks and parts of the bridge, which are not reconcilable with the measurements given in the finding.

There is error, and the case is remanded, with directions to render judgment for nominal damages. The other Judges concurred.

(80 Conn. 86)

DECKER v. MANN.

(Supreme Court of Errors of Connecticut. June 13, 1907.)

1. APPEAL—ERROR—QUESTIONS FOR REVIEW—FAILURE TO INSTRUCT—EVIDENCE NOT IN RECORD.

An assignment of error, on the ground of failure to instruct as to the legal effect of certain evidence, cannot be considered, where the record does not recite the evidence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 2933.]

2. SAME—REQUESTS FOR OR NECESSITY OF INSTRUCTION.

An assignment of error, on the ground of failure to instruct as to the effect of certain evidence, cannot be considered, where it does not appear that the court was requested to instruct on that matter, or that a proper consideration of the evidence required such an instruction.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, § 1309.]

3. SAME — FAILURE TO ASSIGN PARTICULAR ERROR.

An assignment of error, on the ground of failure to instruct as to the legal effect of evidence tending to show that defendant had disputed the claims of plaintiff, is inadequate to raise the point that payment upon a disputed claim within six years before the bringing of the action would not suspend the running of the statute of limitations.

4. SAME — ASSIGNMENT OF ERRORS—GENERAL ASSIGNMENT OF REFUSAL OF NUMEROUS INSTRUCTIONS.

Under Gen. St. 1902, § 802, providing that the precise error claimed shall be specifically stated in the reason of appeal, a mere general assignment of error, in failing to charge as requested, is insufficient, where there were numerous requests to charge on different subjects.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3034.]

Appeal from Court of Common Pleas, Hartford County; John Coats, Judge.

Action by Louis Decker against Gottlieb Mann. From a judgment for plaintiff, defendant appeals. Affirmed.

A. S. Campbell, for appellant. M. Bacharach, for appellee.

THAYER, J. The only errors claimed in the appellant's reasons of appeal are that the court erred in its charge, first, "in that it did not instruct the jury as to the legal effect of the evidence tending to show that the defendant, within six years before the commencement of the action, had disputed the claims of the plaintiff"; second, "in that it did not instruct the jury as to the legal effect of the evidence tending to show accord and satisfaction of the plaintiff's claim"; and, third, "in not charging the jury as requested."

The evidence referred to in the first assignment of error is not recited in the record. It does not appear that the court was requested to instruct the jury as to its legal effect, or that a proper consideration of the evidence by the jury called for such instruc-

tion. The assignment is clearly inadequate to raise the point, urged by the defendant's counsel that payments made upon a disputed claim within six years before the bringing of the action would not suspend the running of the statute of limitations.

The second assignment raises no question for consideration, because the record does not show that any evidence of an accord and satisfaction was offered upon the trial.

The third assignment of error does not comply with section 802 of the General Statutes of 1902, which requires that the precise error claimed shall be specifically stated in the reason of appeal. A mere general statement, as that the court erred in charging as it did, or in refusing to charge as requested, where, as in this case, there were numerous requests covering a number of different subjects, is insufficient. This court has repeatedly refused to consider claimed errors which were attempted to be raised by such general assignments of errors. *Osborne v. Troup*, 80 Conn. 485, 490, 23 Atl. 157; *New England Merchandise Company v. Miner*, 76 Conn. 674, 675, 58 Atl. 4; *Chase v. Waterbury Savings Bank*, 77 Conn. 295, 299, 59 Atl. 37, 69 L. R. A. 329; *McAllin v. McAllin*, 77 Conn. 398, 401, 59 Atl. 413; *Farrell v. Eastern Machinery Company*, 77 Conn. 484, 493, 59 Atl. 611, 68 L. R. A. 239, 107 Am. St. Rep. 45.

There is therefore no question of law properly raised on the record for our consideration.

There is no error. The other Judges concurred.

(6 Penn. 306)

TAYLOR v. GEORGE W. BUSH & SONS CO.

(Supreme Court of Delaware. May 6, 1907.)

MASTER AND SERVANT—INJURIES TO SERVANT—FELLOW SERVANTS.

Plaintiff was hired and paid from day to day as a helper on defendant's coal wagons. It was part of plaintiff's duty, when ordered by the stable boss, to assist in bedding the stalls; the drivers being required to throw out straw from the loft of the stable with which to do the bedding. On the night in question, after obtaining his pay from the office, plaintiff walked in a passageway in the stable yard to the stable to get his dinner pail, and as he walked near one of the stable doors a driver, without warning, threw a bale of straw from the loft, which fell on plaintiff and seriously injured him. *Held*, that the injury occurred at a time when the relation of master and servant was still subsisting, so that plaintiff was barred of recovery by the fellow servant rule.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 150, 352, 353.]

Error to Superior Court, New Castle County.

Action by Lewis E. Taylor against the George W. Bush & Sons Company. From a judgment for defendant (61 Atl. 236), plaintiff brings error. Affirmed.

Argued before NICHOLSON, Ch., and SPRUANCE and BOYCE, JJ.

Franklin Brockson, for plaintiff in error. Christopher L. Ward and John P. Nields, for defendant in error.

NICHOLSON, Ch. This was an action on the case, brought in the Superior Court in and for New Castle county by Lewis E. Taylor, the plaintiff, against George W. Bush & Sons Company, the defendant, for the recovery of damages for personal injuries. Under the instruction of the court below the jury rendered a verdict in favor of the defendant; the plaintiff having declined to accept a nonsuit. Upon this verdict judgment was entered, and a writ of error taken by the plaintiff. In the court below the motion for a nonsuit was based upon the ground that it appeared from the evidence of the plaintiff that he was a servant of the defendant when he was injured, and that his injury was due to the negligence of a fellow servant.

The facts in the case are in substance as follows: The plaintiff was employed by the defendant company as one of the helpers on the defendant's coal wagons. He had been so employed for about three months, his hiring being from day to day, and he lived about 14 blocks from the defendant's place of business and stables. The plaintiff and other servants of the defendant, "drivers" of coal wagons and "helpers," were in the habit of bringing their dinners each day, by permission of the defendant, to the stables and stable yard of the defendant, and of there eating their noonday meal, either in the stable or stable yard, and leaving their dinner pails in the stable until the end of the day's work, when they carried them home. The plaintiff's duties included some occasional work about the stables, when so ordered by the stable boss, such as putting straw in the stalls from the loft above, etc. On the 7th of April, 1908, about 6 o'clock in the evening, the plaintiff, after receiving his pay slip and money at the company's office, which was situated about a block from the company's stables, walked to the stable yard, as he was in the habit of doing, to get his dinner pail. As he was walking on a passageway inside the company's stable yard, near a door of one of the stables, on his way into the stable to get his dinner pail, a servant of the defendant by the name of Blake, one of the defendant's drivers, threw a bale of straw out of the stable loft, which fell upon and seriously injured him. One of Blake's duties was to get straw out of the loft to bed his horses with, and he generally threw it out of the window; but there was a hole in the back part of the stable loft, and it was sometimes thrown down in that way. The plaintiff had no notice or warning that the straw was about to be thrown down.

There are a number of assignments of er-

ror, but counsel on both sides practically agreed that there is but one question before this court; that is, whether the plaintiff was a servant of the defendant at the time he was injured. The counsel for the plaintiff, in his elaborate and carefully prepared brief, expresses the whole of his contention in the following words: "It is respectfully submitted that the evidence shows that the plaintiff was not a servant of the defendant at the time he was injured; that he was injured by gross negligence of the defendant, while he was on its premises at its invitation, and in the exercise of due care and caution upon his part; that the privilege of going upon the defendant's premises was a mere gratuity, and not extended to him by any contract of service." The ground upon which the plaintiff's counsel bases his contention that the plaintiff was not, at the time he was injured, a fellow servant of Blake, the servant of the defendant who dropped the bale of straw upon him, in consequence of which he was injured, is that at that time he had finished his day's work and was off duty.

The question raised is an interesting and important one, and involves an examination and analysis of the reasoning of the authorities which have established what is called the "fellow servant" or "common employment" doctrine, in order to determine its application to such a state of facts as is presented in this case, or to ascertain whether the facts and circumstances of this case are within the scope of the doctrine. A great number of authorities have been cited by counsel on both sides, who have furnished the court with very full briefs. No cases have been cited from our own Reports, however, and the particular question involved comes before us as a case of first impression in this state.

The opinion of Chief Justice Shaw in the case of *Farwell v. Boston & Worcester R. Corp.*, 4 Metc. (Mass.) 49, 38 Am. Dec. 339 (1842), is unquestionably the "fountain head" of the "fellow servant" or "common employment" doctrine, as Pollock states in his work on Torts. Justice Harlan quotes and adopts the language of this opinion in the case of *Hough v. Railway Co.*, 100 U. S. 215, 25 L. Ed. 612 (1879), when for the first time it is explicitly laid down by our Supreme Court, and in the leading English case of *Bartons-hill Coal Company v. Reid*, 3 Macq. H. L. Cases, 266 (1858), that being the case in which the House of Lords first settled the doctrine for both England and Scotland. Lord Chancellor Cramworth also adopted and paid homage to this opinion of Chief Justice Shaw. In order that we may have this doctrine before us in a most authoritative form, I will quote from Justice Harlan's opinion at length.

"The general rule," said Chief Justice Shaw, in *Farwell v. Boston & Worcester Railway Corporation*, 4 Metc. (Mass.) 49, 38

Am. Dec. 389, 'resulting from considerations as well of justice as of policy, is that he who engages in the employment of another for the performance of specified duties and services, for compensation, takes upon himself the natural and ordinary risks and perils incident to the performance of such services, and in legal contemplation the compensation is adjusted accordingly; and we are not aware of any principle which should except the perils arising from the carelessness and negligence of those who are in the same employment. These are perils which the servant is likely to know, and against which he can as effectually guard as the master. They are perils incident to the service, and which can be as distinctly foreseen and provided for in the rate of compensation as any other.' To prevent misapprehension as to the scope of the decision, he deemed it necessary, in a subsequent portion of his opinion, to add: 'We are far from intending to say that there are no implied warranties and undertakings arising out of the relation of master and servant. Whether, for instance, the employer would be responsible to an engineer for the loss arising from a defective or ill-constructed steam engine; whether this would depend on an implied warranty of its goodness and sufficiency, or upon the fact of willful misconduct or gross negligence on the part of the employer, if a natural person, or of the superintendent or immediate representative and managing agent, in case of an incorporated company—are questions on which we give no opinion.' As to the general rule, very little conflict of opinion is to be found in the adjudged cases, where the court has been at liberty to consider it upon principle, uncontrolled by statutory regulations. The difficulty has been in its practical application to the special circumstances of particular cases. What are the natural and ordinary risks incident to the work in which the servant engages; what are the perils which, in legal contemplation, are presumed to be adjusted in the stipulated compensation; who, within the true sense of the rule, or upon grounds of public policy, are to be deemed fellow servants in the same common adventure or undertaking—are questions in reference to which much contrariety of opinion exists in the courts of the several states. Many of the cases are very wide apart in the solution of those questions."

It is obvious that we are not concerned with the limitations and exceptions I have cited for the purpose of giving a more complete statement of the doctrine. Upon each of these limitations or exceptions, and upon others as well that are not enumerated, there are a host of decisions and conflict of authority; but, as appears from the statement of the case before us already made, the only question for this court to decide is whether the plaintiff, at the time he received the injury, was or was not a servant of the de-

fendant, within the scope of the doctrine. In a case where, as in the one before us, no question was raised but the single one whether or not the person injured, the plaintiff, was at the time of the injury a servant of the defendant, within the scope of the doctrine. Justice Cochran, of the United States District Court (Dishon v. Cincinnati, N. O. & T. P. Ry. Co., 126 Fed. 197), argues as follows, after quoting from Justice Harlan a section of the above and from Pollock on Torts a statement of the doctrine and the reason for it, essentially the same as that I have quoted from Chief Justice Shaw:

"Serious question has been made as to whether this reasoning and the fellow servant doctrine based upon it are sound; but that this reasoning is the true basis of that doctrine is not now disputed by any one. As Prof. Pollock says, it 'has prevailed in the authorities.' This being so, this reasoning should be given its full force. There should be no sticking in the bark at any point. It should be held that the servant assumes all the risks he runs, excluding that of the negligence of the master, and including that of the pure negligence of co-servants, whenever doing anything contemplated by his contract of employment; i. e., which under that contract it is his duty or he has a right to do. In other words, it should be held that the assumption of risk by the servant is as broad and sweeping as the scope of action on his part required or authorized by the contract. The risk of the servant goes with him wherever he goes under his contract of employment, and the assumption should accompany the risk. There is no good reason for holding that the assumption of risk exists when the servant is doing one thing required of him by the contract, and does not exist when he is doing another thing so required, or that it exists when he is doing a thing required of him by the contract, and does not exist when he is doing a thing which he is simply authorized to do by the contract. Any stopping short, therefore, of making the assumption by the servant of the current risks of his employment as wide as the action on his part contemplated by the contract, discredits the principle and reasoning on which the fellow servant doctrine is based, and that doctrine itself. Hence it is never a test of the application of the fellow servant doctrine to any given case whether or not the injury was received by the servant during working hours, or when he was at work after working hours. The sole test of its application thereto is whether, at the time of the injury, the servant was doing something which it was his duty, or he had a right to do under the contract. If he was so acting, the doctrine applies; if not, it does not apply. I think this test is clearly deductible from the relevant authorities."

The learned judge then cites and analyzes a great array of authorities in a very lengthy

and interesting opinion, quoting very freely from most of the cases, and discriminating those cited in support of the plaintiff's contention. His conclusion was that the injuries received by the decedent of the plaintiff, Dishon, were caused by the negligence of a fellow servant, and therefore the defendant company was not liable. This list of authorities seems to be absolutely exhaustive. No relevant case has been cited by counsel in the argument of the present case not cited and analyzed in the opinion of Judge Cochran, nor have I been able to find any, and it seems unnecessary, if not superfluous, to extend the limits of this opinion by any wide review of authorities.

Counsel for the defendant in their admirable brief have selected and grouped and analyzed the most relevant and important cases, not only those directly supporting their contention, but those cited by counsel for the plaintiff. Of these *Gillshannon v. Stony Brook R. R. Co.*, 10 Cush. (Mass.) 228, *Ionnone v. Railroad*, 21 R. I. 452, 44 Atl. 592, 46 L. R. A. 730, 79 Am. St. Rep. 812, *Seaver v. Boston and Maine R. R. Co.*, 14 Gray (Mass.) 466, *Gilman v. Eastern R. R. Co.*, 10 Allen (Mass.) 233, 87 Am. Dec. 635, *McGuirk v. Shattuck*, 160 Mass. 45, 35 N. E. 110, 39 Am. St. Rep. 454, *Rosenbaum v. St. Paul R. R. Co.*, 38 Minn. 173, 36 N. W. 447, 8 Am. St. Rep. 653, *Wright v. North Hampton R. R. Co.*, 29 S. E. 100, 122 N. C. 852, and *Bowles v. Ind. R. R. Co.*, 62 N. E. 94, 27 Ind. App. 672, 87 Am. St. Rep. 279, are cases in which the injuries complained of were received before or after working hours, when the employé was being conveyed to or from his work, and it was held in each case that this was a permissible privilege allowed by the defendant to the complainant in his capacity as servant. The transportation was an incident connected with the employment of the plaintiff while in the enjoyment of it, and the court held that the relation of servant and master existed, and that the negligence of the servant or servants engaged in the duty of transportation was negligence of a fellow servant.

Lowell v. Howell, L. R. I. C. P. D. 161, *Boldt v. New York Central R. R. Co.*, 18 N. Y. 432, *Crowe v. New York Central R. R. Co.*, 70 Hun, 37, 23 N. Y. Supp. 1100, *Mele v. Dela. Hudson Canal Co.* (Super. Ct.) 14 N. Y. Supp. 630, and *Olson v. Andrews*, 168 Mass. 261, 47 N. E. 90, are all cases in which the injuries complained of were received on the premises of the defendant before or after working hours, when the employé was walking to or from his work. In these it was held, in like manner, that which the employé was doing was so far involved in his service that the relation of master and servant then existed. In *Heldmaier v. Cobbs*, 96 Ill. App. 315, the employé was injured during the dinner hour while eating. In *Helmke v. Thilmany*, 107 Wis. 216, 83 N. W. 360, employé

was injured after his work was over by cog-wheels in a closet where he had gone for his coat. In *Boyle v. Columbian Fireproofing Co.*, 182 Mass. 93, 64 N. E. 726, the employé was injured on an elevator on which he was going down, with other workmen, to dinner. In the last three cases it was held that the relation of master and servant existed, with the consequence of imposing liability on the employer, whose negligence caused the accident, and there was no question of negligence on the part of a fellow servant.

Brydon v. Stewart, 2 Macq. H. L. Cases, 30, was a Scotch case which went up to the House of Lords, and was afterwards quoted and analyzed by Lord Cramworth in the leading English case, which I have cited above, of *Bartonshill Coal Company v. Reid*, 3 Macq. H. L. Cases, 266. In *Brydon v. Stewart* the employés were injured in being drawn out of a mine after they had struck work, and the master was held liable in that case (there being no question of negligence of a fellow servant), because the relationship of master and servant was still subsisting. The facts in the case of *Dishon v. Cincinnati, N. O. & T. P. Ry. Co.*, already discussed and quoted, involved an application of the principle deduced from the cases cited by the learned judge in that case, a few of which we have considered above, which it is not incumbent upon us in the present case either to approve or disapprove. In such a case as the one presented there can be no doubt of the applicability of the doctrine as laid down by the authorities we have cited.

A part of the plaintiff's duties as a "helper" to assist the drivers of the defendant company's coal wagons in the delivery of coal was, as he testifies, to feed the horses in the defendant's stables, or put straw in their stalls, mend harness, etc., whenever he was called upon by the stable boss to perform such services, while it was one of the regular duties of the drivers to get straw down for the horses from the stable loft. A nooning of only 30 minutes was allowed to the "helpers" and "drivers," and the privilege was accorded to them of eating their noonday meal in the stables or stable yard and of leaving their dinner pails in the stable, calling for them at the end of each day's work, a privilege obviously accorded to them by the defendant company in part for the reason that the employés might thus eat their noonday meal and be on the spot ready for work again at the end of their 30 minutes' nooning. Plaintiff testifies that he lived about 14 squares away from the stable, too far for him to go home for his dinner in the time allowed.

It follows that, when the plaintiff was injured in the defendant company's stable yard at the end of his day's work, immediately after getting his pay slip and money, and just as he was about to enter a stable door for the purpose of getting his dinner pail, in

accordance with his custom, the injury occurred on the defendant's premises, where his work was in part performed, while he was enjoying a privilege allowed by the defendant to the plaintiff in his capacity as servant, and so far involved in his service that the relation of master and servant was then subsisting. Therefore, as it is admitted that the injury was caused by the negligence of one of the defendant company's drivers, a servant engaged in the same kind of employment, by dropping upon his head without warning a bale of straw, and it is not contended that this servant of the defendant was known in any way to be incompetent, or that the master was guilty of any negligence in employing him or in failing to provide other methods or appliances for the transfer of straw from the loft to the horses' stalls, it follows that the case comes clearly within the so-called fellow servant doctrine, and that the employer is not liable.

We think there was no error in the rulings or charge of the learned Chief Justice, and therefore the judgment of the court below is affirmed.

(80 Vt. 37)

ROYCE v. CARPENTER et al.

(Supreme Court of Vermont. May 10, 1907.)

1. ASSIGNMENT—BOND FOR DEED.

A bond for a deed is a contract for the sale of real estate, and is assignable.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 4, Assignments, §§ 25, 32; vol. 48, Vendor and Purchaser, § 443.]

2. VENDOR AND PURCHASER—BOND FOR DEED—TITLE.

A purchaser in a bond for a deed of real estate is the equitable owner of the land, and an assignee of the bond takes the same estate.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Vendor and Purchaser, §§ 442, 443.]

3. SAME.

The equitable owner of land, who subsequently obtained a deed thereof, gave to a purchaser a bond for a deed, who paid a part of the price and entered into possession, and then transferred the premises by indorsement on the bond to a third person, who retained possession until he surrendered it to the purchaser and gave him the bond, with an indorsement reciting that the third person transferred the premises to the purchaser. The purchaser transferred by indorsement on the bond to the orator, who took and retained possession of the premises. *Held*, that equity would treat the transactions as conveying the equitable title to the orator.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Vendor and Purchaser, §§ 442, 443.]

4. APPEAL—MASTER'S REPORT—REVIEW—EXCEPTIONS.

Where, in a suit tried before a master, the record does not show a certain document presented to the master, an exception to his report because of his ruling in relation thereto will not be considered.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 2897-2899.]

5. SAME.

The question whether a master erred in receiving and considering in the deposition of a

witness questions and answers specifically objected to by one of the parties at the time of the taking of the deposition is not presented for review, where the report of the master says nothing regarding any objection to the deposition, and it has not been furnished the court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 2897-2899.]

6. SAME.

The question whether the master erred in receiving or rejecting testimony is not raised, where his report does not show that any objections were made before him on which exceptions to the reception or rejection of testimony were based, and where it does not refer to the transcript of the testimony for that purpose, though reference is made to the transcript in the exceptions.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 2897-2899.]

7. ESTOPPEL—KNOWLEDGE OF FACTS—RELINQUISHMENT BY ADVERSE PARTY.

An upper mill owner, who saw a lower mill owner expend his money in building a dam and mill, and did not make objection and furnished materials for the dam, was not estopped by acquiescence or laches from asserting his rights against the lower mill owner because of his setting back water and injuring the water power of the upper mill, where when he furnished the materials he did not know what the effect of the erection of the dam would be, and where the lower mill owner did not rely on the conduct of the upper mill owner.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Estoppel, § 186.]

8. SAME.

Acquiescence in the wrongful act of another, such as will operate to preclude the obtaining of equitable relief, must be not only with knowledge of the wrongful acts, but also of their injurious consequences, and the same must last for such an unreasonable length of time as to make it inequitable to enforce the remedies of equity against the wrongdoer.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Estoppel, § 128.]

9. NUISANCE—EQUITABLE RELIEF.

Courts of equity will redress an injury resulting from a private nuisance only where the injury resulting cannot be adequately compensated by damages at law, or where from the continuance of the nuisance a constantly recurring grievance arises which cannot be otherwise prevented than by injunction.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Nuisance, § 56.]

10. WATERS AND WATER COURSES—WATER POWER—INJURY FROM DAM—INJUNCTION.

In a suit for relief from injuries sustained in consequence of the maintenance of a dam, causing backwater to interfere with an upper mill owner's water power, the evidence showed that the water was frequently set back on the upper mill owner's wheel so as to seriously obstruct it and render it impossible to obtain sufficient power to run the mill, and that the damage would continue to a greater or less extent, dependent on the character of the mill of the upper owner and the amount of business he could command, as long as the lower mill owner maintained the dam at the present height. There was no evidence of the comparative values of the properties affected, nor of the balance of convenience or inconvenience in granting or withholding equitable relief. *Held*, that equity would perpetually enjoin the maintenance of the lower dam in such a way as to interfere with the upper water power.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Waters and Water Courses, §§ 260, 261.]

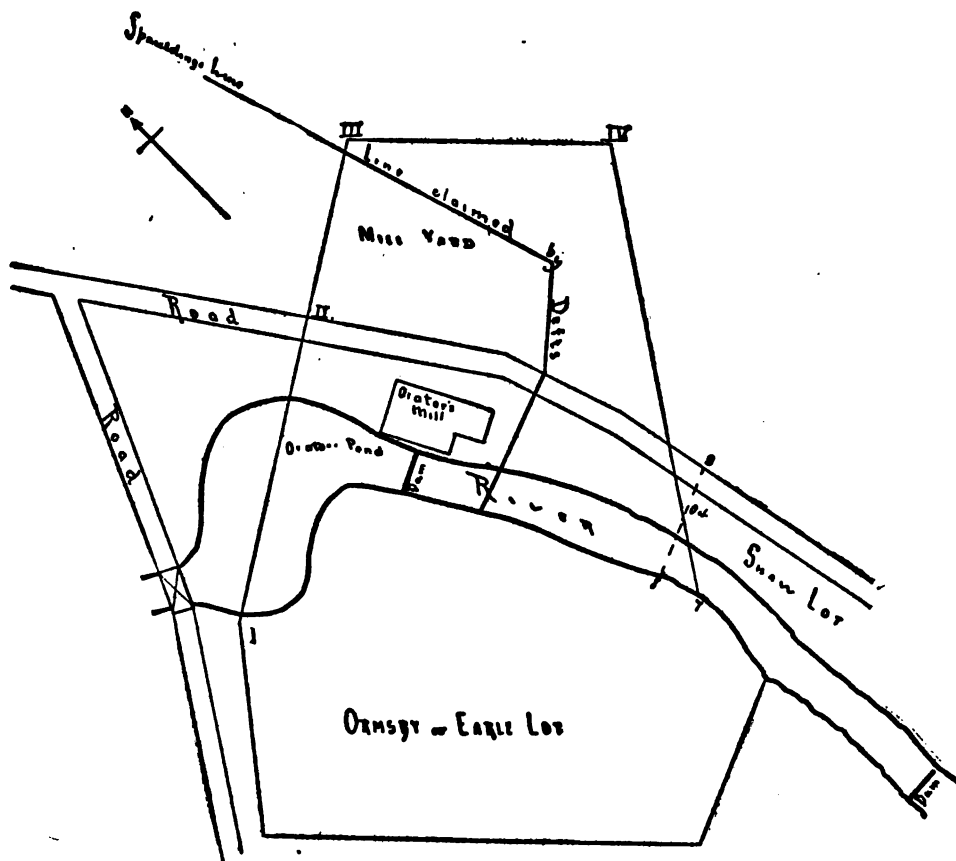
Appeal in Chancery, Windsor County; James M. Tyler, Chancellor.

Suit by Edwin W. Royce against Norris Carpenter and another. Heard on appeal, answer, master's report, and exceptions. From a decree for the orator, defendants appeal. Affirmed.

Argued before, ROWELL, C. J., and MUNSON, WATSON, STAFFORD, and HASELTON, JJ.

Wm. W. Stickney, John G. Sargent, and Homer L. Skeels, for appellant. Gilbert A. Davis and Waterman & Martin, for appellees.

Millyard." The allegations further are that the orator holds a bond for a deed and is in possession of the land above referred to as formerly owned and occupied by William Earle. This land is on the south side of the river against and extending below the orator's mill, and is bounded on the north by the river. It is called the "Ormsby" or "Earle lot," but hereinafter reference will be made thereto as the "Earle lot." The defendants, having purchased of Agatha M. Moore the land bordering the orator's mill property on the east, and known as the "Shaw lot," in 1900 erected a dam across



WATSON, J. The allegations of the bill show that for some years the orator has been and now is the owner of a certain sawmill on the northerly bank of Black river, in the town of Plymouth, together with the water privilege and the land connected therewith; the same being occupied and used by him for lumbering purposes, which premises are bounded on the south by land formerly owned and occupied by William Earle, and on the east by land formerly owned by Agatha M. Moore. It appears from the report that in earlier days the land about the orator's mill, and owned in connection with it, was called the "Briggs

the river a short distance below the orator's dam and mill, and thereby flowed some of the Earle lot to his damage, and also set back the water in the river so as to flow his land and injure his water power and sawmill. The orator prays that the defendants may be enjoined from thus overflowing his land and injuring his water power and sawmill, for an account to be taken of the damages, and for general relief. September 28, 1899, John A. Woods owned the equitable title to the Earle lot, and it became his by deed July 31, 1900. On the former date he gave a bond for a deed of the same to Joseph M. Dyer, who paid \$40 towards

the purchase price and entered into possession of the property. November 6, 1899, Dyer and his wife transferred the same by indorsement on the bond to Orlando L. Coolidge; the latter taking possession. He retained the possession until June 11, 1900, when he surrendered it to Dyer and gave him the bond; there being no transfer in writing, except that Coolidge placed thereon in writing: "I, the said O. L. Coolidge, transferred to the said J. M. Dyer, June 11, 1900." September 4th, following, Dyer and wife transferred the same, by endorsement on the bond, to the orator, who took possession of the place and has retained it ever since. The bond and transfer to the orator were recorded in the land records of the town. On the 1st day of the next month a payment fell due on the bond. This and all subsequent payments falling due thereon to the time of the hearing before the master were made by the orator. The bond was a contract for the sale of land and assignable. Under such a contract the purchaser is treated in equity as the equitable owner of the land, and an assignee takes the same equitable estate.

It is said that Dyer and wife, after their transfer to Coolidge, had no legal title to the contract, and hence they could assign no interest therein to the orator. The assignment back to Dyer, though informal, was written by Coolidge on the bond. In connection therewith he gave the bond to Dyer and surrendered the possession of the property. By this transaction the parties intended manifestly that all the equitable rights in the property under the contract owned by Coolidge should be assigned to Dyer. A court of equity will regard the substance, rather than the mere form, of the assignment, and give it such effect as the parties intended. Under the subsequent assignment from Dyer and wife, the orator has the same rights.

Shortly before Dyer transferred the bond to Coolidge, the defendant Carpenter applied to them for the privilege of flowing the water of the river upon the Earle place, if the defendants should erect their dam as it is now located. Wood, Dyer, and Carpenter met near the place of the dam and verbally agreed that the defendants might build their dam of the height later set forth in the deed from Wood to them, dated June 6, 1900, on Carpenter's paying \$25 to be applied on the bond to Dyer. At sometime the \$25 were paid by Carpenter to Wood, but it was never indorsed on the bond. When the bond was assigned to Coolidge, he had notice of the agreement with Carpenter, and consented to it. The record does not show that the orator, at the time of his purchase of the bond, had actual notice of this agreement or of such payment; but facts are found touching the question of constructive notice. The damages to the Earle land are reported separately, and the question whether on the facts

found the orator was entitled to recover the same was submitted to the court. The court below disallowed these damages, thereby impliedly holding the orator chargeable with constructive notice. Since in this no claim of error is made, we pass to the other branch of the case.

The determination of the true location of the division line between the land of the orator and the land of the defendants is essential to the decision of the case. The orator claimed before the master that it was the southerly portion of line iv to 7 on the plan marked "Batchelder's Plan," and, if not this line, then the line 3 to 4 to 8 on the same plan, or a line near them. This line as first above given strikes the south bank of Black river about 14 rods southerly of the foundation of the old sawmill, which stood pretty near where the orator's present mill stands. The defendants claimed the true line starts on the south bank of the river 4 rods, or nearly that distance, below the orator's mill. The master finds that the original line between the Briggs millyard and the Shaw lot was the southerly end of the line iv to 7 laid down on the plan, and that in the early days the Briggs millyard came down the river to that line. The defendants did not seriously question this, but contended that about 1831 there was a change made in the location of the line, so that it commenced on the south bank of the river, 4 rods, or about that distance, downstream from the foundation of the Briggs sawmill as it then existed. But from all the evidence the master was unable to find that the line was ever changed from where it originally ran, and he finds the line, commencing at point 7 on the plan, and running toward point iv, as far as the road or wall to be the true line between the parties. It is said, however, that the master reached this conclusion by an erroneous construction of Exhibit 27, a deed from Franklin Prior to Walter Fletcher, dated January 25, 1831. The master construed this deed as conveying one undivided half of the Shaw lot; whereas, the defendants say it should have been construed as conveying the whole lot. The defendants objected to the construction given, because they said that when properly construed the title to the Shaw lot and to the Briggs mill lot merged in Fletcher, and that he made a change in the division line between them. The master says such merger could not have been, for the title to the Shaw property was in Prior and Fletcher, and they conveyed it September 20, 1831, by their warranty deed, to I. P. Brown, bounding it on the up-river side by the Briggs sawmill yard.

If the master's construction is right, there could be no such merger of title as defendants claim. Nor could there be if his construction is wrong: June 29, 1825, Asa Briggs conveyed the mill lot to Asa Briggs, Jr. The findings show that the land thus

conveyed included the Briggs millyard, extending down the river to the "original line" between it and the Shaw lot. No further change of title appears until October 23, 1828, when Asa Briggs and Asa Briggs, Jr., conveyed the property to Walter Fletcher; the point of beginning named in the deed being "about four rods south of the sawmill; thence northerly across the road to I. P. Brown's land." With the point of beginning and the easterly line as thus given, Fletcher took by that conveyance no title to the land between the two lines here claimed by the respective parties. That remained in Asa Briggs, Jr., or in him and his father. January 25, 1831, Fletcher conveyed the mill property by the same description to Franklin Prior, and Prior on the same day executed to Fletcher Exhibit 27, before noticed. There was still the land between the two lines owned by neither Prior nor Fletcher, and as an inevitable sequence to defendants' position there could have been no merger of title. Nor could there be a resulting merger from the orator's predication that the easterly line of the millyard has always remained the same. For then, under the conveyances of January 25, 1831, Prior took the mill lot, and Fletcher the Shaw lot, with the original dividing line between them. In either view, therefore, the defendants' objection to the master's construction of deed Exhibit 27, regarding its force as evidence bearing on the line in question—and it was in this respect that the objection was made—is without force. No other objection is available under the exception. *Sargent v. Burton*, 74 Vt. 24, 52 Atl. 72; *Bourne v. Bourne*, 69 Vt. 251, 37 Atl. 1049; *Allen's Adm'r v. Allen's Adm'rs*, 79 Vt. 173, 64 Atl. 1110.

Defendants argue that other deeds were also misconstrued by the master; but, be this as it may, no exception brings the matter before us.

The master further finds that the line on the plan drawn from 3 to 8 represents the division line between the orator's land and that of the defendants, by prescription; but in making this finding testimony was used given by one Frederick A. Butler, the orator's immediate grantor, showing a contract between him and Winslow H. Sawyer, a former owner of the Shaw lot, and now dead, whereby, for a consideration paid by the former to the latter, the line was established as above indicated, with subsequent use and occupation to the line thus established by Butler under a claim of right for more than 15 years. Defendants objected to Butler's testifying to any contract with Sawyer, the latter being dead, and they stand on an exception to the report based thereon. It is unnecessary to consider the question thus raised, since the original line as found by the master stands as the true line between the parties. It is for the same reason unnecessary to consider the questions argued relating to the admissibility of any of the tes-

timony of this witness bearing on the existence of the prescriptive line, including his acts and declarations concerning it.

It is further contended that all of the testimony given by Butler should have been excluded from consideration, for the reason that he was not present after the close of the hearing before the master, to be further cross-examined. The witness was examined and cross-examined before the master fully. When the hearing there was closed, each party reserved the right to take the depositions of one or two persons, and the defendants' solicitor said he wished to cross-examine Butler further and reserved that right. No further cross-examination was had. Whose fault it was the master had no knowledge. The master states that a copy of a subpoena for taking the depositions of Abram Merrill and Butler was sent him by defendant's solicitor, claiming it showed the orator in fault for defendants' not having Butler's deposition to use. He further states that no service of the subpoena on Butler was shown by the copy, and he could not find from it that it was the fault of the orator that the deposition was not taken. The exception to the report in this regard is because the master was misled as to the character of the document relating to the taking of the deposition—that it was not a subpoena, but a citation served on defendants to be present at the taking of Butler's and Merrill's depositions by the orator, and therefore it was incumbent on the orator to show why Butler's deposition was not taken accordingly. The paper thus in question was made a part of the master's report, but neither it nor a copy has been furnished the court. Hence we cannot say that the master was in error.

Exception was saved to the report because the master received and considered in Merrill's deposition questions and answers specifically objected to by defendants at the time of the taking. Although the report makes reference to the deposition for another purpose, it says nothing regarding any objection thereto, nor has the deposition been furnished. The exception refers to the deposition. Several other exceptions were taken to the report because the master received or rejected certain pieces of testimony. The report does not show that any objections were made before the master on which these exceptions are based; nor does it refer to the transcript of testimony for that purpose. Reference is made to the transcript in defendants' exceptions, but this does not bring it before the court. *Sowles' Adm'r v. Sartwell*, 76 Vt. 70, 56 Atl. 282. These exceptions therefore, including those relating to the deposition, are not considered.

The defendants began to erect their dam in May, 1900. At that time the orator was in the South, returning the last days of June. He then knew defendants were erecting their dam, and sawed, or caused to be sawn, in his mill some timber to be used in the dam.

It is urged that the orator's conduct in this respect, together with his standing by and seeing defendants expend their money in building the dam and mill, without making objection, constitutes such acquiescence and laches on his part as will estop him in equity from asserting his rights here claimed. The master states that there was no evidence that the material was furnished with such knowledge of what the effect of the erection of the dam and mill would be upon the orator's mill as estops the latter from relief in the premises. Nor was any finding made that the defendants relied upon the conduct of the orator in this behalf, or were thereby influenced in their actions. There can be no estoppel unless the party alleging it relied upon the representation—whether in words, acts or silence—of the party to be estopped, was induced to act by it, and, thus relying and induced, did take some action. *Wooley v. Edson*, 35 Vt. 214; *Wells v. Austin*, 59 Vt. 157, 10 Atl. 406; 2 Pom. Eq. Jur. § 812.

Nor was there such acquiescence in the wrongful acts of the defendants by the orator as will operate, on principles of and in analogy to estoppel, to preclude him from obtaining equitable relief, leaving him to his remedy at law. To have this effect the acquiescence must be not only with knowledge of the wrongful acts themselves, but also of their injurious consequences, and it must last for such an unreasonable length of time as to make it inequitable to the wrongdoer to enforce the remedies of equity against him after being suffered to go on unmolested and with apparent acquiescence in his conduct. Here the orator's knowledge of the injurious consequences is negatived by the findings. Hence there is no quasi estoppel. 2 Pom. Eq. Jur. § 817; *City of Logansport v. Uhl et al.*, 99 Ind. 581, 49 Am. Rep. 109; *Bausman v. Kelley*, 38 Minn. 197, 36 N. W. 333, 8 Am. St. Rep. 661. It is the use of the dam, not its erection, that is an interference with the orator's rights. *Dutton v. Stoughton*, 79 Vt. 361, 65 Atl. 91. Hence, without knowledge of the injuries consequent on use, he would have no knowledge that a wrong had been committed. That one cannot acquiesce in a wrong, while ignorant that it has been committed, is too self-evident to require further discussion.

Nor is the case presented one where the doctrine of laches should be applied. No facts are found showing any change of situation by the defendants after the orator had knowledge that he would suffer damages arising from backwater and before the commencement of these proceedings, 10½ months later. In these circumstances it cannot be said that the delay was so prejudicial to the defendants as to render it inequitable for the orator now to assert his rights. *Halstead v. Grinnan*, 152 U. S. 412, 14 Sup. Ct. 642, 38 L. Ed. 495.

Finally, defendants contend that all damages which the orator has or will suffer from backwater can be fully and adequately com-

pensated by a pecuniary sum, and that to grant a perpetual injunction is inequitable. It is found that up to the time of bringing this suit the orator had suffered by the erection and maintenance of defendants' dam \$25; that when the water is high, so as to flow over the dam six inches or more to one or two feet, as it frequently does, the water sets back on orator's wheel so as seriously to obstruct it and render it impossible to obtain sufficient power to run his sawmill to any advantage; and that the damage will continue to a greater or less extent, dependent on the character of the orator's mill and amount of business he can command, as long as defendants maintain their dam at its present height. Nothing appears regarding the comparative values of the properties affected, nor as to the balance of convenience or inconvenience in granting or withholding such injunction.

Courts of equity do not always, as a matter of course, afford relief by way of injunction in cases of this nature, where a right of action exists for a nuisance. In the case of *Ottawaquechee Woolen Co. v. Newton*, 57 Vt. 451, the orator sought such relief against the defendants' erection of a dam which would set the water back on its wheel; but an injunction was refused. The defendants had been to great expense in the purchase of property, and in making preparations to build up an extensive manufacturing business, prospectively of great public benefit. It was there said that, in determining whether an injunction should be granted or denied, the court should take a broad and comprehensive view of the situation, and ascertain if it will be equitable to grant it. The refusal of the writ was placed on two grounds, one of which was that the anticipated trouble from backwater could nearly, if not quite, be obviated by the substitution of a different wheel from the one then in use by the orator, and that the expense of such substitution would be small as compared to the loss of defendants by being deprived of the right to utilize their water power. In *Dutton v. Stroughton*, to which reference has been made, an injunction was granted, but no question was made respecting the nature of the relief. Equitable jurisdiction regarding private nuisances is based upon the ground of restraining irreparable mischief, or of preventing vexatious litigation or a multiplicity of suits; but, to justify the interposition of a court of equity to redress the injury or remove the annoyance, "there must be such an injury as from its nature is not susceptible of being adequately compensated by damages at law, or such as, from its continuance or permanent mischief, must occasion a constantly recurring grievance, which cannot be otherwise prevented but by an injunction." 2 Story, Eq. Jr. § 825; *Kerr on Injunctions*, 225; *Gould on Waters*, § 528; *Imperial Gas Co. v. Broadbent*, 7 H. L. 600; *Holsman v. Bolling Spring Bleaching Co.*, 14 N. J. Eq. 335; *Carlisle v.*

Cooper, 21 N. J. Eq. 576; Turner v. Hart, 71 Mich. 128, 38 N. W. 890, 15 Am. St. Rep. 248.

Applying these principles to the circumstances presented by the case before us, clearly an injunction should issue. The findings show an injury not only from the essential nature of which, but also from its continuous character, the legal remedy is inadequate—one which cannot be prevented otherwise, than by an injunction.

Decree affirmed, and cause remanded, with mandate.

(30 Vt. 48)

WILKINS v. SOMERVILLE et al.

(Supreme Court of Vermont. Chittenden.
May 10, 1907.)

1. ESCROWS—CONDITIONS—PERFORMANCE.

Where a grantor deposited a deed in escrow for delivery to the grantee, he was competent to annex such conditions to its delivery as he saw fit, and the fact that in doing so he violated the terms of his contract does not give the deed any force which it would not otherwise have, and hence title could not pass by it without a compliance with the conditions of the deposit.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Escrows, §§ 8, 17.]

2. EQUITY — JURISDICTION — PROPERTY AND RIGHTS THEREIN.

Where a grantor, who had deposited a deed in escrow for delivery to the grantee when he paid a named sum, later, and before the deed was delivered, conveyed the land to another, the original grantee's proper remedy for relief is in equity.

3. ESCROWS—CONDITIONS—TIME OF PERFORMANCE.

A contract by which defendant agreed to deposit a deed conveying his farm in escrow for delivery to the grantee, on the payment of a certain sum, was not objectionable as uncertain, though it contained no specified time in which the condition of the escrow should be performed, since by implication performance must be within a reasonable time.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Escrows, § 11.]

4. SAME.

Under these conditions, where it was found that a reasonable time had not elapsed on the day named for the withdrawal of the deed from the depositary, the conveyance of the property to another the day before was within the time the grantee by his contract had a right to perform, and, unless the rights of a bona fide purchaser intervene, equity requires that the grantee have a reasonable further time in which to perform the condition and receive a deed.

5. VENDOR AND PURCHASER—CONVEYANCE BY VENDOR TO THIRD PARTY—NOTICE—EFFECT.

Where a purchaser of land knew that his vendor had deposited a deed conveying the land to another in escrow for delivery to the grantee, on his compliance with certain conditions, and was put upon inquiry by the existence of an order restraining the depositary from redelivering the deed to the vendor, he stands in the same equity as his vendor, and will be compelled to perform the contract with the original grantee to the same extent as the vendor would have been liable to perform.

6. SPECIFIC PERFORMANCE — RELIEF — BILL — SUFFICIENCY.

Where a bill praying specific performance of a contract to convey land does not show the orator ready and willing, nor that he offers to

perform, the court will not, where a case for specific performance has been made out in other respects, deny relief, without an opportunity to the orator to move for leave to amend his bill.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Specific Performance, § 398; vol. 19, Equity, § 759.]

7. INJUNCTION—MAINTAINING STATUS PENDING LITIGATION — INJUNCTION AGAINST WITHDRAWING ESCROW.

Where, in a suit to compel specific performance of a contract, whereby defendant S. agreed to deposit a deed of his farm in escrow with a bank, to be delivered to the orator on the payment of a certain sum by him, where it was shown that S. attempted to withdraw the deed from the bank before a reasonable time had elapsed for the payment of the money by the orator, and had conveyed the land to another, it was proper to issue a temporary injunction holding the deed and the title to the property in statu quo.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Injunction, §§ 86-90, 303-306.]

Appeal in Chancery, Chittenden County; Willard W. Miles, Chancellor.

Bill by John S. Wilkins against Samuel Somerville and others. From a decree dismissing the bill, the orator appeals. Reversed and remanded, with mandate.

Argued before ROWELL, C. J., and TYLER, MUNSON, and WATSON, JJ.

H. S. Peck, for appellant. M. M. Gordon and Geo. W. Wing, for appellees.

WATSON, J. On January 16, 1902, a contract was made between the orator and the defendant Samuel Somerville, by which it was agreed that the orator should pay the sum of \$6,000 for that part of Somerville's farm lying in Duxbury, containing his homestead, and that the deed thereof, when made, should be deposited with the Capital Savings Bank & Trust Company, in Montpelier, in escrow until that sum should be paid. The farm was believed by both to contain valuable veins of asbestos and talc, and this they had in view in their negotiations. On the same day a warranty deed of the property was duly executed by Samuel and his wife, the defendant Eliza M. Somerville, to the orator, and was deposited by the direction of Samuel with the bank in escrow; but, instead of the condition being pursuant to his agreement with the orator, he directed the depositary to hold the deed until \$6,000 should be deposited to his credit, or until called for by him or his attorney after 30 days from date. The orator neither consented to, nor had any knowledge of, any change in the condition; nor was he afterwards informed of it. Indeed, never thereafter did Samuel make reference to the time the deed should remain in the custody of the bank, until September 19th, when he wrote the orator that after 30 days he should think best to take it therefrom. Again, October 6th, he in like manner notified the orator that the date for withdrawing the deed was October 20th, advising him that what he did must be done before then. In answer to

each of these communications, the orator protested against its withdrawal. Later Samuel extended the date to October 30th, and the depository notified the orator that, unless payment be made by that time, the deed would be returned to the vendor. Thereupon the orator protested to the latter that under their agreement he had no right to recall the deed. On the day before the bank was thus to return the deed, an order was issued restraining it from so doing. On the same day, Samuel and wife by their deed of warranty conveyed the land, together with land in Fayston, to the defendant Mark Mears, who in making the purchase was co-operating with defendants George D. Mears, A. W. Slocum, and Mathew M. Gordon; it being understood and agreed between them that Mark Mears should furnish the money to pay for the property, hold the title, and transfer the same to a company to be formed by them. In this purchase the consideration to be paid was \$6,000, of which \$2,500 was paid by check, with an agreement to pay the balance in 60 days. The deed to Mears was sent by him to the defendant Eber Huntley, town clerk of Duxbury, for record. Soon thereafter this suit was commenced, with a temporary injunction holding the deed and the title to the property in statu quo.

The vendor, when depositing the deed with the bank, undoubtedly was competent to annex such conditions to its delivery to the orator as he saw fit, even to the extent of retaining the right to withdraw it from the custody of the depository at any time, or after a specified time. The fact that in so doing he violated the terms of his contract does not change the situation in this respect, nor give the deed any force which it would not otherwise have. *Stanton v. Miller*, 58 N. Y. 192. No title could pass by it without a compliance with the conditions of the deposit.

It is clear that the orator cannot have adequate remedy by an action at law. In view of the conveyance of the property to a subsequent purchaser, the question is: What relief will be granted in a court of equity? The contract is in its nature and incidents entirely unobjectionable. True, it contained no specified time in which the condition of the escrow should be performed; yet there was no uncertainty in this respect, since by implication performance must be within a reasonable time. *Ordway v. Farrow*, 79 Vt. 192, 64 Atl. 1116. It is found that such reasonable time had not elapsed October 30, 1902, the day finally named by the vendor for the withdrawal of the deed from the bank. Hence the conveyance of the property to Mears the day before was within the time in which the orator by his contract had a right to perform. Yet by that conveyance the vendor not only disabled himself from carrying out his prior contract, but he prevented its subsequent performance by the orator also. In these circumstances, unless

the rights of bona fide purchasers without notice intervene, equity requires that the orator be placed as nearly as possible in the same situation as the vendor agreed that he should be in—that he have a reasonable further time in which to perform the condition and receive a deed of conveyance of the property according to the terms of his contract. See *Battell v. Matot*, 58 Vt. 271, 5 Atl. 479; *Ordway v. Farrow*, before cited.

But the subsequent purchaser, Mears, was not without notice. Before he took his deed he knew all concerning the deed to the orator, and was put on inquiry as to the restraining order against the bank, issued the same day. Hence Mears, standing on the same equity as his vendor, will be compelled to perform the contract with the orator by a conveyance of the land in the same manner and to the same extent as the vendor would have been liable to do, had he not transferred the legal title. 1 Story, Eq. Jur. §§ 390, 784; *Taylor v. Stibbert*, 2 Ves. Jr. 438; *Potter v. Sanders*, 6 Hare, 1; *Champlon v. Brown*, 6 Johns. Ch. 398; *Ten Eick v. Simpson*, 1 Sandf. Ch. 244; *Haughwout v. Murphy*, 22 N. J. Eq. 531. This doctrine rests upon the general principle in equity that, from the time of a contract for the sale of land, the vendor, as to the land, is considered a trustee for the purchaser, and the vendee, as to the purchase money, a trustee for the vendor; and every subsequent purchaser from either, with notice, is subject to the same equities as would be the party from whom he purchased. 1 Story, Eq. Jur. § 789; *Taylor v. Stibbert*, 2 Ves. Jr. 439; *Ten Eick v. Simpson*, 1 Sandf. Ch. 244.

The prayer of general relief is sufficient. It is said, in substance, however, that the bill does not show the orator ready and willing, nor that he offers, to perform; but, since a case for specific performance has been made out in other respects, a court of equity will hesitate to deny such relief without an opportunity to the orator to move for leave to amend his bill. In the event of such relief being granted, we do not understand that damages are here sought by the orator in addition thereto. Whether, in case he does not avail himself of specific performance, any claim he may have for damages or for money expended may be here enforced by way of a lien on the property, or otherwise, is a question on which we give no intimation.

It sufficiently appears, without further discussion, that, as far as the temporary injunction relates to the land in question, it was properly issued to protect the orator's equitable rights in the premises, and, with such modifications as may be necessary to the carrying out of the decree, it should be made perpetual, provided that, if the orator fails to perform within the time limited, then the injunction should be dissolved for his failure to perfect his title under the decree. To the extent that the injunction relates to

other land, if at all, it was wrongfully issued, and should be dissolved. Regarding such land, the case will be proceeded with on the question of injunction damages, if any are claimed.

The defendant Huntley has no interest in the matters here litigated; he being made a party to the suit only for purposes of the injunction.

Decree reversed, and cause remanded, with mandate. Let the costs below be there determined.

(75 N. J. L. 177)

SIMMONS v. MAYOR, ETC., OF CITY OF MILLVILLE.

(Supreme Court of New Jersey. June 10, 1907.)

1. MUNICIPAL CORPORATIONS — SEWER IMPROVEMENTS—ASSESSMENTS FOR BENEFITS.

Assessments for benefits from the construction of sewers in cities must conform to the act of February 19, 1895 (P. L. 1895, p. 95).

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, § 1106.]

2. SAME—VALIDITY.

The total assessable cost of a sewer system was more than \$100,000. The total assessment for benefits was \$5 less, and was levied upon some of the abutting owners to the exclusion of others and to the exclusion of owners within the sewerage area, but not along the line of the sewer. *Held*, that the assessment was invalid.

(Syllabus by the Court.)

Certiorari by Thomas S. Simmons against the mayor and common council of the city of Millville to review an assessment for sewer benefits. Assessment set aside.

Argued February term, 1907, before GARRISON, SWAYZE, and TRENCHARD, JJ.

French & Richards, for prosecutor. Louis H. Miller, for defendant.

SWAYZE, J. The prosecutor seeks to set aside an assessment of benefits for sewers in the city of Millville. The proceedings were had under the act of April 7, 1890 (P. L. 1890, p. 192). Only lands fronting on the line of the sewer, and not all of such lands, were assessed. Churches, factories, and railroad property were altogether omitted, and the aggregate frontage which thus escaped assessment was large. The report of the commissioners shows that they did not assess in respect to the cost of the work so far as it extended beyond the line of the whole property assessed, but assessed the cost thereof upon the city at large. The total cost of the sewers was \$111,075.24; the amount assessed upon the city at large \$10,531.05. Of the balance \$100,544.19, all but \$5 was assessed upon abutting property owners.

The act requires a just and equitable assessment of the cost upon all the owners of lands fronting on the improvement which are peculiarly benefited thereby, in proportion as nearly as may be to the advantage each shall be deemed to acquire. Gen. St. p. 625, § 804. We cannot doubt that both churches and factories, and perhaps the rail-

road, are benefited in their use, if not in the market value of the properties, by the construction of the sewers. *Paterson and Hudson River Railroad Co. v. Passaic*, 54 N. J. Law, 340, 23 Atl. 945; *Erie Railroad v. Paterson*, 72 N. J. Law, 83, 85, 59 Atl. 1031.

The suggestion that some of these properties are not benefited, because they already have private sewers discharging into the Maurice river, cannot be entertained, especially in view of the recent legislation having in view the protection of rivers from pollution.

Since substantially the whole cost, as far as the statute permitted its assessment at all, was assessed upon certain properties including the prosecutor's, to the exclusion of others, the result is injurious to him, and cannot be sustained. *Schlapfer v. Town of Union*, 53 N. J. Law, 67, 20 Atl. 894.

There is another error in the proceedings. By the act of February 19, 1895 (P. L. 1895, p. 95; Gen. St. p. 2138), it is provided that, where sewers may be constructed forming part of a general system of sewerage, it shall and may be lawful to assess benefits, not only upon the land fronting on the line of the sewer, but also upon all lands throughout the entire sewerage area in the municipality. The language of the act is in form permissive, but our courts have held that a similar statute of 1887 was mandatory. *Central Land Co. v. Bayonne*, 56 N. J. Law, 297, 28 Atl. 713. The constitutionality of the act of 1895 was sustained in *Vreeland v. Bayonne*, 60 N. J. Law, 168, 37 Atl. 737. Since that decision the practice seems to have been to proceed under that act. *Brown v. Town of Union*, 62 N. J. Law, 142, 40 Atl. 632; *Seamen v. Camden*, 66 N. J. Law, 516, 49 Atl. 977; *Camp v. Neuscheler*, 67 N. J. Law, 21, 50 Atl. 597; *Butler v. Montclair*, 67 N. J. Law, 426, 51 Atl. 494. *Brown v. Town of Union* was affirmed in 65 N. J. Law, 601, 48 Atl. 562, and the court said: "The manifest intent of that act (of February 19, 1895) is that, whenever sewers are constructed in any municipality at public expense, and special benefit accrues therefrom to private lands within the corporate limits, an assessment for the benefit shall be imposed on such lands, and the act prescribes constitutional regulations for the levying of such an assessment."

Since the act of 1895 is constitutional, general, and mandatory, sewer assessments in all cities must be made in conformity with its provisions, as was said of the older act in *Central Land Co. v. Bayonne*, unless it has been repealed or is inapplicable to the present case.

It is argued that it is repealed by the act of March 14, 1895 (P. L. 1895, p. 298; Gen. St. p. 631, § 842), and the act of 1906 (P. L. 1906, p. 414). This contention cannot prevail. The only effect of the act of March 14, 1895, is to enable a city to provide by ordinance for the appointment of commissioners

of assessment, instead of having them appointed by the circuit court. The only effects of the act of 1906 are to provide for the appointment of a special officer to collect assessments, to enable the common council to regulate the rate of interest, and to extend the time for the commissioners to report. None of these amendments conflict with the provisions of the act of February 19, 1895, that require the assessment for benefits to be coextensive with the drainage area. An assessment may be levied under the act of 1890, and yet in accordance with the rules prescribed in the act of February 19, 1895. *Camp v. Neuscheler*, 67 N. J. Law, 21, 50 Atl. 597. Even the provision of section 22, which makes the assessment a lien from the confirmation of the report, is not necessarily inconsistent with the provision of the act of 1895, which postpones the collectibility of the assessment. It has been held that, where the statute so provides, the lien may attach at the time of making the improvement, although, of course, the amount could not then be ascertained. *Hartshorn v. Cleveland*, 52 N. J. Law, 473, 19 Atl. 974, affirmed 54 N. J. Law, 391, 25 Atl. 963. That there is no necessary connection between the time when the lien attaches and the time when the amount is collectible is shown by the common provision making the assessment payable in installments. Moreover, both sections, 22 and 24, were in the original act of 1890, and the amendments of March 14, 1895, and of 1906 are to be read into that act. The mere amendment of these sections does not indicate a legislative intent to repeal the general scheme established by the act of February 19, 1895.

The act of 1906 (P. L. 1903, p. 156) relates only to the special case where an assessment for a lateral sewer has been confirmed prior to the confirmation of the assessment for the trunk sewer or the intermediate connecting sewer. The act of 1904 (P. L. 1904, p. 88) applies only to extensions of sewers and sewer systems. Neither act has any bearing upon the present case.

It is further argued that the act of February 19, 1895, applies only to the main outlet sewer, and that, since the cost of that sewer was assessed upon the city at large, the prosecutor cannot complain on that ground. This argument is based upon a misreading of the act of 1895. That act is not limited to the main outlet sewer, but extends to all main, trunk, or intercepting sewers, and the provision for assessment upon lands fronting on the line thereof makes it clear that something more than a mere outlet sewer was intended. In every system of sewerage, some sewers must be main or trunk sewers carrying not only the sewage of buildings along the immediate line, but receiving also the discharge of other sewers. The main or trunk sewers are necessarily larger and more expensive, and the object of the act of 1895 was to distribute the addi-

tional expense among those who profited by it. It would be manifestly unjust to charge property along the line of a main or trunk sewer with the additional expense caused by the necessity of carrying the sewage of other property, and it would be almost as clear an injustice to put the burden of this expense upon the general tax levy in case of the property of which the existing needs made necessary, or the probable future needs made advisable, the additional expense.

We think the assessment in this case was not in accordance with the statutory provisions, and it must therefore be set aside, with costs.

Since the property is subject to assessment for the sewers, it is the duty of the court, under the act of 1881 (Gen. St. p. 3404, § 547), to make a proper assessment. In order that the city may have an opportunity to apply to the court for the purpose, judgment must not be entered, except upon two days' notice to the city authorities.

(76 N. J. L. 25)

MUNDY v. BOARD OF WATER COM'RS OF PERTH AMBOY.

(Supreme Court of New Jersey. June 10, 1907.)

MUNICIPAL CORPORATIONS — MUNICIPAL BOARDS—PROCEEDINGS—REVIEW BY COURTS.

If a municipal board on whom powers of condemnation have been conferred by the Legislature resolves to acquire land by purchase at a price greatly in excess of its market value, such resolution will be set aside as unreasonable and improvident; the power of eminent domain having been conferred to meet just such junctures.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, § 623.]

(Syllabus by the Court.)

Certiorari by John L. Mundy to the board of water commissioners of Perth Amboy to review a resolution. Resolution set aside.

Argued February term, 1907, before GARRISON, SWAYZE, and TRENCHARD, JJ.

Adrian Lyon, for prosecutor. Charles C. Hommann and Willard P. Voorhees, for water commissioners. George S. Silzer, for defendants Fountain.

GARRISON, J. The resolution adopted by the board of water commissioners of the city of Perth Amboy for the purchase of 32½ acres of land at Runyon pumping station for the sum of \$15,500 should be set aside.

The testimony shows that from recent sales, and even from a recent purchase of substantially similar land by this board, it should reasonably have been apprehended that the fair market value of the tract of 32½ acres would not exceed \$1,000.

The board has had conferred upon it by the Legislature the power of condemnation to meet just such a situation as this. Under these circumstances the failure of the board to have recourse to proceedings in condemnation in view of the excessive purchase price

demand is an unreasonable and improvident exercise by the board of the powers conferred upon it.

The resolution is set aside.

(73 N. J. Eq. 219)

CONTINENTAL COMPRESSED AIR CO. v. FRANKLYN.

(Court of Chancery of New Jersey. April 19, 1907.)

1. INJUNCTION—SUBJECTS OF RELIEF—ACTION AT LAW—ADEQUATE LEGAL REMEDY.

A garnishee by a statutory plea denying indebtedness to the defendant in attachment being entitled to raise the question at law whether the defendant in attachment could lawfully exercise an option in a contract to declare the contract void, and thus discharge the garnishee's obligation to make payment under the contract, the garnishee was not entitled to maintain a bill to enjoin the proceedings at law in order to obtain a determination of such question in equity.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Injunction, §§ 15, 24.]

2. SAME—EQUITY—EXERCISE OF POWERS—TIME.

The remedial powers of a court of equity to enforce by injunction equitable rights which cannot be enforced at law may be exercised after, as well as before, judgment at law.

Bill by the Continental Compressed Air Company against Claude S. Franklyn for an injunction to restrain an action at law. Denied.

Defendant issued an attachment against the Taylor Hydraulic Air Compressed Company, Limited, and served notice of garnishment on complainant. The defendant in attachment appeared, and at trial judgment was rendered against it for the amount of the debt for which the attachment was issued. Action by *scire facias* is now pending by defendant against complainant for the recovery of an indebtedness alleged to have been due from complainant to the defendant in attachment at the time of the garnishment. The bill now filed by complainant seeks to restrain the pending action. The demand for equitable relief is based upon the claim that the statutory plea which complainant is required to file in the pending action at law is insufficient to fully protect its rights. The bill alleges that the supposed debt which was garnished was money then due from complainant to the defendant in attachment under a certain written contract, in which contract the right was given to the defendant in attachment to exercise the option, in the event of a default of payment, to declare the contract void and return certain moneys already paid, and that such option was exercised by the defendant in attachment after the attachment was issued and the garnishment made.

John Meirs, for complainant. Harvey F. Carr, for defendant.

LEAMING, V. C. (after stating the facts). I am unable to recognize equitable jurisdiction

in this cause. Where a court of law can do as full justice to the parties and to the matter in dispute as can be done in equity, this court will not stay the proceedings at law. The suggestion of equitable jurisdiction in this cause is based upon the claim that the statutory plea of complainant as garnishee, to the effect that it is not indebted to the defendant in attachment, is inadequate to enable complainant to disclose and avail itself of the conditions stated in the bill. It seems manifest that there can be no foundation for that claim. That statutory plea is treated by the courts as substantially a general issue and as sufficient to enable the court to fully determine the rights of the parties. *Welsh v. Blackwell*, 15 N. J. Law, 55, 58. With that breadth given to the statutory issue at law, it necessarily follows that, in determining whether the defendant in attachment could lawfully exercise the option to declare the contract void and thus discharge complainant's obligation as garnishee to make the payments named in the contract, the law court will be controlled by the same principles which would control this court in the determination of the same question.

While I am entirely clear that complainant has no rights which may not be fully protected in the pending action at law, it may not be inappropriate to add that, should it transpire that equitable rights do exist which the law courts are unable to enforce by reason of limitations incident to their procedure or rules of action, the remedial powers of this court may be extended to such conditions as well after as before judgment.

The injunction now sought will be denied.

(74 N. J. L. 445)

DORAN v. THOMSEN.

(Supreme Court of New Jersey. May 23, 1907.)

1. NEGLIGENCE—USE OF AUTOMOBILE BY THIRD PERSON—LIABILITY OF OWNER.

An owner of a vehicle is not liable for an injury caused by the negligent driving of a borrower, if it was not used at the time in the owner's business.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, § 140.]

2. MASTER AND SERVANT—TORTS OF SERVANT—LIABILITY OF MASTER.

A master is ordinarily liable to answer in a civil suit for the tortious act of his servant, if the act be done in the course of his employment in his master's service. Whether so done or not must depend upon the facts of each particular case.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 1226-1228.]

(Syllabus by the Court.)

Action by Patrick Doran against Hugo A. Thomsen. Demurrer to declaration sustained as to the first and third counts and overruled as to the second count.

Argued November term, 1906, before HEN-DRICKSON, SWAYZE, and TRENCHARD, JJ.

Willard W. Cutler, for plaintiff. Collins & Corbin, for defendant.

TRENCHARD, J. The declaration contains three counts, the first of which alleges that the defendant was the owner and possessor of a certain motor vehicle, capable of being run upon the public highway at the speed of 60 miles an hour, and it thereby became the duty of the defendant to use due care in the management and control thereof, "and to only allow careful, experienced, and competent persons to operate, propel, and run the said motor vehicle, and in such way and manner and at such a rate of speed as to keep the same within safe and proper control." The breach alleged is that the defendant negligently consented and allowed the vehicle to be run along the public highway by an inexperienced, careless, and incompetent person, well knowing the person to be incapable of safely operating the vehicle, and by the negligence of such person it was run at such a high rate of speed, to wit, 60 miles an hour, and in such a careless manner, as to run over the plaintiff while upon the public highway, causing the injury of the plaintiff.

The second count alleges that the defendant possessed and had under his control a motor vehicle, capable of being run along the public highways at a speed of 60 miles an hour, to the great danger of the plaintiff and all other persons lawfully using the highways; that it was the duty of the defendant to use due care in the use and control of the same while being operated upon the public highways to avoid running into the plaintiff and other persons lawfully using the highways, and to keep the same within proper control and to run at no greater speed than authorized by law; that defendant disregarded these duties and did "negligently direct, consent, and allow the said motor vehicle so in his possession and control to be operated by a member of his family, and the said motor vehicle was then and there so carelessly, negligently, and improperly operated, propelled, and run by a member of defendant's family, for the said defendant, and without regard to the safety of the said plaintiff" and other persons using the highway, at such a high rate of speed that it was not under the control of the person so operating the same for the defendant, and through the negligence of such person ran into the plaintiff, who was walking upon the highway, causing the injury complained of.

The third count is substantially the same as the first, with this difference, however, that it alleges that the defendant carelessly allowed his daughter, "an inexperienced, careless, and incompetent person," to operate the vehicle in such manner as not to have it under proper control, well knowing that it was operated by his daughter, and that she

was inexperienced and incompetent, and defendant "utterly failed and neglected to take any means to prevent the said motor vehicle from being so operated by his said daughter."

The defendant has demurred separately to each count, and assigns, among others, the following grounds: First, that none of the counts show that the motor vehicle was at the time of the accident under the control or management of the defendant, or that the person driving it was under the control of the defendant, or that the relationship of master and servant existed between the defendant and the driver; second, that the counts allege liability of the owner for the negligence of a bailee.

The first and third counts plainly disclose no cause of action. They are apparently based upon the erroneous assumption that, because the defendant loaned his motor vehicle to some one over whom he had no direction or control at the time of the accident, he shall be held liable for the mere loaning. But no such liability rests upon him. An owner of a vehicle is not liable for an injury caused by the negligent driving of a borrower, if it was not used at the time in the owner's business. *Herlihy v. Smith*, 116 Mass. 265; *New York, etc., R. Co. v. New Jersey Electric R. Co.*, 60 N. J. Law, 338, 38 Atl. 828, affirmed 61 N. J. Law, 287, 41 Atl. 1116, 43 L. R. A. 849. These counts contain no allegation that the vehicle was used at the time in the owner's business; nor is there any allegation therein that the vehicle was under the control or management of the defendant, or that the person driving it was under the control of the defendant, or that the relationship of master and servant existed between the defendant and the driver.

The second count, however, although loosely drawn, we think may stand. It alleges that the defendant did negligently direct, consent, and allow the motor vehicle to be operated by a member of his family, and that, while such person was operating the same for the defendant, the accident was caused by the carelessness, negligence, and incompetency of the person so operating the same. It in effect avers the relationship of master and servant, and that the accident was caused by the negligence of the servant while operating the motor vehicle for the master. There is, perhaps, no rule of law more firmly settled than that a master is ordinarily liable to answer in a civil suit for the tortious act of his servant, if the act be done in the course of his employment in his master's service. Whether so done or not must depend upon the facts of each particular case. *Aycrigg v. New York & Erie Railroad*, 30 N. J. Law, 460.

The demurrer to first and third counts is sustained, and to the second count is overruled.

(72 N. J. Eq. 313)

BARTON et al. v. SLIFER.

(Court of Chancery of New Jersey. April 18, 1907.)

1. COVENANTS—USE OF LAND—BUILDING RESTRICTIONS—WHO MAY ENFORCE.

Where an owner of land lays it out into streets and lots, and adopts a restrictive covenant as to the building line, and inserts the covenant in all deeds as an exaction from all purchasers for the benefit of each, the equitable right to enforce the covenant inures to each purchaser, irrespective of when he purchased.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Covenants, §§ 50, 78.]

2. INJUNCTION — BREACH OF RESTRICTIVE COVENANT—USE OF LAND—SUFFICIENCY OF BILL.

Complainants showed a right to enforce a restrictive building covenant, where their bill averred the purchase of the original tract of land by an association, its subdivision into lots, the adoption of a general building scheme to secure an unobstructed view, etc., to the lot purchasers, the adoption of the restrictive covenant, and its insertion in all deeds made by the association.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Injunction, §§ 223-242.]

3. COVENANTS — USE OF LAND — BUILDING LINES—LOSS OF RIGHTS.

Where the deeds to all lots in a town contained a uniform restrictive building covenant, complainants' right to enforce it against a neighboring owner was not lost because there had been several violations of the covenant, where the violations in no substantial way affected their property, and did not show any intention to abandon the general plan in the district wherein the parties' property was located.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Covenants, §§ 50, 120.]

4. INJUNCTION — RESTRICTIVE COVENANTS — BREACH—BUILDING LINES—LACHES.

Complainants were not estopped by laches to enforce a restrictive building covenant, where when defendant attempted to violate it, they promptly notified the foreman of the work that their rights were being violated, and where a bill was thereafter filed as quickly as it could be procured.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Injunction, § 199.]

Bill for injunction by Charles S. Barton and another against Levi K. Slifer. Preliminary injunction advised.

The bill is filed by complainants to restrain defendant from the erection of a building in violation of the following restrictive building covenant:

"And also under and subject to the express conditions and restrictions that no building of any description whatever shall at any time be erected within ten feet of the front line of said avenue, nor within four feet of the side lines of said lot (excepting where a party may own two or more contiguous lots, then a building may be erected on any part of the lot or lots the owner thereof may desire, without regard to the intervening line or lines, provided the same is not built within four feet of the outside lines of said lots, nor within ten feet of the front lines thereof), and also that no building, or any part thereof, erected upon the said lot or lots, shall be used or occupied as a livery or

sales stable, dye-house, bone-boiling or skin-dressing establishment, soap, candle, glue, starch, lamp-black, poudrette or fish-guano manufactory, slaughter-house, piggery or tannery. Nor shall any building be used or occupied as a drug store, without the written consent of the said party of the first part hereto."

The act sought to be enjoined consists of the violation of that part of the covenant prohibiting the erection of a building within four feet of the side line of defendant's lot.

In the year 1879 the tract of land which now comprises Ocean City, Cape May county, was a wild beach and was purchased by the Ocean City Association, and laid out in streets and lots with a view to the establishment of a Christian seaside resort. To that end the covenant in question, with other covenants, was adopted by the association and inserted in all deeds made by it as a part of a general scheme adopted by it for the benefit of the entire tract, with the purpose of securing, among other things, a space of at least eight feet between all buildings to afford light, air, view, and fire protection.

The lot now owned by complainants was conveyed by the Ocean City Association to John C. Lake by deed dated February 3, 1885. The lot now owned by defendant was conveyed by the Ocean City Association to Jacob B. Graw by deed dated July 21, 1886. The deed held by defendant expressly recites that the conveyance is subject to the operation of the covenant above referred to.

The northeasterly line of Ninth street forms the southwesterly side line of the two lots in question, and the lot owned by defendant is next oceanward of that owned by complainants.

A building has been erected on the lot owned by complainants, and that building is located on the lot in conformity to the requirements of the covenant. The proposed building of defendant, if erected of the width intended, will operate to obstruct the view and air to complainants' lot to a greater degree than would be the case if the building should be erected in conformity to the restrictive covenant.

This cause has been heard at the return of an order to show cause for a preliminary injunction on amended bill and affidavits and answering affidavits.

Bourgeois & Sooy, for complainants.
Thompson & Cole, for defendant.

LEAMING, V. C. (after stating the facts). When an owner of a tract of land lays it out into streets and lots and adopts a restrictive covenant of the nature of the one now in question, with a view to secure the defined conditions named in the covenant for the benefit of the entire tract which he seeks to develop, and inserts the covenant in all deeds as a part of the defined scheme and as an exaction from all purchasers for the ben-

eff of each purchaser, the equitable right to the enforcement of the covenant enures to each purchaser, irrespective of the time of his purchase. Under the conditions named the benefit to be derived from the covenant as a part of the general scheme necessarily enters into the consideration of each purchase, although the covenant may, in terms, only bind each purchaser and his heirs and assigns.

It is urged on behalf of defendant that the present amended bill and annexed affidavits do not afford sufficient evidence of the conditions above stated to warrant the issuance of the preliminary writ sought. While the amended bill and affidavits annexed to it are not as explicit in details as might be desired, I entertain the view that the averments are sufficient to bring complainants' case within the rule stated. The amended bill shows the purchase of the original tract by the Ocean City Association and its subdivision into lots for sale, and the preparation and filing of a map showing the lots thus defined and the adoption by that corporation of "a general building scheme for the purpose of securing the unobstructed view and light and air," and the adoption of the restrictive covenant now in question and the insertion of that covenant in all deeds which have been executed by the corporation. The affidavit of S. Wesley Lake, annexed to the amended bill, sets forth that the corporation was organized for the establishment of a Christian seaside resort, and that the corporation inserted the covenant in question in all deeds made by it in order that the place might be more desirable as a place of residence, and that the object of the corporation was to make it impossible for the city to be built up solid and to secure a space of eight feet between all buildings for the circulation of air and the preservation of view and fire protection for the enjoyment of all people, and that over 7,000 lots have been sold by the corporation, and that no lot has been sold without the covenant in question being embodied in the deed of conveyance. None of these averments are controverted.

It is also contended on behalf of defendant that there has been such a departure from the general scheme designed to be preserved by the restrictive covenant as to amount to a waiver of the right to its enforcement.

The record discloses that the territory extending from Eighth to Ninth street, in Ocean City, has in recent years become the business portion of the city. In that territory the covenant in question has been frequently violated. Some 12 buildings have been there erected in disregard of the covenant, some as to the front building line and some as to the side lines. But the amended bill alleges that the territory extending southwesterly from Ninth street to Fourteenth street and from the ocean to the bay, in which territory there are now 380 buildings, of which 830 are resi-

dences, is essentially the residential portion of the city, and that in that territory the covenant has been preserved. The side lines of the lots in question are on Eleventh street, which street runs northwesterly and southeasterly from the ocean to the bay, and is approximately the center of the territory referred to in the bill as the residential portion of the tract. The answering affidavits point out six buildings within the territory between Ninth and Fourteenth streets which are claimed to be located contrary to the requirements of the covenant. One of these is on Ninth street and another on Asbury avenue near Ninth street. These two buildings are approximately two blocks distant from complainants' lots, and are on other streets and are adjacent to the territory which has been referred to as the business section of the city, and it is manifest that any violation of the covenant occasioned by these two buildings in no way affects the desirability of complainants' property. A third building referred to as between Ninth and Fourteenth streets is the Steward building, which building is located on the east corner of Twelfth street and Asbury avenue. It is averred that the porch posts of that building are flush with the side line of Twelfth street. As to this building, it may be said that it is by no means certain that the location of the porch posts as pointed out operates as a violation of the covenant. But, without determining that question, it will be observed that the location of the Steward building, like the two buildings already referred to, is on streets other than that on which complainants' property is located, and is more than a block distant, and in no way affects the desirability of complainants' property. The fourth building pointed out by defendant's affidavits is at Twelfth street and Asbury avenue. This, like the other properties already referred to, is too distant from complainants' property to in any way affect its desirability. The fifth violation of the covenant referred to as within the residential district is one now under construction at Eleventh street and Bay avenue, which building is being erected on the line of Eleventh street. The map filed by defendant does not disclose Bay avenue. It is evident that this structure must be many blocks distant from complainants' property. The sixth violation of the covenant referred to as within the territory defined as residential is a building occupied by N. C. Clelland, which is situated on the corner of Eleventh street and Asbury avenue. This building fronts on a street in which complainants are not interested, but the side of the building is on the opposite side of the same street on which complainants' property is located, and one block oceanward thereof.

It is pointed out that the front of this building violates the covenant in question, and that at the side of the residence portion of the building brick steps lead from the building to the side line of the street, and the

porch encroaches on the building line. Complainants' property is in no way affected by the front encroachment, and, while the porch and steps at the side of the building may operate to violate the covenant, it is manifest that any violation there may be is trivial in its nature.

This review of the testimony is made necessary to intelligently determine whether complainants' right to enforce this covenant against defendant has been lost. From the review it will be observed that there have been no violations of the covenant which have in any substantial way affected the property of complainants, and but two possible violations upon the streets on which complainants' lot is situated, and that but six violations of the covenant are alleged within a district in which 380 buildings are erected.

I think it clear that the equitable right of complainants to enforce this restrictive covenant has not been lost. Even though it should be conceded that the 12 violations of the covenant which have been permitted in what has been defined as the business district northeasterly of Ninth street has amounted to an abandonment, in that district, of the original scheme designed to be preserved by the covenant, it does not follow from that fact that the right to the enforcement of the covenant for the preservation of the original scheme in a separate district where essentially different conditions prevail has been lost. Changing conditions, such as the growth of business interests, may well modify the needs of one portion of a city to such an extent as to induce the abandonment of the general plan as to that portion without any intentional abandonment of the plan as to territory where other and radically different conditions prevail. In this view I am unable to regard the breaches of the covenant in the territory northeasterly of Ninth street as evidence of an intention to abandon the preservation of the general plan in the residential portion of the city referred to.

As to the territory southwesterly of Ninth street, which has been defined as the residential district, I entertain the view that the six violations of the covenant pointed out by defendant cannot be considered as sufficient evidence to indicate the abandonment of the original plan in the district where nearly 400 buildings have been erected in conformity to the plan. The extremely small percentage of the breaches of the covenant which defendant has pointed out rather tends to the establishment of the fact that it has been the defined purpose of the property holders in that district to adhere to the preservation of the original plan sought to be preserved by the covenant.

I think it also clear that the equitable right of complainant to the enforcement of the covenant in question is not impaired by isolated breaches of the covenant in locations where such breaches can in no way be said to affect the desirability of complainants' prop-

erty. It is not to be expected that the courts will be appealed to for the preservation of the general scheme in localities where a complainant is without interest. It is only when the interest of a property owner is affected that, in my judgment, he can be reasonably charged with the duty of applying to the court for the preservation of the general scheme. This view is forcefully expressed by Vice Chancellor Emery in *Morrow v. Hasselmen* (N. J. Ch.) 61 Atl. 369, 371, and I concur in the conclusions there stated by the learned Vice Chancellor.

It is also claimed on behalf of defendant that complainants are in laches in permitting the building of defendant to become partially erected before the bill was filed. I think complainants have done all that can be reasonably required of them. Defendant is not a resident of this state.

Complainants promptly gave notice to the foreman of the work that their rights were being violated, and the bill was thereafter filed as quickly as it could be procured.

A preliminary injunction will be advised in accordance with the prayer of the amended bill.

(75 N. J. L. 175)

FIVE-MILE BEACH LUMBER CO. v. FRIDAY et al.

(Supreme Court of New Jersey. June 10, 1907.)

CERTIORARI—WHEN LIES—REVIEW OF ORDER OF COURT.

Certiorari will not lie to review an order of the circuit court in an ordinary action to enforce a mechanic's lien, since the court is a constitutional court of record of general jurisdiction proceeding according to the course of the common law.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Certiorari, §§ 20, 23, 27.]

(Syllabus by the Court.)

Application of the Five-Mile Beach Lumber Company against Mary E. Friday and others for writ of certiorari. Rule to show cause. Denied.

Argued February term, 1907, before GARRISON, SWAYZE, and TRENCHARD, JJ.

Bleakly & Stockwell, for the rule. Matthew Jefferson, James M. E. Hildreth, and French & Richards, opposed.

SWAYZE, J. After a trial of this case in the Cape May circuit, the defendant obtained a rule for a new trial reserving exceptions. Upon the argument, the plaintiff learned that the only reasons relied upon were the alleged errors covered by the exceptions that had been reserved. Thereupon the plaintiff, relying upon the decision of this court in *Holler v. Ross*, 67 N. J. Law, 60, 50 Atl. 342, moved to dismiss the rule. Instead of granting the motion, the court amended the rule by eliminating the reservation of exceptions, the benefit of which the defendant waived, and then granted a new trial. It is this order

which the plaintiff now seeks to review by certiorari.

The circuit court is a constitutional court of record, having general jurisdiction over common-law actions *inter partes* and proceeding therein according to the course of the common law. As such its orders are reviewable, not by certiorari, but by writ of error, and only after final judgment. *Taylor Provision Co. v. Adams Express Co.*, 72 N. J. Law, 220, 65 Atl. 508.

The proceedings in an action to enforce a mechanic's lien proceed according to the course of the common law. The statute expressly enacts that the practice, proceedings, and pleadings thereon shall be conducted, and the judgment entered, as in suits in said circuit court to recover money due on contract. The regular method of review is by writ of error. Numerous instances are to be found in our Reports. It is sufficient to cite a few of the more recent. *Barnaby v. Bradley & Currier Co.*, 60 N. J. Law, 158, 37 Atl. 764; *Naylor v. Smith*, 63 N. J. Law, 596, 44 Atl. 649; *Ennis v. Eden Mills Paper Co.*, 65 N. J. Law, 577, 48 Atl. 610; *Murphey-Hardy Lumber Co. v. Nicholas*, 66 N. J. Law, 414, 49 Atl. 447; *Turner v. Wells*, 67 N. J. Law, 572, 52 Atl. 358; *Buckley v. Hann*, 68 N. J. Law, 624, 54 Atl. 825; *Smith v. Collopy*, 69 N. J. Law, 365, 55 Atl. 805. So uniform a practice indicates that the method of reviewing proceedings in suits to enforce mechanics' liens is the same as in any common-law action in the circuit—by writ of error after final judgment, and not by certiorari.

If it were in our power to award the writ, we ought not to do so in this case. The circuit court has control of its own rules and may correct any inadvertence or mistake therein. 1 *Tidd's Practice* (3d Am. Ed.) *506.

The motion is denied, with costs.

(76 N. J. L. 109)

GRANT v. ANCIENT ORDER OF FORESTERS.

(Supreme Court of New Jersey. June 10, 1907.)

MANDAMUS—TO FRATERNAL ORDER—REMEDY WITHIN ORDER.

Application was made to this court by a subordinate branch of a fraternal organization for a writ of mandamus to compel the reinstatement to membership in the parent body of the subordinate branch, which had been suspended by the chief officer of the organization under its rule, with the approval of the executive council after a hearing, and it appearing that no property rights or money demands were involved, and that the applicant had not first exhausted his right of appeal to the appellate body within the organization, it was held that the writ of mandamus must be denied.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Mandamus, § 259.]

(Syllabus by the Court.)

Application by the state, on the relation of Richard Grant, for writ of mandamus to the Ancient Order of Foresters. Application denied.

Argued February term, 1907, before FORT, PITNEY, and HENDRICKSON, JJ.

Cornelius Doremus and William H. Galloway, for Grant. A. C. Hart, for the Foresters.

HENDRICKSON, J. This is an application for a mandamus requiring the defendant corporation, a fraternal organization, to revoke the order of suspension of Court Manhattan No. 8,483 and its officers and members from membership in the defendant the parent body, and to reinstate such subordinate court to full membership therein. The suspension was summarily ordered by the high chief ranger, the chief officer of the organization, on March 23, 1906, on the ground that Court Manhattan did on March 9, 1906, permit one McNulty, a suspended member of the court, to sit in the sessions of the court and participate in its business, well knowing that he had been suspended. Subsequently a hearing was given to the suspended court before the executive council in New York City, which body sustained and continued the suspension. The relator claims that the suspension was irregularly made, and that the alleged hearing before the executive council was so irregularly and unfairly conducted that the proceeding is void. The defendant denies this, and raises, in limine, an objection to this court's taking action upon the application, on the ground that, before its interference can properly be invoked, the suspended court must first exhaust its remedy by an appeal to the superior bodies of the organization, where such an appeal may be had under its rules. Manifestly, we should dispose of this objection before taking up the merits of the complaint. The case shows that, under the rules of the organization, there is a right of appeal to the subsidiary high court, which will meet in September next, and from the decision of the latter there may be an appeal to the supreme high court. It should be stated that this is not a case involving property rights or money demands, but involves a question of discipline only. While the case shows that the high court has a sick and funeral benefit department, the subordinate courts cannot participate in it, unless they are connected with that department by becoming contributors to that fund. Court Manhattan was not connected with that department, but had its own beneficial department as allowed by the rules. In such a situation, the law is settled that ordinarily the appeal must be first taken within the organization, before recourse can be had to the civil courts. *Zelliff v. Knights*, 53 N. J. Law, 536, 22 Atl. 63. The relator contends that this principle should not be applied to his application, on the ground that the irregularity of the hearing was so marked that no testimony or minutes were taken and hence there was no record upon which to appeal. But the case

shows that the relator and his witnesses were examined in the presence of the council, and that there were some minutes kept of the proceedings, and it cannot be said that the action of the council was void for want of jurisdiction. It is presumed that the appellate body within the organization will do justice between the parties. *Zelliff v. Knights*, supra. So that in the present status of this controversy we are impelled to decline to take cognizance of it.

The application for a mandamus must be denied, with costs.

MANNING v. FALLON.

(Supreme Court of New Jersey. June 10, 1907.)

MONEY RECEIVED—GROUNDS FOR ACTION.

Where plaintiff gave defendant money for the purpose of purchasing a saloon for him, and defendant purchased a saloon with the money, but took possession thereof himself, operating it and receiving the proceeds, and refused plaintiff possession, plaintiff was entitled to recover the amount he had given defendant in an action as for money had and received.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 35, Money Received, § 27.]

Action by William B. Manning against John J. Fallon. On rule to show cause. Rule discharged.

Argued February term, 1907, before FORT, HENDRICKSON, and PITNEY, JJ.

Herrman & Steelman, for plaintiff. Manning & Atkinson, for defendant.

FORT, J. This was a suit brought to recover \$740 which the plaintiff alleged he gave to the defendant for the purpose of purchasing a saloon for him in Jersey City. The defendant did purchase a saloon and used his plaintiff's money for that purpose, but the defendant took possession of the saloon himself, operated it, received the proceeds, and refused to let the plaintiff have the saloon, and finally ejected him from it. Plaintiff then brought this action against the defendant as for money had and received. There was a verdict for the plaintiff, and, we think, rightly.

There was no error in the charge of the court, or in the admission of evidence.

The rule to show cause is discharged.

(72 N. J. Eq. 661)

WOOD et al. v. LEMBCKE et al.

(Court of Chancery of New Jersey. May 9, 1907.)

WILLS—CONSTRUCTION—CREATION OF POWER—CONVEYANCE BY EXECUTOR.

A testatrix, after appointing an executor, directed the payment of her debts, and then blended her real and personal estate, giving to four children each one-sixth, to another child one-sixth less \$800 charged as an advancement, and the remainder to the executor in trust for another child. Held, that the executor had authority to convey real estate, since to make the division and establish the trust a sale of the real estate was necessary.

Suit by Orlando Wood, executor of Almira L. Wood, deceased, and others, against Maria Lembcke and another. Decree directed for complainants.

Willard P. Voorhees, for complainants. W. Edwin Florence, for defendants.

BERGEN, V. C. The last will and testament of Almira Wood, deceased, after appointing her son Orlando Wood executor, and directing that all of her debts be paid, reads as follows: "Third, I give and bequeath unto my six children as follows: John E. Wood, Orlando Wood, Phillip H. Wood, and Almira M. Dunham, each to have and to hold one-sixth part equally each of all that I may die possessed, either real or personal as to the remainder having advanced Ambrose Wood, Eight Hundred Dollars, he is to have one-sixth part less the amount of Eight hundred Dollars, and as to the remaining one-sixth part of all I may die possessed of, I do order to be given in trust to Orlando Wood for the use of Mortimer Wood to be paid to the said Mortimer Wood as his necessities may seem to require." Since the death of the testatrix the executor named in the will and all of the children and legatees of the testatrix entered into a written agreement with the defendants, by the terms of which they agreed to convey to the defendant certain real estate of which the testatrix died seised, and the defendants bound themselves to purchase. The defendants having refused to comply with the agreement, upon the ground that the will did not confer upon the executor any power of sale, the bill in this cause was filed to compel the specific performance of the contract of sale by the defendants. The only question raised which it is necessary to determine is that the executor is not vested, either expressly or by implication, with a power of sale, and therefore a marketable title is not offered.

The testatrix in and by her will appoints an executor to manage and settle her estate, and then, blending her real and personal possessions, gives to four of her children each a one-sixth part of the whole, to another one-sixth less \$800 charged as an advancement, and the remaining one-sixth to Orlando Wood, the executor, in trust for the use of another son. It thus appears that the testatrix intended an equal division of her entire estate, real and personal. What one-sixth would amount to, after the payment of debts, can only be ascertained after the executor has fulfilled the duties of his office and settled his final account, to determine which there must be a sale of all the real and personal estate, for the testatrix has by her will blended the two kinds of property into a common fund. It is a part of the duty of the executor to make the division required by the will and to hold at least one share in trust. "If the executor is directed by the will, or bound by law, to see to the application of the proceeds of the sale, or if the

proceeds, in the disposition of them, are mixed up and blended with the personalty, which it is the duty of the executor to dispose of and pay over, then a power of sale is conferred on the executor by implication." *Lippincott's Ex'r v. Lippincott*, 19 N. J. Eq. 121. The proceeds of this estate will, under this will, have to pass through the hands of the executor in the form of money. To make the division and establish the trust requires a sale of the land; and, although a power of sale is not expressly given, it arises under the circumstances existing in this case by implication.

The result, therefore, is that the objection made by the defendant is not well founded; and, there being no other reason offered why this contract should not be specifically performed, it will be so decreed.

(73 N. J. Eq. 841)

UNITED STATES FIDELITY & GUARANTY CO. v. CITY OF NEWARK et al.

(Court of Chancery of New Jersey. May 18, 1907.)

1. MUNICIPAL CORPORATIONS—PUBLIC WORKS—CONTRACTOR'S LIEN—STATUTES.

P. L. 1892, p. 369, creating a lien on funds due public contractors for the benefit of laborers and materialmen, and providing for the enforcement of such lien, does not contemplate an action in the Chancery Court by the original contractor against the municipality.

2. SAME—NATURE OF PROCEEDING—SCOPE OF RELIEF.

P. L. 1892, p. 369, creates a lien on funds due municipal contractors for the benefit of laborers and materialmen, which sections 1 and 5 declare shall extend to the full extent of the claim or demand and to the extent of the liability of the contractor for the claim preferred. *Held*, that a proceeding to enforce such lien was a proceeding in rem limited to a determination of the lien claims against the contractors, and to the application of the funds due the contractors from the municipality to the extent necessary to pay such liens, or, if the fund is insufficient, then to distribute the same among the lienors pro rata.

3. SAME—CROSS-BILL.

In a suit to enforce a lien on an amount due a municipal contractor, given by P. L. 1892, p. 369, the court has no jurisdiction to entertain a cross-bill by the contractor's representatives for the purpose of an accounting between such representatives and the municipality.

Suit by the United States Fidelity & Guaranty Company against the city of Newark and others, in which Frederick W. Abbott, surviving partner of the firm of Stewart & Abbott, and James C. Stewart and Alexander Stewart, as executors and assignees of John L. Stewart, deceased, filed a cross-bill. On motion to strike such cross-bill. Motion granted.

Francis Child, Jr., and Herbert Boggs, for the motion. Sherrard Depue, opposed.

HOWELL, V. C. On August 15, 1901, the city of Newark entered into a contract with Stewart & Abbott for the construction of a reservoir at Cedar Grove in the county of

Essex. A portion of the work provided for therein was subcontracted a few days later to James Seme. Seme gave a bond to Stewart & Abbott conditional for the due performance of his subcontract, and the complainant, a Maryland corporation which is engaged in the surety business, became surety to Stewart & Abbott thereon. In June, 1903, Seme discontinued work under his subcontract, and thereupon, in pursuance of a condition in the bond, the surety company, with the assent of Stewart & Abbott, undertook to finish Seme's contract, and this they claim they have now fully performed. On December 10, 1904, Stewart & Abbott, so the bill claims, were indebted to the complainant for labor and materials furnished by it in the performance of the Seme contract in the sum of thirty-five thousand and odd dollars, which they refused to pay, and thereupon on that day it took steps under the municipalities lien law to obtain a lien on the moneys owing by the city of Newark to Stewart & Abbott. The bill alleges that at the time it was filed the city of Newark owed Stewart & Abbott several distinct and separate amounts of money arising out of the contract, which aggregated upwards of \$185,000. Some time in December, 1904, and, as the bill alleges, after the filing of the lien claim, the members of the firm of Stewart & Abbott transferred and assigned to James C. Stewart and Alexander M. Stewart the moneys due and to grow due under their contract. The bill claims that this assignment was subject to the complainants' lien claim. In the meantime John L. Stewart, a member of the firm of Stewart & Abbott, died, leaving a will by which he appointed Alexander M. Stewart and James C. Stewart as executors thereof. The defendants are (1) the city of Newark, (2) the board of street and water commissioners of Newark, (3) Frederick W. Abbott, surviving partner of Stewart & Abbott, (4) James C. Stewart and Alexander M. Stewart, assignees of Stewart & Abbott, (5) John C. Stewart and Alexander M. Stewart as executors of the will of John L. Stewart, deceased, (6) the Empire State Granite Company, another lienor. The prayer is for a decree adjudging the validity of the complainant's lien, and directing the city to pay over to the complainant the amount claimed therein out of the funds due or to become due from the city to Stewart & Abbott, or their assignees, with interest and costs.

The city of Newark and the board of street and water commissioners answered this bill, admitting the Stewart & Abbott contract, and stating upon information and belief the Seme subcontract and the suretyship of the complainant thereon, but neither admit nor deny the relations between Seme and the surety company, or between the surety company and Stewart & Abbott, and claim that they have no knowledge of the amount of money owing to the complainant by Stewart & Abbott. They deny that they have in hand the moneys

claimed in that behalf in the bill, but say that there would be considerable money due to Stewart & Abbott under their contract with the city if they had performed all their obligations thereunder; that they had incurred large penalties, and deductions from the contract price would have to be made; and that there would then be little if anything due to them on account of their contract. In the twelfth paragraph of the answer the city uses this language: "It submits to this court the question of how much if anything is due by the city of Newark or from the city of Newark to the said Stewart & Abbott, or to their assignee, or to this complainant, or to any person entitled to receive the same." An answer was also filed by Frederick W. Abbott, surviving partner, and James C. Stewart and Alexander M. Stewart, as executors and assignees. They admit the Stewart & Abbott contract, the Seme subcontract, the bond of Seme and the surety company, Seme's abandonment of the work, its performance by the surety company, the filing of the alleged lien, the indebtedness of the city of Newark in large amounts to Stewart & Abbott, the assignment of the moneys due to James C. Stewart, and Alexander M. Stewart claiming that the assignment was made before the filing of the lien claim by the complainant, but they deny that Stewart & Abbott were indebted to the complainant in the sum of \$35,000, or any other sum, or that the surety company acquired any lien upon any moneys due from the city of Newark; and they set out in detail the series of transactions and settlements between Stewart & Abbott and Seme and the surety company, and claim that the surety company is indebted to Stewart & Abbott, or the persons who now represent them, in a large amount of money. They then exhibit their cross-bill against the surety company, setting up the transactions between Stewart & Abbott and their representatives on the one hand, and Seme and the surety company on the other hand, and pray for an accounting of these transactions, and that the court may by its decree direct the surety company to pay to the answering defendants whatever may be found due on such an accounting.

This answer was subsequently amended by adding thereto at the conclusion of the cross-bill embodied therein another cross-bill separate and distinct from the one above mentioned exhibited against the city of Newark and the board of street and water commissioners and the surety company (the complainant), the object and purpose of which is to charge the city of Newark with a large amount of work as extra work in addition to that provided for in the original contract of 1901, the prayer being that an accounting may be taken of the moneys due from the city of Newark and the board of street and water commissioners to Stewart & Abbott's present representatives, and that a decree be made directing the city to pay them the amount

found due upon such an accounting, including interest. This cross-bill, however, admits and claims in paragraph 45 thereof that in addition to this claim for extra work which first appears in this cross-bill the city of Newark owes to Stewart & Abbott's representatives large sums of money due under said contract which have not been paid over by it, the exact amount of which is unknown to them, but which they believe to be upwards of the sum of \$132,000. There is no prayer in the bill for any discovery or other specific relief.

A motion is now made on behalf of the city of Newark under the 213th rule to strike this last-mentioned cross-bill from the files, for the following reasons: (1) Because the cross-bill is multifarious in that it seeks different forms of relief against the complainant and the defendant, the city of Newark. (2) Because the bill is filed under the municipalities lien law which creates a purely statutory jurisdiction, and there is no provision for affirmative relief of the nature prayed for. (3) Because the cross-complainants have a complete and adequate remedy at law.

The only cross-bill that the moving defendant (the city of Newark) is interested in is the one that was brought into the case by the amendment above mentioned, and the only relief prayed thereby is that the city of Newark and the board of street and water commissioners may account to the Stewart & Abbott representatives for the extra work mentioned therein, and that a decree be made directing the city to pay the amount so found due. There appears to be no particular relief sought against the complainant. This being the situation, I shall discuss the motion without reference to the subdivisions of the reasons stated in the notice. It will be well to begin by a consideration of the statute which authorizes the suit to be brought. It must be remembered that the proceeding is wholly statutory, and can be in touch with the ordinary systematic methods of the Court of Chancery only at the point of procedure. Beyond mere procedure, the rights, duties, and liabilities of the parties are regulated by the statute. This act (P. L. 1892, p. 869) has its object expressed in the title. It is an act to secure to laborers and materialmen payment of moneys due to them for labor or materials furnished by them toward the performance of public works. It does not contemplate an action in this court by an original contractor against the municipality. Its office is merely to create a lien in favor of subcontractors, laborers, and materialmen, and to provide the means for foreclosing the same. It was largely on this ground that the Court of Appeals held that the Court of Chancery alone had jurisdiction to entertain suits under the act. *DeLafield Construction Company v. Sayre*, 60 N. J. Law, 449, 38 Atl. 366. As I read the statute, the office of a suit under it is (1) to ascertain whether a lien has been formally perfected by proper

filing and service of notices; (2) whether sufficient money earned or to be earned under the contract remains on which the lien can fasten; and (3) an ascertainment of the amount due on the lien, and a decree against the municipality for that amount. The reason and spirit of the act in my opinion will be satisfied by inquiring in this action, not how much money is actually due from the municipality to the contractor, but whether sufficient money remains to meet the liens which shall be established. There seems to be no reason for pushing the inquiry beyond this point, and no reason for entertaining a litigation between the parties to the original contract, excepting for the purpose of providing for the established liens. The Court of Appeals in the case just cited declares that there is no provision for a personal judgment against the contractor as a debtor, but that the right of the claimants to obtain such judgments against him in other actions is expressly preserved. In *Garrison v. Borio*, 61 N. J. Eq. 236, 47 Atl. 1060, Vice Chancellor Grey declined to enter a personal decree against the lienor on a lien preferred under the act in question.

It is quite clear that the statute did not mean to authorize this court to make a final and determinative adjudication between the municipality and the contractor, but meant to have the inquiry go so far only as to ascertain whether there remained a sufficient amount of contract money to pay the liens which are found to be valid liens. When we consider that the action to determine or terminate the lien may be brought by the contractor or by the municipality as well as by the claimant, and that their separate actions may be consolidated, and that the complainants' right to bring personal actions in other courts is preserved, we can readily see that the proceeding was intended to be a proceeding in rem, much like the proceeding for the foreclosure of a pledge or mortgage, and resembling in many of its features the ordinary bill of interpleader. Again, the nature and extent of the lien created by the statute is another argument in favor of this view. Sections 1 and 5 describe these qualities and give a lien, not on the whole fund necessarily, but "to the full extent of such claim or demand," and "to the extent of the liability of the contractor for the claim preferred." These are limitations upon the extent of the lien, and, inasmuch as this court can only foreclose to that extent, it would seem as if the jurisdiction of the court must stop at that point. In *Norton v. Sinkhorn*, 63 N. J. Eq. 313, 50 Atl. 506, the Court of Appeals held that the proceeding was in rem; that it was a controversy over a particular fund involving only the amount due to the contractor from the owner and the amount due to the lien claimants respectively. Chief Justice Depue says (at page 318 of 63 N. J. Eq., page 508 of 50 Atl.): "Where the amount

due to the contractor is undisputed, the sole question for adjudication is the amount due to the lien claimants, respectively, from the contractor. When that has been ascertained, then the function of the court is to apportion the amount due the contractor among the lien claimants in the proper proportion, provided the fund under the control of the court is sufficient to answer that purpose; if not sufficient, then pro rata until the fund in hand is exhausted. At this stage the jurisdiction of the court under the statute ends. No personal judgment, either for or against a lien claimant, can be given, nor does the statute provide for a judgment against a municipality in case the amount due to the contractor exceeds the sums due to the lien claimants."

This being the nature of the proceeding, how stands the cross-bill with relation to it. A cross-bill is a mode of defense to the original suit, and in its subject-matter it must be confined to the scope of the original cause of action and to the defense set out in the answer of the cross-complainant. In this case the cross-bill is not intended for any such purpose. To say that the city of Newark owes more than enough money to pay the liens described in the bill is no defense to the original suit. Such an allegation in a cross-bill does not aid in elucidating the problems raised by the original bill. The admission or claim in the cross-bill that the city owes more than enough to pay the alleged liens shows this in the most conclusive manner. In effect the cross-complainant comes into court saying there is money enough in the city treasury to pay all these so-called liens if they shall be established as such, and, according to our calculation, much more than enough; but we desire that the court shall go beyond the purview of the original suit and ascertain for us the amount of this excess and try out all the difficult questions which are raised by the cross-bill in connection therewith, and ascertain for us the amount of this excess, and give us a decree and execution therefor. In other words, the cross-complainant comes into court asking for a decree in personam in a statutory suit which provides only for a remedy in rem. If no money decree in personam can be made in this proceeding against the contractor, nor against the lienor, on the ground that the proceeding is one in rem, it is difficult to see how the court can make the money decree in favor of the cross-complainant against the municipality. In fact, Chief Justice Depue in the opinion just quoted declares against the proposition.

In the *Norton Case*, in Chancery (61 N. J. Eq. 508, 48 Atl. 822), also before Vice Chancellor Grey, *Norton*, the subcontractor, who had furnished stone for a road which was being built by Sinkhorn and Walton in Mercer county, filed a bill to enforce a lien under the Municipalities Lien Law. Sinkhorn an-

swered that Norton had so delayed his performance of the stone contract that he was subjected to a loss in completing the work. He also filed a cross-bill against Norton claiming that the amount of loss was such that he was obliged to pay a greater sum than was coming to Norton, and for the excess he prayed, by way of cross-bill, for a decree in personam against Norton. Norton then moved under rule 213 to strike this defense from the answer, and also to strike out the whole of the cross-bill which sought affirmative relief against him. The Vice Chancellor struck out the cross-bill, upon the ground that there was no provision for a personal judgment against the claimant—citing *Delafeld v. Sayre*, *supra*, as an interpretation of a doubtful statute. He declared that this case had established a mode of procedure which had been followed, and that, inasmuch as the cross-bill was wholly dependent for its support upon an interpretation of the statute that there might be a personal decree against the subcontractor for the balance due from him, he struck out the whole cross-bill. Coming on to the parts of the answer setting up the same defenses practically, he struck out those also. The Court of Appeals in 63 N. J. Eq. 313, 50 Atl. 506, modifying the decree below, held that the cross-bill was properly stricken out, but that the answer should have been allowed to stand.

Leaving now out of consideration the question of procuring a personal decree in favor of the Stewart & Abbott representatives against the city of Newark, and omitting that portion of the prayer from the cross-bill, what is left amounts to a prayer for accounting. The cross-bill is not necessary to procure an accounting. All the relief which can be had under any prayer for an accounting can be had on the original bill and answers, so that the cross-bill is not only entirely unnecessary, but is worse than useless, because it adds to the expense and delay of finally adjusting the issues presented. *Johnson v. Buttler*, 31 N. J. Eq. 36; *Scott v. Lalor*, 18 N. J. Eq. 301.

It was argued against the motion that the submission by the city to this court of the question of the amount due by it on the contract was practically a consent that the court might take jurisdiction of all the matters in difference disclosed by the cross-bill. I do not think that this statement in the answer should have any such broad construction. Manifestly what the city meant to do was to submit the issues raised by bill and answer, and, indeed, I do not think it could go so far as to admit a jurisdiction under the statute in question to make a decree not contemplated by it.

If my interpretation of the statute is correct, this court, notwithstanding the submission, would still be without power to act because it has no jurisdiction over the subject-matter. The cases cited in the cross-complainant's brief on this point are all cases in

which the court has undoubted jurisdiction over the subject-matter.

My conclusion, therefore, is that the cross-bill must be stricken from the files.

(72 N. J. Eq. 336)

WILSON v. ANTHONY et al.

(Court of Chancery of New Jersey. May 2, 1907.)

JUDGMENTS—EQUITABLE RELIEF—FRAUD.

The fraud in obtaining a foreign judgment for which equity will enjoin execution of a domestic judgment founded on the foreign judgment does not relate to the cause of action, or to evidence adduced before the foreign court, but to deception and downright fraud in procuring jurisdiction, or in preventing defendant by fraudulent means from presenting his defense.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, § 785.]

Suit by Charles A. Wilson against Roy F. Anthony and others. Heard on motion for an injunction to restrain the execution of a judgment at law. Injunction denied.

See 65 Atl. 988.

On June 7, 1904, one Samuel L. Bailey recovered a judgment by default against the complainant, Wilson, in the Supreme Court of the state of New York for \$1,594.31. This judgment was assigned to the defendant Anthony, who brought suit thereon in the New Jersey Supreme Court. Wilson pleaded to the action that he had not been served with process in the New York suit, and the action was tried upon this issue before the Chief Justice and a jury on April 10, 1906. There was a verdict for the plaintiff, and an affirmance of the judgment entered thereon by the Court of Errors and Appeals; the judgment being finally entered for \$1,845.55. Wilson, in May, 1906, after the verdict in the New Jersey action, moved the New York Supreme Court to set aside the judgment. This motion was heard in October, 1906, and, as was stated on the argument, was denied on the ground of laches. Again, in 1907, Wilson made a second motion in the New York Supreme Court to set aside the service of the summons in that action and the judgment consequent thereon, which motion was likewise denied. The complainant now comes to this court with a bill praying that Anthony & Bailey may be enjoined from enforcing payment, not only of the New Jersey judgment, but of the New York judgment as well, on the ground of fraud. The fraud set out in the bill consists of allegations (1) that Wilson was not served with process in the New York suit, (2) that the complaint there was withheld from the files until the day the judgment was entered, and (3) that Bailey made a false affidavit to the complaint. The complaint charges Wilson with an indebtedness of \$1,300 for 2,000 bushels of corn and the husks and stalks on which the same was grown, and the affidavit verifies the complaint that the same is true to the plaintiff's own knowledge.

Frank E. Bradner, for complainant. Andrew Van Blarcom, for defendants.

HOWELL, V. C. (after stating the facts). The jurisdiction of this court to interfere with the enforcement of judgment at law is undoubted and is not questioned by the defendants. The cases on the subject in our own state are so numerous that they cannot all be alluded to. In this case the court is asked to enjoin enforcement of a domestic judgment for the reason that the foreign judgment, which was its foundation, was obtained by fraud.

Mr. Justice Gummere, now Chief Justice, in *Fairchild v. Fairchild*, 53 N. J. Eq. 678, 34 Atl. 10, 51 Am. St. Rep. 650, says: "Can this judgment rendered by a court which had jurisdiction over the parties and over the subject-matter of the litigation be ignored by the courts of this state notwithstanding the prescription of the Constitution of the United States? * * * It seems to me not, for, while this constitutional provision and the federal statutes referred to have been the subject of more or less diversity of judicial opinion, it is now entirely settled that the only grounds upon which the judgment of a court of general jurisdiction can be disregarded in another state are (1) where the adjudging tribunal had no jurisdiction over the person against whom judgment was pronounced or over the subject-matter of the litigation, and (2) where the adjudication of the foreign tribunal has been obtained by fraud."

Is the fraud alleged in the bill of complaint such fraud as is required by the decision in *Fairchild v. Fairchild* to override the judgment in question? As to the first allegation, viz., that there was no service of process in the foreign jurisdiction, it is sufficient to say that it appears by the bill that this has already been adjudicated against the complainant, not only in our Supreme Court, but in our Court of Errors and Appeals, and twice in New York in the original suit, and on the argument complainant's counsel felt compelled to admit that he must discuss the case as if service had been undoubtedly made upon the complainant in New York. Neither do I think that the complainant can avail himself of the withholding of the complaint from the files until the entry of the judgment. I think we must assume, in the absence of evidence to the contrary, that the mere procedure which resulted in the entry of the judgment in the New York court was regular and in accordance with the law of that state. I am quite as confident that the third cause of complaint has as little foundation in law as the other two.

A careful examination of the affidavits submitted with the bill, taken in connection with the facts disclosed by the defendants' affidavits, does not satisfy me that there was any fraud practiced by Bailey. Neither am I convinced by these depositions that Wilson had a clear and unmistakable defense to the

action in New York. But, suppose there was a defense made out, it could not avail Wilson unless he could also show fraud. How, then, does the case stand? An attempt was made to convince this court of the fact of fraud by offering to show that the New York judgment was unjust; that instead of a judgment for the plaintiff therein the real fact was that the balance of account was in favor of the defendant; and that the judgment was therefore the product of false evidence, in short, of perjury. "To secure the interference of equity it will not suffice to show that injustice has been done by the judgment against which relief is sought. It must appear that the party has an equitable defense of which he could not avail himself at law, or had a good defense at law of which he was ignorant until after the time for making defense at law had passed, or that he was prevented from making his defense by fraud or artifice of his adversary, or by fraud, accident, or mistake unmixed with any negligence of his own, or that his ground of interference is a matter of pure equity cognizance." *Green, V. C.*, in *Brick v. Burr*, 47 N. J. Eq. 189, 19 Atl. 842. Similar language was used by the court in *Mechanics' Bank v. Burnet Manufacturing Company*, 33 N. J. Eq. 486. There the allegations were non-service of process and no indebtedness. The court refused to consider these grounds, but enjoined the judgment on another ground.

There is no allegation here that the plaintiff in the New York suit in any way prevented the defendant from making his defense there. The fact of service has been adjudicated against him. He had his opportunity to make his defense which he neglected to avail himself of, and now no mere allegation that the judgment is for too large an amount can move a court of equity. In fact, a judgment obtained by perjured testimony without other matters of equitable cognizance could not avail the complainant on this motion. Chancellor Kent so held in *Smith v. Lowry*, 1 Johnson's Ch. (N. Y.) 820, and this case has been approved on this point in *Cairo & Fulton R. R. Co. v. Titus*, 27 N. J. Eq. 102, *Hannon v. Maxwell*, 31 N. J. Eq. 818, and *Dringer v. Erie Ry.*, 42 N. J. Eq. 578, 8 Atl. 811, where Vice Chancellor Van Fleet approves of the statement made by Mr. Justice Miller in *United States v. Throckmorton*, 98 U. S. 61, 25 L. Ed. 93. "The acts for which a court of equity will, on account of fraud, set aside or annul a decree between the same parties rendered by a court of competent jurisdiction have relation to frauds extrinsic and collateral to the matter tried by the first court, and not to a fraud in the matter on which the decree was rendered."

Great stress was laid on the argument by complainant's counsel on two recent English cases—*Abouloff v. Oppenheimer*, 10 Q. B. D. 205 (1882), and *Vadala v. Laws*, 25 Q. B. D. 810 (1890). There were, respectively, actions at law upon foreign judgments—one render-

ed by a Russian court, and the other by an Italian court—and in each case it was held that the English courts would inquire into the fact of perjury committed in the original action. If they have any pertinence whatever to the matters in controversy here, they show that when the New York judgment was sued upon in the New Jersey Supreme Court the defense of fraud might have been set up and litigated, and that therefore the complainant is barred from again raising this issue. These cases are severely criticised by Judge Wallace in the Circuit Court of the United States for the Southern District of New York in *Hilton v. Guyett* (C. C.) 42 Fed. 249, as being in conflict with the *Throckmorton* Case above cited, which has been so strongly approved in this state, and for the further reason that the authorities cited do not sustain the proposition. In my opinion they must be held to have engrafted on the *Duchess of Kingston's Case* (2 Smith's L. C. —) a modification of the rule there laid down, which does not appear ever to have been hinted at in our courts.

I therefore conclude that the fraud referred to in *Fairchild v. Fairchild*, *supra*, does not and cannot relate to the cause of action or to evidence adduced before the court in the foreign jurisdiction, but does relate to deception and downright fraud in procuring jurisdiction or in preventing the defendant by fraudulent means from presenting his defense. And, inasmuch as the case does not show any fraud in the institution of the suit or in obtaining jurisdiction, or that the defendant was in any way hindered by the plaintiff from appearing and defending the action, or from producing such witnesses as had knowledge of the facts, the injunction prayed for must be denied.

(72 N. J. Eq. 523)

WILSON v. SEEBER et al.

(Court of Chancery of New Jersey. May 15, 1907.)

1. ATTORNEY AND CLIENT—ACTION ON CONTRACT FOR COMPENSATION—EVIDENCE.

In a proceeding by an attorney to obtain part of the proceeds of a compromise of a suit as compensation under a contract of retainer, evidence examined, and held to show that the contract was made.

2. SAME—LIEN.

Where an attorney contracted with his client that, as compensation for conducting the suit, he should receive one-third of the proceeds of the action, the contract gave him an equitable lien upon the proceeds when they took form.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 5, Attorney and Client, §§ 378, 380.]

Bill by William R. Wilson against George Seeber and others. Heard on return of an order to show cause. Preliminary restraint continued until final hearing.

Alan H. Strong, for complainant. Edward M. Colle, for defendants.

PITNEY, Advisory Master. This is a contest over a part of a sum of money which, at

the time of the filing of the bill, December, 1906, was in the shape of a promissory note or notes given by the defendant Seeber to the defendant Schauble, and which notes were, I believe, in the hands of the defendant David. At the filing of the bill, an order to show cause, with interim restraint, was made thereon returnable in January, 1907. Later, on the 15th of January, by consent of all parties, the notes in question were paid under order of the court, and enough of the proceeds to cover complainant's claim were committed to the custody of the defendant David, to be held by him as trustee in an account in bank in his name as such trustee and subject to the order of the court. That fund, now in immediate control and custody of the court, was the proceeds of a compromise of a suit brought by bill in this court on September 1, 1906, by Schauble against the defendant Seeber, in which the complainant herein, Mr. Wilson, a solicitor of this court, was solicitor. This suit, he contends, was brought by him in pursuance of a preliminary contract made between himself and the defendant Schauble, by which Wilson was to have one-third of the proceeds of the suit, and the fund in court aforesaid is admitted to be a part of the proceeds of a settlement of that suit.

Two questions are involved, both of which must be resolved in the complainant's favor in order to give him the relief now sought: First, was the contract made as alleged? Second, did it give him (Wilson) such an interest in the proceeds of the suit as to enable him to maintain this equitable action?

The first question is one of fact, and its solution depends upon the consideration of a variety of circumstances and a careful examination of several rather bulky affidavits. For present purposes, it will be sufficient if I shall find that it is probable that on the final hearing of the cause and an opportunity on each side for cross-examination the complainant will succeed in establishing the contract.

The complainant's contention is, in brief, as follows: In October, 1904, Schauble was the owner of 179 shares of the capital stock of the Rising Sun Brewing Company, and in that year transferred the same for the sum of \$130,000 to one Nugent, who really bought in the interest of the defendant Seeber, to whom the stock was subsequently transferred, and in whose name it has since stood. Schauble subsequently thought that he had been unfairly dealt with in the transaction. At and subsequent to that time Judge Gilhooly, of Elizabeth, was his standing counsel in important matters; but Mr. A. J. David, a young lawyer in Elizabeth, was employed by him in unimportant matters. On divers occasions, and particularly in the early part of 1906, Schauble consulted with Judge Gilhooly as to his right to undo the transaction and recover the shares of stock, and wished to employ him to bring a suit for that pur-

pose. Judge Gilhooly expressed doubts as to the prospect of a recovery, and finally declined to be retained for that purpose, stating that he had been somewhat involved in transactions connected with or growing out of the transfer of the stock, and suggested to Schauble that he employ the complainant, Wilson, for that purpose. Shortly after, and in the summer of 1906, Schauble called upon Wilson, and expressed a wish to employ him, but stated that he had no money to invest in the suit, and desired that Wilson undertake it on shares. He gave Mr. Wilson the particulars of the case. That gentleman, learning from Mr. Gilhooly that he had no objections to his (Wilson's) undertaking the suit, did undertake it, upon the agreement, as he swears, that he was to have one-third of the proceeds, and to run all the risks of expenses and costs, provided that after an examination of the circumstances he thought it could be successfully carried through. He did make this examination, and commenced the preparation of his bill and affidavits, which I have seen, and they show a great deal of labor. At the same time, before filing the bill, he asked Judge Gilhooly to draw a written agreement between him and Schauble as to compensation, which Gilhooly did, and which Wilson handed to Schauble, and which he said Mr. Schauble agreed to and promised to execute. Before the agreement, however, was actually executed, it came to the knowledge of Wilson that there was a scheme on foot by which the ownership of these shares of stock by Seeber might within a very short time be transferred to some other person, and he thereupon hurried matters, finished the preparation of Schauble's affidavit, and came before me on September 1, 1906, at Morristown, with Schauble, and upon presentation of the bill I advised an order to show cause, with interim restraint against the transfer of the stock by Seeber. Naturally, and at once upon obtaining this order, the question arose where the money was to come from in case Seeber should immediately tender a re-transfer of the stock and demand a return of the purchase price, and Schauble at once asked the assistance of Wilson in procuring money for him. Nothing was said in the written unsigned contract which made it the duty of Wilson to raise any money. Mr. Wilson applied to Mr. Gilhooly, and learned from him that Mr. Isham, an Elizabeth capitalist, would advance the money provided he could have the stock for the sum of \$155,000. Mr. Schauble, upon learning this from Wilson, agreed to it generally, or in part. Either Wilson or Gilhooly had prepared a contract to that effect to be signed by Schauble. That contract, however, was nominally with Judge Gilhooly; Isham's name not being mentioned in it. Objection was made to this contract by Schauble, because it did not provide for protecting him against a suit which had been brought by the brewing company to enforce a large claim against him, which was

then pending, and he wished that the sum to be paid him by Judge Gilhooly for the 179 shares of stock should be over and above any amount that he (Schauble) should be obliged to pay as a result of the suit of the brewing company against him.

In this state of affairs, Mr. Wilson and Mr. Schauble met by appointment early in the morning at Judge Gilhooly's office; Schauble having both contracts in his possession—first, the one Judge Gilhooly had drawn between Wilson and Schauble, and, second, the one between Schauble and Gilhooly for the sale by Schauble to Judge Gilhooly, acting for Mr. Isham, of the shares of stock, if recovered. Mr. Schauble then informed Judge Gilhooly that he was entirely satisfied with the contract with Mr. Wilson for his compensation, but he wished the contract for the advancement of the money and the sale of the stock to Gilhooly to be amended in the respect previously mentioned. Mr. Gilhooly thereupon drafted a new contract between himself and Schauble, which was supposed to, and did in fact, cover the objection. Upon this new draft being shown to Schauble, he expressed no dissatisfaction with it, but said that, before executing it, he wished to submit it to Mr. David. This remark seems to have irritated Judge Gilhooly, and he declared that he would have neither of the papers executed in his office, and hastened the departure of Mr. Schauble. The result was that neither the contract with Mr. Wilson or that with Judge Gilhooly were ever executed. On the return of the order to show cause, Mr. Wilson employed Mr. Marsh, of Plainfield, as assistant counsel, and the hearing went over by consent. In the meantime, Schauble seems to have become either suspicious of complainant's sincerity in his devotions to Mr. Schauble's interest in the suit, or his ability to properly conduct it, and, besides employing Mr. David, sought to employ Mr. Colle, of the Essex bar, and asked Mr. Wilson to go with him to Mr. Colle's office as soon as the latter should return from Europe. A meeting took place at Mr. Colle's office about September 13th, in which the subject of Mr. Wilson's compensation was taken into consideration, Mr. Wilson insisting upon his contract in writing as already agreed upon, and that it should be signed. Mr. Colle, after hearing all the parties, acting as counsel for Schauble, prepared another agreement, which distinctly recognized and provided that complainant should have one-third of the recovery and one-third of any compromise; but in a subsequent clause provided that Schauble might discharge Wilson at a certain stage of the cause by paying him a comparatively small sum of money. This contract Wilson declined to sign.

I have stated Mr. Wilson's contention. It is thoroughly supported by his own affidavits, and, as to the consent of Schauble to the terms of the contract, it is sustained by the affidavit of Judge Gilhooly. It is also sus-

tained by the account of what occurred on the 13th day of September in the office of Mr. Colle. It is quite impossible to account for the provision for one-third compensation found in the contract prepared by Mr. Colle, except upon the assumption that such proportion had been previously agreed upon. The defendant Schauble, in opposition to the deposition of Judge Gilhooly and complainant, denies some of the allegations of the circumstances leading up to his employment of Mr. Wilson, and he denies that he ever agreed to give one-third, and he denies a part of what occurred in Judge Gilhooly's office on the occasion when the judge swears that the second draft of the contract was prepared by him between himself and Mr. Schauble. But I think that denial, when carefully examined, and, compared with the other affidavits, is not sufficient to overcome their probative force, and I think that the great probability is that at the final hearing the complainant will be able, by clear preponderance of proof, to show that the written draft of a proposed contract between himself and Schauble was clearly assented to by Mr. Schauble and that the suit which was commenced by him was so commenced on the strength of that contract. I am entirely satisfied that Schauble was aware that Wilson prepared the bill and affidavits, and appeared before the vice chancellor and procured an order to show cause, and employed assistant counsel on the occasion of the return of that order, upon the honest supposition that the written agreement which had been prepared, but not executed, was agreed to by Schauble, and would be executed. If I am right in this conclusion, from the affidavits and circumstances of the case, then upon plain principles the mere nonexecution of the contract is of slight importance. No answers were ever put in to complainant's bill, and the result was that in the latter part of October that suit was settled by Schauble behind complainant's back, by paying or securing to Schauble the sum of \$40,000, a portion of which sufficient to pay the complainant is, as before mentioned, now in the custody of Mr. David and under the control of the court.

The second question is whether that contract gives such an interest in the proceeds of that settlement as to enable the complainant to succeed in this suit. The paper itself, prepared by Judge Gilhooly, purports to be dated on the _____ day of August, 1906, and recites that Schauble had stated to Wilson the facts and circumstances attending the transfer of the stock; that Schauble claims that the same was procured from him by fraud; that he is now the owner of the stock; that it is worth a larger sum than Seeber paid him; that Schauble has asked Wilson to take proceedings to have the transfer set aside and the stock returned to him, and had proposed to Wilson that his compensation should be paid out of the sale of the stock when recovered, and not otherwise;

that Wilson should pay the court expenses; that in consideration of his services and assumption of costs Schauble should pay Wilson a sum equal to the one-third part of the value of the stock over and above the amount for which it was sold to Seeber. Then comes the contract itself—that Wilson should commence suit in chancery praying for the annulment of the sale and a recovery of the stock, and "will devote his best endeavors and energies in the prosecution of the suit until its final determination, and agrees to accept as compensation for his services, and for such disbursements as he may be required to make, the one-third part of the value of said stock over and above the amount or sum paid by Seeber to Schauble, or the amount or sum that may be required to be paid by Schauble for the redemption of said stock." This event has never happened, but then follows this further provision: "And he further agrees that, in case a compromise is made by his consent in writing or settlement otherwise effected, in like manner to accept in payment of his services and disbursements as aforesaid the one-third part of the amount paid upon such compromise or settlement whether the same be received by said Schauble or not." Then follows this covenant on the part of Schauble: "And the said Philip Schauble on his part, on performance by said Wilson of the services and covenants above named, agrees to pay said Wilson the one-third part of whatever money shall be paid or received by said Schauble or by any other person on his behalf in compromise or settlement of the aforesaid claim." There was a further agreement on his part that he would not settle or compromise or sell or dispose of his interest in the stock without the consent in writing of Wilson; and, further, "that if there is a decree that the stock shall be returned to Schauble, he would pay to Wilson one-third part of the value of the stock over and above the amount required to be paid by him for the redemption of the stock." Then follows a definition of what is meant by the "value of the stock."

It is not necessary for present purposes to consider whether the agreement for one-third of the value of the stock, taken in connection with the clause providing against a settlement of the claim or a transfer of the stock, without the consent of Wilson, gave Wilson an interest in the stock itself, for it seems to me that the sole question for present purposes is the true construction of the clause by which Schauble "agrees to pay said Wilson the one-third part of whatever money shall be paid to or received by Schauble or by any other person on his behalf in compromise or settlement of the aforesaid claim." A great many authorities were cited by counsel on each side, showing commendable industry and research. I have gone through them all. The general rule undoubtedly is that it must appear that the complainant has an interest by the contract in the very fund itself, either

existing at the date of the contract, or thereafter to come into existence. In examining and considering the authorities, two matters must be borne in mind: First, that in England, and in many of the states of the Union where the common-law doctrine of champerty still prevails, the question could not arise, and hence there are no authorities; and, second, in examining the English cases, a rule arising out of their bankrupt law, dealt with by me in *Board of Education v. Duparquet*, 50 N. J. Eq. 234, 24 Atl. 922 (and see *Ward v. Duncomb*, L. R. App. C. [1893] 369, per Lord Macnaghten, at page 333 et seq.), must be borne in mind, since it has no application here. Moreover, it must be remembered that this is not, in its present shape, a suit in which a third party is interested, but between the sole parties to the contract themselves.

It may for present purposes be admitted that a mere promise to pay out of a particular fund, when received by the promisor, will not amount to an assignment of an interest in the fund. I noticed this rule in *Lannigan v. Bradley & Currier Co.*, 50 N. J. Eq. at page 205, near the bottom, 24 Atl. 505. The cases referred to by the learned annotators of 2 *Leading Cases in Equity*, p. 1644, were those where the fund sought to be charged was in no wise connected with or the result of the transaction out of which the debt arose which it was sought to charge upon it. On the other hand it seems clear that an order by a debtor, in favor of his creditor, addressed to a third party, to pay that creditor out of a certain fund either then existing or thereafter to exist in the hands of that third party, gives an interest in that fund to the party in whose favor the order is drawn. And, further, it may be said with safety that the rule is that the solution of the question will depend upon the proper construction of the language of the contract—whether that language be committed to writing or not—to be taken in connection with all the facts and circumstances of the case. So construed, it seems to me that the complainant's case is free from serious doubt. The first important element is that the fund in question is the immediate result of the litigation instituted by complainant, and is the very fund mentioned in the contract. In the next place, no other creditor or assignee is claiming it, and the case is free from all complications arising out of conflicting claims between two creditors or two assignees of the same fund, such as we find in most of the adjudged cases. And the language is clear. *Schauble* agrees to pay Wilson "one-third part of whatever money shall be paid to or received by *Schauble*" by way of compromise, etc. The language is not to pay a sum equal to one-third, but to pay the one-third part.

The question of the effect of several such writings making up a contract was discussed first by Lord Langdale, as Master of the Rolls, in *Rodick v. Gandell*, 12 Beav. 325; and

on appeal from his decision by Lord Truro, Lord Chancellor, as reported in *Rodick v. Gandell*, 1 Mac. and Gor. 763 (in 1851 and 1852), where there is an exhaustive examination of the authorities. Subsequently, in 1855, the subject came before Sir W. P. Wood, Vice Chancellor, afterwards Lord Hatherly, in *Riccard v. Prichard*, 1 K. John. 277, 1 Jur. N. S. 750. The Vice Chancellor there abstracts the rule laid down by Lord Truro, *supra*, thus (1 Jur. N. S.): "That where there is an agreement between debtor and creditor that the debt owing shall be paid out of a particular fund coming to the debtor, that creates a valid equitable charge upon the fund, and operates as an equitable assignment of the fund *pro tanto*." These English cases are all based upon the decision of Lord Hardwicke (1749), in *Row v. Dawson*, 1 Ves. Sr. 331. There *Tonson* and *Conway* loaned money to *Gibson*, who, by way of reimbursing those gentlemen, drew a draft on *Swinburne*, who was the deputy of *Horace Walpole*, a member of the cabinet in charge of the Exchequer of England, with these words added, "out of the money due to me from *Horace Walpole* out of the Exchequer, and what will be due at *Michaelmas*, pay to *Tonson* and *Conway*, value received." *Gibson* became bankrupt, and the question was whether the holders of this draft were first entitled to be paid the amount of the draft out of the moneys due to *Gibson* from the Exchequer. Lord Hardwicke held that the draft was clearly distinguishable from an ordinary bill of exchange, and worked an assignment of so much of the money due to *Gibson* in favor of *Tonson* and *Conway*, and gave them a preference. Lord Hatherly's terse statement of the rule was approved by Mr. Justice Dixon, in his opinion in *Terney v. Wilson*, 45 N. J. Law, 282. The Supreme Court was there exercising its equitable jurisdiction in the matter of set-off to a judgment. And the same doctrine was acted upon in *Brown v. Dunn*, 50 N. J. Law, 111, 11 Atl. 149; also a case of the exercise of equitable jurisdiction by the court.

There is a case in New York, of *Williams v. Ingersoll*, 89 N. Y. 508, which deals with the construction of instruments of this character, which seems to show that the law in the state of New York was at one time somewhat different. The learned judge there states, at page 518, that, "whatever the law may be elsewhere, it must be regarded as the settled law of this state that an agreement either by parol or in writing to pay a debt out of a designated fund does not give an equitable lien upon the fund or operate as an equitable assignment thereof"; but he proceeds, in that very case, at page 521, to state a rule of law which seems to me directly in conflict with that previously stated. He uses this language: "It is not important to inquire here whether the agreement proved by the plaintiffs was an agreement to assign or an agreement for a lien upon any sum which might be

recovered, for either agreement would have the same effect, as the plaintiffs' claim is for the full amount of the award. The agreement was not alone that the plaintiffs should be paid out of any sum recovered. Such an agreement, as I have above shown, would not have been sufficient to give the plaintiffs any claim upon the award. But there was also proof tending to show that it was the intention to assign to the plaintiffs or to give them a lien upon any sum recovered, and retain out of it their compensation, and to pay the balance, if any, to Heath, and for the purpose of upholding the judgment we may assume that the trial judge found any facts which the evidence tended to establish. The form of words used in making the agreement is not alone to receive attention, but all the circumstances of the transaction are to be considered." This was accompanied by an elaborate examination of the authorities, and resulted in an unanimous decision of the court in favor of the lien in that case. The later New York cases seem to have abandoned the seeming doctrine of the older. *Holmes v. Evans*, 129 N. Y. 140, 29 N. E. 233, is an example, and also a still later case of *Harwood v. La Grange*, 137 N. Y. 538, 32 N. E. 1000, decided in 1893. The headnote of that is as follows: "That, when an attorney renders services in an action under an agreement that he shall receive his compensation out of the proceeds thereof, he has an equitable lien upon or ownership as equitable assignee in such proceeds." And the court, in sustaining that principle, refer to *Williams v. Ingersoll*, supra; *Fairbanks v. Sargent*, 104 N. Y. 108, 9 N. E. 870, 6 L. R. A. 475, 58 Am. Rep. 490; *Boyle v. Boyle*, 106 N. Y. 654, 12 N. E. 709; and *Chester v. Jumel*, 125 N. Y. 237, 26 N. E. 297.

Defendant relies upon the recent case of *Weiler & Lichenstein v. Jersey City Street Railway Company*, 68 N. J. Eq. 659, 61 Atl. 459. In that case the decision against the solicitors went on the grounds, in the first place, that the claim against the railway company was in its nature not capable of being assigned; and that there was in point of fact no actual product of the litigation, and no fund capable of assignment; and that the parties had a right to settle between themselves, which they had done. The suit was not, as here, by the solicitors against their client, but by the solicitors against the defendant, the railway company, in the suit which they had brought for their client. That circumstance and the nature of the action—tort for personal injuries—combine to distinguish it from the present case. The same may be said of several other cases cited by the defendant. For instance, *Kusterer v. City of Beaver Dam*, 14 N. W. 617, 56 Wis. 471, 43 Am. Rep. 725. That also was an action for personal injuries against the city, where the plaintiff had entered into a contract with his attorneys to conduct the suit upon shares, and after issue was joined the

city settled with Kusterer and took a release under seal, which they were allowed to plead *puls darrein*, and at the trial the court dismissed the action against the protest of the attorneys, and the latter appealed. It was held that it was impossible to grant the attorneys relief in the suit. The court made this remark: "Impressed with the equity of the claim on the part of the attorneys for the plaintiff, we have carefully reviewed many decisions with the view, if possible, of protecting them, at least to the extent of the taxable costs; but, as the cause of action was not assignable, and hence remained, prior to judgment, under the absolute control of the plaintiff," the court concluded it was unable to assist them. Another case is *Williams v. Miles*, 63 Neb. 851, 89 N. W. 455. That was a bill to set aside the probate of a will which had been instituted by several parties claiming under a supposed later will and as heirs at law. The solicitors had undertaken it under a contract for a share of the estate. After a defeat of the plaintiff in the court below, and also on appeal, three of the plaintiffs moved to dismiss the bill of complaint as against themselves on equitable terms. This was resisted by the solicitors, and it was held that they could not resist it. The court remarked: "Had the action proceeded to judgment on which would attach a lien in favor of plaintiff's attorneys, or were the controversy of such a character as to bring funds, money, or property into the possession of the court or custody of the law on which the plaintiff's attorneys could claim a lien, legal or equitable, for the value of the professional services," etc., the court then asserted it had power to act, but went on to show that it would be impossible to compel the moving plaintiffs to continue the action. The court did not determine as to whether the contract in that case, which seemed to be similar to that in this case, created a lien or not. Another case cited is *Cameron v. Boeger* (1902) 63 N. E. 690, 200 Ill. 84, 93 Am. St. Rep. 165. The contract in that case was much like the present, and there was an attempt by the solicitor to open a decree of dismissal of the suit which had been entered by consent of the plaintiff in the suit behind the solicitor's back, and the court held it could not be done. The learned judge, however, proceeded to go into the merits, and expressed the opinion that, according to the decisions in Illinois, the solicitor's contract gave him no lien on the fund. One other western case cited by complainant is worthy of notice, viz., *Canty v. Latterner*, 31 Minn. 239, 17 N. W. 385. That, as here, was an action by an attorney against his client, and the subject of the suit was in court. There a contract had been made by the defendant with the attorneys that they should prosecute an action against a railroad company to recover the amount due from the latter to the former for damages to his land by reason of the railroad company occupying it, and re-

ceive for his services a certain sum, if he won the cause, and nothing if he failed to do so; and the contract contained this further clause: "I hereby agree that he [the attorney] shall receive said money from the Minnesota & St. Louis Railroad out of the amount due me from said railroad company for running through my land, to be paid when suit is settled." It was held that that contract amounted to an equitable assignment of the portion of the chose in action referred to entitling the attorney to receive the same specifically, and, the railroad company having paid the money into court, it was held that he had a lien on the fund in court to that extent. A consideration of all the cases cited do not alter the view above expressed, that the intention of the parties hereto, namely, the complainant, Wilson, and Mr. Schauble, was that Wilson was to have one-third of the very proceeds of the action, and that the contract gave him an equitable lien upon those proceeds when they took form, and that this result is in accordance with equity and good conscience.

The defendant sets up against the whole of the complainant's case a charge that the complainant was not, in all that he did, in reality working for Schauble's interest, but that he was really working in the interest of Mr. Isham. Defendant asserts that Isham was under a contract to purchase this stock from Seeber at a date just after the 1st of September, which required a large amount of money on Isham's part; that the money market at that time was very stringent, and Isham wished this injunction to be granted in order that he might be relieved of the necessity for carrying out his contract just at that time; and that the procuration of the injunction was in reality the scheme of Isham, devised and set on foot by him and his attorney, Judge Gilhooly, the real object of which was to relieve Isham. He further asserts that it was a part of the scheme that advantage was to be taken of Schauble's necessity for money to extort from him a contract to sell the stock to Isham; and that Wilson, the complainant, was a party to the whole scheme. Without going into the details, it is enough for me to say that these assertions of defendant do not seem to me to be established by the affidavits in connection with the circumstances, to such a degree as to justify me in using them at this stage of the case in defeating complainant's lien on this fund. The great difficulty in adopting that view is that, in its worst aspect, it still left or resulted in a great benefit to the defendant. It put a large sum of money in his pocket. He was put into possession of facts and circumstances which went to support his claim to the stock which he had been seeking for a considerable time to enforce, and which he was unable to find any lawyer to take up, and which facts and circumstances, when set forth in a bill and supported by affidavits, procured by Wilson's industry, and possibly and probably with the help of Judge Gilhooly, the defendant Seeber

was unable to meet, and finally was willing to pay \$40,000 in settlement.

It is further said that Wilson was all the while urging his client, Schauble, to accept Isham's proposition to furnish the necessary redemption funds, and that he declared that he felt bound to furnish the money. I have already called attention to the fact that there was no such undertaking on his part found in the written contract. At the same time, he was naturally anxious to have Mr. Schauble provided with means necessary for the recovery of the stock, and very likely urged him to sign the second contract prepared by Gilhooly, by which he was to receive \$25,000, beside a payment not exceeding \$7,500, for the purpose of settling the suit of the brewing company against himself. That situation sufficiently, for present purposes, explains certain clauses in some of the affidavits made by the complainant in the main cause of Schauble v. Seeber, in opposition to a motion to dismiss that cause, which he resisted.

Upon the whole case, I come to the conclusion that the restraint should be continued until the final hearing.

(75 N. J. L. 193)

BAUMAN v. COWDIN et al.

(Supreme Court of New Jersey. June 10, 1907.)

1. MASTER AND SERVANT—INJURY TO SERVANT—DEFECTIVE MACHINERY.

The duty of a master to his servant to exercise reasonable care is performed when he provides an apparatus in common use purchased from a reputable and experienced manufacturer and makes a test where a test is required.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 173, 180-192.]

2. SAME—TEST OF MACHINERY.

Whether the obligation of the master requires him to test immediately after its installation an apparatus in common use installed by a reputable manufacturer under an independent contract depends upon the circumstances of the case and the terms of the contract.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 235-242.]

3. SAME.

The master is not liable when an accident happens to the servant on the first occasion when the apparatus is used, if the method of use is the same method as would be required to make a proper test.

(Syllabus by the Court.)

Error to Circuit Court, Passaic County.

Action by Emil Bauman against John E. Cowdin and others. Judgment for plaintiff, and defendants bring error. Reversed.

Argued February term, 1907, before GAR- RISON, SWAYZE, and TRENCHARD, JJ.

Michael Dunn, for plaintiffs in error. Sherrerd Depue, for defendant in error.

SWAYZE, J. The plaintiff, while employed by defendants as fireman in the boiler room of their mill, was injured by the explosion of a new boiler cleaner. The cleaner was of a type in common use, and had been put in just prior to the explosion by the Manchester

Manufacturing Company, a reputable and experienced manufacturer, under a contract which provided that the Manchester Company should attach the cleaner to the boiler. The work of attachment was completed Saturday afternoon, and fire was started under the boiler Sunday night. About 7 o'clock Monday morning, the plaintiff was ordered by the engineer to open the valves on the pipes which connected the cleaner with the boiler. One of the valves leaked, and the engineer ordered the plaintiff to tighten up the nuts on the valve to stop the leak. While he was engaged in this work, the accident happened.

It is a little difficult to tell exactly on what the plaintiff relies. It is said that the boiler cleaner remained on the floor of the boiler room several days before it was put up; that the valves were improperly located, and in particular that there should have been a stop valve at the boiler, so that the cleaner might be tested with a greater assurance of safety; that there was a structural defect in the cleaner, either because the top was of defective iron, or because the bolts holding the cap on were too tight and did not allow for the difference in expansibility; that the cleaner was improperly connected with the boiler; that no test was made by the defendants before the plaintiff was set to work; and that the steam pressure was let into the boiler too rapidly.

Many of these charges of negligence can be readily disposed of. The explosion was not caused by the fact that the cleaner remained on the floor of the boiler room several days before it was put up. If there was any deterioration in the cleaner during that time, it had no connection with the injury to the plaintiff. Nor was that injury due in any way to the location of the stop valve. The possibility that the plaintiff might have been a few feet further from the cleaner, and perchance have escaped injury, does not make the defendants liable. The structural defects in the cleaner, which seem to have been the real cause of the explosion, if attributable to negligence, were due to the negligence of the Manchester Manufacturing Company on whose experience and reputation the defendant had the right to rely. *Atz v. Manufacturing Co.*, 59 N. J. Law, 41, 84 Atl. 980; *Carlson v. Phenix Bridge Co.*, 182 N. Y. 273, 30 N. E. 750. The master's duty is to exercise reasonable care only, and that care is exercised when he provides an apparatus in common use purchased from a reputable and experienced manufacturer, and makes a test where a test is required, since that is the ordinary course of prudent men. *Reynolds v. Merchants' Woolen Co.*, 168 Mass. 501, 47 N. E. 406, where the cases are collected. If the cleaner was improperly connected with the boiler, of which there seems to be no evidence, that also was the fault of the Manchester Company, an independent contractor. The fact

that the actual work of connecting was done by a plumber in the employ of defendants does not alter the case. He may have been pro hac vice the servant of the Manchester Company. *D., L. & W. R. R. Co. v. Hardy*, 59 N. J. Law, 35, 84 Atl. 986, affirmed 59 N. J. Law, 562, 39 Atl. 637. And, in the absence of proof that the contract between the defendants and that company had been altered, we must assume that any work done in performance of the contract was done for the latter. Upon this subject we should suppose that the evidence as to an allowance for his work upon the contract price was relevant; but, as no exception was taken to the refusal to admit it, we cannot review that ruling now. It is, however, unnecessary to dwell further upon this subject, since the accident was not caused by any impropriety in the method of connecting the cleaner and the boiler.

The only question in the case which requires much discussion grows out of the alleged failure to make a proper test of the cleaner before setting the plaintiff to work. We dismiss the suggestion of the defendants that this failure was known to the plaintiff, and that he therefore assumed the risk. It is true that he testified no test had been made, but this can only mean that, as far as he knew at the time of trial, there had been no test. This is not quite the same as positive proof that he had knowledge at the time of the accident of the want of a test and the danger.

The obligation of the master to test and inspect machinery at proper intervals is so well settled that no citation of authority is necessary. Whether this obligation requires him to test immediately after its installation apparatus installed by a reputable manufacturer under an independent contract depends upon the circumstances of each case, and the terms of the contract. It is not, however, presented by the present case. Assuming that such is the master's duty, the evidence on the part of the plaintiff is that such a test could only be properly made by heating the cleaner and introducing steam. One of the plaintiff's witnesses testified that no mere pressure test, whether by air or water pressure, would be a safe test of an apparatus which was to contain steam and become heated by steam under high pressure. The defendants' brief says: "All the experts on the part of the plaintiff, and all the witnesses on the part of the defendant, who had any knowledge on the subject, admitted that the steam heat test was the proper and well-known test to use to determine whether or not this appliance was safe and fit to use in the mill." The only other test suggested—the hammer test—was actually used, and it is not suggested that it was inefficient as far as it went. We assume that the plaintiff's view is correct. If so, there seems to be an insuperable obstacle in the way of his recovery, for the explosion was caused by the

introduction of steam heat into the cleaner. It would be quite illogical to find the defendants negligent for doing the very thing which, upon the plaintiff's contention, they were obliged to do in the performance of their duty to him. It is not to the point that the plaintiff did not know they were making a test. They were under no obligation to tell him their object in introducing steam into the cleaner. Nor is it of any significance, if it be the fact, that the introduction of steam was with a view to the actual operation of the cleaner, and not to a trial test. The first time steam was introduced answered all the purposes of a test. If the cleaner proved defective, its use would be stopped. If it withstood the test, there was no reason why it should not be used continuously for the purpose for which it was intended, if a continuous use was necessary. Nor can the plaintiff complain because he was the employé who helped start the working of the apparatus. The defendants had the right to start it through some of their employés, and there is no suggestion that the work was not properly within the plaintiff's line of duty.

The plaintiff's statement of the master's duty defeats his action, unless there was some impropriety in the method of making the test. It is urged that the cleaner was heated, and the steam introduced too rapidly, and there is evidence that proper care required that the process should be a slow one. The difficulty in the plaintiff's way upon this view is that there is nothing to show that the heating of the cleaner and the introduction of steam in the manner in which these things were done would have resulted in an explosion, if the cleaner itself had not been structurally defective. The fact seems to be quite clear that the injury happened from this structural defect, and for such a defect the defendant is not liable.

The motion to nonsuit should have prevailed, and the judgment must be reversed.

(75 N. J. L. 111)

In re NEW YORK BAY R. CO.

(Supreme Court of New Jersey. June 10, 1907.)

TAXATION—EXEMPTION FROM LOCAL TAXATION—PROPERTY USED FOR RAILROAD PURPOSES.

Application was made by a railroad corporation of this state for a summary determination as to certain lands in the city of J. located within the right of way of its railroad which had been assessed by the local authorities of the city during the period from 1894 to 1902, and also assessed during the same period by the state board of assessors as property used for railroad purposes, to settle their character for the purposes of taxation, and by which assessors the same has lawfully been assessed, pursuant to section 28 of the revised railroad and canal taxation act (P. L. 1888, p. 285). It appeared that work on the road began in 1889 and was continued from time to time upon some portions of the right of way for several years thereafter, but that no work was done in the vicinity of the lands assessed, which consisted of lots in certain city blocks, until the

latter part of the year 1900, up to which time part of the lands remained unused and unimproved and part was in use for farming purposes. In the latter year the work of construction began and was practically continuous thereafter until October 1904, when the road was completed so that it could be operated. It was held (1) that ordinarily, where a company has not completed its road and is engaged in the work of construction, the exemptive words of the statute must be extended to property within the right of way not actually used for other purposes during such work of construction; (2) but, where such work of construction has been delayed beyond the requirement of reasonable necessity in order thereby to serve the interest or convenience of the company, then lands situated as these were before the work of construction began in that part of the right of way would not be entitled to the benefit of such exemption; (3) that the taxes assessed by the city authorities from 1894 to 1900, inclusive, must be sustained, and the assessment made by the state board of assessors during the same period must be canceled and the taxes collected thereon by the state returned to the applying company, that the taxes levied by the city for the years 1901 and 1902 must be canceled.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Railroads, §§ 871, 873, 874.]

(Syllabus by the Court.)

Application by the New York Bay Railroad Company for a summary determination of the character of certain lands owned by the applicant and located within the bounds of the city of Jersey City for the purposes of taxation. Judgment that the lands during the period from 1894 to 1900, inclusive, were not property used for railroad purposes within the meaning of Pub. Laws 1888, p. 269, exempting such property from local taxation, and that after the year 1900 the exemption was applicable.

Argued February term, 1907, before FORT, PITNEY, and HENDRICKSON, JJ.

James B. Vredenburg, for the New York Bay R. Co. Robert Carey, for the mayor and aldermen of Jersey City.

HENDRICKSON, J. This is an application by the New York Bay Railroad Company for a summary determination of the character of certain lands owned by the applicant and located within the bounds of the city of Jersey City for the purposes of taxation, which have been assessed by the local authorities of the city and also assessed by the state board of assessors as property used for railroad purposes, pursuant to the authority of section 28 of the revised act for the taxation of railroad and canal property (P. L. 1888, p. 269). The lands thus doubly taxed are plot 2, block 1390, Miles street, block 1383, lot 2, Miles street, block 1404, lot 3, and gore, as plotted upon the assessment map of Jersey City. The case shows that these plots were assessed for taxes by the city for the years 1894 to 1902, inclusive, and that for the same years they were assessed by the state board of assessors, and that the taxes thus levied have been paid to the state. The lands thus assessed are within the right of way of the New York Bay

Railroad, the main stem which connects the Pennsylvania Railroad at Waverly with a freight terminal yard on New York Bay in that part of Jersey City called Greenville.

The company was formed in 1880 by a merger of other companies. Work was done on this railroad in 1889 and 1890 by filling in back of the dike on Newark Bay, and running that filling westerly towards Waverly, and this work continued off and on at that point for several years, covering a distance of several thousand feet. Some work was also done in 1889 near the crossing of the Central Railroad in Jersey City, 400 feet of trestle being built west of the crossing and 200 feet of embankment east of the crossing; but nothing was done in that part of the right of way which includes the blocks where the taxes in question were levied until the latter part of the year 1900, when the grading of the road and the building of bridges over streets and the laying of tracks commenced. Until that year the land in blocks 1888 and 1890 remained in its natural state, unimproved, and was not used for any purpose, but the land in block 1404, except the gore, was being used in 1900 for farming purposes, a truck farm being located therein, which was farmed until the farming was interfered with by work on the railroad. Construction trains ran over this property between 1900 and 1904, but the work was not completed so that the railroad could be operated until October 1904.

The question, therefore, is: Were the plots of ground covered by the assessments in question during the years named when they were levied property used for railroad purposes within the meaning of the revised act for the taxation of railroad and canal property, approved March 27, 1888 (P. L. 1888, p. 269)? It was held by the Court of Errors in *U. N. J. R. R., etc., Co. v. Jersey City*, 55 N. J. Law, 129, 26 Atl. 135, that the authorized right of way of a railroad duly acquired, over which railway has been constructed and is in good faith operated, is used for railroad purposes within the meaning of the act named, although it may not, for the time being, be wholly occupied by tracks or other railroad appliances. But the case sub judice presents a different question, for the taxes in dispute were levied during the period of construction, and before the road was in operation. The rule to be here applied was laid down by this court in *State, etc., v. Haight*, 35 N. J. Law, 40. That rule, briefly stated, is this: Where a company has not completed its road and appendages, and is engaged in the work of construction, the exemptive words of the statute must be extended to property, not actually used for other purposes, which has been acquired as the means of carrying into effect the objects of the charter, and is fairly within the plan upon which the work is being executed and will be necessary for the business of the company when the same is completed. Under this rule we would

have no hesitation in extending the claim of exemption from local taxation to the lands assessed for so long a period as was reasonably necessary for the construction of the road. But, where such a work has been delayed beyond the requirement of reasonable necessity in order to serve the interest or convenience of the company, then we think that lands in the situation that these were before the work of construction began in that part of the right of way would not be entitled to the benefit of such exemption. Such a ground of limitation in applying a rule of exemption to railroad property was laid down in the opinion in *State v. Mansfield*, 23 N. J. Law, 510, 57 Am. Dec. 409, where Justice Potts said that "the limitation must be fixed where the necessity ends and the mere convenience begins." The burden was upon the company seeking the benefit of the exemption to show that they had brought themselves within the rule here stated. This we think they failed to do. Another ground for denying the exemption to block 1404, lot 8, is found in the fact that in 1900 and prior thereto it was used for farming purposes. *State v. Mansfield*, supra.

Our conclusion, therefore, is that the lands so assessed by the local authorities of Jersey City during the period from 1894 to 1900, inclusive, were not property used for railroad purposes within the meaning of the exemption act, and that the city taxes so assessed thereon during the period named should stand, and that the assessments made on said lands by the State Board of Assessors during the same period should be canceled and the taxes collected thereon by the state returned to the applying company; that after the year 1900 the exemption must apply and the taxes levied thereon by the city authorities for the years 1901 and 1902 must be canceled.

The judgment will be entered without costs to either party.

(75 N. J. L. 251)

MANDA v. CITY OF ORANGE et al.

(Supreme Court of New Jersey. June 10, 1907.)

1. EMINENT DOMAIN — EXERCISE BY CITY — LAYING WATER PIPES.

In proceedings by a city to condemn the right to lay down water pipes in and upon lands of the citizens under the act approved April 21, 1876 (P. L. p. 366; Gen. St. p. 646, § 902), and the supplement thereto approved March 13, 1883 (P. L. p. 98; Gen. St. p. 652, § 925), it is essential to the validity of the proceedings that the act of April 21, 1876, should have been adopted by the city.

2. SAME—COMPLIANCE WITH STATUTORY PROVISIONS.

Statutes conferring the power of condemnation under the right of eminent domain are strictly construed. Every provision of the statute must be strictly complied with, and such compliance must affirmatively appear on the face of the proceedings.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Eminent Domain, §§ 131-134.]

(Syllabus by the Court.)

Certiorari by W. A. Manda against the city of Orange and Arthur Horton, clerk of Essex county, to review an order authorizing condemnation proceedings.

Argued February term, 1907, before HARRISON, SWAYZE, and TRENCHARD, JJ.

Cowles & Carey, for prosecutor. William A. Lord, for defendants.

TRENCHARD, J. This writ of certiorari brings up for review an order made December 8, 1906, on the application of the city of Orange, appointing commissioners in condemnation proceedings to appraise certain rights in lands of the prosecutor located at South Orange, N. J., and the petition and all other proceedings therein.

The prosecutor insists that the order and proceedings are illegal and void, because, among other reasons, the petition upon which the order appointing commissioners was made was insufficient to warrant the appointment of commissioners. In its petition the city alleges that under and by virtue of the provisions of an act entitled "An act to enable cities to supply the inhabitants thereof with pure and wholesome water," approved April 21, 1876 (P. L. p. 366; Gen. St. p. 646, § 902), and of a supplement thereto entitled "A further supplement to the act entitled 'An act to enable cities to supply the inhabitants thereof with pure and wholesome water,' approved April twenty-first, anno domini, one thousand eight hundred and seventy-six," approved March 13, 1883 (P. L. p. 98; Gen. St. p. 652, § 925), and of an act entitled "An act to regulate the ascertainment and payment of compensation for property condemned or taken for public use," approved March 20, 1900 (P. L. p. 79), the city of Orange has "determined to acquire the right and privilege to lay down, repair, replace and forever maintain water pipe or pipes in, over, through and across land" of the prosecutor. The act of April 21, 1876, authorizes cities of this state to provide their inhabitants with water by the methods therein prescribed, but expressly provides, in section 16 thereof, that "its provisions shall remain inoperative in any city in this state until assented to by a majority of the legal electors thereof" voting upon the question at an election held and conducted in the method prescribed by the act. The supplement of March 13, 1883, is the statutory provision which authorizes the acquisition by condemnation of the right to lay down water pipes; but its operation is likewise limited to those cities "which may have adopted or shall adopt the provisions of said act [of April 21, 1876] by the assent of a majority of the legal voters thereof voting at an election held or to be held in said city." Under these statutory provisions it is essential to the validity of the proceedings under review that the act of April 21, 1876, by virtue of which the city claims the right to condemn, should have been adopted by the city.

The petition in question fails to allege the adoption of the act, and there remains only to be considered the consequence of that failure. The city, by authority purely statutory, seeks to take the property of the prosecutor against his will, and at a price to be determined by others. The state has granted this right to certain municipalities only, and that upon the express condition of the adoption of the provisions of the act by which the authority is granted. The municipality seeking to avail itself of this statutory right must present its petition to a justice of the Supreme Court, and in its petition the ground of its right to have commissioners appointed must appear. This is the object of the petition. It is the basis of the jurisdiction of the justice to act, and being jurisdictional in character, and in a statutory proceeding, everything essential to the right sought to be exercised must affirmatively appear. The court will not indulge in any presumption in aid of jurisdiction.

In *Vreeland v. Jersey City*, 54 N. J. Law, 49, 22 Atl. 1052, this court said: "Statutes conferring the power of condemnation under the right of eminent domain are strictly construed. Every condition prescribed by the Legislature in the grant must be complied with, and the proceedings to condemn must be conducted in the manner and with the formalities prescribed in the grant of power. Formalities and modes of procedure prescribed are the essence of the grant, which the courts cannot disregard on a conception that they are not essential."

In *Hampton v. Clinton*, 65 N. J. Law, 158, 46 Atl. 650, the above rule was cited and applied, and the defendant having failed, until after condemnation proceedings were instituted, to annex to and file with its certificate of incorporation a consent prescribed by statute, it was held that the appointment of commissioners was illegal, although such consent was filed after the proceedings were commenced.

In *Louchelm v. Hemsley*, 59 N. J. Law, 149, 35 Atl. 795, commissioners had been appointed by the mayor of Atlantic City to construct a city hall. These commissioners sought to condemn lands of the prosecutor, who brought to this court for review by certiorari the appointment of the commissioners and their proceedings in condemnation. The statute under which the commissioners were appointed required that they should be residents of the city and of different political parties. Neither their appointment nor the proceedings under review disclosed these facts affirmatively, and the omission was held fatal. The court said: "A special authority delegated by statute to particular persons to take away a man's property and estate against his will must be strictly pursued, and must appear to have been so pursued on the face of the proceedings in which the authority is exercised."

In the case at bar, it is contended that the adoption of the act is sufficiently made to appear in the petition by citing the title of the act and the allegation that, "under and by virtue of the provisions of the act, * * * the city of Orange has determined to acquire the right and privilege," etc.; but this contention cannot prevail. That language falls far short of alleging the adoption of the act in the manner prescribed in the act itself. The most favorable deduction to be drawn from it in favor of the defendants is the possible inference that the city may have adopted the act, as otherwise it would not be likely to attempt to proceed under it; but in a case of this kind jurisdiction is not to be based on inference, but the facts must be alleged. Every allegation in the petition may be absolutely true, and yet the act may never have been adopted, and the city may be utterly without authority to condemn. The prosecutor questions, not that the city has determined to do something, but its right to reach that determination and put it into effect. The case of *In re Montgomery et al.* (D. C.) 48 Fed. 896, is in point. That was a proceeding brought on behalf of the United States government in the United States District Court for the District of New Jersey to condemn lands. The proceeding was based upon a statute of the United States, which provided that any officer of the government authorized to procure real estate for public uses was "authorized to acquire the same for the United States by condemnation under judicial process, whenever in his opinion it is necessary or advantageous to the government to do so." The petition alleged that "the Secretary of War had requested the Attorney General of the United States to commence these proceedings in condemnation according to the acts in such case made and provided." The sufficiency of the petition was challenged on the ground, among others, that it "fails to show that, in the opinion of the Secretary of War, it is necessary or advantageous to the United States that the land in question should be acquired under judicial process." In support of the petition, it was argued that the allegation that the Secretary of War had requested the Attorney General to commence the proceedings would carry with it the presumption that he was of the opinion that it was both necessary and advantageous to the United States to acquire the lands. The court said: "This argument is plausible, but unsound. It is a well-settled principle that when the exercise of a special authority, delegated by statute to a particular person or to a special tribunal, is dependent upon conditions precedent, all preliminaries which show fulfillment of such conditions, and which confers upon such person or tribunal power to act, must clearly appear upon the face of the proceedings. The proper practice is to state affirmatively and with certainty

all facts upon which, in such case, jurisdiction depends. Intendment and presumption should not be resorted to for the justification of any judicial proceedings, in derogation of private rights."

The case of *In re City of Buffalo*, 78 N. Y. 362, is one in which the city voted to acquire certain property by condemnation proceedings. The act under which the proceedings were taken provided that the right of condemnation should be exercised only upon certain conditions, among which were the passage of a resolution by a two-thirds vote, showing the determination to take the land. The court said: "Before the city can take lands for a street, these resolutions must have been passed, and the last one with the prescribed vote, for it is a familiar principle that, when the sovereign delegates the power to take the property of the citizens, all the prerequisites to the exercise of that power that have been prescribed must be strictly observed and conformed to. The need is upon the city, before it can take the lands, to be able to show that these requirements have been met. For the basis of the power of the city to act is the concurring judgment of two-thirds of the members of the common council that there is a necessity for the taking, without which, action of the city to take lands is wholly unauthorized and illegal. Nor may it be presumed, as the appellants claim. In such case as this, the presumption that official duty has been done cannot be made."

In the present case the city contends that it is relieved of the necessity of showing the adoption of the act conferring power by section 2 of the act of March 20, 1900; but an examination of that section plainly shows that such contention cannot prevail. That section does not purport to provide what shall be a sufficient petition. It merely provides that it shall contain certain matters. There certainly is no reason to suppose that by its enactment the Legislature intended to thereby relieve the petitioner from presenting to the justice of the Supreme Court who is asked to make the order the jurisdictional facts in a petition under oath.

We conclude, therefore, that the rule of law is well settled that statutes conferring the power of condemnation under the right of eminent domain are strictly construed. Every provision of the statute must be strictly complied with, and such compliance must affirmatively appear on the face of the proceedings. When tested by that rule, the proceedings under review are fatally defective.

Our conclusion on the point considered renders it unnecessary to consider the other reasons alleged for reversal.

The order of appointment and all subsequent proceedings will be set aside, with costs.

(73 N. J. E. 242)

FERRELL v. STRONG.

(Court of Chancery of New Jersey. May 29, 1907.)

INJUNCTION—STAYING PROCEEDINGS IN LAW COURT—EQUITABLE RELIEF.

Where the facts set forth in a bill show that complainant has an estate in lands which cannot be ascertained in a pending action at law against her, but can only be asserted in a court of equity, further proceedings in the law court will be suspended until a decree may be had in equity.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Injunction, §§ 15-17, 306.]

Bill for an injunction by Mary Young Ferrell against Robert A. Strong. Decree for complainant.

John Boyd Avis, for complainant. G. Dore Cogswell, for defendant.

LEAMING, V. C. A more careful consideration of this case confirms the views expressed by me at the hearing.

The facts set forth in the bill disclose an estate in the lands in question which can only be ascertained and asserted in a court of equity. In the pending action at law against complainant these rights cannot be asserted, and she is in consequence entitled to have further proceedings in the law court suspended until a decree may be had under the present bill in equity. Atlantic City Ry. Co. v. Johanson (N. J. Ch.) 85 Atl. 719. I will advise a decree accordingly.

(72 N. J. E. 229)

WATKINS v. STATE MUT. BUILDING & LOAN ASS'N.**FITZGERALD v. SAME.**

(Court of Chancery of New Jersey. May 2, 1907.)

BUILDING AND LOAN ASSOCIATIONS—RECEIVERS.

A receiver will not be appointed for a building and loan association in process of liquidation under the act of 1904 (P. L. 1904, p. 44) on mere suggestion that the trustees appointed under the act named were men who were too closely connected with the former management of the association, together with criticism as to the manner of their selection, without substantial evidence of wrongdoing.

Bills by David O. Watkins, as commissioner of banking and insurance, and by Patrick Fitzgerald, against the State Mutual Building & Loan Association for a receiver. Denied.

Nelson Burr Gaskill, Asst. Atty. Gen., for Commissioner. Joseph Kaighn, J. J. Sumner, III, and R. E. Lum, for Fitzgerald. El. A. Armstrong, for defendant.

LEAMING, V. C. I have determined not to appoint a receiver at this time. There is no evidence before me from which I can properly conclude that the interests of creditors or stockholders require it. Suggestions have been made that the trustees are men who are too closely connected with the former management of the association, and the

manner of their selection is also criticised. These suggestions carry the implication that irregularities may exist which the trustees will not be free to expose. It is manifestly improper for me to base my action upon such suggestions in the absence of some substantial evidence or positive assertion of facts. I shall assume that the trustees named will do their whole duty until I am judicially informed of matters which justify a different assumption.

The bills will be retained, and a receiver may be applied for at any time the necessity can be made apparent.

Creditors and stockholders will be privileged to examine the books of account and papers of the association, and may employ accountants for that purpose if it is thought desirable.

(73 N. J. E. 235)

VAN KEUREN v. SIEDLER.

(Court of Chancery of New Jersey. May 23, 1907.)

1. SPECIFIC PERFORMANCE—SALE OF REAL ESTATE—ENFORCEMENT BY VENDEE.

Where a contract for the sale of land calls for a conveyance free from incumbrances, in the absence of an unwillingness on the part of the vendor to have the incumbrances discharged from the purchase money at the time of conveyance, equity will not entertain a bill for specific performance to compel the vendor to discharge the incumbrances from his funds prior to the passing of title.

2. VENDOR AND PURCHASER—CONTRACT—CONSTRUCTION.

An agreement to convey land free from incumbrances calls for a marketable title.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Vendor and Purchaser, §§ 234-238.]

3. SPECIFIC PERFORMANCE—ISSUES.

In a suit by a vendee for specific performance, the bill alleged that defendant had contracted to convey the same land to a third person, which contract was of record prior to the contract with complainant. *Held*, that the bill was demurrable as a determination of the validity of the prior contract at the time of the contract with complainant could not be determined in a suit to which the third party was not a party.

4. SAME—REMEDY AT LAW.

Though the bill prayed for compensation in case defendant could not give a marketable title, it could not be entertained as a bill to recover damages, as such remedy must be at law.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Specific Performance, § 412.]

Suit by Melvin R. Van Keuren against Charles Siedler for a specific performance of a contract for the sale of land. Demurrer to the bill sustained.

James Steen, for complainant. Condict, Condict & Boardman, for defendant.

LEAMING, V. C. Complainant's bill is for the specific performance of a contract wherein defendant agreed to convey to complainant certain land in Jersey City free and clear of incumbrances. The bill avers the existence of a mortgage and certain un-

paid taxes on the land in question, and also avers that a certain contract of sale exists wherein defendant agreed to convey the same land to the Realty Development Company, which last-named contract was executed and recorded prior to the execution of the contract with complainant, and avers that time is not of the essence of the prior contract of sale. The bill prays for a decree to compel defendant to convey the land to complainant free from incumbrances and for compensation in case defendant is unable to comply with his contract in whole or in part.

So far as the taxes and the mortgage are concerned, there can be no difficulty. A decree can appropriately be made authorizing their payment from the money yet to be paid by complainant. In fact, the bill does not clearly disclose any unwillingness upon the part of defendant to have had that course heretofore adopted. Where there are outstanding undisputed liens against a property which is to be conveyed free from all incumbrances, it is, in ordinary business practice, the custom to discharge the liens out of the purchase money at the time the conveyance is delivered; and I doubt the right of a vendee to require such liens to be discharged by the vendor from his own funds prior to that time. In the absence of an unwillingness upon the part of vendor to have the purchase money so applied when it is ample in amount, I am of the opinion that this court should not entertain a bill on behalf of the vendee based upon the neglect or refusal of vendor to discharge the incumbrances in advance of the time for passing title. *Worch v. Woodruff*, 61 N. J. Eq. 78, 84, 47 Atl. 725.

From the bill it is manifest that the real controversy arises from the existence of the prior recorded contract wherein defendant contracted to convey the same land to the Realty Development Company; and complainant charges that this contract is a cloud upon the title rendering it marketable, and alleges that defendant refuses to remove the cloud under a claim upon his part that it is not a defect in or cloud upon the title. The bill does not positively assert whether or not the prior contract of sale is at this time a live and enforceable contract, but proceeds upon the theory that it renders the title an unmarketable one, and that this court will by its decree compel defendant to deliver a marketable title.

The contract which complainant now seeks to enforce entitles him to demand a marketable title, and the title to the land in question is clearly unmarketable so long as the prior recorded contract of sale remains an apparent binding contract. But the difficulty at this time encountered is that complainant having entered into his contract with constructive notice of the existence of the prior contract is not entitled to a conveyance of the land if in fact the prior contract is still alive; and no judicial ascertainment of that fact can be had in this suit because the

Realty Development Company is not a party. A decree requiring defendant to convey the land to complainant would, in consequence, be necessarily based upon an assumed fact which cannot be inquired into in this suit. The same considerations manifestly render it impossible for this court to grant any relief under the present bill. The bill cannot be entertained as a bill to recover damages for the failure of defendant to deliver a marketable title. That remedy must, under the facts stated in the bill, be sought in a court of law. The demurrer must be sustained.

It may not be inappropriate to suggest, for the consideration of complainant, the possibility of relief through a bill against both defendant and the development company based upon a claim of the invalidity of the prior contract and seeking a cancellation of the record and specific performance. This suggestion is made wholly for complainant's consideration, and in no way as an expression of opinion on the subject.

(73 N. J. Eq. 577)

SIVIN et al. v. MUTUAL MATCH CO. et al.
(Court of Chancery of New Jersey. May 14, 1907.)

CORPORATIONS—STOCKHOLDERS' ACTION—UNPAID STOCK.

The stockholders of a going corporation who have not paid up their stock in full cannot maintain an action to compel other stockholders to pay up unpaid stock.

Bill by Samuel Sivin and another against the Mutual Match Company and others. Heard on bill, answer, replication, and proofs. Bills dismissed in part.

Merritt J. Lane and Mr. Kaplan, for complainants. Joseph Kahrs, Mr. Bilder, and Max D. Steuer, for defendants.

EMERY, V. C. The principal object of this bill, which is filed by several stockholders of the Mutual Match Company, is to compel the defendant stockholders to pay up in full and to par value the stock issued to them. The defendant stockholders control the management of the company, and the company is made defendant. The bill alleges that the complainants' stock was purchased or taken on the false representation by the defendant stockholders that the defendants' stock was fully paid up in cash or property to the full value thereof; but the proofs show that this charge was unfounded, and they also show, as I conclude, that none of the stock issued, either that to complainants or defendants, is full paid, but was issued mainly for property purchased on a basis of valuation of about \$2.50 of stock to \$1 of money invested, or value of property transferred. The complainants acquired their stock as full paid in connection with the conveyance of property to the Mutual Match Company by the Columbia Match Company.

in which complainants were stockholders, and it appears satisfactorily that they received this excessive amount of stock in order to put their relative interests in the Mutual Company on substantially the same basis as the stock of the Mutual Company already issued and proposed to be issued to the defendants, on completing the practical amalgamation or consolidation of the two companies, by a sale of the assets of the Columbia Company to the Mutual Company. As against creditors of the Mutual Company, or any person suing in the right of creditors, and for the payment of the company's debts, none of the stock would be considered as paid-up stock under the statute, and all of the stockholders, complainants as well as defendants, would be liable ratably for the payment of the debts. This liability of stockholders to creditors is, however, worked out by an accounting of the debts to be paid, and the proportionate liability of each stockholder. If the company is in insolvency, the ratable liability is determined by a judicial hearing, ascertaining the quota due from each stockholder for the payment of all the debts (*Cumberland Lumber Co. v. Clinton Hill, etc., Co.*, 57 N. J. Eq. 627, 630, 42 Atl. 585 [Err. & App. 1898]); and, if no receiver has been appointed, then by a bill in equity for an accounting to which the creditors and stockholders are parties (*Wetherbee v. Baker*, 85 N. J. Eq. 501, 506 [Err. & App. 1882]).

In the present case the company is a going company, and the management of its affairs, including the right to call for payments on unpaid stock, is in the directors of the company. Corporation Act, Revision 1896, § 22 (P. L. p. 284). According to some authorities, such assessment when made should be made ratably on all the stockholders liable. 3 Thompson, Corporations, § 3539, citing *Great Western Tel. Co. v. Burnham*, 79 Wis. 47, 47 N. W. 373, 24 Am. St. Rep. 698, where a bill showing an unequal assessment was held to be demurrable. *Id.* §§ 474, 3539. In this aspect of it, the object of the bill is not to require an assessment by the directors on all unpaid stock, but for a direct decree to compel defendants, and defendants alone, to pay up their unpaid stock, and, if such decree should be made without complainants also making any payments on their stock, it would result, of course, in giving complainants the substantial benefit of defendants' payments. So long as the company is a going concern, the court will not interfere on behalf of a stockholder who is in the same default, simply to compel another stockholder to pay up his unpaid stock.

There is no express statutory liability of one stockholder to another for the payment to the company of unpaid stock—as in the case of creditors (section 21, Corporation Act, Revision 1896)—and the stockholder suing in the right of the company must not only establish the company's right to compel payment, but his suit is also subject to the ap-

plication of the maxim that he must come into equity with clean hands. The general rule is that a stockholder in the same default or participating in an alleged illegality or fraud is estopped even from obtaining a decree in the company's right. 4 *Thomp. Corp.* § 4457. And, as the complainants' default appears from the evidence necessarily taken as to the circumstances of the issue of their stock, the maxim withholding relief must be applied by the court in the exercise of equitable jurisdiction, whether the defense is specially pleaded or not.

If in the proper management of the company as a going concern, a resort to the liability of a stockholder for payments on his unpaid stock should be shown, and it should also be shown that the directors, in violation of their duties and trusts to the company, or even to the stockholders who had paid in their stock in full, neglect or refuse to make such call, a court of chancery might, through a receiver or otherwise, make the assessment and call on the unpaid stock. But ordinarily such call or assessment would be made ratably on all stockholders liable. Such case or contingency should not be prejudged or affected by any refusal to compel payment in this case. So far, therefore, as the bill seeks to compel this payment, I will advise a decree of dismissal; but, as the bill is filed in right of the company, the dismissal will be without prejudice to any bill or suit by the company, or on its behalf, after an assessment or call duly made on the defendants, or either of them, or to any bill or suit by or on behalf of the company, in the right of creditors of the company, or by or on behalf of the company by any stockholders other than the complainants.

The bill also sought to have a mortgage of \$12,000, held by defendant Cassel Cohen upon lands of the company, declared to be without consideration. This allegation was not sustained by the proofs, and at the oral argument no special relief against the mortgage was claimed. In the briefs sent in, counsel for complainant, however, ask a reference to ascertain the amount due, and, before advising decree, I will hear counsel (orally or by brief) on the right to any decree in this suit for relief touching this mortgage.

SCHOETTLE v. HENGEN et al.
(Court of Chancery of New Jersey. May 8, 1907.)

EQUITY—PLEADING—ADMISSION BY REPLICATION.

By joining issue on the plea, complainant admits the sufficiency of the facts stated as a defense, if they are proven to be true.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Equity, § 604.]

Bill by Gustave A. Schoettle against Daniel F. Hengen and others, executors. Decree advised dismissing the bill.

S. M. Roberts, for complainant. H. M. Cooper, for defendants.

LEAMING, V. C. To the bill filed by complainant, defendants have filed a plea in bar, setting forth that a former bill of like effect was heretofore filed by complainant against defendants, and after hearing dismissed by decree of court. To that plea complainant filed a replication. At the hearing the evidence offered established the truth of the facts pleaded. Complainant now contends that the matter pleaded by defendants is insufficient in law to operate as a bar to the maintenance of the present bill.

It is well settled that this question cannot be raised in this manner. To contest the sufficiency of a plea the cause must be set down for hearing on bill and plea. This operates as a demurrer to the plea. But, when complainant files a replication to the plea, he admits its legal sufficiency, and at the hearing the only question which can be considered by the court is its truth. At the hearing the court cannot inquire into the materiality of the facts set up in the plea. If their truth is established, the bill must be dismissed. If the facts set up in the plea are not established, the complainant is entitled to a decree in accordance with this bill. These principles are well settled and uniformly recognized. *Flagg v. Bonnel*, 10 N. J. Eq. 82; *Hunt v. West Jersey Traction Co.*, 62 N. J. Eq. 225, 49 Atl. 434. The result is that this court has no discretion whatever in this matter. The truth of the matters set up in the plea having been fully established at the hearing, the bill must be dismissed.

At the hearing the court called the attention of counsel of complainant to the cases above cited, and thereupon a motion was made for leave to withdraw the replication; but that motion has since been withdrawn and complainant's counsel has elected to stand upon the issues as framed.

A decree must be advised dismissing the bill.

(75 N. J. L. 68)

LEHIGH & WILKESBARRE COAL CO. v. BOROUGH OF JUNCTION et al.

(Supreme Court of New Jersey. June 10, 1907.)

COMMERCE—INTERSTATE COMMERCE—TAXATION.

Coal, shipped from the state of Pennsylvania and stored in this state to await orders for sale, and then to be transshipped to customers purchasing, after such storage, is not in interstate commerce, and is taxable at the place of storage here.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Commerce, §§ 124-136.]

(Syllabus by the Court.)

Certiorari by the Lehigh & Wilkesbarre Coal Company against the borough of Junction and others, to review an assessment for taxes. Tax affirmed.

Argued November term, 1906, before FORT, PITNEY, and REED, JJ.

George Holmes, for prosecutor. William C. Gebhardt, for defendants.

FORT, J. The defendant imposed a tax upon 100,000 tons of coal belonging to the complainant and stored within the defendant's territorial boundaries. But a single question is raised upon this writ. The contention of the prosecutor is that the coal taxed by the defendant was in transit, and hence is not taxable.

Whether the coal is or is not in transit is a question of fact. A careful examination of the facts in this case leads us to the conclusion that the coal taxed by the defendant cannot be deemed to be coal in interstate commerce, as the prosecutor contends. The case before us is within the principle declared by the Supreme Court of the United States in *American Steel & Wire Co. v. Speed*, 192 U. S. 500, 24 Sup. Ct. 365, 48 L. Ed. 538. The coal here taxed was brought from Pennsylvania to Junction in this state, where, under the proof, it was to remain indefinitely. When shipped from Pennsylvania there was no point which was then definitely known to which it was to be transshipped, nor was the purchaser known. When it left the mines the intent was to stack it in what are called trimmers. The proof is that it might remain so stacked for a year or more. When the coal reached Junction it had reached the destination intended when it was shipped from the mines, and the place where it was to be held in storage at the risk of the prosecutor, to be sold and delivered as contracts for that purpose were completely consummated. The cases applicable to the question here, as decided in this state, are all cited by Mr. Justice Van Syckel in *John Hancock Ice Co. v. Rose*, 67 N. J. Law, 86, 50 Atl. 364. The case before us is distinguishable from all the New Jersey cases which hold property in transit to be nontaxable. Nor can this tax be held to amount to a regulation of commerce within the opinion of Chief Justice Beasley in *Erie R. R. Co. v. State*, 31 N. J. Law, 531, 86 Am. Dec. 226. We find, under the proof, that the coal taxed was not in transit.

The tax brought up is affirmed.

SWEETEN v. MAYOR, etc., OF CITY OF MILLVILLE.

(Supreme Court of New Jersey. June 10, 1907.)

MUNICIPAL CORPORATIONS—CONTRACTS—CONSTRUCTION—MODIFICATION BY SUBSEQUENT AGREEMENT.

Plaintiff contracted to construct a sewer system for a city to be ready for acceptance on a certain date. By the contract the streets were to be left in the same condition as when found. Plaintiff also agreed by section 23 of the contract to indemnify the city for all suits brought for damage due to the improper conduct of the work or his negligence, and, in case such claims should be made, the city could re-

tain as much of the money due on the contract as it considered necessary for protection until the claim was settled. Later a new agreement was entered into between the parties, stating that in consideration of the payment of a certain sum by plaintiff the city released him from all claims for failing to complete the work in the time allowed, and for failing to restore the street surfaces according to the terms of the contract, and that plaintiff, in consideration of the payment of a certain sum, released the city from all claims, excepting for sums retained by the city under section 23 of the original contract. The agreement also stated that it should not be considered as annulling or modifying the provisions of the original agreement, but a mutual release for the particulars specified. *Held*, that section 23 of the original contract was left unmodified, and hence, where a suit was begun by a gas company for damages resulting from work done under the contract by reason of plaintiff's negligence, and remained unsettled, the city could retain as much of the money due plaintiff as it deemed necessary to save it harmless from the suit until the same was settled.

Action by Frank B. Sweeten, trading as Sweeten & Son, against the mayor and common council of the city of Millville. Demurrer to defendant's plea overruled.

Argued February term, 1907, before the CHIEF JUSTICE, and GARRETSON and REED, JJ.

French & Richards, for plaintiff. Louis H. Miller, for defendant.

REED, J. The declaration sets out that Sweeten contracted by an agreement entered into on July 17, 1903, to construct a sewer system for the city of Millville, to be ready for acceptance on May 1, 1904. By the contract it was provided that the streets should be left in the same condition as when found.

It appears from a recital in the declaration that the contract contained a section, No. 23, which read as follows: "The contractor hereby agrees to keep such work as may be done by him under this contract and specifications in complete repair for twelve months after its final acceptance, and authorizes the said city to retain three per cent. of the gross amount of this contract for the same period to insure such repairs; such three per cent. to come out of the amount retained herein-after referred to. The compensation for any such repairs must be included in the regular prices bid for the system, and, in case of failure on the part of the contractor to perform this portion of the contract, such repairs will be made by the said city and the expenses thereof deducted from the percentage retained." It also contained another section, No. 23, which read as follows: "The contractor hereby agrees to keep sufficient guards by day and by night to prevent accident by travel, and to indemnify and save harmless the said party of the first part from all suits, injuries or damages received or sustained by any person or persons or properties, by or from said party of the second part, his servants, agents, employes or workmen during the prosecution of the work, or

by or in consequence of any improper materials in its construction, or by or on account of any act of negligence or omission whatsoever of said party of the second part, or any of his servants, employes, workmen or agents; and in case of suit or suits, claim or claims therefor being made, so much of the money due or to become due to the said party of the second part, under and by virtue of this contract as shall be considered necessary by said city, may be retained by the city and withheld from the said party of the second part until all such suits or claims shall have been settled and evidence of such settlement furnished the city to its satisfaction, and the said party of the first part shall not in any way be liable therefor."

The declaration then states that on January 19, 1905, the plaintiff had performed his part of the contract. It sets out that on that date there was a suit pending against the contractor and also the city of Millville, which suit was brought by the Millville Gas Company to recover damages resulting from the negligence of the defendants in laying sewer pipes under the said contract. It sets out that the verdict against the defendant, Sweeten, in said suit was paid before judgment, and evidence of such settlement by the said plaintiff was furnished to the defendant to its satisfaction on September 11, 1905. It sets out that a new agreement between Sweeten and the city of Millville was entered into on May 5, 1906, a copy of which is referred to as annexed to the declaration. This new agreement recites that whereas the contractor had failed to complete his work by May 1, 1904, from which failure the city had suffered great injury, to an amount agreed upon by the parties to be \$2,600; and whereas, the contractor had neglected to restore the street surfaces to the condition as when found; and that it was agreed that it would cost the city \$800 to restore them; and whereas, the parties had agreed that upon payment by the contractor of the said sums together amounting to \$3,400, the city should release the contractor from all damages for such failures, and whereas, said work had been accepted by the city; and whereas, there was unpaid to the contractor \$14,857 on his entire contract price and the city had retained \$2,902.57 as provided for in section 23 of the original contract, and \$800 for damages claimed in the action brought by the Millville Gas Company, and \$3,400 retained for the contractor's defaults; and whereas, the balance was \$6,755.36 which the city paid over to the contractor: The agreement witnesses that in consideration of the payment of said \$3,400 the city has released the contractor from all claims for failing to complete the work and for failing to restore the street surfaces according to the terms of the original contract. It witnesses that the contractor, in consideration of the payment of \$6,755.36, releases the city from all action

and claims, excepting for the \$1,800 and the \$2,902.57 retained by the city under section 23 and section 26 of the original contract, which sum should be held by the city and finally disposed of according to the true intent, meaning, and effect of the said sections. It also witnesseth that this agreement should not be considered as annulling or modifying the provisions of the original agreement, but should be considered a mutual release for the particulars set out and specified. The declaration also states that the plaintiff has kept all work done under the contract in complete repair for 12 months after its final acceptance by the city. These are the statements in substance of the declaration. To this declaration a plea was interposed. The plea sets up that on October 25, 1905, before the settlement of the suit in the declaration mentioned, the Millville Gas Company commenced another action against Sweeten and the city of Millville to recover \$5,000 for damages on account of certain injuries sustained by the said gas company from work done under the contract mentioned by reason of negligence on the part of Sweeten and his servants, and that this action is still pending. The plea states that the sums mentioned in the declaration are retained until such suit is settled. To this plea the plaintiff has filed a demurrer.

It is to be observed that the plaintiff's case is that the sum of \$2,902.57 was retained as a guaranty of the contractor's covenant to keep his work in complete repair for 12 months after its final acceptance; that its acceptance was admitted in the new contract of May 5, 1905; that the work had been kept in repair for the requisite period, and that the contractor, when this action was brought in August, 1906, was entitled to receive this money. The plaintiff's case is that the sum of \$1,800 was retained as guaranty that the city would not suffer by reason of the particular action brought by the Millville Gas Company, and that the claim for which this particular action was brought was settled, and so the plaintiff is entitled to receive this money. By the terms of the agreement of May 5, 1905, it was provided, as already appears, that it should not modify the provisions of the original agreement, but should be construed as a mutual release for the particular purpose specified therein. Those purposes were to liquidate the amount of damages to the city for defaults by the contractor in respect of the two particulars, namely, his failure to complete the work in time, and his failure to restore the street surfaces to their former condition.

The provisions of sections 23 and 26 of the original contract were left unmodified. Now, section 23 provides that the contractor shall save the city harmless from all suits against the city on account of any act or omission or negligence by the contractor or his servants, and it further provides that, in case of such suit or suits, so much of the moneys

due or to become due under the contract as shall be considered necessary by the city may be withheld from the contractor until all such suits shall have been settled, and evidence of such settlement furnished the city to its satisfaction.

The mention in the contract of May 5th of the purposes for which the \$1,800 was retained and the purposes for which the \$2,902.57 was retained was merely descriptive for the purpose of identifying the amounts which were to be afterward accounted for. Those moneys, by the terms of the May 5th contract, were to be dealt with according to the true intent of the original agreement. Whenever the purpose for which either of these sums were originally retained was accomplished, they so far became due to the contractor. The provisions of section 23 thereupon empowered the city to retain all or part of them to await a settlement of any suit brought against the city for the negligence of the contractor. The retention was within the very words of the twenty-third section, which expressly provided for the withholding of any money to become due to answer for claims and suits for the time mentioned.

We think the plea is good and the demurrer should be overruled.

(78 N. J. L. 354)

HIRSHBERG, HOLLANDER & CO. v. JOHN F. ROBINSON & SON.

(Supreme Court of New Jersey. June 10, 1907.)

EVIDENCE—HEARSAY EVIDENCE.

Hearsay evidence is incompetent to establish any specific fact, which is, in its nature, susceptible of being proved by witnesses who speak from their own knowledge.

(Syllabus by the Court.)

Appeal from District Court of Camden.

Action by Hirschberg, Hollander & Co. against John F. Robinson & Son. Judgment for defendants, and plaintiffs appeal. Reversed.

Argued February term, 1907, before GAR- RISON, SWAYZE, and TRENCHARD, JJ.

Wilson, Carr & Stackhouse, for appellants. Thomas P. Curley, for appellees.

TRENCHARD, J. This is an appeal from a judgment of the district court of the city of Camden. The action was brought to recover the amount due upon the sale of certain paint by the plaintiffs to the defendants. The judgment was for the defendants. By the state of the case it appears that there was evidence tending to show that paint was delivered by the plaintiffs to the defendants as directed by the latter to the Hotel Elberon, at Atlantic City, N. J., and was intended for use upon that building which was then in course of erection, and which building the defendants had contracted to paint; that the defendants had not paid for the paint because they contended that they had rescinded

the order. It appears that the defendants conceived that they were entitled to rescind the order for the paint because of an alleged misstatement made by William Rich, the plaintiffs' salesman, that Dr. Ludy, the owner of the building, had sent him to defendants and wanted him to have the order for the paint.

If the defendants had a right of rescission at all, it necessarily rested upon the falsity of the statement, the falsity of which must have been established by legal evidence. The only proof attempted to be offered by the defendant as to the falsity of such statement was the testimony of John F. Robinson. As it appears in the state of the case, it was as follows: "That Dr. Ludy (not in the presence or hearing of Mr. Rich or the plaintiffs) informed him (Robinson) that he had not sent Rich to Robinson to get the order." Objection was made by the plaintiffs to this testimony, on the ground that it was hearsay, and that the plaintiffs could not be bound by the statements of third persons made in the absence of the plaintiffs or their agent. The testimony was admitted, and exception thereto duly taken. It is familiar law, requiring no citation of authority to support it, that hearsay evidence is incompetent to establish any specific fact, which is, in its nature, susceptible of being proved by witnesses who speak from their own knowledge. Tested by this rule, the evidence of the witness was incompetent. If the statement of the salesman was false, there were two persons competent to testify to that fact, viz., Dr. Ludy and the salesman, neither of whom testified to the falsity of the statement.

The result is that the judgment below should be reversed, and a venire de novo awarded.

(73 N. J. Eq. 243)

GILBERT & O'CALLIGHAN v. ANDERSON.
(Court of Chancery of New Jersey. May 31, 1907.)

PARTNERSHIP — PURCHASE OF BUSINESS BY ONE PARTNER—DUTY OF PURCHASER.

Where one partner, who was the manager of the business, purchased the interest of the other partners, it was his duty to make full disclosure of the condition of the business in every way essential to an adequate knowledge on the part of the other partners as to what they were selling.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Partnership, § 142.]

Bill for injunction by Gilbert & O'Callighan against J. Lukens Anderson on return of order to show cause. Order discharged.

J. D. McMullin, for complainant. H. C. Kramer, for defendant.

LEAMING, V. C. Complainants and defendant bore to each other a trust relationship as partners, and, when defendant purchased the interest of complainants in the partnership business, it was his duty as a

partner and manager of the business purchased to make a full and complete disclosure of the condition of the business in every way essential to an adequate knowledge on the part of complainants as to what they were selling; and the burden is upon the defendant to establish the fact that he performed his full duty in that respect. It is impossible to draw any conclusion from the affidavits filed other than that defendant performed his full duty. Complainants fix the date of dissolution as March 15, 1907. Defendant fixes the date as March 8, 1907. It is manifest that on either of these dates the prospect of effecting a sale of the land in question was so remote that neither complainants nor defendant, with all the facts touching the transaction before them, could properly have regarded the negotiation as an asset of value or worthy of consideration. Up to March 20th the negotiations were in effect abandoned, according to the testimony of Mr. Meyer. If Mr. Meyer's testimony is to be credited, it is manifest that at the date of the dissolution neither he nor defendant could have entertained any expectation that negotiations would ever be renewed touching the sale of the lands in question. I think it is entirely clear that it was only the subsequent reduction in price by the owners of the land which suggested the resumption of the negotiations of sale. If defendant, at the time of dissolution, stated (as it is claimed by complainants) that no business or deal was pending, I entertain the view that such statement was fully justified so far as the transaction in question is concerned. As a blocked or abandoned negotiation, it could scarcely have been properly considered as pending or worthy of serious consideration. Had the increased offer for the land or the reduction in the price for the sale of the land been made prior to the dissolution, a different aspect might be given to the situation.

I am convinced that, under the evidence before me, a preliminary writ would be without sufficient justification.

The order to show cause will be discharged.

(75 N. J. L. 201)

STATE v. SHARP.

(Supreme Court of New Jersey. June 10, 1907.)

1. INDICTMENT — DEMURRER — OVERRULING — JUDGMENT.

Upon overruling a demurrer to an indictment for a misdemeanor, the court may enter judgment at once, or, in its discretion, permit the demurrer to be withdrawn and a plea interposed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Indictment and Information, §§ 498, 499.]

2. FORNICATION—INDICTMENT.

An indictment charging that the defendant did commit fornication with Sarah A. C. is good without stating that Sarah was an unmarried woman.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Fornication, § 3.]

(Syllabus by the Court.)

Error to Court of Quarter Sessions, Atlantic County.

Charles Sharp was convicted of crime, and brings error. Affirmed.

Argued February term, 1907, before GUMMERE, C. J., and GARRETSON and REED, JJ.

J. J. Crandall, for plaintiff in error. J. M. P. Abbott, for the State.

REED, J. The defendant, Charles Sharp, was indicted by the Atlantic county grand jury for that in said county he did commit fornication with Sarah Augusta Cavileer, and then and there carnally knew the said Sarah Augusta Cavileer. To this indictment the defendant, after pleading not guilty, withdrew his plea and interposed a demurrer to the indictment. The trial court overruled the demurrer, and called upon the defendant to again plead. This the defendant refused to do. The court then caused a jury to be impaneled to try whether the defendant stood mute obstinately and on purpose; and the jury returned a verdict that the defendant stood mute obstinately. It was then ordered that a plea of not guilty be entered for the defendant, and thereupon a jury was called to try the issue formed by the said plea of not guilty, which jury returned a verdict of guilty. The court pronounced judgment that the defendant be fined and imprisoned. This judgment is brought up by this writ. Upon the overruling of the demurrer, the defendant was not entitled of right to a trial. The court could at once have pronounced judgment. This course of practice is entirely settled at common law. Archbold's Cr. Pr. & Ev. 116; 2 Hawkins, P. C. c. 31, § 7; Reg. v. Gibson, 8 East, 107-111; Rex v. Taylor, 5 D. & Ry. 422; Rex v. Birmingham & Gloucester Ry., 3 W. B. 223. Everywhere in this country if there is a demurrer to an indictment for a misdemeanor and it is overruled, the judgment, unless the demurrer is permitted to be withdrawn, is final against the defendant. 1 Bish. Cr. Pro. & Pr. § 784.

The demurrer was not withdrawn in this case. The defendant had the right to either stand upon it or to waive it by asking leave to withdraw it so that he could plead to the indictment. He chose to do the former. The two subsequent trials, however, did the defendant no injury, for the judgment entered is supported by the record, and the overruled demurrer unwithdrawn. Indeed, the plaintiff in error assigns no error attacking the judgment on the ground that the trials were irregular. His refusal to plead was obviously designed to preserve his strict rights as a demurrant, and so his assignment of error was logically based upon the issue raised by the demurrer, namely, whether the indictment was legally sufficient.

The first point of attack upon the indictment is that it fails to state that the woman

with whom defendant is charged with committing fornication and with having carnal knowledge of was an unmarried female. When a statute creates a misdemeanor by defining the elements which make up the offense, the rule is that the statutory language shall be used in the indictment. Thus in Massachusetts the statutory provision is that, if a man commits fornication with a single woman, each of them shall be punished; and the Massachusetts court held that the statutory language or its equivalent must be used in an indictment for fornication, and therefore it must appear that the parties were not married. Commonwealth v. Murphy, 2 Allen (Mass.) 163. Our statute, however, does not attempt to define what shall be fornication. The statutory language is: "Any person who shall commit fornication shall be guilty of a misdemeanor." P. L. 1898, p. 807, § 48. The word "fornication" is a word of long-settled meaning, and implies an act with an unmarried woman; so, where the statute simply makes fornication a misdemeanor, the use of the word "fornication" as descriptive of the act would seem to be sufficient. Mr. Bishop says that in an indictment no greater certainty is necessary than will show a prima facie case, and the prosecutor, it is believed, is not required to prove that the party was not married, and therefore, in the absence of particular statutory words, the prosecutor could not be called upon to allege that the parties were not married. A marriage would seem in its nature to be a matter of defense, while it is a matter lying peculiarly within the knowledge of the defendant. Bish. St. Cr. § 693. In this state it has been ruled that the state is not bound to prove that the woman with whom the commission of the act is charged was unmarried; that being the presumption. Gaunt v. State, 50 N. J. Law, 490, 14 Atl. 600. The state being not required to prove the singleness of the woman, it follows in the language of Mr. Bishop that the state, in the absence of statutory language, is not called upon to allege it. This view is supported by the very satisfactory opinion delivered by the Supreme Court of Indiana in the case of State v. Stephens, 63 Ind. 542.

It also assigned for error that it should have been alleged that the birth of a bastard followed the act of copulation. For this position the case of Smith v. Minor, 1 N. J. Law, 19, is cited. That case merely holds that at the time of the decision (1790) fornication was not a crime in this state, either at common law or under any statute. In construing the statute then in existence, the court held that it required not only fornication, but something more, namely, the birth of issue to constitute a statutory crime. But Judge Patterson's Crimes Act of 1796 made fornication itself criminal, and since then it has never been questioned, until now, that the offense made a crime was not completed by intercourse of the kind with an unmarried

woman. Of course, birth of issue may be evidence of the act, but it is not a part of the misdemeanor.

We think the indictment was good, and the judgment should be affirmed.

(73 N. J. Eq. 224)

TUCKER v. BALDWIN et al.

(Court of Chancery of New Jersey. May 29, 1907.)

WILLS—CONSTRUCTION—POWER OF SALE—LIMITATION AS TO TIME.

Under a will giving testator's wife the income for life, and showing intention that on her death the estate pass to his children, the discretionary power given the executor to sell and reinvest in real estate sufficiently productive to pay income is limited to the life of the widow.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, § 1655.]

Suit by Mabel C. Tucker against Alexander P. Baldwin and others. Heard on bill and answer. Decision for complainant.

Condict, Condict & Boardman, for complainant. Pilch & Pilch, for defendant Alex. P. Baldwin.

GARRISON, V. C. The object of this bill is to obtain a partition of certain real estate in the city of Newark in this state of which Joseph Baldwin died seised. The parties are the heirs at law of said Joseph Baldwin, and also claim that, under the will of the said Joseph Baldwin, deceased, they are the devisees of the real estate in question. Joseph Baldwin died on the 22d of September, 1874, leaving a will dated April 1, 1870, and probated on the 5th of October, 1874. Among other things the will contained the following provisions:

"I do make Aaron Ward, Junlor, David Martin and Alexander P. Baldwin my executors of this my last will and testament, their joint signatures being necessary to make all transactions legal growing into and out of this will.

"I bequeath to my affectionate wife Margaret * * * also for the time she shall remain my widow all rents, interests and profits into and out of my estate. * * *

"All other property in which I may die ceased if at the discretion of my executors is shall be of more advantage to sell it the proceeds shall be invested in unencumbered real estate it being sufficient productive to pay interest & Co. accruing to my said wife during her natural life as above provided and limited. * * *

"At the death of my said wife the interest so accruing shall be paid equally to my living children or their heirs share alike, the children receiving the share coming to my children."

The three executors above named took out letters testamentary. Aaron Ward, Jr., one of them, died on the 29th of December, 1894, David Martin, another one, died in the year 1904. Margaret Baldwin, the widow of the

testator, died on the 21st day of August, 1897, having remained unmarried after the testator's death. The complainant is a granddaughter of the testator.

The executors, during the lifetime of the widow of the testator, did not sell or dispose of the real estate of which the testator died seised described in the bill of complaint. The bill and the answer each construe this will as vesting title in fee in the children, or the children of deceased children, of the testator, after the death of the widow of the testator.

This will was under consideration in this court and in the Court of Appeals in the case of Baldwin v. Tucker, 61 N. J. Eq. 412, 48 Atl. 547 (Emery, V. C., 1901), affirmed on opinion below (64 N. J. Eq. 833, 55 Atl. 1132). Under the issues raised in that suit this court decided that, under this will, the corpus of the personal estate passed at the death of the testator's widow to the testator's children. It expressly refused to decide, because it was not then before it whether this will should be so construed as to devise a fee to the said children, holding that the executors had no estate or interest in the lands, but only a power of sale. It is the existence of this alleged power of sale which is pleaded by the defendant as a bar to the right of partition. The parties in this suit agree that the will properly construed contains a devise of the real estate to the living children or the children of any deceased child. I do not find it necessary now to decide whether this will should be so construed, because the parties either take as devisees under the will or as heirs at law, if the testator died intestate with respect to this real estate, and therefore, since they are all before the court and would have the right to partition in either event, if the power of sale does not bar the right, there is no occasion not to take the time to determine in which right they hold.

The defendant insists that, under the terms of this will, the executors were given a power of sale, and that such power is exercisable by the surviving executor, and therefore there may not be a partition.

The complainant insists, first, that this power is a naked power, and that, in the case of a naked power to executors to sell, such power does not survive the death of one of the named executors. *Moore v. Moore*, 41 N. J. Law, 440 (Sup. Ct., 1879); *Corlies v. Little*, 14 N. J. Law, 383 (Sup. Ct., 1834); *Coykendall v. Rutherford*, 2 N. J. Eq. 360 (Pennington Chan., 1840). She recognizes that this rule of the common law has been changed by statute (2 Gen. St. p. 1428, § 17); but she insists that in that act the power is held to survive "unless it shall be or is otherwise expressed in said will," and she argues that this will does express the intention of the testator that the power shall not survive, because he provides that "their joint signature being

necessary to make all transactions legal growing into and out of this will." I am inclined to the opinion that, if the power of sale in this will is construed to be such an one as was exercisable by the executors after the death of the widow, this statute probably is broad enough in its terms to cause the power to survive to the remaining executor. I do not, however, consider it necessary to decide this question, because, in my view, it is clear that the power of sale conferred by this will upon the executors was solely to be exercised during the lifetime of the widow, and for the purpose solely of enabling them to make investments of the proceeds of sale at a greater rate of interest or income than that procurable from the real estate of the testator.

Translating the badly constructed and badly spelled clause (above quoted verbatim), I find that this testator provided that all other property of which he died seised might, at the discretion of the executors, be sold if they found that it was of more advantage to the interests of the widow to sell it, so that the proceeds might be invested in unencumbered real estate sufficiently productive to pay income, which income was to go to his widow during her natural life. After the death of his widow he clearly intended that the estate should go to his children or the living children of any of his deceased children, whether he legally expressed such intention or not. I am of opinion, therefore, that the naked power of sale vested in these executors by this will was limited during the lifetime of the widow and terminated at her death. The general principle will be found stated and supported by numerous authorities in 22 Amer. & Eng. Ency. of Law (2d Ed.) p. 1132: "Where a power is given to be exercised for a particular purpose, and such purpose has failed or has been accomplished without the exercise of the power, the power is exhausted."

I therefore conclude that the only matter set up by the answering defendant in this suit is not sufficient to defeat the equity of the complainant, and that there should be a reference in the ordinary form to determine the interests of the parties and the question of whether the property should be sold or partitioned.

OWENS v. OWENS.

(Court of Chancery of New Jersey. May 15, 1907.)

DIVORCE — PROCEEDINGS — SUFFICIENCY — AMENDMENT.

Divorce Act 1902 (P. L. p. 506), § 15, provides that no proceedings under the act shall be set aside for any defect in matter of form or for any mistake or omission not affecting the real merits of the cause, and the Chancellor may permit either party to amend his proceedings and give judgment according to the merits. In a suit for divorce against one "R. H. Owens," citation was directed to "R. S. Ownes,"

and the return of service contained that name, though all of the files in the cause, except the master's report, were indorsed "R. S. Owens, defendant." Held, that a decree would not be granted until the Chancellor ordered the proceedings amended on a petition setting forth all the errors appearing in the record, praying for an order of correction, and accompanied with all necessary affidavits to satisfy the court that the error was purely clerical, and that the real defendant was in fact the person served with the citation and referred to by the name "Ownes."

Petition for divorce by Clara L. Owens against Roger S. Owens. Decree denied.

George G. Runyon, for petitioner.

LEAMING, V. C. In this cause the name of the defendant is "Roger H. Owens." The citation is directed to "Roger S. Ownes," and the return of service contains that name. All of the files in the cause, except the master's report, are indorsed: "Roger S. Ownes, Defendant."

It seems reasonably clear that the error has occurred through the erroneous indorsement on the petition, and also that the real defendant, Roger H. Owens, was in fact the person served. It is manifest, however, that a final decree should not be advised with the record in its present condition.

A petition should be presented setting forth specifically all of the errors which appear in the record and praying for an order of correction. This petition should be accompanied with all necessary affidavits to satisfy the court that the error is purely clerical, and that the husband of petitioner was in fact the person served with the citation and the person who is referred to by the name "Roger S. Ownes." Upon such petition and proofs the Chancellor may, if so advised, order the proceedings amended under section 15 of the divorce act of 1902 (P. L. p. 506).

I shall decline to advise a decree upon the present record.

(75 N. J. L. 26)

HANKINS et al. v. NEWELL et al.

(Supreme Court of New Jersey. June 10, 1907.)

1. QUO WARRANTO—CORPORATIONS—TITLE TO OFFICE.

Quo warranto is the appropriate remedy by which to test the title to office in a private corporation.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Quo Warranto, § 21.]

2. CORPORATION—PROXY—NECESSITY OF SEAL.

A seal is not essential to the validity of a proxy to vote for officers at a corporate election.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, §§ 767-776.]

(Syllabus by the Court.)

Application by the state, on the relation of Bunting Hankins and others, for writ of quo warranto to Howard L. Newell and others. Petition granted.

Argued February Term, 1907, before GAR- RISON, SWAYZE, and TRENCHARD, JJ.

James Buchanan, for relators. Edwin R. Walker, for respondents.

GARRISON, J. A petition for a writ of quo warranto was filed and a rule thereon made requiring the respondents to show cause by what authority they claimed to have, use, and enjoy the office and privileges of trustees of the Bordentown Cemetery Association; the petitioners claiming to have been elected to such office of trustees and that the defendants have usurped the said office.

The respondents contend in limine that the writ of quo warranto cannot go to inquire into an alleged usurpation of an office in a private corporation.

Such is the English rule. Shortt on Quo War. p. 129.

The American rule differs in this respect from the English. Mr. High, in his work on Quo Warranto, says: "The propriety of an information in the nature of a quo warranto as a remedy for an unlawful usurpation of an office in a merely private corporation was formerly involved in some doubt, but the question may now be regarded as settled in this country. This species of remedy being generally employed in England in cases of public or municipal corporations, the English precedents are inapplicable to this particular question and its solution must be referred to the more general principles underlying the jurisdiction in question. Tested by these principles, an intrusion into an office of a merely private corporation may in this country be corrected by information with the same propriety as in cases of public or municipal corporations, since there is in both cases an unfounded claim to the exercise of a corporate franchise amounting to a usurpation of the privilege granted by the state." High on Extraord. Leg. Rem. § 653.

As early as the year 1827 the writ of quo warranto was so used in this court. State v. Crowell, 9 N. J. Law, 390.

The provisions of the forty-second section of the corporation act for a summary review of corporate elections have no bearing upon the present question for the reason that such provisions when taken in connection with the other requirements of the act are confined to elections in corporations having stock. In re Election of Cedar Grove Cemetery Company, 61 N. J. Law, 422, 39 Atl. 1024.

Cedar Grove Cemetery Company was a stockholder's company. Coming to the merits of the controversy, the respondents contend that two of the three relators are ineligible to the office of title to which they are seeking to contest. This claim which is based upon the idea that each trustee must be the sole proprietor of an entire lot is not well founded. There is no such requirement in the act of incorporation, and, on the contrary, the implication to be drawn from the statutory qualification of voters is the other

way. Proprietors of undivided interests in a lot may vote, and the requirement as to trustees is that they "shall be chosen from among the proprietors of lots or plots." The case of Austin v. Atlantic City, 48 N. J. Law, 118, 3 Atl. 65, relied upon by counsel for respondents, turned upon a question of fraud, and is inapplicable here.

The remaining question is whether a seal is requisite to the validity of a proxy. The claim of the petitioners is that 130 legal votes given for them by valid proxies were rejected by the inspectors of election upon the sole ground that such proxies were not under seal. If the votes so rejected had been counted, the petitioners would have been elected. The act of the Legislature under which the association was organized provides that proprietors of lots "may either in person or by proxy give one vote for each plot or lot." There is no statutory requirement that the proxy thus authorized should be under seal, and our attention has not been directed to any general rule of law or to any line of reasoning by which that formality is rendered essential to the validity of a proxy. In re Election of Steamboat Company, 44 N. J. Law, 529.

Our conclusion is that the prayer of the petition should be granted.

(75 N. J. L. 54)

ATLANTIC CITY R. CO. v. KIEFER.

(Supreme Court of New Jersey. June 10, 1907.)

CARRIERS—WHO ARE—QUESTION FOR JURY.

Whether a person who has alighted from a standing train at a station, and who is crossing the railway tracks, by a plank way provided by the company for that purpose, after the train from which he has alighted has moved out, is still a passenger entitled to so cross without looking or listening, is a question of fact for the jury, where, under the proof, reasonable men may differ as to whether he was proceeding from the station platform to a place of safety within a reasonable time after he had alighted from the train.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, §§ 991-993, 1315.]

(Syllabus by the Court.)

Error to Circuit Court, Camden County.

Action by Bertha Kiefer, administratrix, against the Atlantic City Railroad Company. Judgment for plaintiff. Defendant brings error. Reversed.

Argued February term, 1907, before FORT, PITNEY, and REED, JJ.

J. Willard Morgan and Thompson & Cole, for plaintiff in error. John W. Wescott and Ralph W. E. Donges, for defendant in error.

FORT, J. On August 31, 1903, Charles W. Kiefer was a passenger on a train of the Atlantic City Railroad Company, leaving Camden at 6:42 p. m., and due at Clementon Station at 7:15 p. m. The train arrived at the Clementon Station on time, and Kiefer alighted from it on the station platform on the west of the tracks. The railroad at this

point is double tracked; the tracks extending north and south. The station building at Clementon is on the west side of the tracks, and there is also a platform on the east side. From the station platform on the west to the passenger platform on the east there is a planked passageway across the tracks, which is provided for the use of passengers in crossing from one platform to the other, as well as generally by the passengers when leaving or boarding the trains. There was no fence between the tracks, nor other obstruction on the railway right of way at this point. It also appeared by the proof that, on leaving the train, passengers alighted from either side of the cars, as suited their convenience.

On the night in question several passengers alighted from the east side of the train and passed over the track adjoining that on which the train stood to the platform on the east, and thence off the same to the highway to go to their respective homes. Kiefer's most direct way to go home was to go across the tracks from the west platform, on which he alighted, to the east platform, and thence to the highway. On the night in question the train from which Kiefer alighted stood directly over the planked way. After he alighted the proof is that he stopped long enough to light his pipe, he having gone across the west platform to the side of the station building for this purpose. After lighting his pipe and after the train from which he alighted had pulled out for a distance, variously estimated by the witnesses as being from 175 to 700 feet from the place where he had alighted from the train, he proceeded to cross the tracks by the planked way from the station platform on the west to the passenger platform on the east, and was killed by an express train coming from the opposite direction from that taken by the train from which he alighted.

On this state of facts a nonsuit was asked, and, when the case was closed, there was also a motion for the direction of a verdict for the defendant. These motions, we think, under the authority of the case of *Atlantic City R. R. v. Goodin*, 62 N. J. Law, 394, 42 Atl. 333, 45 L. R. A. 671, 72 Am. St. Rep. 652, were rightly denied. Under the proof, (1) whether the deceased was a passenger, or (2) whether he was guilty of contributory negligence in what he did, or (3) whether the defendant was guilty of negligence in operating its trains, were all questions for the jury.

The plaintiff made three requests to charge, all of which were charged. The third request was as follows: "The deceased, Mr. Kiefer, was a passenger so long as he was lawfully and with ordinary care using the foot crossing in question for the purpose of crossing the defendant's tracks to get upon the public highway." The objection urged against the law as thus declared is that it took from the jury the question of whether Kiefer was or was not a passenger at the

time he was killed, and substituted therefor the mere fact that he was lawfully crossing the tracks at the time he was killed. If so, the charge was erroneous. If he was not a passenger at the time he was struck, he was required, in crossing the tracks, to exercise all the care that a reasonably prudent man would exercise in crossing railway tracks under like circumstances. The plaintiff's proof disclosed the fact that the deceased neither looked nor listened as he crossed, and it was therefore for the jury to say, if they found he was not a passenger, whether he was or was not guilty of contributory negligence in thus crossing. Whether, therefore, Kiefer was bound to anticipate the approach of a train from the opposite direction depends upon whether the jury should say, under the proof, that he was at the time he was hit still a passenger, passing from the train to a place of safety off the premises of the defendant company by the way provided by the defendant for that purpose. The effect of charging the third request was to practically charge that Kiefer was a passenger so long as he was lawfully crossing the tracks of the company, no matter how far the train from which he had alighted had moved out. The jury was told that Kiefer was a passenger so long as he was lawfully and with ordinary care using the planked way for the purpose of crossing to get to the public highway. This made the deceased a passenger from the mere fact that he was lawfully and with ordinary care crossing the planked way. One may be lawfully using a crossing such as the planked way proven in this case, and still not be a passenger. A railway track is a place of known danger, and the care required of one crossing the same who is not a passenger is such as is commensurate with the danger—the care that a reasonably prudent man would take under like circumstances. One might be crossing this planked way after having visited the station for any lawful purpose, and hence be lawfully using the same, but this would not excuse him from the duty to look or listen for approaching trains. Whether a person passing across a railway track by a planked way provided for that purpose, after he has alighted from the train and after it has moved out from the station, is still a passenger and entitled to cross without looking or listening, is a question of fact for the jury, if there be controversy under the proof as to whether the person claiming to have been a passenger proceeded from the station to a place of safety within a reasonable time after alighting from the train. The rule is that the relation of passengers and carrier, when established, does not terminate until the passenger has reached his destination, alighted from the train, and had a reasonable time in which to leave the place where passengers are discharged. 4 Elliott on Railroads, § 1592; *Houston & T. C. R. Co. v. Batchler* (Tex. Civ. App.) 83 S. W. 902; *Imhoff v. C. & M.*

R. Co., 20 Wis. 344; 5 Am. & Eng. Ency. of Law, p. 497. The relation of carrier and passenger continues until the passenger has left the carrier's premises, or has been allowed a reasonable time to leave the premises. *Hansley v. Jamesville & W. R. R. Co.*, 115 N. C. 602, 20 S. E. 528, 32 L. R. A. 543, 44 Am. St. Rep. 474. What, under all the circumstances, is a reasonable time, is a question of fact for the jury. *Houston & T. C. R. Co. v. Batchler* (Tex. Civ. App.) 83 S. W. 902.

Reasonable time is defined in *Imhoff v. C. & M. R. Co.*, supra, as the time in which persons of ordinary care and prudence, under like circumstances, get off the car. The mere fact that a person is lawfully crossing a railway track is not enough to entitle him to claim the rights of a passenger. A person alighting from a standing train, and crossing the tracks to get to the station platform, a place of safety, is undoubtedly a passenger, and is not required to look or listen in anticipation that a train may pass and hit him. That law is too familiar to require any citation of authority. But this rule does not apply after the train moved out. *Goldberg v. N. Y. C. & H. R. R.*, 133 N. Y. 561, 80 N. E. 597. How long may a person remain at a station, after alighting from the train, and after it has moved out, before crossing the tracks to get to a place of safety, and still remain a passenger and be freed from any duty to look out for himself in such a place of known danger? The court cannot, in such a case, take from the defendant the right to have the jury say whether the person injured was or was not a passenger. There must be some period of time after a train moves out of a station, when even one who has been a passenger, although lawfully crossing, cannot go blindly across the tracks without using any care to protect himself against the dangers that are always to be anticipated when crossing railway tracks. *Hansley v. Jamesville & W. R. R. Co.*, supra.

In this case the proof was that the deceased, at the time he was hit, was not looking, but was walking leisurely with his head down. It was not even a clear case, under the proof, for refusing a nonsuit, but it certainly was a case where the jury must first find, to entitle the plaintiff to recover, that at the time the deceased was injured he was still a passenger, and hence free from the obligation to look or listen. If they cannot so find, there should be a verdict for the defendant, notwithstanding the fact that the person injured was lawfully crossing the tracks when the accident happened. One may be lawfully crossing railway tracks, and still not be a passenger entitled to assume that a train will not be moved along the tracks while he is crossing them to reach a place of safety, or for some other lawful purpose. A person who may be lawfully upon railway tracks, but who is not found to be a passenger, has no rights that rise higher than those which flow from the fact that he

is upon the tracks by the defendant's invitation, and the law does not relieve such a person from the duty to exercise care commensurate with the dangers surrounding him.

The judgment of the Camden county circuit court is reversed, and a venire de novo awarded.

(75 N. J. L. 66)

HAUSER et al. v. GOODSTEIN.

(Supreme Court of New Jersey. June 10, 1907.)

EVIDENCE—ADMISSIONS—ACQUIESCENCE.

The rule that an undenied statement made in the presence of a person implicated or interested is a tacit admission of the facts asserted does not apply when such statement is made by a witness in the course of a judicial hearing in which the party implicated or interested could not interfere. To interrupt such proceeding to deny a statement made under such circumstances would be to charge the witness with perjury, and alike inconsistent with decorum and the rules of law.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 771-785.]

(Syllabus by the Court.)

Appeal from District Court of Elizabeth.

Action by Simon Hauser and others against Fanny Goodstein. Judgment for defendants, and plaintiff appeals. Reversed; and new trial granted.

Argued February term, 1907, before FORT, HENDRICKSON, and PITNEY, JJ.

John J. Stamler, for appellant. John K. English, for appellees.

FORT, J. This was an action to recover upon a book account. The account was sold to Joseph Goodstein, the husband of the defendant, and he was sued and judgment recovered against him therefor. Subsequently the plaintiff learned that in the purchase of the bill of goods in question Joseph was in fact only the agent of the defendant his wife. The defendant being an undisclosed principal, such a suit will lie. *Greenburg v. Palmieri*, 71 N. J. Law, 83, 58 Atl. 297.

A judgment was entered against the defendant and this appeal is taken upon two grounds: First, the improper admission of evidence; second, the refusal of the court to direct a verdict. If the evidence objected to and here alleged to have been illegally admitted was admissible, then the refusal to direct for the defendant was not erroneous. The evidence admitted over objection was the testimony of Joseph Goodstein given in a suit for the claim of property, put in by this defendant, alleging she was the owner of many of the articles levied upon. The evidence of Joseph in that suit that he was acting as the agent of the defendant in purchasing the articles here sued for was offered and admitted over objection. The evidence we think was inadmissible.

It was, at best, a mere proof of a declaration of agency made by the alleged agent after the alleged agency was terminated. An

agency may not be established by proof of that kind.

But it is contended that it appeared by the proof that at the time when Joseph gave his evidence of the fact of agency the defendant was in court, seated a short distance from the witness, and could have heard and did not deny the statement, and hence the evidence must be given such force as is usually given to statements made in the presence of a person which call for some denial, or otherwise they may be taken as a tacit admission of their truth. Whether such force is to be given to statements so made is in all cases subject to two conditions at least: First, whether the party heard the statement and comprehended it; and, second, whether he was in such a situation as called upon him to make a reply or denial. *Commonwealth v. Kenney*, 12 Metc. (Mass.) 235, 46 Am. Dec. 672; *Donnelly v. State*, 26 N. J. Law, 604, 632; *Roesel v. State*, 62 N. J. Law, 235, 41 Atl. 408. In this case the statement as to the agency was made on the witness stand in court, and, conceding that the defendant was within hearing distance and heard, still it is clear that she was not in a situation where she could make reply or denial. The rule in such a case is stated by Chief Justice Shaw in *Commonwealth v. Kenney*, supra, in this way: "If [the statement] be made in the course of any judicial hearing, he could not interfere and deny the statement. It would be to charge the witness with perjury, and alike inconsistent with decorum and the rules of law."

The evidence admitted was illegal, and, as, without it, the plaintiff failed to make out a case, the judgment of the district court must be reversed, and a new trial granted.

(76 N. J. L. 97)

COLLOTY v. SCHUMAN.

(Supreme Court of New Jersey. June 10, 1907.)

1. PRINCIPAL AND AGENT—PROOF OF AGENCY—ADMISSIBILITY—DECLARATIONS BY AGENT.

In a suit by a real estate broker for commissions on the rental of the defendant's hotel property, it appeared at the trial that the agreement for the commissions was made by plaintiff not with the defendant, who was owner of the property, but with her son; that plaintiff secured a tenant and made a lease to her, which was signed not by the defendant, but by her son as the lessor, without any reference to the character in which he signed, whether as agent or otherwise. In the effort to prove that the agreement for commissions was made by the son as agent for his mother, he was called as a witness by the plaintiff, and was permitted to testify, over objection, that in signing the lease he represented his mother. Upon review, *held* the evidence was properly admitted.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Principal and Agent, § 40.]

2. BROKERS—REAL ESTATE—ACTION FOR COMMISSION—EVIDENCE—SUFFICIENCY.

It further appearing by the evidence that prior to the rental defendant and her son both at different times visited the office of plaintiff, and that the defendant gave instructions to the plaintiff to rent the property upon which he act-

ed, and that part payment of the commissions had been made by check received from defendant, further *held*, that motions to nonsuit and direct a verdict for defendant were properly denied.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Brokers, §§ 128, 129.]

(Syllabus by the Court.)

Certiorari to District Court of Atlantic City.

Certiorari by Kate Schuman against Eugene M. Colloty, to review a judgment of the district court of Atlantic City. Judgment affirmed.

Argued February term, 1907, before FORT, PITNEY, and HENDRICKSON, JJ.

Thompson & Cole, for plaintiff. Eli H. Chandler, for defendant.

HENDRICKSON, J. This writ brings up for review a judgment of the district court of Atlantic City entered upon a verdict. The suit was brought to recover commissions claimed by Mr. Colloty, the plaintiff, to be due him as a real estate broker upon the rental of the Hotel Wellington, owned by Mrs. Schuman, the defendant, and located in that city. The alleged errors arise out of the refusal of the trial judge to nonsuit and to direct a verdict for the defendant and upon the admission of evidence. In support of the first ground, it is contended that there was no legal evidence to support the plaintiff's demand, which was based upon an alleged contract or agreement between the parties for the payment of \$150 for procuring a tenant for the premises named. The case showed that a parol agreement to pay the commission named for the rental was made between Edward Schuman, a son of the defendant, and the plaintiff. The plaintiff's contention was and is that the son entered into the agreement as agent for his mother, who owned the property, and it follows that the plaintiff's right to recover depends upon proof of such agency. The judge submitted this question to the jury, and it rendered a verdict for the amount of the demand.

In obedience to a rule of court, the judge has certified that there was evidence to go to the jury from which they could find liability, and has certified therewith the evidence taken at the trial. The case also shows that the plaintiff, in support of his contention, offered in evidence the lease he made of the premises to a Mrs. Coleman, which was made in the name of the son as lessor, and signed by him without any reference to the character in which he signed, whether as agent or otherwise. Plaintiff then called as a witness the son, who was permitted to testify over objection that, in signing the lease, he was representing Mrs. Schuman, the defendant. The grounds of objection were that the evidence was irrelevant, and that the agency could not be proven by the agent himself. And it is the admission of this testimony which defendant assigns as the second ground for reversal. We will deal with this ground for

error now before further discussing the other ground alleged. The evidence, if otherwise legal, was certainly relevant to the question of agency. We think the evidence was also admissible upon well-settled rules. The principle involved must not be confused with that which applies when the admissions or declarations of an agent are offered in proof of his agency. The rule in support of the admission of the evidence objected to will be found discussed in 2 Wharton L. of Ev. 949-952, where the learned author says: "The distinction to be kept in mind is that, while parol evidence cannot be received to discharge a party, it may be received when its effect is to show that another party, namely, the principal, is also bound." See, also, *Id.*, 920. And in *Rice v. Gove*, 22 Pick. (Mass.) 158-160, 33 Am. Dec. 724, Justice Dewey, speaking of this principle as found in the books and cases, says: "It seems to be broad enough to support the position that, in an action against this principal, the authority of the agent to act may be proved by the agent himself." See, also, 1 Am. & Eng. Ency. of L. (2d Ed.) 969. The evidence was properly admitted.

In addition to this proof, it also appeared that the plaintiff testified to his having received authority to let the premises from defendant and her son; that they both came to his office at different times; that, when Mrs. Schuman came, she instructed him to rent the property; that he, in pursuance of those instructions, rented the property at \$3,000 per year; that of his commissions of \$150 there had been paid to him \$42.50 in the form of a check which he received by letter from Mrs. Schuman. The defendant produced a letter from E. M. Collyer & Co. on cross-examination of plaintiff, and had him identify it as written by his authority, which defendant offered in evidence. The letter read: "Mrs. Schuman. Dear Madam: Please mail check of balance of commissions on rental of your property on South Virginia Avenue. We only ask commission on what rent you collect, which leaves a balance due of \$82.50." It appears that no answer was made to the letter, and no denial of the facts therein stated was attempted at the trial. Mrs. Schuman did not attend and testify.

We think, under the circumstances, there was no error in the refusal to nonsuit or to direct a verdict for the defendant, and the result is that the judgment below must be affirmed, with costs.

(72 N. J. Eq. 825)

THATCHER v. CONSUMERS' GAS & FUEL CO.

(Court of Chancery of New Jersey. May 1, 1907.)

1. GAS-CORPORATIONS-INCREASING BONDED DEBT-STATUTES.

Act March 27, 1878 (Gen. St. p. 1613, § 33), providing that, whenever it may be necessary for any gaslight company to increase its

bonded indebtedness, it may, by a majority vote of its board of directors with the consent of a majority of the stockholders holding 60 per cent. of the capital stock, increase the bonded indebtedness to an amount not exceeding two-thirds of the amount of the capital stock, merely conferred additional powers on such corporations as were not previously allowed to issue bonds to the amount fixed by the act, and did not restrict the privileges of those that already possessed the power to create bonded indebtedness to a greater amount than that named in the act.

Bill for an injunction by Charles T. Thatcher against Consumers' Gas & Fuel Company. Preliminary injunction denied.

Defendant is a gas company of Atlantic City, N. J., incorporated under the general gas act of April 21, 1876 (P. L. 1876, p. 300; Gen. St. p. 1608), and is about to increase its bonded indebtedness to an amount exceeding two-thirds of the amount of its capital stock. Complainant is a stockholder, and seeks to enjoin the proposed corporate action, upon the ground that the act of March 27, 1878 (P. L. 1878, p. 173; Gen. St. p. 1613, § 33), restricts the bonded indebtedness of gas companies to two-thirds of the amount of their capital stock. The act of March 27, 1878, is as follows:

"An act to enable gaslight companies, incorporated under the laws of this state, to increase their bonded indebtedness.

"Approved March 27, 1878.

"Section 1. That whenever it may be necessary for any gaslight company, incorporated under the laws of this state, to increase their bonded indebtedness, for the purpose of increasing their business or for any other purpose, then and in that case the said corporation, by a majority vote of its board of directors, after having obtained the consent of a majority of the stockholders representing at least sixty (60) per cent. of the capital stock, be and they are hereby authorized to increase said bonded indebtedness to any amount not exceeding two-thirds of the amount of the capital stock of said company, the said increase as aforesaid to be governed by the law and pursued under the mode directed by the act of incorporation of such gaslight company."

Thompson & Cole, for complainant. Bourgeois & Sooy and C. L. Corbin, for defendant.

LEAMING, V. C. (after stating the facts). The only question here involved is whether or not the act of March 27, 1878 (P. L. 1878, p. 173; Gen. St. p. 1613), above quoted, operates to render it unlawful for a gas company which is incorporated under what is known as the general gas company act (Gen. St. p. 1608) to issue bonds to an amount in excess of two-thirds of the amount of its capital stock.

A brief statement of the condition of the law at the time the act now in question was enacted would seem to be essential to a per-

fect understanding of the legislative purpose in its enactment.

The general act for the formation of gas companies was passed at the first session of the Legislature after the constitutional amendment became operative which prevented special legislation conferring corporate powers. That act contains no provision touching the right of corporations organized under it to incur debts or to issue bonds or other evidences of indebtedness. In the absence of such provision, the right existed as an implied power. *Lucas v. Pitney*, 27 N. J. Law, 221, 228; *Fifth Ward Savings Bank v. First Nat. Bank*, 48 N. J. Law, 513, 523, 7 Atl. 318; 4 *Thompson on Corp.* § 5697; 5 *Id.* 6050, 6051. The right to execute a mortgage which should include corporate franchises in its lien could not exist as an implied power. That right existed in virtue of the general corporation act which provided "that every corporation, as such, shall be deemed to have power * * * to mortgage any such real or personal estate with their franchises." In 1891, and again in 1897 and 1902, the Legislature passed supplements to the general gas act authorizing gas companies formed under that act to execute mortgages on their real and personal property, including their franchises. P. L. 1891, p. 271; P. L. 1897, p. 202; P. L. 1902, p. 277. These supplements were, I think, wholly unnecessary.

The act now in question was enacted two years after the general gas act, but not as a supplement to it. At that time there existed in this state a great number of gas companies incorporated by special legislative acts. An examination of these special acts will disclose that a great number of them contain provisions authorizing money to be borrowed, and bonds and other assurances to be issued therefor to an amount not exceeding one-half of the amount of the capital stock. Others contain similar express powers to the amount of two-thirds of the capital stock; others contain provisions for borrowing money and issuing securities without any restriction as to amount; and others contain no provisions touching the subject of indebtedness.

With this general view of the condition of legislation at the time, the legislative purpose in the passage of the act in question seems apparent. The act is, by its title, an enabling act. It is "to enable gaslight companies, incorporated under the laws of this state, to increase their bonded indebtedness." The provisions of the act enabling the increase of bonded indebtedness necessarily assume in the corporations to be affected by it a pre-existing but restricted power to create a bonded indebtedness. This clearly negatives any possible legislative purpose to apply the operation of the act to corporations already possessing the powers without restriction, and therefore excludes from any rational legislative intent such corporations as already possessed the power to create

bonded indebtedness to a greater amount than that named in the act. I think it clear, therefore, that the act can only be regarded as an act conferring additional powers on such corporations as were previously restricted in the particulars referred to.

A preliminary injunction will be denied.

(72 N. J. Eq. 831)

CURTICE BROS. CO. v. CATTS et al.
(Court of Chancery of New Jersey. May 4, 1907.)

SPECIFIC PERFORMANCE—CONTRACT FOR SALE OF PERSONALTY.

Where no adequate remedy at law exists, specific performance of a contract by defendants will be decreed on their refusal to sell tomatoes grown on certain land as agreed where it leaves the company helpless, except to whatever extent an uncertain market may supply the deficiency.

[Ed. Note.—For cases in point, see *Cent. Dig.* vol. 44, *Specific Performance*, § 199.]

Bill by the Curtice Bros. Company against James E. Catts and others. Decree advised for complainant.

Complainant is engaged in the business of canning tomatoes, and seeks the specific performance of a contract wherein defendant agreed to sell to complainant the entire product of certain land planted with tomatoes. Defendant contests the power of this court to grant equitable relief.

J. W. Acton, for complainant. W. T. Hillard, for defendants.

LEAMING, V. C. The fundamental principles which guide a court of equity in decreeing the specific performance of contracts are essentially the same whether the contracts relate to realty or to personalty. By reason of the fact that damages for the breach of a contract for the sale of personalty are, in most cases, easily ascertainable and recoverable at law, courts of equity in such cases withhold equitable relief. Touching contracts for the sale of land, the reverse is the case. But no inherent difference between real estate and personal property controls the exercise of the jurisdiction. Where no adequate remedy at law exists, specific performance of a contract touching the sale of personal property will be decreed with the same freedom as in the case of a contract for the sale of land. Prof. Pomeroy, in referring to the distinction, says: "In applying these principles, taking into account the discretionary nature of the jurisdiction an agreement for the sale of land is *prima facie* presumed to come within their operation, so as to be subject to specific performance, but a contrary presumption exists in regard to agreements concerning chattels." *Pomeroy on Contracts, Specific Performance*, § 11.

Judge Story urges that there is no reasonable objection to allowing the party who is injured by the breach of any contract for the sale of chattels to have an election either to

take damages at law or to have a specific performance in equity. 2 Story's Eq. Juris. (13th Ed.) § 717a. While it is probable that the development of this branch of equitable remedies is decidedly toward the logical solution suggested by Judge Story, it is entirely clear that his view cannot at this time be freely adopted without violence to what has long been regarded as accepted principles controlling the discretion of a court of equity in this class of cases. The United States Supreme Court has probably most nearly approached the view suggested by Judge Story. In *Mechanics' Bank of Alexandria v. Sexton*, 1 Pet. (U. S.) 229, 305, 7 L. Ed. 152, Mr. Justice Thompson, delivering the opinion of that court, says: "But, notwithstanding this distinction between personal contracts for goods and contracts for lands is to be found laid down in the books, as a general rule; yet there are many cases to be found where specific performance of contracts, relating to personalty, have been enforced in chancery; and courts will only view with greater nicety contracts of this description than such as relate to land." See, also, *Barr v. Lapoley*, 1 Wheat. (U. S.) 151, 4 L. Ed. 58. In our own state contracts for the sale of chattels have been frequently enforced and the inadequacy of the remedy at law, based on the characteristic features of the contract or peculiar situation and needs of the parties, have been the principal grounds of relief. *Furman v. Clark*, 11 N. J. Eq. 306; *Cutting v. Dana*, 25 N. J. Eq. 265, 271; *Rothholz v. Schwartz*, 46 N. J. Eq. 477, 481, 19 Atl. 312; *Gannon v. Toole* (N. J. Ch.) 32 Atl. 702; *Hurd v. Groch* (N. J. Ch.) 51 Atl. 278, *Duffy v. Kelly*, 55 N. J. Eq. 627, 629, 37 Atl. 597; *Law v. Smith*, 59 Atl. 327, 68 N. J. Eq. 81.

I think it clear that the present case falls well within the principles defined by the cases already cited from our own state. Complainants' factory has a capacity of about 1,000,000 cans of tomatoes. The season for packing lasts about six weeks. The preparations made for this six weeks of active work must be carried out in all features to enable the business to succeed. These preparations are primarily based upon the capacity of the plant. Cans and other necessary equipments, including labor, must be provided and secured in advance with reference to the capacity of the plant during the packing period. With this known capacity and an estimated average yield of tomatoes per acre the acreage of land necessary to supply the plant is calculated. To that end, the contract now in question was made, with other like contracts, covering a sufficient acreage to insure the essential pack. It seems immaterial whether the entire acreage is contracted for to insure the full pack, or whether a more limited acreage is contracted for and an estimated available open market depended upon for the balance of the pack. In either case a refusal of the parties who contract to supply a given acreage to comply

with their contracts leaves the factory helpless, except to whatever extent an uncertain market may perchance supply the deficiency. The condition which arises from the breach of the contracts is not merely a question of the factory being compelled to pay a higher price for the product. Losses sustained in that manner could, with some degree of accuracy, be estimated. The condition which occasions the irreparable injury by reason of the breaches of the contracts is the inability to procure at any price at the time needed and of the quality needed, the necessary tomatoes to insure the successful operation of the plant. If it should be assumed as a fact that upon the breach of contracts of this nature other tomatoes of like quality and quantity could be procured in the open market without serious interference with the economic arrangements of the plant, a court of equity would hesitate to assume to interfere; but the very existence of such contracts proclaims their necessity to the economic management of the factory. The aspect of the situation bears no resemblance to that of an ordinary contract for the sale of merchandise in the course of an ordinary business. The business and its needs are extraordinary in that the maintenance of all of the conditions prearranged to secure the pack are a necessity to insure the successful operation of the plant. The breach of the contract by one planter differs but in degree from a breach by all.

The objection that to specifically perform the contract personal services are required will not divest the court of its powers to preserve the benefits of the contract. Defendant may be restrained from selling the crop to others, and, if necessary, a receiver can be appointed to harvest the crop.

A decree may be advised pursuant to the prayer of the bill.

By reason of the manner in which the facts on which this opinion is based were stipulated, no costs will be taxed.

(75 N. J. L. 80)

CENTRAL R. CO. et al. v. BOROUGH OF ATLANTIC HIGHLANDS.

(Supreme Court of New Jersey. June 10, 1907.)

TAXATION—JURISDICTION OF BOROUGH.

A borough a boundary of which is high-water mark of a bay has no power to tax land and piers thereon outside high-water mark.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Taxation, §§ 427, 431.]

Certiorari by the Central Railroad Company and others against the borough of Atlantic Highlands to review an assessment for taxes. Tax set aside.

Argued February term, 1907, before FORT, HENDRICKSON, and PITNEY, JJ.

George Holmes and Wm. A. Barkalow, for prosecutors. Charles R. Snyder, for defendant.

FORT, J. The borough of Atlantic Highlands was incorporated under the act of 1891 (P. L. 1891, p. 280). This act provided for a petition being presented to the court of common pleas containing a description of the proposed borough, and for an election by the people. The petition was required to recite the boundary lines of the proposed borough, and, if the election was favorable, the borough was established. Atlantic Highlands was incorporated under this act through a favorable vote of the people.

By the agreed facts in this case it is admitted that the boundaries as established in 1891, by petition as aforesaid, "at a stake standing at high-water mark on the shore of Sandy Hook Bay facing the easterly line of lands of the Atlantic Highlands Association at the point or place of the bluff known as Point Look Out, and running thence westerly along and following the line of the shore of the stream at present known as Wagner's creek." Then the other courses and distances are recited, returning in a final course to the place of beginning. It is quite evident from this description that the northerly boundary line of the borough of Atlantic Highlands is to high-water mark of Sandy Hook Bay.

The writ in this case brings up an assessment for taxes by the borough against the prosecutors for the pier and land owned by the Navesink Railroad Company levied in 1905. It is admitted that the land taxed lies outside of high-water mark, running from high-water mark for a distance of about 1600 feet into the bay, and that the property consists of piers, etc., erected upon said land; the whole being taxed as real estate. We think this assessment must be set aside. The borough has no power to tax outside of its corporate limits. A municipality's right of taxation is limited to property within its territory. *State v. Hull*, 25 N. J. Law, 561; 1 *Deady on Taxation*, p. 488; *Pt. Smith Bridge Co. v. Hawkins*, 16 S. W. 565, 54 Ark. 509, 12 L. R. A. 487; *Pacific Sheet Metal Works v. Roeder*, 26 Wash. 183, 66 Pac. 428.

By the statute of 1891 the borough might be erected out of the township, and such was the case here. The township of which this borough previously formed a part was the township of Middletown, in the county of Monmouth. The boundary line of the county of Monmouth ran to a point outside of Sandy Hook to the center of Raritan Bay to the Middlesex county line, and is coextensive with the boundary line between the state of New Jersey and the state of New York at this point, and the boundary lines of Middletown township were coextensive at this line with those of the county of Monmouth. The land which is taken out of a township for the creation of a borough, of course, leaves in the township all not taken, and we think that the land here taxed by the defendant is only taxable by the township of Middletown.

In this case the question of accretions and the extension of the shore on high-water line by alluvial deposits, or by filling in by the proprietors, is not before us, and hence does not have to be passed upon.

The tax must therefore be set aside.

(72 N. J. Bq. 665)

SCHMITT v. TRAPHAGEN.

(Court of Chancery of New Jersey. May 9, 1907.)

EQUITY—ISSUES SUBMITTED FOR TRIAL AT LAW—NEW TRIAL.

In a suit to quiet title, a motion for a new trial of an issue submitted for trial at law will be denied by the Court of Chancery without examining into the merits of the decision, since the conclusion of the court at law is appealable.

Bill to quiet title by Joseph Schmitt against Henry Traphagen. Heard on motion for new trial of an issue submitted to the court at law for trial. Denied.

Russ & Heppenheimer and M. T. Rosenberg, for complainant. Collins & Corbin and Augustus A. Rich, for defendant.

GARRISON, V. C. This is a suit under the act to quiet title, and is a motion in such suit for a new trial of an issue directed by this court to be tried at law in accordance with the provisions of the statute.

It appears from the state of the case submitted to this court that at the trial in the Supreme Court the justice of the Supreme Court presiding thereat conceived that the sole question was one of law, and therefore directed a verdict in favor of Schmitt upon the issues tried before him. I have not myself examined the question which was passed upon at the trial in the Supreme Court, and, for the reason which I am about to state, the question, if it was one of legal title, was eminently one to be passed upon by the courts of law. It was conceived to be such a question by the eminent jurist presiding. Any independent investigation that I could make would result either in concurring in his judgment, or in disagreeing with it, and, in the latter event, if I granted a new trial, the justice of the court sitting at such new trial would probably consider that he was bound by the same view of the law taken by the justice of the Supreme Court sitting at the first trial. It appears to me that the best solution of this question is to have an appeal taken as promptly as possible to the court of ultimate decision, and this can be as well done from the judgment directed by the justice of the Supreme Court as from any judgment upon the same question emanating from this court.

I have therefore determined to adopt the view of the law enunciated by Mr. Justice Dixon at the trial as my view, and to refuse a new trial.

(72 N. J. E. 580)

MITCHELL v. UNITED BOX BOARD & PAPER CO. et al.

(Court of Chancery of New Jersey. May 14, 1907.)

1. CORPORATIONS—SALE OF CORPORATE PROPERTY—VALIDITY AS AGAINST DISSENTING STOCKHOLDERS.

An existing corporation agreed to sell its property to a new corporation organized by the officers of the existing corporation, the president and vice president being the underwriters for 25,000 shares of capital stock of the new corporation, being all of the stock except \$1,000, subscribed for organization purposes. The agreement gave to the stockholders of the existing corporation the prior right to subscribe for the stock of the new corporation, and stipulated for a cash installment and for the payment of the balance in installments. To what extent stockholders of the existing company had subscribed to the new stock, or whether any stockholders other than the president and vice president had so subscribed, did not appear. *Held*, that a dissenting stockholder could question the validity of the sale, notwithstanding the offer to sell stock, since the condition of subscription for stock in the new corporation made the stockholder liable for additional payments, and required his participation in another company.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, § 783.]

2. SAME.

A sale by a corporation of its property may be adjudged voidable as against it, at its suit or at the suit of a dissenting stockholder, by reason of constructive fraud, arising from the fact that the sale was made to its directors or to a buyer controlled by them in making the purchase, or that the sale was not at a fair price.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, §§ 1401, 1402.]

3. SAME.

Contracts with a corporation for the services of a director, to be performed in the management of the ordinary business of a corporation, are valid, subject to judicial review, so far as the amount of compensation is concerned, either on behalf of stockholders of a going corporation, or the creditors of an insolvent one.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, §§ 1401, 1402.]

4. SAME.

Advances of money to a corporation by a director thereof may be secured, and a sale of property to the director to pay the debt is valid, so far as the transfer is concerned, subject to review on the question of the fairness of the price.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, §§ 1401, 1402.]

5. INJUNCTION—PRELIMINARY INJUNCTION.

Where the proofs show that a dissenting stockholder, suing a corporation to restrain it from carrying out a contract for the sale of its property, may make out a case entitling him to avoid the sale on behalf of the corporation, he is entitled to such a preliminary injunction as will render a decree in favor of the corporation effective, if one should be finally made.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Injunction, §§ 86, 89.]

Suit by Sidney Mitchell against the United Box Board & Paper Company and others. On application for preliminary injunction. Heard on bill and affidavits, answering affi-

davits, and cross-examination in open court. Granted.

Griggs & Harding, Richard W. Morrison, and James Todd, for complainant. James E. Howell and Frank R. Lawrence, for defendants.

EMERY, V. C. This is an injunction bill filed by a stockholder of the United Box Board Company against the company and its directors, and also against another corporation, the American Box Board Company, and its directors, to enjoin the execution of an agreement between the two defendant companies for the sale of certain assets of the United Company to the American Company. The defendant companies are corporations of this state. The agreement for sale is attacked as a fraud on the United Company, and the bill is filed to protect its rights in the assets proposed to be sold. Application is now made for a preliminary injunction restraining the sale.

The affidavits disclose substantially the following facts: The United Box Board Company (which I shall call the United Company) is the owner of 42,980 shares of the stock of the American Strawboard Company, of the par value of \$100 per share, which stock is pledged with the Trust Company of America, as security, for \$1,302,400 collateral trust bonds issued by the United Company, and is also the owner of 1,975 shares of Strawboard Company stock not pledged as such security. It has also in its treasury, for sale, general mortgage bonds to the amount of \$975,000; these bonds being secured on property of the United Company, other than the Strawboard Company stock. The United Company has a floating debt of about \$850,000, and of this about \$765,000 has for some time been advanced by, or carried on the credit of, Mr. Barber, the president, and Mr. Fleming, the vice president of the company, both of them directors of the company, by indorsements of the company's paper. As security for these advancements and indorsements, they hold the \$975,000 bonds above referred to. Whether any others of the directors are creditors or indorsers does not clearly appear. The United Company, on December 20, 1906, made an agreement with the American Box Board Company, a third company, for the sale to the latter of all of the Strawboard Company stock and \$562,500 of its general mortgage bonds. The entire purchase price of the stocks and bonds is fixed together at the single sum of \$850,000, payable in three installments of \$250,000 each, on the 15th days of January, April, and July, 1907 respectively, and the balance of \$100,000 on October 15, 1907. The American Box Board Company agrees, in addition, to execute an agreement assuming the payment of the outstanding collateral trust bonds, with interest, after January 15, 1907, together with the sinking fund payments. The deliveries of the bonds and stock are, however, separated, and on the

payment of the first installment of \$250,000 on account of the whole purchase price, mortgage bonds to the amount of \$300,000 are to be delivered, and on payment of the second installment of \$250,000 on account, the remaining \$282,500 of bonds are to be delivered. On payment of the third installment of \$250,000, the 1,975 unpledged shares of the Strawboard Company stock are to be delivered to the American Company, and the United Company is then to deliver to the Trust Company (which holds the 42,980 shares of Strawboard Company stock) an assignment to the American Company of the equity in these shares, subject to the collateral trust mortgage. The Trust Company is to deliver this assignment to the American Company upon payment to the Trust Company (for account of the United Company) of the last installment of \$100,000, and upon the delivery to the Trust Company for account of the United Company of a due and sufficient instrument in writing of the American Company, assuming and agreeing to pay the collateral trust bonds, with interest. The agreement contains two provisions, inserted, as is now claimed by the defendant directors, for the purpose of specially protecting the rights of the United Company and all its stockholders. The first is a clause in the agreement by which the United Company has the right to repurchase all of the property and rights to be sold to the American Company at any time before January 2, 1908, upon repayment by the United Company of the purchase money which has been paid, with 10 per cent. interest, and surrendering for cancellation any agreements assuming payments on the collateral trust mortgage. The second is a provision by which the American Company gives to the stockholders of the United Company the prior right to subscribe for its stock, for the purpose of carrying out this agreement of sale between the two companies, and the terms of subscription offered by the American Company for its full paid shares of \$100 are cash installments of 84 per cent, three installments of 10 per cent. each, payable on the 10th days of January, April, and July, 1907, and 4 per cent. on October 10, 1907, the balance as called for by the directors of the American Company (not more than 10 per cent. a year) until fully paid.

It is admitted in defendant's affidavits that the vendee company, the American Box Board Company, was organized at the instance of the officers and directors of the United Company, and also that Messrs. Barber and Fleming are the underwriters for 25,000 shares of its capital stock, being all of its stock except \$1,000 subscribed for organization purposes. To what extent stockholders of the United Company have subscribed to the American Company stock, or whether any stockholders other than the defendant directors have so subscribed, does not appear. The condition of the subscription making the stockholder liable for additional payments,

and requiring his participation in another company subject to other control, precludes this offer from being considered as substantially an offer of an equitable share as on a division of the assets of the United Company, and entitles the United Company, or a dissenting stockholder suing in its right, to question the sale without regard to such offer. The 84 per cent. cash subscriptions make up the \$850,000 required for the cash payments of the agreement, which are proposed to be used by the directors of the vendor company to pay the floating debt of the vendor company due to or guaranteed by the two directors of the vendor company. The underwriting agreement of these two directors seems to be at present practically the sole asset of the vendee company, and, in view of this situation, it should, on the present application, be considered that the validity of the sale must or may be finally determined under the aspect of a sale to the two directors of the vendor company, who control the vendee company, and whose claims against the vendor company are proposed to be satisfied from the proceeds of sale. Counsel on both sides have argued the case from this standpoint, and complainant claims (1) that on the admitted facts the sale is illegal and void, and should be altogether restrained, without regard to the question of fairness of price; (2) that the sale of the Strawboard Company stock is for a grossly inadequate price; and (3) that the proposed sale is a scheme or conspiracy to deprive the United Company of its most valuable asset, and secure its benefit to the directors making the sale. On the part of the defendant directors it is claimed (1) that the sale is made by the directors, as managers of the business of the company, and, in the absence of fraud or dishonest exercise of judgment, cannot be questioned by the company or stockholders suing in the right of the company; (2) that the sale was for a full and fair price, and, in the present circumstances and financial condition of the company, is the best and only method of relieving it of pressing debts, and assuring a more satisfactory financial condition; (3) that the charge of actual fraud and conspiracy to obtain the stock for the directors is without any foundation or warrant.

The charges of conspiracy and actual fraud seem to be fully and fairly answered by the affidavits; but, in order to have relief on this bill, it is not necessary, in my judgment, to prove such actual fraud. If the sale should be held voidable as against the vendor company, by reason of legal or constructive fraud arising from the fact that the sale was made to its directors, or to a vendee controlled by them in making the purchase or that the sale was not at a fair price, the sale might be set aside on this bill. The application will therefore be disposed of from that view of the scope of the bill.

As to the validity of a contract made by a corporation, through its directors, with one

or more of their body, a distinction seems to be made in the decisions of our courts, dependent to some extent or the nature of the contract. Contracts for the services of a director, to be performed in the management of its ordinary business, are valid, but subject to judicial review, so far as the amount of compensation is concerned, and this either on behalf of stockholders of a going corporation, or the creditors of an insolvent corporation. I examined all the decisions of our courts on this point in *Lillard v. Oil, etc., Co.*, 56 Atl. 254, 69 N. J. Eq. — (1903). Advances of money by a director to the corporation may be secured, and a sale of property to the director to pay such debt is valid, so far as the transfer is concerned, but the price must be a fair one, and the price actually fixed is not final, but is subject to review. *Wilkinson v. Bauerle*, 41 N. J. Eq. 635, 643, et seq., 7 Atl. 514 (Err. & App. 1886). In *Stewart v. Lehigh Valley R. R. Co.*, 38 N. J. Law, 505, 522 (Err. & App.), the language of Mr. Justice Dixon, while saving to the director of a corporation rights not arising out of express contract, including the right to the repayment of money loaned, is broad enough to exclude all express contracts, and, if applicable to the circumstances of this case, might make this sale altogether voidable by the company. For, while the transaction in one aspect of it was, or may be claimed to be, a sale of the company's assets for the purpose of paying its debts, yet, in view of the fact that these debts and liabilities appear to be already secured by the deposit of mortgage bonds, the transaction in other aspects may be taken to be substantially an independent sale of the Strawboard Company stock, as to the advisability and terms of which the directors were so responsible to the company in their fiduciary capacity that a sale to any of their number could be avoided by the company, without inquiry as to its terms or its favorable or unfavorable character. The general rule that directors cannot lawfully enter into a contract, in the benefit of which even one of their number participates, without the knowledge and consent of the stockholders, was restated in *United States Steel Corporation v. Hodge*, 64 N. J. Eq. 813 (Err. & App. 1902) 54 Atl. 1, and declared to be so firmly entrenched as not to be open to debate. The power of the stockholders to affirm the contract made with a director was recognized in this case, and for the reason that such contracts are voidable only as against the company considered as composed of the whole body of stockholders, not voidable by each stockholder in his own individual right. *Lillard v. Oil, etc., Co.* (N. J. Ch.) 56 Atl. 254, 257 (Emery, V. C., 1903). This view of the voidability of a contract of sale by a director to a corporation, and its affirmance by a stockholder's vote, is affirmed in a leading English case. *North Western Transportation Company v. Beatty*, 12 App. Cas. 589 (Jud.

Comm. 1887). In this case a director sold one of his own vessels to a shipping company, and the sale was affirmed by the stockholders, with the aid of his own vote. Sir Richard Bagally says on this point: "The general principle is well established that, in the absence of charter provisions, a director of a company is precluded from dealing on behalf of the company, with himself, and from entering into engagements in which he has a personal interest, conflicting, or which possibly may conflict, with the interests of those whom he is bound by fiduciary duty to protect, and this rule is as applicable to the case of one of several directors as to a managing or sole director. Any such dealing or engagement may, however, be affirmed or adopted by the company, provided such affirmance or adoption is not brought about by unfair or improper means, and is not illegal or fraudulent or oppressive towards those shareholders who oppose it."

In the present case the agreement for sale was not communicated to the stockholders until after its execution. It has not been affirmed by the stockholders at any meeting, and if no such affirmance takes place, one of the questions at final hearing will be whether the company (or complainant suing on its right) can avoid the transaction as being substantially a sale of the company's assets to one or more of its directors, and not merely, as in *Wilkinson v. Bauerle*, an exercise in good faith of the power of the directors to sell or transfer assets of the company for the purpose of paying its debts, leaving the fairness of the price to be determined. If the sale should be held to be a proper exercise of the power of the directors, the further question will then arise as to the fairness of the transaction and of the price. If the sale is to be treated as a sale to the directors, then the burden of showing such fairness is on the directors. These questions cannot be properly decided until all of the facts relating to the sale and to the value of the Strawboard Company stock, and the probable effect upon the United Company of the permanent withdrawal of the Strawboard Company stock from its assets and from its control, are developed at final hearing. But, inasmuch as the proofs now presented show that the complainant may at the hearing make out a case, entitling him to avoid the sale on behalf of the company, he is entitled to such preliminary restraint as will render a decree in the company's favor effective, if it should finally be made. This can be secured, I think, by enjoining the final delivery of the shares of Strawboard Company stock, and the execution and delivery of the assignment of the shares of this stock now in the custody of the Trust Company, until the final hearing, or further order.

As to the delivery of the bonds, the situation is different. In the circular letter of December 20, 1906, issued by the directors, announcing the sale to the American Company,

and inviting stockholders to participate, the consideration price of the bonds and of the Strawboard Company stock is separated, \$400,000 being fixed as the value of the stock, in the directors' judgment, and \$450,000 as the value of the \$562,500 bonds, being 80 per cent. of the par value. In the agreement, as above stated, on the first two payments, aggregating \$500,000, the bonds are to be delivered. No objection is made to the price of 80 per cent. fixed for the bonds, or to their sale to the American Company at that price. It would seem, therefore, that no injunction should be issued against carrying out this portion of the agreement of sale, if the American Company and the directors of the United Company choose to do so, and, upon settling the order for preliminary injunction, I will hear them as to the necessity or propriety of imposing as a condition of granting the injunction such terms as will protect defendants, if this portion of the contract be carried out.

(75 N. J. L. 31)

SMITH v. WEAVER.

(Supreme Court of New Jersey. June 10, 1907.)

1. JUDGMENT — BY CONFESSION — DEBTS FOR WHICH JUDGMENT MAY BE CONFERRED.

A judgment was entered upon a bond by virtue of the warrant of attorney upon an affidavit which stated that the consideration of the bond was the sum of \$2,475.49, being the amount of money due from the obligor to the deponent on the account of money which came to the obligor's hands as the executrix of the will of one Weaver and interest due on the same, and that the debt for which judgment is confessed is justly and honestly due and owing to deponent, and that the judgment is not confessed to answer any fraudulent purpose, etc.

Held, that judgment was properly entered on this affidavit.

2. SAME.

The obligee of a bond given for a valid consideration may enter judgment by virtue of the warrant of attorney for any debt or demand that would sustain an action under the bond against the maker thereof, provided such demand at the time such judgment is confessed is justly and honestly due and owing in the sense that it is an unpaid indebtedness, and not in the sense that a fixed day of payment has been reached and passed.

3. SAME.

The case of *Strong v. Gaskill*, 53 N. J. Law, 665, 25 Atl. 19, affirmed on the opinion contained in 59 Atl. 339, followed.
(Syllabus by the Court.)

Certiorari by Josephine T. Weaver against Ella Etta Smith. Rule to show cause why a judgment on bond and warrant of attorney should not be set aside. Rule discharged.

Argued February term, 1907, before GARRISON, SWAYZE, and TRENCHARD, JJ.

John J. Crandall, for prosecutor. Melosh & Morten, for defendant.

GARRISON, J. A judgment entered upon a bond by virtue of the warrant of attorney is attacked upon the ground that the affida-

vit upon which the judgment was entered does not state the true consideration of the bond as required by the statute, or, rather, that it does not state any consideration at all, because it does not show an enforceable debt. The affidavit is in these words: "Ella Etta Smith, being duly sworn, saith she is the plaintiff named below, and that the true consideration of the bond of which the preceding is a copy on which judgment is about to be confessed was and is the sum of two thousand four hundred and seventy-five dollars and forty-nine cents, being the amount of money due from the said Josephine T. Weaver to this deponent on account of money which came to her hands as the executrix of the will of Samuel W. Weaver, and interest due on the same, and that the debt for which judgment is confessed is justly and honestly due and owing to Ella Etta Smith, and that the judgment is not confessed to answer any fraudulent intent or purpose or to protect the property of the defendant from any other creditors."

The transaction thus succinctly stated is that, the sum named in the affidavit being in the hands of the obligor as executrix and due to be paid to the obligee by her in that capacity, she agreed in her personal capacity to pay to the obligee the sum so due. It is not contended that this is not a true statement of the actual transaction between the parties, and, this being so, it does not lie in the mouth of a stranger to the bond to say that the debt created by it is without consideration. The consideration stated by the affidavit is the retention by the obligor as executrix of the precise sum that she agrees to pay to the obligee, and the consideration detrimental to the obligee is her forbearance with respect to the sum so due to her from the obligor as executrix. "So due" in this context, it should be noted, means that which ought to be paid and not that which is legally actionable, and it should further be noted that the statute with respect to bonds and warrants of attorney treats the consideration of a bond and the debt for which judgment is confessed as two separate and distinct things. In the opinion adopted by the Court of Errors and Appeals in the case of *Strong v. Gaskill*, 53 N. J. Law, 665, 25 Atl. 19, it was said, touching the statute in question:

"That act, in speaking of the debt to be recovered, concerns itself solely with the debt in existence at the time of the recovery of the judgment. While it requires a true statement of the consideration of the bond, it leaves all matters appertaining thereto as they were before its passage. The debt it speaks of is the one in existence at the time of the making of the affidavit by virtue of which the judgment is entered. The consideration of the bond is required to be stated, in order that it may be seen whether the original transaction was a valid one and capable of sustaining the debt for which judg-

ment is to be entered, not whether the debt itself was in existence at the time the bond was given. In other words, it does not prescribe that judgments may be entered for such debts only as antedated the delivery of the bond.

"In prescribing what the affidavit shall contain, the act says that it shall state the true consideration of the bond. It then adds, in a separate clause, 'and shall further set forth that the debt or demand for which judgment is confessed is [not "was"] justly and honestly due and owing.' The first clause has reference to the validity of the bond; the second to the legal propriety of the judgment. It treats them as two different things, leaving the connecting links to be controlled by the principles ordinarily applicable to these two distinct subjects of adjudication. The latter requirement is not that the original debt, or so much thereof as remains unpaid, may be set forth and recovered, but that judgment may be confessed for any debt honestly due and owing under said bond; that is, any honest debt supported by the consideration upon which the validity of the bond itself depends. Reading the whole section together, it confers upon a party holding a bond given for a valid consideration the right to enter judgment for any demand which is of such a nature that it would sustain an action under the bond against the maker thereof, provided such demand, at the time of the confession of judgment, is honestly due and owing.

"This contention receives support from the history of the legislation in question. At the time of the passage of the original act, in 1817, the language used was that the affidavit should state the true cause of action. In 1820 this language was altered so as to require a statement, not of the cause of action, but of the true consideration of the bond. The significance of this change is apparent in the light of the view above indicated. * * *

"Nor do the words 'justly and honestly due and owing' limit the indebtedness for which judgment can be entered to such only as present an accrued right of action. Debts now due and owing, in the sense that they are unpaid indebtedness, is what is meant, not that a fixed day of payment has been reached and passed. * * *

"If the affidavit state the consideration by giving truthfully the substance of the transaction, a judgment entered for an honest demand for an actual indebtedness, and without fraudulent purpose, will not be open to the attack of other creditors merely because the affidavit is inartificially drawn. The word 'true,' in this connection, means that which is frank and actual, rather than which is precise and technical."

Strong v. Gaskill was affirmed in 53 N. J. Law, 665, 25 Atl. 19, upon the opinion delivered in the circuit court from which the above excerpt is taken. The opinion thus

referred to is not, however, officially reported, and is to be found in accessible form only in 59 Atl. 339. We have sufficiently indicated the grounds for our conclusion that the attack upon the judgment in the present case is without force.

The rule to show cause is discharged.

(75 N. J. L. 1)

STATE v. LANG.

(Supreme Court of New Jersey. June 10, 1907.)

1. CRIMINAL LAW—PLEA IN ABATEMENT—INCOMPETENCY OF GRAND JURORS.

One indicted by a grand jury, two members of which were disqualified by age, cannot, though barred from challenging the jurors, interpose a plea in abatement, but he may attack the legality of the jury by motion to quash the indictment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 640.]

2. CONSTITUTIONAL LAW—EQUAL PROTECTION OF THE LAWS—CRIMINAL PROSECUTIONS—INDICTMENT—GRAND JURY.

Gen. St. p. 1853, § 6, prescribing the qualifications of grand jurors, and declaring that, where any person disqualified shall be summoned as a grand juror, it shall be good cause of challenge, provided that no exception to any such juror on account of his citizenship or age shall be allowed after he has been sworn, does not deny to one the equal protection of the laws in not being afforded an opportunity to challenge members of a grand jury disqualified by reason of age because the crime charged against him was committed while the grand jury was in session, for it operates alike on all persons under like circumstances.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Constitutional Law, § 711.]

3. CRIMINAL LAW—PREJUDICIAL ERROR—REFUSAL TO QUASH INDICTMENT—DISQUALIFICATION OF GRAND JURORS.

Where one charged with homicide was properly found guilty, the error, if any, in overruling a motion to quash the indictment because of disqualification of two members of the grand jury finding the indictment was not prejudicial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 3085.]

4. JURY—DISCRETION OF COURT—EXCUSING JUROR.

The court in a criminal case did not abuse its discretion in excusing from service as a juror a member of the National Guard of the state at a time when his regiment was in camp at the state camp ground.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 31, Jury, §§ 384-386.]

5. HOMICIDE—MURDER IN FIRST DEGREE—INSTRUCTIONS.

An instruction on a trial for homicide that murder in the first degree consists in the taking of a human life with intent to kill and with deliberation and premeditation; that it is not necessary that deliberation and premeditation should continue for an hour or for a minute, but that it is enough that the design to kill be fully formed and purposely executed; and that the elements constituting the crime are an intent to kill and an execution of that intent with deliberation and premeditation—properly defines murder in the first degree.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Homicide, § 12.]

6. CRIMINAL LAW—MISCONDUCT OF PROSECUTING ATTORNEY—ARGUMENT—EVIDENCE.

Where, on a trial for homicide, it appeared that accused killed his niece, whom he desired

to marry, and that he killed her because she refused to submit herself to his embraces, the language of the prosecutor in his argument to the jury that defendant was a monster in his passions, licentious in his desires, beastly in his love, brutal when thwarted and cowardly when caught, was not ground for reversal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 1674.]

7. SAME—VERDICT—REVIEW—SUFFICIENCY OF EVIDENCE.

Under Criminal Procedure Act (Act 1894, § 136), as amended by the Revision of 1898 (P. L. 1898, p. 915), an assignment that the verdict of conviction in a criminal case is not sustained by the evidence will not be considered, though the certification of the trial judge brings up the entire record; the certification not being treated as a writ of certiorari.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 3074.]

Error to Court of Oyer and Terminer, Middlesex County.

Frederick Lang was convicted of murder in the first degree, and he brings error. Affirmed.

Argued February term, 1907, before GUMMERE, C. J., and GARRETSON and REED, JJ.

Alan H. Strong, for plaintiff in error.
George Berdine, for the State.

GUMMERE, C. J. The plaintiff in error was tried and convicted in the Middlesex oyer and terminer upon an indictment charging him with the murder of one Katie Gordon, and the jury, by its verdict, fixed the grade of his crime as murder in the first degree. The entire record of the proceedings had at the trial has been returned with the writ as provided by the 136th section of the criminal procedure act of 1898 (P. L. 1898, p. 915).

The first and second causes of reversal challenge the correctness of the ruling of the trial court in sustaining a demurrer to a plea in abatement filed by the defendant, and in overruling a motion to quash the indictment. Both the plea and the motion were rested upon the same proposition, viz., that the indictment was not found by a lawfully constituted grand jury, because two of the members of that body were over 65 years of age. By the provision of our statute which prescribes the qualifications of grand jurors it is enacted that "every person summoned as a grand juror in any court of this state shall be a citizen of this state, and resident within the county from which he shall be taken, and above the age of twenty-one and under the age of sixty-five years; and if any person who is not so qualified shall be summoned as a grand juror it shall be good cause of challenge to any such juror; provided that no exception to any such juror on account of his citizenship or age shall be allowed after he has been sworn or affirmed." Gen. St. p. 1853, § 6. It appears upon the face of the indictment that the crime charged against the defendant was committed by him while the grand inquest was in session. He was there-

fore debarred by the statute from interposing a challenge to any of its members on account of age; and the basis of his plea in abatement, and of his motion to quash, is that the deprivation of this right—which is afforded to all persons who are charged with violations of the criminal law which have occurred prior to the impaneling of the grand jury—is a denial of that equal protection of the laws which is guaranteed to every person by the fourteenth amendment to the federal Constitution. It is settled in this state that the improper composition of a grand jury will not constitute a ground for a plea in abatement. The remedy in such case is to challenge before indictment found, or to move to quash afterward. *Gibbs and Stanton v. State*, 45 N. J. Law, 379, 46 Am. Rep. 782; same case on error, 46 N. J. Law, 353. And where the defendant has had an opportunity to challenge a grand juror before he is sworn, and has neglected to avail himself of it, he cannot afterward take advantage of the lack of qualification of such grand juror by a motion to quash the indictment. *State v. Hoffman*, 71 N. J. Law, 285, 58 Atl. 1012. The ruling of the trial court, therefore, sustaining the demurrer to the plea in abatement, was proper, under the cases cited, for the reason that the defendant was not entitled to question the legality of the grand jury by such a plea. But, as he had been afforded no opportunity to interpose a challenge to either of the members of that body who were over the age of 65 years, he was entitled to attack the legality of the body by a motion to quash, and the determination of the propriety of the action of the trial court in overruling that motion requires a consideration of the meritorious question presented thereby.

The proposition that the cited provision of our jury act is violative of the fourteenth amendment of the federal Constitution, because it does not afford to all persons charged with crime equal protection, seems to us to be unsound. The reason why the Legislature has seen fit to confer upon a person who is charged with a criminal offense the privilege of challenging a grand juror who is over 65 years of age, provided the challenge is interposed before the grand juror is sworn, is not easy to understand. It is plain, however, that it was not for the purpose of protecting the alleged criminal against an unfounded indictment; for the Legislature, by providing that, after such grand juror is sworn, he shall be as fully qualified to serve as if he had been under the stated age, has recognized that advancing years is no ground for imputing lack of impartiality to a citizen who is drawn for grand jury service. We are not able to perceive, nor has counsel pointed out to us, how the privilege of interposing a challenge on such ground affords any "protection," within the meaning of the federal Constitution, to a person charged with crime. But, assuming that some benefit

is conferred by the privilege to those persons whose alleged violations have antedated the impaneling of the grand jury, and that the benefit is not shared in by those who are charged with having committed crimes while the grand jury is in session, the fact that the latter class are not permitted to share in the benefit does not constitute a violation of the equal protection clause of the fourteenth amendment. As was declared by the Supreme Court of the United States in *Hayes v. Missouri*, 120 U. S. 68, 7 Sup. Ct. 350, 30 L. Ed. 578, that provision "does not prohibit legislation which is limited either in the objects to which it is directed, or by the territory within which it is to operate. It merely requires that all persons subjected to such legislation shall be treated alike, under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed." It was this view of the scope of the provision which led the same tribunal, in the case of *Missouri v. Lewis*, 101 U. S. 22, 25 L. Ed. 989, to hold that it was not violated by a statute which permitted an appeal from the final judgment of certain of the circuit courts of the state of Missouri, and denied it as to judgments rendered by others of such courts, and which led to the conclusion in *Brown v. New Jersey*, 175 U. S. 172, 20 Sup. Ct. 77, 44 L. Ed. 119, that the amendment did not prohibit a state from enacting that, in a criminal trial had before a struck jury, the defendant should be entitled to only 5 peremptory challenges, although ordinarily on the trial of indictments the right to 20 peremptory challenges was given. Our act prescribing the qualification of grand jurors treats alike all persons charged with crime, under like circumstances and conditions. The province of the grand jury is to make diligent inquiry concerning all alleged violations of the criminal law, not only those which have occurred before its organization, but those which have occurred during its session. All persons who have been charged with violating the law prior to the organization of the grand jury are granted the privilege of challenging a grand juror who is over 65 years of age. The privilege is denied to all persons who are charged with having committed a crime during the sitting of the grand jury. The defendant in error was not denied the equal protection of the laws in not being afforded an opportunity to challenge the two members of the grand jury referred to in his motion to quash, and the trial court, therefore, was guilty of no error in overruling that motion.

But if our consideration of the question had led us to the conclusion that the criticism upon the indictment was well founded, and that there was error in the refusal to quash, we, nevertheless, would not be justified in reversing this judgment on that account. In the case of *Gibbs and Stanton v. State*, supra, where the defendants sought to reverse a conviction upon a similar ground, this court,—

after pointing out that, under the legal system which has prevailed in this state since the amendment of the eighty-ninth section of the criminal procedure act in the year 1855, no error, either of substance or form, will work the reversal of a criminal judgment, unless it is of such a nature that it either did, or might have, prejudiced the defendant on the trial of the cause—sustained the judgment then under review, on the ground that, as the conviction of the defendants was upon their own confession, it was undeniable that the alleged imperfections in the preliminary proceedings could not have prejudiced them upon their trial. The section of the act of 1855 referred to in the cited case is to the effect that no judgment given upon any indictment shall be reversed "for any error except such as shall, or may, have prejudiced the defendant in maintaining his defense upon the merits." The 136th section of the criminal procedure act of 1898 (P. L. 1898, p. 915), under which the present review is had, contains precisely the same provision as the act of 1855, and the question is therefore presented for determination whether the imperfections in the preliminary proceedings could have prejudiced the defendant in maintaining his defense upon the merits. The verdict of the jury declaring the guilt of the defendant is as decisive of the truth of that fact, when based upon a consideration of all the proofs submitted, as when based upon the admission of the defendant himself. That being so (to repeat the declaration in *Gibbs and Stanton v. State*), "it is consequently undeniable that the alleged imperfections in the preliminary proceedings could not have prejudiced the defendant upon his trial."

The next ground of reversal attacks the action of the trial court in excusing one Charles Jackson from service as a juror. It appeared, from the examination of the juror on his voir dire, that he was a member of the National Guard of the state, and that his regiment was then in camp at the state camp grounds at Sea Girt. Upon this fact appearing, he was excused from service by the court of its own motion. That the trial court has power to discharge a juror who is drawn in a criminal case, provided reasonable cause exists for such judicial action, is fully settled in this state. *Patterson v. State*, 48 N. J. Law, 831, 4 Atl. 449; *Aarnson v. State*, 56 N. J. Law, 9, 27 Atl. 937. Counsel urges before us that in the present case no reasonable cause existed for excusing the juror, and that, therefore, the action of the court was not justified under the cases cited. Matters of this kind arising during the course of the trial must necessarily be left largely to the discretion of the trial judge, and, unless it be made plain that he has abused his discretion, and that the defendant may have suffered injury thereby, the propriety of his action cannot be challenged upon review. In the present case, not only was there no abuse of judicial discretion, but, on the contrary,

the excusing of the juror from service was eminently proper under the conditions disclosed.

The next cause of reversal is directed at the instruction of the court to the jury as to the constituents of the crime of murder of the first degree; the contention being that there was error in what was said to the jury upon the subject of deliberation and premeditation. The court charged as follows: "Murder in the first degree consists in the taking of a human life with intent to kill, and that intent must be executed with deliberation and premeditation. It is not necessary that that deliberation and premeditation should continue for an hour, or even for a minute. It is enough that the design to kill be fully formed and purposely executed. You will see, therefore, that the two important elements necessary to constitute the crime of murder in the first degree are an intent to kill and the execution of that intent with deliberation and premeditation. I do not know that I can define those words better than they define themselves. Deliberation and premeditation imply a weighing of the matter and a forethought with regard to the matter; but as I have stated, that weighing of the matter, and that forethought, need not be for an hour, or even for a minute." The ground of objection to this instruction is that the court, by declaring that "It is enough that the design to kill be fully formed and purposely executed," eliminated the necessity for deliberation, notwithstanding the fact that the court had previously instructed the jury that, in order to constitute the crime of murder in the first degree, the intent to take life must be executed with deliberation and premeditation. It is enough, in disposing of this attack upon the charge, to say that the definition complained of has received the approval, not only of this court, but of the Court of Errors and Appeals, in every case in which it has been submitted for consideration since the decision in *Donnelly v. State*, 26 N. J. Law, 601, and that it is no longer properly open to criticism.

The next cause of reversal is directed at an alleged error of the trial court in refusing to stop the prosecutor of the pleas, in his summing up to the jury, upon the application of the defendant. The language complained of was that the defendant was "a monster in his passions, licentious in his desires, beastly in his love, brutal when thwarted and cowardly when caught." The evidence submitted to the jury showed that the defendant was the uncle of the girl whom he killed, a brother of her mother. It was fairly to be inferred from the proofs that he desired to marry her, notwithstanding the fact that a marriage between them would have been incestuous, and that, if this could not be accomplished, he desired to have her submit herself to his embraces without the sanction of a marriage ceremony. The proofs also fairly support the inference that he killed

her because she refused to submit herself to his wishes. In view of these facts, it seems to us that the prosecutor was within his privilege in making the statement which was objected to. It is necessary for the proper administration of justice that, in the summing up to the jury, counsel shall be given the widest latitude, within the four corners of the evidence, and, so long as he confines himself to the evidence, what is said by him in its discussion by way of comment, denunciation, or appeal affords no ground of exception. *State v. Barker*, 68 N. J. Law, 19, 52 Atl. 284.

The last cause for reversal assigned is that the verdict is not sustained by the evidence. A reference to the decision of the Court of Errors and Appeals in the case of *State v. Jagers*, 71 N. J. Law, 281, 58 Atl. 1014, 108 Am. St. Rep. 748, is all that is necessary for the disposition of this point. It is there pointed out that under the 136th section of the criminal procedure act, as originally passed in 1894, the court of review was required to examine the evidence for the purpose of determining whether or not it justified the verdict of the jury; but that since the amendment of that section by the revision of 1898 that duty was no longer required of the reviewing tribunal. It is contended by counsel, in his argument, that the certification by the trial judge of the entire record of the proceedings had upon the trial is practically the same as if this court had issued its certiorari to the oyer and terminer to send up the evidence in the cause. He refers to a suggestion to that effect, made by the court in *State v. Hummer* (N. J. Err. & App.) 65 Atl. 249; and the argument based upon this suggestion is that the court, having before it the evidence ought to examine it for the purpose of determining whether it justifies the verdict of the jury. It seems to us, however, that the certification of the proceedings before it, made by the oyer cannot be treated as a writ of certiorari. To so hold would be to declare that the Legislature could confer the certiorari power upon the court of oyer and terminer, or, rather, upon a convicted defendant, for the certification provided by the statute is not left to the discretion of the court which makes it, but to the defendant who sues out the writ of error to review the judgment against him.

We conclude, upon an examination of all the matters presented to us on the reasons for reversal, and by the assignments of error, that the conviction under review should be affirmed.

(75 N. J. L. 62)

STATE v. DAVIDSON.

(Supreme Court of New Jersey. June 10, 1907.)

CRIMINAL LAW—WRIT OF ERROR—PRESUMPTION AS TO JURISDICTION.

Though the caption of the indictment found at a term of the court of oyer and terminer, under which trial was had in the court of

quarter sessions, is in the oyer, and nothing else in the record shows into what court the indictment was returned, and it does not appear how it was transferred to the quarter sessions, and there appears in the minutes of the quarter sessions an order that "all the indictments this day found be retained and filed in said court of quarter sessions for trial or other disposition," it will not be considered that the indictment was returned into the quarter sessions and not to the oyer, and that no order was made in the oyer directing the handing down of it to the quarter sessions for trial; but, the quarter sessions being a court of general jurisdiction, its proceedings will be assumed to be regular, and all things necessary to give it jurisdiction will be presumed, the contrary not appearing.

Error to Court of Quarter Sessions, Monmouth County.

Mamie Davidson was convicted of a crime, and brings error. Affirmed.

Argued February term, 1907, before FORT, HENDRICKSON, and PITNEY, JJ.

Wesley B. Stout, for plaintiff in error. Henry M. Nevius, for the State.

FORT, J. The defendant was convicted of keeping a disorderly house in the court of quarter sessions of the county of Monmouth. She was indicted by the grand jury of that county at the October term, 1906, at a court of oyer and terminer held by the justice of the Supreme Court and the judge of the court of common pleas of that county. The caption of the indictment as returned in the record is in the oyer. Other than the language of the caption of the indictment, nothing in the record shows into what court the indictment was returned.

It appears that the indictment was tried on the 25th day of October, 1906, before the court of quarter sessions of the county, and the record shows the following order made by a judge of that court: "Ordered that all the indictments this day found be retained and filed in said court of quarter sessions for trial or other disposition." Why this order was made, and how it came to be made, or how the indictment was transferred to the quarter sessions from the oyer, does not appear. When the indictment was moved in the quarter sessions, no objection was made to the jurisdiction of that court or that proper order had not been made by the oyer to hand down the indictment to the quarter sessions pursuant to statute (P. L. 1898, § 8, p. 869). The plea to the indictment appears to have been that of not guilty, and to have been taken in the quarter sessions. No allegation is made that there was any defect in the indictment itself.

It is now contended here that because there appears in the minutes of the court of quarter sessions the order above referred to directing that the indictment shall be retained in that court that this shall be taken as evidence of the fact that the indictment was returned into that court, and not to the oyer, and that no order was made in the oyer directing the handing down of the in-

dictment to the quarter sessions for trial. We do not think that this contention can be sustained. The court of quarter sessions had jurisdiction over the subject-matter of this indictment. That fact is not questioned. It is a court of general jurisdiction and its proceedings will be assumed to be regular and all things necessary to give it jurisdiction will be presumed unless the contrary shall appear.

Another ground upon which this proceeding could have been defeated technically, without considering the question raised, is that there are no assignments of error in the record, as required by the practice of this court on error. Nor if this be deemed to be the entire record under the 136th section of the criminal procedure act are there any grounds stated upon which the plaintiff in error relies for reversal, as required by the 137th section of said act. P. L. 1898, p. 915.

The judgment of the Monmouth quarter sessions is affirmed.

VINELAND HISTORICAL & ANTIQUARIAN SOCIETY v. LANDIS et al.

(Court of Chancery of New Jersey. April 10, 1907.)

1. ADMINISTRATORS—CHANCERY COURT—REMOVAL OF ADMINISTRATION—GROUNDS.

The jurisdiction of the Chancery Court to remove the administration and settlement of an estate from the orphans' court, and complete the administration, will not be exercised, except on proof of fraud or mistake in the procurement of the account or in the proceedings before the orphans' court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 22, Executors and Administrators, § 2009.]

2. SAME—DISCLOSURE OF ASSETS.

Where an executrix was also personally interested in the estate, a bill in chancery would lie to compel her to disclose all the property, real and personal, which she then held or had held during her administration in her own name, but which in fact she held in trust for the benefit of the estate, though in the absence of fraud or mistake the court could not compel her by answer in advance to reveal or discover matters of which complainant could compel a discovery in the orphans' court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 22, Executors and Administrators, § 2168.]

Bill by the Vineland Historical & Antiquarian Society against Matilda T. Landis, and others, to remove the administration of an estate to the Chancery Court, and for an accounting. Relief granted in part.

Leverett Newcomb, for complainant. H. S. Alvord, for defendant executrix. C. K. Landis, for other defendants.

LEAMING, V. C. (orally). I am convinced that no benefit will be derived from my taking this matter under advisement. I am entirely clear in my own mind as to the proper disposition of the motions at this time. There is no doubt of the jurisdiction of this court to entertain bills of this nature, and

the facts may go to the extent of inducing this court to remove bodily the settlement of the estate from the orphans' court, and conclude the administration of the estate here; but that jurisdiction, by the uniform course of a long line of authorities, will not be exercised, except upon the establishment to the satisfaction of this court that there has been fraud or mistake in the procurement of the account or in the proceedings before the orphans' court. A more limited relief is often given by this court in case where this court can appropriately be of service to the orphans' court in its administrative work. If there are matters of discovery which can be aided by means of the procedure in this court, and which the more limited powers of the orphans' court cannot reach, this court may appropriately act in that sphere and give to complainant the benefit of such procedure here; but, so far as an attempt at the administration of the estate in this court is concerned, jurisdiction should not be exercised, unless there is brought to the knowledge of this court conditions of fraud or mistake in the procurement or settlement, or in the proceedings pending. Further progress of this case may disclose conditions which demand for complainant a broader scope in the information which should be disclosed to him in the nature of a discovery by defendants than appears at this time; but, at this stage of the proceedings, it is entirely clear that, under the averments which are contained in this bill, this court should not compel an answer in advance which undertakes in any way to reveal or discover matters that are open to complainant's procurement in the orphans' court—that is to say, in so far as the bill in this case seeks to compel through an answer statements of account or facts or of conditions which are as easily procured in the orphans' court as in this court, that court should be applied to. And they cannot be appropriately sought through a claim of discovery in this court; but, where information is appropriately needed in which the orphans' court has no means of procuring disclosure, then, of course, it is entirely right and appropriate that the answer itself should set forth, in response to the interrogatories of the bill, matters of that nature. I see no way that this court can properly refuse the complainant his right to a discovery embodied in the answer in response to the interrogatories of the bill touching these matters which the bill alleges constitute a trusteeship upon the part of the executrix consisting of land and personal property standing in her name, and concerning which the complainant has no knowledge, or claims to have indefinite knowledge. If the executrix is able to proceed with the administration of this estate by converting the real estate or personal property which was in the name of the deceased, and also which was in her name, into cash, she must necessarily have possession of or the means of procuring all the information which would

be necessary to enable her to disclose by an answer such real estate and personal property as stands in her name in trust for the estate of the deceased, and I cannot conceive that it would be in any sense a hardship to call upon the executrix to disclose with reasonable certainty and detail a list of such real estate and personal property as stands in her name and in fact belonged to decedent. And I can also conceive that it would be appropriate for complainant to seek that information as a matter of equitable right, information in the nature of discovery to which, I think, he is clearly entitled at this preliminary stage; but I cannot conceive that the complainant is entitled to a restatement of accounts, or any statements of account in the answers to be filed, or to any matters in the nature of accounts which are properly procurable in the orphans' court, and which that court can easily reach by its ordinary procedure. It may transpire at a hearing in this cause that matters may be disclosed wherein it becomes necessary to remove the entire administration to this court. At present there is nothing suggested in the bill which would seem to make that possible, because there is no fraud clearly averred; and at this time I cannot see the propriety of compelling the defendant to enter into an account in her answer further than is necessary in the disclosure of the assets, the title to which is inaccessible to the complainant—that is, assets the title to which is in the name of the trustee, who is the same person who is executrix, and the knowledge of which must be in her possession. It may be a burden to list the property, but I think the burden is one which she should assume, and the view which I entertain will lead me to advise an order, which counsel may prepare, allowing the motion to the extent that I have indicated, and denying it as to the rest—that is to say, I will make an order of a nature which exempts the defendant from embodying in detail statements of account, or any amplification of the account already stated—but decline to make an order which will exempt the defendant from making a disclosure of the property which stands in the name of the executrix.

Mr. Newcomb: That applies to both the real and personal assets?

The Court: Yes, any property in the name of the executrix which belongs to the estate. I think it is extremely important that there somewhere be made an exact record of that property. Her duties as executrix are inconsistent with her interest as a holder of the legal estate, and I think such property should be made a matter of record. Just what assets of that nature there are I think complainant should be made acquainted with. I feel entirely clear that the views which I have suggested in a rough way are entirely within the line of the adjudications. All the cases which I have seen clearly point to that view. So far as the money due to the exec-

utrix is concerned, as referred to in the will, I can see no difference between a plain legacy to an executrix of a specific amount, and a direction in the will that there be paid to her so much money which the testator says he owes her. I cannot see that it is material what that money was owing for. Therefore there need not be any disclosure of the items of the indebtedness which the will expressly recognizes as existing indebtedness. I think counsel can, with the suggestions which I have made, prepare an order which will meet the interests of the case.

Mr. Alvord: In regard to giving a detailed description of the real estate that was standing in the name of Matilda T. Landis, the defendants desire to know whether that refers to what is now left of the estate or what was standing in her name at the time of the decease of the testator.

The Court: I think Miss Landis ought to disclose a list of all assets that have been in her name from the beginning. I think such a list ought to exist somewhere in this court, or in the orphans' court. It is, to my mind, an important thing that such a list be made. I am not assuming for a moment that it would be within the field of possibilities for Miss Landis to abuse her trust—I know to the contrary—but I do think that an orderly administration should record such a list.

Mr. Alvord: A large number of pieces of real estate have been sold and disposed of by her and put in the estate as part of the estate in the same manner as if the land had belonged to Charles K. Landis; that is, stood in his name at the time of his death. Is it material, and is it desirable, that the executrix should list that for the present purposes by way of answer? Or will it be considered sufficient if the executrix by way of answer now sets forth what lands she has still remaining undisposed of that were in her name at the time of the decease of Charles K. Landis which all now operate as a trust in her hands?

The Court: The theory of my decision is such that it would not necessarily call for a list of that which has already been sold; but I think it would be well and desirable to have a list of the whole, that which has been sold and that which may still be on hand.

Mr. Newcomb: I cannot tell how the trust estate has been administered without seeing a statement of what she had from the commencement or what she is possessed of.

The Court: I think she ought to supply with her answer information showing what property there has been from the beginning in her name belonging to the estate of Charles K. Landis.

Mr. Alvord: That will be quite an undertaking, and, of course, I will endeavor to comply with that order to the very best of our ability; but we would like by the order to be given some considerable time for that purpose. I don't mean an unreasonable time, but a reasonable length of time. I would sug-

gest that we be allowed 60 days in which to prepare an answer, and if I should require a longer time than that I can apply to the court.

The Court: I see no difficulty about that.

Mr. Newcomb: And the order that we try to agree upon should include all of these points?

The Court: Yes, that is the better way.

(75 N. J. L. 199)

MAGNER v. YORE.

(Supreme Court of New Jersey. June 10, 1907.)

1. MUNICIPAL CORPORATIONS—POLICE—REMOVAL.

Under the tenure of office act (P. L. 1899, p. 26) a member of the police force of a city cannot be removed by the city council because of ineligibility existing at the time of his appointment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Municipal Corporations, § 492.]

2. QUO WARRANTO—TITLE TO OFFICE—PLEA.

A plea to an information in the nature of quo warranto, setting up title to the office in defendant, and praying that it be allowed and adjudged to him, if it is bad in that aspect, cannot be sustained under section 12 of the quo warranto act (P. L. 1903, p. 379) as a plea of want of title in the relator.

(Syllabus by the Court.)

Quo-warranto by Thomas Magner against John Yore. Demurrer to plea overruling a judgment of ouster.

Argued February term, 1907, before GARRISON, SWAYZE, and TRENCHARD, JJ.

James Benny and Gilbert Collins, for relator. Elmer W. Demarest, for defendant.

SWAYZE, J. We are satisfied that there has been no laches on the part of the relator, and the motion of the defendant to dismiss the proceedings must be denied, with costs.

We think the motion to strike out the plea ought not to prevail. Although there may be some doubt whether it is properly framed, we incline to the opinion that it may be looked at as a plea that the office was vacant at the time of Yore's appointment, but we need not enlarge upon the subject, since we think the plea is bad in substance.

The plaintiff was chief of police of Bayonne, appointed December 13, 1902, entered upon the duties of his office January 1, 1903, and performed the same until February 10, 1906, when the present attempt to oust him was made. There was no written charge against him. The plea sets up that the office was vacant at the time defendant was appointed because the relator did not possess the qualifications required, some by the statute and some by the rules and regulations adopted by the common council and in force at the time of the relator's appointment.

The act of 1899 (P. L. 1899, p. 26) enacts that no officer or employé in the police department of any city shall be removed from office or employment therein, except for just cause as provided by the first section of the

act, and then only after a written charge, stating the cause of complaint, shall have been preferred and publicly examined by the appropriate municipal board upon reasonable notice to the person charged. The intent of the act is declared to be to give a fair trial and reasonable opportunity to make his defense. This act extended to all officers and employes and all cities the provisions of the act of 1892 (Gen. St. p. 1546, § 895) as to chiefs and captains of police in second class cities, which latter act also would be applicable to the present case if not superseded by the act of 1899.

The act makes no distinction between officers *de facto* and officers *de jure*. The object of the legislation was to improve the character and discipline of the police force by securing the members in their positions during good behavior, and to prevent their removal for partisan and personal reasons not affecting their character or efficiency as policemen. These reasons are quite as applicable to *de facto* officers as to officers *de jure*. The act permits their removal only for incapacity, misconduct, nonresidence, or disobedience of just rules and regulations. Neither of these causes includes ineligibility at the time of appointment. This court has intimated in a previous case that a police officer cannot be removed for conduct prior to entry upon the service. *Campbell v. Police Commissioners*, 71 N. J. Law, 98, 58 Atl. 84. If the relator was ineligible, the proper method to oust him was by quo warranto. But, even if the statute permitted removal for ineligibility existing at the time of the appointment, the plea fails to show that the statutory procedure was followed. As far as appears, no charges were made, no notice given the relator, and no hearing had. The plea fails to show a legal removal of the relator, or a vacancy in the office at the time defendant was appointed, and therefore fails to show title to the office in him.

It is said, however, that since the act of 1895 (Gen. St. p. 2635, § 12), now included in the revised act as section 12 (P. L. 1903, p. 379), the title of the relator may also be put in issue. *Lane v. Otis*, 68 N. J. Law, 64, 52 Atl. 305; *Id.*, 68 N. J. Law, 656, 54 Atl. 442. The question remains, then, whether the pleadings are effective for that purpose. We think they are not. The plea is in form a single plea in bar setting up title to the office in the defendant, and praying that it may be allowed and adjudged to him. Such a plea does not put in issue the title of the relator except indirectly. If it should be held that the title of the relator also is put in issue by such a plea, we should have the anomaly of a single plea tendering two distinct issues. It may well be that since the act of 1895 the old rule forbidding more than one plea in quo warranto (*State v. Roe*, 26 N. J. Law, 215) is not applicable to proceedings under the act of 1894, now sec-

tion 4 of the revised act (P. L. 1903, p. 377), but the defenses are of a different character and require different pleas. One attacks merely the right of the plaintiff to file the information in his own name, and not in the name of the Attorney General, as a citizen not claiming the office might do with leave of court. P. L. 1903, p. 375, § 1; *State ex rel. Mitchell v. Tolan*, 83 N. J. Law, 195, 198, 199. In the present case the defendant has by his plea relied upon his own title, and it cannot now be sustained merely as an attack upon the right of the relator to proceed in his own name without leave of the court. Since the plea fails to show a good title to the office in the defendant, the relator is entitled to judgment of ouster upon the demurrer.

(72 N. J. R. 828)

SHINN v. KUMMERLE et al.

(Court of Chancery of New Jersey. May 4, 1907.)

CORPORATIONS — INSOLVENCY — JUDGMENTS — SUITS TO SET ASIDE.

General Corporation Act, §§ 64, 86 (P. L. 1896, pp. 298, 304), making preferments in contemplation of insolvency void, does not authorize equity at the suit of the receiver of a corporation to set aside a judgment against it in favor of the wife of its president, resulting from his activity in her behalf and the purposeless inaction of the remaining directors.

Bill by Clifton O. Shinn, receiver, against Gustave A. Kummerle and others, to set aside a judgment. Decree dismissing the bill advised.

Thompson & Cole, for complainant. R. A. Armstrong, for defendants.

LEAMING, V. C. I am unable to reach the conclusion contended for by complainant. It is clear that to relieve against the judgment in question the provisions of sections 64 and 86 of the general corporation act (P. L. 1896, pp. 298, 304), must be extended beyond their terms and beyond any scope heretofore given to these sections by the adjudicated cases.

Had the evidence disclosed a concerted plan among the directors to protect this claim by permitting it to go to judgment, and then to secure a receivership to prevent the procurement of other judgments, it would be difficult to distinguish the transaction in its inherent quality from a confessed judgment or a voluntary transfer of assets by way of preference; but I am compelled from the evidence to view the judgment as the legitimate result of selfish activity upon the part of the president, in behalf of his wife, involuntarily aided by a purposeless inaction upon the part of the remaining directors. The Court of Chancery cannot relieve against this unfortunate and unjust situation.

I will advise a decree dismissing the bill.

(75 N. J. L. 225)

QUINLAN et al. v. WELSH.

(Supreme Court of New Jersey. June 10, 1907.)

NEW TRIAL—EXCESSIVE DAMAGES.

On a rule to show cause, in an action for injuries to real property, where the damages found are alleged to be excessive, the verdict will not be set aside on a mere preponderance of proof, nor unless it is so evident that the jury have erred as to convince of mistake, prejudice, or partiality.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, New Trial, §§ 153-156.]

(Syllabus by the Court.)

Action by Bridget Quinlan and John Quinlan against Michael Welsh. Verdict for plaintiffs. Rule to show cause discharged.

Argued February term, 1907, before GAR-RISON, SWAYZE, and TRENCHARD, JJ.

Frederic M. P. Pearse and Robert Adrain, for plaintiffs. Alan H. & Theo. Strong, for defendant.

TRENCHARD, J. This action was brought by the plaintiffs against the defendant to recover damages for injuries alleged to have been done to the property of the wife, Bridget Quinlan, by reason of the unlawful cutting down of the highway known as Main street in front of her property in the borough of South Amboy. At the trial there was testimony tending to show that the work was done by the defendant, and that it was done without lawful authority.

The trial judge correctly charged the jury "that the damages must be limited to the value of the loss of enjoyment of the property from some time in August or September, 1905, until the 18th day of December, 1905." *Hatfield v. Central Railroad Company*, 33 N. J. Law, 251; *Ackerman v. Nutley*, 70 N. J. Law, 438, 57 Atl. 150. The jury found a verdict for the plaintiffs for \$150. The defendant was allowed a rule to show cause why the verdict should not be set aside, and assigns numerous reasons why the rule should be made absolute. However, the only reason argued is that under the rule laid down by the trial judge the damages were excessive. To be sustained the verdict must be supported upon the theory of the law upon which it was submitted to the jury. *Sensfelder v. Stokes*, 69 N. J. Law, 86, 54 Atl. 517. We think the verdict in this case may be thus sustained.

Witnesses called by the plaintiffs testified in effect that the work of grading was begun in August, 1905, and continued until December 18, 1905, when the summons was issued; that the property of Mrs. Quinlan abutting the cut consisted of two dwelling houses erected on a lot having a front of 75 feet on Main street; that one of these houses was a single house, in which Mrs. Quinlan resided with her husband; that the other house was one-half of a double house, which one-half was rented for \$8 per month; that the house in which the plaintiffs resided had

been rented years ago, before it had been improved, for \$20 per month; that at the time the work was commenced the houses were eighteen inches above grade; that the cut was made 4 feet 6 inches below this; that the curbstones, sidewalks, and fences fell down, rendering it impossible to enter the premises from the front. Some of this testimony was contradicted by witnesses on the part of the defendant, but it was the province of the jury to say to which the greater credit should be given. On a rule to show cause, in an action for injuries to real property, where the damages found are alleged to be excessive, the verdict will not be set aside on a mere preponderance of proof, nor unless it is so evident that the jury have erred, as to convince of mistake, prejudice or partiality. *Merritt v. Harper*, 44 N. J. Law, 73.

We find no such cause for disturbing this verdict, and the rule to show cause will be discharged, with costs.

(73 N. J. Eq. 14)

SCHULTZE v. SCHULTZE.

(Court of Chancery of New Jersey. May 28, 1907.)

DIVORCE—CUSTODY OF CHILDREN.

Defendant, after divorce because of his adultery, married his paramour, and his three children were awarded to the custody of the mother; defendant being directed to pay her alimony, which he did intermittently. *Held*, that while the order might be modified to allow a boy, after arriving at the age of 16, at his request, to go with his father, the other two children, a girl of 14 and a boy of 10, would be allowed to remain in the care of the mother.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Divorce, § 793.]

Action by Emily Schultze against Fred G. A. Schultze. On petition of defendant for custody of children after the granting of complainant's prayer for a divorce. Denied in part.

James D. Carton, for complainant. James W. Miller, for defendant.

PITNEY, V. C. (orally). The girl is 15 years old. She is of an age to choose for herself. I have talked with her privately, I have seen her, and I shall decline positively to make any order with regard to her. That ends that. If she chooses to go with her father, she can go. I know about the case. I think that it is very likely that the second Mrs. Schultze is a very decent woman, in a way, as decent as such a woman can be with the history that I know of her. I mean the second Mrs. Schultze. But I shall positively decline to make any order with regard to the girl. I will hear you farther, if you, Mr. Miller, have anything to suggest about the boy; I have examined him privately, and find he does not wish to leave his mother and go with his father. The affidavits of the defendant show that—if there is any re-

liance upon human evidence—this woman is bringing up her children properly, as well as she can on the scanty means she has; and the children both go to school. Their teachers say they stand high in their classes. You have read the affidavits, I suppose. The court looks entirely to the welfare of the children. That is as thoroughly settled as anything in the state of New Jersey can be. When it comes to ordering as to the custody of a girl 15 years old, you come into a different atmosphere and a different line of law entirely. When a child passes 14 the general rule is they have a choice as to the guardianship and custody, and I positively decline to make any order now, once for all, with regard to the girl. I will hear you about the boy. If she chooses to go with her father, I have nothing to say; but she doesn't, doesn't want to go with him; she doesn't want to go and be under the control of his wife, and I certainly honor her for it.

Mr. Miller, on behalf of the defendant petitioner, was here heard at length.

PITNEY, V. C. This case stands in this wise: The petitioner, Mrs. Schultze (Mrs. Emily Schultze), and the defendant were married a great many years ago, and had three children. They were then very poor. They are all foreigners. I believe the husband was unable at one time to earn anything for his living, for at the trial of this cause the petitioner produced letters from her husband to her in which he begged her to sing in ordinary saloons, or anywhere, to get money to pay living expenses; to pay money to him in order to live. She was a devoted wife. I do not say that he was not an industrious man trying to do the best he could; but she was a devoted wife. They had three children, a boy, a girl, and a boy. Finally, he got a position as immigrant agent for the New York Central Railroad, or some other railroad, whose business was at Hoboken. He went to live there. Now, the present Mrs. Schultze was not at that time a good housewife. She did the best she could. She was a musical character, and she was not what you call a business man's wife, and perhaps she didn't keep things as tidy about the house, and her children, as she would desire to do; but, be that as it may, about that time the husband became infatuated with Miss Meyer, and neglected his wife, and stayed away, and ran away with this Miss Meyer, lived with her in an apartment over in New York City until his wife hunted him up and ran him down, and caught him in the act, so to speak. He was spending his money on this other woman and was neglecting his family. These are solid facts that were proven before me at the hearing on the merits. She then brought a suit for divorce against him on the ground of adultery, and the case was proven beyond all peradventure, although both the defend-

ants, Mr. Schultze and Miss Meyer, swore point-blank that there never had been any improper conduct between them. Well, that is quite usual, but it doesn't show a very high moral tone on the part of either. Now, I granted a divorce. In the meantime these children were in the custody of the father, with the privilege to the mother to see them. That privilege was exercised in such a manner on the part of the husband that she did not get a fair chance to see them; but he went out to East Orange, or somewhere there, or South Orange, somewhere there, and rented a house and lived with this Miss Meyer, and had his three children there in the same house with her, and poor Mrs. Schultze went and took board or rooms in a house, the rear of which backed up on the rear of the house in which her husband was living, so that she could see and watch her children playing in the back yard. Now, that was all proved to my satisfaction. His sister's house, I believe, was the place where by order of the court she should go and see her children once a week. It was a mere mockery, the chance she had to see them, unless she went to this house and saw them there in the custody of her husband's mistress.

This was pending suit. Now, after I pronounced a decree of divorce in favor of Mrs. Schultze against her husband, the question arose as to the custody of those children. They were much younger than they are now. That was seven years or more ago. The oldest boy, I think, was but nine years old then, the girl seven. Then the little fellow there was a boy two or three years old. I had an interview with them. They didn't want to go with their mother. They wanted to stay with their father. There, of course, was a case of influence; but I made up my mind I would never commit those children to the care of a man who was living in open adultery with a woman, and I didn't. I committed them to the care of the mother, and made the father pay the keep of them, and I have never done a thing in my life that I look back upon with more satisfaction than upon that order. Shortly afterwards, the father married his paramour, and she is his wife to-day. And it is to that home, composed of that father and his former paramour, that I am asked to send these children. Now, about four years ago, I think it is, an application was made by the father to have the custody of these children taken away from the wife. She went immediately after the divorce to live in Ocean Grove. She has been living there ever since, and, if there is one place in the state of New Jersey above another where the children would be brought up in a clean atmosphere, it is Ocean Grove. It is a religious community; no liquor sold there, I believe, or anything of that kind; all good, pious Methodists, Sunday schools and public schools, and everything of the best character. I honored her choice going there.

Well, on the father's application on that occasion, the children were brought before me at Jersey City, and a crowd of witnesses on each side were sworn as to how the mother was taking care of them. One difficulty that she labored under all the while was that her husband would not pay her alimony regularly, held back her alimony, and she had these three children to support; and that difficulty has been continued ever since, and I will speak of it in a moment. On that occasion I saw the oldest boy was getting too big for his mother to control, and I gave him to the father. He was then, I think, 12 years old. He was willing to go, and I gave him to the father. I think probably I did right then. I have no kind of doubt about it. You see the situation is such that it is incurable. When a husband and wife are separated in that way, the case is one that the court cannot cure. They have only to choose the lesser of the two evils. They cannot put those children where they ought to be, with the care of their own father and mother, living together as man and wife, according to the laws of God and man. It is impossible for the court to cure that disease, and that disease is due to the improper actions of the father. He is the man that is to blame for the present situation, and for the situation as it has been ever since he became infatuated with this Miss Meyer. He is the one that is to blame. I gave the boy to the father. Probably I did right. I hope I did. But I left the little girl and the other little boy with the mother, and at that time the girl was only 11 years old. I found that she knew enough to know that her father was committing a crime. She knew enough to know that. He was living with the very woman that he lived with in open adultery, and that she had lived in the house with, and she did not want to go with her father, and gave that as a reason. They have lived at Ocean Grove ever since, and the father has an order that he should have access to those children. The trouble has been he has not paid his alimony. Time and again that poor woman has come to me here and has written to me that her husband was behind in his payment. Well, the moment she employed a lawyer she had to pay money out. So in order to save that I undertook myself to try and force that man to be prompt in his payments. He made all sorts of excuses, wanted the amount cut down, and all that sort of thing. I reduced the alimony, though, from \$12, I believe, to \$10, something like that, at the time I took the oldest boy away. And it has been one struggle from that time to this to have that man pay his alimony. I have written him, and then he would pay up in part—never would pay up in full. The poor woman would be behind, in debt to the grocery man, doctor, and all that sort of thing, and he all the while refusing to pay. No reason in the world that I could see except pure ugliness. A man that does that kind of thing does not

commend himself to the court as the proper person to have the care of a boy to bring up.

Finally, about six months ago, I wrote her to make up a statement as well as she could of the arrears, and also a statement of the amount of debts she owed for want of this money. She made it up the best she could, and I ordered my clerk to make up affidavits and statements, and he made them up and sent them to her and she swore to them, and then I sent them to a lawyer, Mr. Cook Conkling, near where the defendant lived, to prosecute, and he compelled the defendant to pay what the defendant admitted he owed. It was not as much as the petitioner claimed, and she says now she has not been paid in full, but I take it for granted she has.

Now, then, in the face of all that, he comes in and wants the custody of these children. Now, reading between the lines, I should say the reason why he was behind in paying his alimony was to torment his wife into giving up the children, or something like that, or of that kind. I cannot think of anything else. Now, he says he has been denied access to the children; and the wife says in reply that he did not go there very often, went so seldom. Saturday was the day, I think, fixed for seeing the children. They did not think of staying home, because the father did not come. He says he went there and was prohibited from seeing them. The wife says that is not so; they did not stay home because he did not come regularly. But unless he paid his alimony regularly he was not entitled to see those children. It is only when he paid his alimony regularly that he was entitled to see the children. I think Mrs. Schultze might well have said: "I won't let you see the children because you don't pay me my alimony. I am starving here for food because you don't send me my \$10 a week."

Now, that is the situation at this time, and, when I made this order to show cause on the husband's petition, it was on condition that he should pay all arrears up to that date and should furnish Mrs. Schultze with money to pay counsel and to pay her fare up here to Newark to meet this petition. Now, as I remarked before, it is impossible for the court to make an order that is satisfactory to the court or to anybody else, and the reason is because this man has deserted his wife, and gone off with another woman, and rendered himself liable to an action for divorce, and then married his paramour. Now, in that situation there is a sore that the court cannot heal. It must do the best it can.

Now, the girl is 15 years old. I have examined her, and the affidavits show her to be a good scholar and steady student. She has an ambition to become a teacher, and she wants to live with her mother. It is a good community. It is a good neighborhood, and she is well liked by her teachers, and

they speak well of her in their affidavits. Why, it is simply impossible to think for a moment of ordering that girl into the custody of her father, under the control of a woman who lived in open adultery with her father before he was divorced.

Now, with regard to the boy, the same thing may be said of him. He ought to have a father, of course. It is time he had a father. But how is he going to have one? Whose fault is it that he has not got a father right alongside of his mother to look after him every day? No fault but his father. The father is the man to blame for that. If the boy was older (I thought he was about 12 years old, but if the boy was older), I would seriously consider whether he had not got too big for his mother to control, and would seriously think of turning him over to his father; but he is not. He is not old enough to commence to learn business. He is not old enough to need the particular kind of instruction that Mr. Miller has very forcibly and very properly urged upon the court, and I am very much obliged to him for it. He has not attained those years yet. He is less than 11 years old. He has not got through his schooling, and is not fit to go to work, so to speak. I do not think he ought to be taken away from his mother. There is nothing that can compensate or equal the love of a mother; and when it appears, as in this case, that the mother was first a devoted and true wife, and is now a devoted and true mother,—she may not be a model mother, she may not be a woman you would set up and say, "There, copy her"; but, so far as she has the capacity, she is a true mother of these children, and she is their own mother. She has a mother's affection and a mother's solicitude such as nobody else, except in very exceptional cases, can possibly have.

Now, under these circumstances, I am not ready to-day to make an order that that child should be taken from its mother. He is well situated. He is going on in school. He has his schoolmates. He is well situated, surrounded by a moral community where he is not exposed to temptation, and, take it altogether, I decline to make an order that the boy should be taken away from his mother.

Memorandum.—The father and older brother at once and in view of the court interviewed the younger boy, and apparently coaxed him to go with them, but without success.

PITNEY, V. C. Shortly after I had refused on July 10, 1906, the application of the defendant for the custody of the two children remaining in the hands of their mother, the defendant applied to me orally and personally, and, as he said, on new grounds, to renew the application. I instructed him to take *ex parte* affidavits before any special master of the facts which he said arose since

the previous refusal just mentioned, and submit them to me with copies to be served on Mrs. Schultze. This he did. The copies were duly served, and Mrs. Schultze was directed to take answering affidavits and submit them to me. This she did, and I have considered them all, and will file them with the papers in the cause.

It is proper to say that I made personal inquiries of a special master residing in the neighborhood and acquainted with the character of Mrs. Rogers, the principal affiant upon which the defendant relies to sustain his application, and learned from him that she was not a person upon whose unsupported evidence, without an opportunity to cross-examine, it would be safe to rely. Upon a careful consideration of all these depositions, including my personal familiarity with the parties and the history of the cause from the beginning, I have concluded to make no order. In support of that conclusion I need only say that the allegations of the defendant are not, in my judgment, sustained. The witness in question took advantage of a fortuitous and entirely innocent circumstance to magnify it far beyond reasonable limits.

I will add that I have received one or two letters from the daughter which show her to be an intelligent and well-educated young lady, and disproves any allegation that she has been subjected to improper or noxious influences.

(73 N. J. Eq. 653)

GEORGE JONAS GLASS CO. v. GLASS BOTTLE BLOWERS' ASS'N OF UNITED STATES AND CANADA et al.

(Court of Chancery of New Jersey. May 20, 1907.)

1. INJUNCTION—CONSPIRACY—BOYCOTTING.

An organized attempt to induce the public to refrain from purchasing the products of a manufacturer, and to deprive him of a part of his trade market, commonly called "boycotting," having for its object the compelling of the manufacturer to unionize his business and the submission of its conduct to the regulations of a labor union, is an irreparable injury to his property, the continuance of which a court of equity will enjoin.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Injunction, §§ 174, 175.]

2. SAME—PICKETING.

A combination or agreement to picket a manufacturing plant for the purpose of interfering with the free flow of labor to an employer, to whom labor is a necessity for the carrying on of his business, which, if successful, will prevent him from obtaining the means of pursuing a lawful occupation, and the sole purpose of which is to compel him to comply with the demands of an antagonistic power, is a conspiracy against the property rights of the employer, subjecting his property to an irreparable injury, and all parties to such compact, actors as well as abettors, will be restrained from establishing and maintaining such picket service.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Injunction, §§ 174, 175.]

3. SAME.

A labor organization seeking to compel a manufacturer to unionize his plant is not such a competitor in the labor market as to justify it in enticing employes to leave the service of their master, or to induce persons seeking employment with him from so doing, when the enticer does not employ labor. The competition which the law upholds must be honest competition, and not a malicious attempt to injure another.

(Syllabus by the Court.)

Bill for injunction by The George Jonas Glass Company against the Glass Bottle Blowers' Association of United States and Canada, William M. Dougherty, and others. Injunction granted.

Hampton & Fithian and John W. Harding, for complainant. Louis H. Miller and John W. Wescott, for defendants.

BERGEN, V. C. This controversy arises over an attempt of the principal defendant, the Glass Bottle Blowers' Association of the United States and Canada and its officers, who are also defendants, to compel the complainant to "unionize its factory." The association is not incorporated, but a voluntary society made up of a number of persons who act as its officers, and control, through the medium of what is described as "local unions," a certain class of workers in glass blowing factories who are willing to join the organization. The executive officers annually confer with the representatives of such factories as consent to be unionized, and together they fix the rate of wages to be paid, and the general conduct of the manufacturer's business for the coming season, and the result of this conference is communicated to the local unions, who are supposed to comply therewith. It appears in this case that the association had in 1901 succeeded in unionizing and bringing under its control the management of all factories in New Jersey doing a business similar to that of complainant, save that of the complainant and one other which is managed by the persons interested in complainant's business. The complainant's factory since 1896 had been a subject of annoyance and dissatisfaction to the association because Mr. Jonas, its president and principal owner had persistently refused to subject his business to the management and control of this self-constituted monitor, and, after an attempt to boycott the business of the complainant had failed to drive it into the union, a strike was declared at the works of the complainant located at Minotola, in the county of Atlantic, in this state on the 9th day of April, 1902, whereupon the employes of the complainant, to the number of approximately 300, left the employment of the complainant, leased a lot of land in the immediate neighborhood of the factory, and procured and set up a large tent, in which the strikers congregated, which was afterwards replaced, at the expense of the defendant association, by a substantial wooden structure used for

the same purpose. While the officers of the association deny that they instigated the strike, they all admit that immediately upon its declaration some of them took the management and direction of the men who were engaged in it. The complainant charges that, by violence, threats, and opprobrious epithets, the officers of the association, and the men whose actions they were directing, intimidated persons seeking employment at its factory, and prevented them from doing so; that the strike was the culminating effort of the officers of this association to drive it to the wall, and compel it to submit to their dictation; and, further, that, although restrained by an order of this court made in this cause when the bill of complaint was filed they have desisted from acts of physical violence. a cordon of pickets guard all the highways leading to complainant's factory, by whom all persons seeking employment there were, at the time the evidence in this cause was taken, subjected to ridicule, opprobrious epithets, and open or implied threats; that such picketing is a violation of its constitutional right to conduct its business in a legal way according to its own methods, resulting in injury to its business and the destruction of its property.

Before entering upon the consideration of the case, I take occasion to say that it is not intended, by anything that may appear in this opinion, to question the right of proper organization for lawful purposes, nor the right of any one to peaceably state his side of a controversy provided it be what it pretends to be and is done without threats, or show of force, or in any manner, or under any conditions, which may fairly indicate that a threat is intended either to person or property, yet it is not necessary that the deterrent force be threatening words. Acts are sometimes more effective than words, but words or acts, which, taken in connection with the surrounding circumstances are intended to intimidate, and which naturally would deter an ordinary person from proceeding to obtain work from one entitled to employ him are not peaceable persuasions, for they interfere with "the right of personal security, the right of personal liberty, and the right of private property," the enjoyment and pursuit of which is guaranteed to every citizen by the Constitution of the state and the law of the land.

In 1892 George Jonas established at Minotola a factory for the manufacture of glass bottles, and conducted the business as an individual until 1897, when the complaining company was incorporated under the laws of this state, and the property transferred to it. When the plant was located, no village existed, but a considerable tract of land was purchased, and the necessary manufacturing buildings put up, as well as a number of dwelling houses, which were rented to the employes of the company, so that in April, 1902, the company had invested about \$300.

000 in land, machinery, merchandise, and buildings, 47 of the latter being tenant houses. In the year 1896 one George W. Brannin, a member of the executive committee of the defendant association, called upon Mr. Jonas, at Minotola, and had a conversation with him about unionizing the factory, without any agreement being reached. In 1899 Brannin again visited Jonas, and told him that they expected to unionize the different glass factories in South Jersey, and "they had gotten our men, some of them, to go out with them, and he thought it would be to our best interest to unionize the plant." Brannin made no threats, and his conduct during both interviews appears to have been confined to an attempt to demonstrate to Mr. Jonas that it would be of advantage to the complainant to run its factory under the rules and regulations of the association; one of these rules being that complainant should only employ one apprentice to 15 journeymen, while nearly all of the men then employed by it were apprentices. Shortly after this, according to the testimony of Mr. Jonas, about 20 of the men employed by the complainant left, and took employment elsewhere, one of them exhibiting to Mr. Jonas a card, signed by Mr. Hayes, the president of the association; this card, as I gather from the evidence, being a certificate of the association that the party holding it was a member of the union, and entitled to work in any union shop. The first move made by the association to coerce the complainant into a compliance with its wishes was an attempt to induce the firm of Whittemore Bros. Company, of Boston, Mass., to withdraw its patronage from the complainant. This firm, who were manufacturers of shoe polish and blacking, had entered into a contract with the complainant for the manufacture of bottles for use in their business amounting to about \$35,000, and in October, 1901, the association issued and circulated generally in the United States and Canada a circular letter signed by Dennis A. Hayes, its president, addressed, "To our Brethren in the Labor Movement, Greeting," portions of which read as follows: "The Glass Bottle Blowers' Association of the United States and Canada request your attention to the following statement: For fifteen years we have been fighting nonunionism and company stores in New Jersey. * * * There are two nonunion concerns remaining. The principal one is operated by the George Jonas Glass Company. * * * The factories at Minotola are operated almost exclusively on bottles for the Whittemore Bros. Company, Boston, Mass., manufacturers of shoe and leather dressing, and, if we could secure the withdrawal of this order, we might make terms with the George Jonas Glass Company. We have appealed several times to the Whittemore people, and later Mr. James Duncan, first vice president of the American Federation of Labor, called on them a number of times, in relation to the matter, but

his efforts and ours were alike unavailing. The firm ignore our appeal. Thus it has been placed on the unfair list of the A. F. of L., and we hope you will bear this in mind when about to have your shoes blacked, or whenever buying shoe polish or leather dressing of any kind. We would feel under many obligations if you would appoint committees to wait on business men who handle this line of goods, and also write to the Whittemore Bros. Company, No. 237 Albany Street, Boston, Mass., asking them to withdraw their patronage from the concern at Minotola. * * * We want this firm to realize that organized labor is a power, and that its efforts to assist and protect the helpless and oppressed cannot be lightly turned aside." The response to this circular was prompt and effective, for letters were mailed from all parts of the country to the Whittemore Bros. Company, of which over 150 have been put in evidence, the result being that Whittemore Bros. Company refused to observe their contract with the complainant, which was thus deprived of a market for its goods of great value. One of these letters written January 8, 1902, from Canton, Ohio, which reflects the average expression of all, reads in part as follows. "P. S. We have a strong union city, and they claim that you buy your bottles from the George Jonas Glass Co., of Minotola, N. J. If such is the case, I must ask that you cancel my spring order, but as you know as well as I (or better) will you please write me a letter to hand over to committee of labor, etc., see—do not give me away. Say what there is in it. I cannot use your goods while the 'ban' is on. I will not try—Send letter if you wish, to be read in council. I will not use goods unless the ban is raised." It also appears that, after the bill of complaint was filed in this cause, the defendant association continued its boycott against the complainant by sending letters to its customers, notifying them that it was known they were having their bottles made at Minotola, and after stating that revelations of the most appalling character had been made regarding the working of children, and that "two mere babies, worked in open defiance of the law by the George Jonas Company, were killed in the most sickening manner," continued: "That they had decided to put three men on the road, also to establish a press bureau for the purpose of giving to the public the information necessary to enable them to withhold their patronage" from parties using the product of the complainant. In order to indicate the character of the boycott inaugurated and carried on by the defendant association, the following letter is pertinent. "Menard Liniment Company, Boston, Mass.—Gentlemen: In re abuse of children by Jonas et al., some time since we wrote you calling attention to your responsibility for wrongs therein complained of. Are we to understand from your silence that you wish us to publish to the world that

you indorse and stand for the slaughter of the innocents? Very truly, E. A. Agard." The evidence in this cause abundantly proves that the defendant association attempted to establish a boycott against the goods manufactured by the complainant, and so far succeeded as to cause it a serious loss of property, for the sole purpose of compelling the complainant to unionize its factory, or, in other words, to submit the conduct of its business to the demands of the association. Such conduct has been declared by this court to be unlawful, a conclusion which meets my hearty approval. *Martin v. McFall*, 85 N. J. Eq. 91, 55 Atl. 465.

The next important step taken by the association to accomplish its purpose was the sending of a letter to the complainant, signed by Dennis A. Hayes, the president of the association, bearing date March 27, 1902, in which he states that he has been requested by the workmen of complainant "to seek a conference with you, to, so far as possible, correct those grievances and unionize your factory." In ascertaining the real purpose of this letter, it must be borne in mind that Hayes testifies that at this time none of the employés of the complainant were members of his association; that he then had no special interest in them, because many of them had taken the places of those who had participated in the strike, and left the complainant in 1899. The only request made in this letter on behalf of the workmen is that they should be conceded such wages and privileges as unionized factories were paying and allowing, under an agreement with the association. Therefore it is quite apparent that this letter was only another step looking to the compelling of the complainant to submit to the association, for the wages and privileges, the absence of which is described as a grievance, were mere incidents of the control by the association of complainant's business; for, once unionized, the other results would follow, and the conclusion is justified that, under a pretense of benefitting labor, these officers were seeking power, and attempting to establish a monopoly that would stifle competition between workmen desiring to labor in that line, for it is not denied that the number of apprentices under union rules is restricted for the purpose of keeping to the minimum the supply of skilled labor. The complainant refused to unionize its factory, and on April 9, 1902, about two weeks after this letter was written, over 800 of complainant's workmen left its employ, and a strike was declared, which has been since maintained under the direction and management of some of the principal officers of the association, with the avowed object of compelling complainant to unionize.

The present proceeding was instituted by the complainant to have the defendants among whom are numerous of its former workmen, enjoined from boycotting its business; inducing its employés by threats, intim-

idation, force, violence, or the payment of money to refuse to perform their duties or leave its service, or, by like methods, preventing those who desire to do so from entering its employment, and also from using indecent and opprobrious epithets to its officers and employés; from collecting singly or in combination with others with the intention of picketing the public highways leading to its factory for the purpose of inducing laborers not to take employment with it; from gathering at railroad stations at or near complainant's works, and inducing or attempting to induce persons arriving at such stations seeking employment at complainant's factory from so doing, and generally from bribing or intimidating workmen to refrain from entering complainant's employment, or inducing those who are employed to leave.

The principal officers of the defendant association have been called, and they all deny that they instigated the strike; but such denials have little weight when considered in connection with their previous and subsequent conduct, for it is quite clear from the evidence that months before the strike occurred they had been engaged in an effort to bend complainant to the will of their association, and employed all the resources of a rich, powerful, and well-organized society to deprive the complainant of a market for its goods, and to accomplish the destruction of its business in default of its submission to their will, when failing in such efforts, this strike was declared a strike which the officers of this association are immediately found to be directing and controlling, and in furtherance of which the association for a long period, if not to the present time, has paid the wages not only of the men who left the factory, but of strangers brought from other places to lead and direct the strikers. The first demonstration after the strike was declared was a parade led by the defendant Doughty, the vice president of the association, preceded by a band of music, and Mr. Hayes, the president of the association, was so promptly on the ground that the suspicion is justified that he had knowledge of what was coming. The testimony of the witness Edward C. Rush shows that some time prior to this strike meetings of the workmen were held at Vineland, which he attended, and that the defendants Doughty and Launer, another officer of the association, were present at different times and addressed the meetings, advising the men to organize and keep still about it, and that "they would take care of them and pay them good wages if they went out." I am satisfied from the evidence that this strike was promoted by the officers of this association in pursuance of their conceived scheme to compel the complainant to unionize its factory. I believe that Mr. Hayes told the truth when he testified that he had no interest in the workmen before the strike, because they had taken the places of

other strikers, and am satisfied that he used these men as a means to accomplish his long cherished purpose; that it was a war of conquest, not for the relief of the downtrodden, as he now seeks to convince us; and that the officers of this association are as directly responsible for the acts of violence and unlawful conduct of these men as if they had actually participated in each of them. I give little credit to, and have no respect for, men who inaugurate a movement which they know they cannot control, and then seek to excuse themselves because they have advised, as they say, a body of men, many of them ignorant Italians, against the doing of unlawful acts, when common sense and ordinary experience teaches that a body of idle workmen, called together at a common rendezvous, such as this association provided, pay no attention to moral precepts communicated for the purpose of being used as a defense when called upon to respond for the acts of a disorderly mob. If these men had been advised to return to their homes and act as orderly law-abiding citizens, simply exercising their right to quit work, a different situation would have been presented, but, on the contrary, they were gathered at a place provided by the officers of the defendant association for no possible reason except to make a show of force, the known effect of which would be to arouse the fears of others desiring to remain at work, or to take the places of those who had left, and whose continued employment would endanger the success of the result sought to be accomplished. The parties who start a conflagration are, and should be, responsible for its consequences.

The testimony in this case is too voluminous to permit of a particular analysis. It is enough to say that I find that acts of violence were committed; that terror reigned in this village for several days; that peaceable citizens seeking to obtain work were met on the public highways by large bodies of these strikers and turned back; that persons seeking to move into the town were stopped on the public highway, and only permitted to proceed through the interference of a peace officer; that private dwellings were visited by bands of men for the purpose of deterring persons desiring to continue work from doing so; that one of the employees who returned to work was assassinated, all attempts to discover the perpetrator being futile, because of the conditions existing, and all of this done, it is claimed, in the interest of organized labor, a claim which, in my judgment, no class of men will be more swift to repudiate than the fair-minded members of the labor organizations of the country.

A part of the argument submitted by counsel relates to the question whether the laborers were justified in striking. With that question I conceive the court has nothing to do. Men have a right to cease work whenever they choose, with or without a reason. If they violate a contract, the master has his

legal remedy in damages; and, so long as workmen abandoning work disperse and behave as quiet orderly citizens, they are only exercising their rights, but when by force, or intimidation, they undertake to deter those who are willing to work from so doing, they violate the law of the land. On the argument counsel for the defendants admitted that violence, intimidation, and all unlawful interference with persons seeking employment with the complainant was an illegal infringement of its property rights, and rested their defense on this branch of the case upon a denial that the conditions which I have found to exist did exist, and I have no hesitation in declaring that such conduct should be restrained.

There is still another branch of this case to be considered, and that is the placing of men, two or three in number, on the highways leading into Minotola, for the alleged purpose of peaceably persuading laborers from seeking employment with the complainant. After very carefully considering this question, I am of opinion that the complainant is entitled to have the defendants restrained from establishing or continuing such picketing, for the only purpose to be served is to intercept persons coming to seek employment with the complainant, and a court should judge of the right to maintain that sort of surveillance over a complainant's business, according to its evident intent and purpose. In its mildest form it is a nuisance, and to compel a manufacturer to have the natural flow of labor to his employment sifted by a self-constituted antagonistic committee whose very presence upon the highway for such purpose is deterrent is just as destructive of his property as is a boycott which prevents the sale of his product. As was well said by Judge McPherson, speaking for the United States Circuit Court: "There is and can be no such thing as peaceful picketing, any more than there can be chaste vulgarity, or peaceful mobbing, or lawful lynching." *Atch. T. & S. F. Ry. Co. v. Gee* (O. C.) 139 Fed. 582-584. The single object sought to be obtained by picketing is to prevent the complainant from continuing its business by depriving it of one of its essential necessities, namely, labor; for, if the picketing has not that object, the reason for maintaining pickets would not exist. That a person who has left his employer may approach another and, if he is willing to listen, tell him the truth regarding the conditions existing, does not meet the question being considered, because in this case there is a well-defined scheme in which a number of persons have joined to prevent the complainant from carrying on his business. It is not a case where the individual on his own behalf is taking his grievance to a willing listener, but a combination of men, backed by great wealth, conspiring to deprive the complainant of the means of carrying on its business, with the hope that it

will ultimately be compelled to yield and surrender its property to the control of strangers, and any picketing which deprives a citizen of his property rights, which it is manifest the acts complained of in this case are intended to accomplish, is subversive of all law and order, and, if permitted to continue, will in the end destroy the prosperity and happiness of society. The defendants frankly admit that the purpose of picketing is to induce every person intending to seek employment with the complainant to refrain from doing so, and attempt to justify it upon the ground that they are competitors of the complainant in the labor market, and, being such, have the right to take from it all laborers that they can persuade to leave it, or refrain from entering its employ. Honest competition of such character is what every business man must submit to, but it must be competition and not a malicious intention to injure. Inducing the employees of a person to leave their employment, or others not to accept his employment, for the purpose of crippling his business, where the organization offering the inducement is not engaged in any business, competitive or otherwise, and which has no need of the labor, and no reason for interfering beyond the avowed purpose of overthrowing the complainant in the stand which it has taken against the demand of the organization that it shall unionize its factory, is not the competition which the law recognizes or upholds; for "the result which they seek to obtain cannot come directly from anything they do within the regular line of their business as workers competing in the labor market. It can only come from action outside of the province of workingmen, intended directly to injure another." *Berry v. Donovan*, 188 Mass. 353, 74 N. E. 603, 5 L. R. A. (N. S.) 899, 108 Am. St. Rep. 499.

It was urged on the argument that the proofs did not show that every defendant was guilty of some act of violence. It, however, appears that all of the defendants were a part of the combination to compel the complainant to unionize its factory. They did not leave their work and go to their homes, but congregated in large crowds, some participating in one act of violence, some in another; and it is impossible, in any ordinary way, to positively identify each member making up a mob of two or three hundred men. They were all at the headquarters provided by the association for the strikers; were all paid out of the funds of the association, and the strikers were under a written contract with the complainant to serve for a definite period, and all joined together in a body to disregard their written obligations. These acts show that a conspiracy was entered into by all of the defendants to compel the complainant to conduct its business under rules and regulations to which it was unwilling to submit, and the overt acts of some of the defendants in carrying out the object of the com-

bination, having caused irreparable injury to complainant's property, all those who aided and abetted are equally responsible, and all should be enjoined, for the injunction can work no hardship, as it affects no right of property, or restrains the doing of any lawful act.

The complainant is entitled to an injunction against the defendant association and its officers, particularly the defendants Hayes and Agard, restraining it and them from persuading or inducing persons or corporations not to deal with it because it employs non-union workmen, or refuses to be unionized, and against all of the defendants according to the prayer of the bill, except so much thereof as relates to the paying of money to the employees of the complainant who have left or may voluntarily leave its service.

STRAUSS et al. v. CASEY MACHINE & SUPPLY CO. et al.

(Court of Chancery of New Jersey. May 22, 1907.)

1. RECEIVERS—FOREIGN COUNSEL—FEES.

A receiver is entitled to an allowance for the fees of counsel employed in another state. [Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Receivers, § 184.]

2. CORPORATIONS—STOCKHOLDERS—RECEIVERS—DUTIES.

After the appointment of a receiver for a corporation, the court directed that suits against stockholders to recover unpaid subscriptions should be held in abeyance until the determination of other suits against purchasers. Thereafter the receiver called the question to the court's attention, but no order was made thereon. Held that, the receiver being unable to enforce such liabilities without an order of the court, he was not chargeable with neglect of duty in failing to sue to recover the subscriptions.

Bill by Simon Strauss and others against the Casey Machine & Supply Company and others. On exceptions to the master's report on receiver's accounting. Exceptions sustained.

See 60 Atl. 402.

M. T. Rosenberg, for complainants. O. B. Gould, for defendants.

MAGIE, Ch. 1. The exception to the master's finding as to the amount claimed by the receiver for his personal expenses is overruled, and the master's report on that subject is confirmed.

2. The master's report allowing the payment by the receiver of counsel fees to Pierre M. Brown, his counsel in the state of New York, was correct, and the exception thereto is overruled.

3. The master's report that the receiver should not be held for uncollected book accounts of the company was also correct, and the exception thereto is overruled.

4. The only question on which I have entertained any doubt is whether the master's report that the receiver should not be dis-

charged should be confirmed. The reason on which the master bases this conclusion is that the case shows that the receiver did not make such effort as he ought to have made to enforce the liabilities of certain stockholders for amounts unpaid on their stock. I have reached the conclusion that the master erred in thus reporting.

In the first place, the person who seeks to hold the receiver for this alleged failure of duty is the personal representative of a stockholder now deceased, who was himself a delinquent. Neither the deceased stockholder, nor his representative, has paid to the receiver the amount unpaid on his stock. In the second place, I think the receiver has performed his duty in this respect. An order of this court expressly directed that suits against stockholders for deficiency in payment for stock should be "held in abeyance" until the determination of other suits against purchasers. Thereafter the receiver reported to the court that one of such suits was still pending and undetermined, and he suggested whether there should not be made an order that he should proceed to collect the sums due from stockholders. The matter was thus brought to the attention of the court, but no order was made thereon. Admittedly the receiver could not proceed to enforce such liabilities by suit without an order of this court.

I am bound to assume that my predecessor, in refraining from making the order suggested, adjudged that it was improper or unnecessary to do so. No subsequent order has been made, and none is now asked. In my judgment, the receiver is not chargeable with any neglect of duty. There is nothing to show that a direction to bring such suits would be of any avail.

For these reasons, the exception under consideration must prevail, and the report on this subject must be disapproved.

(75 N. J. L. 181)

WOLFF v. MEYER.

(Supreme Court of New Jersey. June 10, 1907.)

1. HUSBAND AND WIFE—CONTRACTS OF WIFE—ACKNOWLEDGMENT.

A married woman, who signs, but does not acknowledge in the statutory form, a written agreement to convey her lands, in which her husband does not join, is liable in an action at law for damages for failure to convey.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Husband and Wife, § 724.]

2. VENDOR AND PURCHASER—BREACH OF CONTRACT—REMEDY OF VENDEE.

Where one agrees to convey land, and before the day for performing the contract arrives conveys the land to another than the vendee, the vendee may treat the conveyance as a repudiation of his contract, and sue at once. He need not wait until the day for performance, nor tender the purchase price.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Vendor and Purchaser, §§ 1030, 1031.]

3. EVIDENCE—MARKET VALUE.

Evidence of the price at which the land is actually sold is relevant upon the question of market value at the time.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 1214-1217.]

(Syllabus by the Court.)

Appeal from District Court, Elizabeth County.

Action by David Wolff against Maud M. Meyer. Judgment for plaintiff, and defendant appeals. Affirmed.

Argued February term, 1907, before GARRISON, SWAYZE, and TRENCHARD, JJ.

J. A. Kiernan and Clarence D. Meyer, for appellant. Samuel Koestler, for respondent.

SWAYZE, J. This is an action against a married woman to recover damages for breach of a written contract to convey land, in which her husband did not join. Her signature was not acknowledged. The contract bears date October 23, 1905, and the balance of the purchase money, after deducting a deposit, was to be paid December 1, 1905. Prior to that time, Mrs. Meyer conveyed the property to one Levinson by deed dated October 18, acknowledged October 31, and recorded November 6, 1905. This suit was begun November 25, 1905.

Two defenses are relied upon—that a married woman cannot bind herself by a contract to convey land, and that the plaintiff was in default because he failed to tender the balance of the purchase price.

Prior to the legislation of 1874 a married woman could not, by her own act, bind herself to convey her land. *Pentz v. Simonson*, 13 N. J. Eq. 232. By the fifth section of the revision of 1874 (Revision, p. 637) she was authorized to bind herself by contract, in the same manner and to the same extent as though she were unmarried, with certain exceptions not material to the present case; but section 14 (Revision, p. 639) provided that nothing contained in the act should enable any married woman to execute any conveyance of her real estate, or any instrument incumbering the same, without her husband joining therein as theretofore.

The present case presents the question which was left undecided in *Lorillard v. Union Brick & Tile Manufacturing Company*, 45 N. J. Eq. 289, 17 Atl. 632, whether a married woman can enter into a contract for the sale of her real estate apart from her husband.

The language of the fifth section is broad enough to cover the present case, unless it is modified by the fourteenth section; and the construction thus far put upon the act by the courts has favored the power of the wife to contract as a feme sole. In *Sullivan v. Barry*, 48 N. J. Law, 1, affirmed 47 N. J. Law, 339, 1 Atl. 240, it was held that the wife could, without the co-operation of her husband, create a term of five years in her lands, and Chief Justice Beasley said: "The leading object of the statute is to give the mar-

ried woman her property, both real and personal, as though she were a feme sole, and to clothe her with all the rights and authorities requisite for its possession, enjoyment, and disposition, and it is indisputable that she is to have the exclusive use and benefit of her realty as though she had no husband."

The exceptions to the wife's power in section 14 are conveyances of the real estate and instruments incumbering the same. An agreement to convey is obviously not a conveyance. Is it an instrument incumbering the real estate? If we adopt the view of Chief Justice Beasley in *Sullivan v. Barry*, which was expressly approved by the Court of Errors and Appeals, that "incumber" is used in its ordinary and not its technical meaning, it is fair to say that an agreement to convey is no more an incumbrance than was the term of years in that case. We might rest the case upon the construction there adopted which limited the incumbrances meant by the statute to mortgages or similar burthens; but there is an additional reason for the same result growing out of the language of the act respecting conveyances (P. L. 1898, p. 670). Section 39 enacts that no estate or interest of a feme covert in any lands shall pass by her deed or conveyance without a previous acknowledgment in a prescribed form, and adds these words, which were not contained in the act prior to the revision of 1898: "Every deed or instrument of the nature or description set forth in the twenty-first section of this act [which includes agreements for sale] heretofore or hereafter executed by her and so acknowledged and certified as aforesaid shall be good and effectual to convey or affect the lands, tenements, or hereditaments, or other property, or her interest therein, thereby intended to be conveyed or affected." This provision was inserted in the statutes shortly after the decision in *Corby v. Drew*, 55 N. J. Eq. 387, 38 Atl. 827, which held the wife's contract to convey to be unenforceable. Since the act of 1898 it has been held that specific performance will be decreed of the contract of a married woman where she has acknowledged it as required by the act (*Goldstein v. Curtis*, 63 N. J. Eq. 454, 52 Atl. 218, affirmed 65 N. J. Eq. 382, 59 Atl. 639), and that it will not be decreed if the agreement is not acknowledged. *Schwarz v. Regan*, 64 N. J. Eq. 139, 53 Atl. 1086; *Ten Eyck v. Saville*, 64 N. J. Eq. 611, 54 Atl. 810. In the latter case Vice Chancellor Stevens referred to the act of 1898, and said: "The carefully guarded declaration that no interest of a feme covert should pass by deed unless acknowledged in a certain way, coupled with a declaration that certain instruments so acknowledged should pass or affect her lands, indicates very clearly that it was the legislative intent that instruments not so acknowledged should not affect her lands." We agree with this view. An agreement to convey not acknowledged therefore does not incumber

the lands and is not within the exception of section 14 of the married woman's act. Revision, p. 639.

It was suggested, but not decided, in *Corby v. Drew*, that, if a married woman could not convey without the concurrence of her husband, she could not agree to convey without that concurrence. The impossibility of performance of a contract to convey, made by a married woman alone, is, however, not, strictly speaking, an impossibility in law such as would make the contract void. It is an impossibility which may or may not arise, and is dependent on the will of her husband. One authorized to contract may make a valid contract, although the possibility of its performance depends on the will of another. An example is a contract by a lessee to assign his lease, although it contains a covenant not to assign without license. *Lloyd v. Crispe*, 5 Taunt. 249. Other cases are cited in the dissenting opinion of the present Chancellor in *Chism v. Schipper*, 51 N. J. Law, 18, 16 Atl. 316, 2 L. R. A. 544, 14 Am. St. Rep. 668.

It is not necessary to dwell upon this point, since a similar question has been decided by the Court of Errors and Appeals. In *Brown v. Honniss*, 70 N. J. Law, 290, 58 Atl. 86, the plaintiff sought to recover damages for breach of a contract to convey land. The defendant was unable to make a clear title because of his wife's inchoate right of dower, but it was not suggested that such an impossibility of performance relieved him from liability to action.

We think the fact that the defendant is a married woman is no defense to this action.

The second ground of defense is that the plaintiff's action was brought before the time for performance of the contract had come and without tendering the balance of the purchase money. It is sufficient to say that the action was not brought until the defendant had by the conveyance to Levinson put it out of her power to perform her contract with the plaintiff. It would have been nugatory for him to wait until December 1st, and then tender the balance of the purchase price. The conveyance to Levinson was an effectual repudiation of the contract with Wolff, and he had the right to bring suit at once. *O'Neill v. Supreme Council, American Legion of Honor*, 70 N. J. Law, 410, 57 Atl. 463.

The brief for the appellant complains of the action of the trial judge in awarding damages equal to the difference between the agreed purchase price and the price paid by Levinson. The record shows that no question was raised before the trial judge as to the measure of damages, and there is no determination in point of law in this respect presented for review. The record shows, however, that objection was made to Levinson's testimony on this subject "as not a fair question for the measure of damages." Whether the evidence was competent depends upon whether the circumstances of the case

were such as to bring it within the rule of *Gerbert v. Trustees*, 59 N. J. Law, 160, 35 Atl. 1121, 69 L. R. A. 704, 50 Am. St. Rep. 578, or of *Brown v. Honniss*, 70 N. J. Law, 200, 58 Atl. 86. The facts seem to bring the case within the latter rule. The only difficulty in the way of the defendant, if she desired to perform her contract, was the necessity of having her husband join in the deed. He did join in a deed to Levinson only eight days after the contract with the plaintiff, and the fact that this deed was dated back to October 18th, five days before the contract, is suspicious. If the rule of *Brown v. Honniss* is applicable, Levinson's testimony was admissible. Although the bargain with Levinson was not the plaintiff's bargain, still the actual price which the land brought at the very time in question was relevant upon the question of market value.

We find no error, and the judgment is affirmed, with costs.

DOCKHAM v. NORTH JERSEY ST. RY. CO. (Supreme Court of New Jersey. June 10, 1907.)

CARRIERS—INJURIES TO PASSENGERS—EVIDENCE.

In an action for injuries sustained while alighting from a street car, evidence examined, and held to warrant the direction of a verdict for defendant on the ground that plaintiff alighted before the car came to a stop.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, § 1402.]

Action by James A. Dockham against the North Jersey Street Railway Company. On rule for the plaintiff to show cause why a new trial should not be granted. Rule made absolute.

Argued February term, 1907, before the CHIEF JUSTICE and GARRETSON and REED, JJ.

William D. Edwards, for defendant and relator. Merritt Lane, for plaintiff.

PER CURIAM. The plaintiff was a passenger on a trolley car of the defendant between 5 and 6 o'clock on June 14th. His residence is the corner of Baldwin avenue and Montgomery street. The defendant's track was upon Montgomery street. Plaintiff says that, on approaching his residence, he signaled the conductor to stop at that corner, and that the signal to stop was given; that he, the plaintiff, rose up, and when the car slowed down went to the forward platform near which he was sitting, stepped down on the step of the car, and as he was going to get off the car started, gave a jerk, and threw him into the street, and the fall resulted in a broken ankle. At the close of the case, the defendant moved for direction for a verdict in its favor. We think this motion should have been granted. The evidence shows that the car was stopped as usual when the rear platform was clear of the crosswalk at the corner of Baldwin avenue

and Montgomery street; that the car was about 42 feet long. A daughter of the plaintiff says that the car stopped with the front platform directly in front of their house, which was about 20 feet from the corner.

No doubt the plaintiff left the car somewhere near that point, but it is quite obvious that the car had not then stopped. The motorman says that the plaintiff brushed past him while he was putting on the brake to stop the car, and that the plaintiff, with a book and a satchel in his left hand, his right hand grasping the rail of the body of the car, stepped into the street before the car stopped. The state of facts are sworn to by Henry Gagel, a passenger who stood close behind the plaintiff, and was waiting for him to get off as soon as the car came to a stop, and by Mr. Gilboy, another passenger, who saw the plaintiff walk to the front, out of the gate, and step off while the car was moving slowly and had not stopped, by Mr. Spine, another passenger who says he saw the plaintiff signal with his hand, and saw the conductor ring the bell, that he saw the plaintiff while the car was moving, catch the car with his hand and get off back-side.

All the circumstances show that the car was still in motion, and was slowing down to stop, and the circumstances are corroborated by the overwhelming weight of testimony.

The rule should be made absolute.

(76 N. J. L. 30)

BAER v. WILLIAMS.

(Supreme Court of New Jersey. June 10, 1907.)

CUSTOM—EVIDENCE—WHEN ADMISSIBLE.

A consulting physician, having at the request of an attending physician visited a patient of the latter, brought suit against the attending physician for the price of such visit. The defendant offered to prove a custom of the medical profession to the effect that in such case the charge is always made against the patient. Held to be error to overrule this offer.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Customs and Usages, §§ 22, 23.]

(Syllabus by the Court.)

Appeal from Camden District Court.

Action by Benjamin F. Baer against Franklin E. Williams. Judgment for plaintiff. Defendant appeals. Reversed.

Argued February term, 1907, before GARRISON, SWAYZE, and TRENCHARD, JJ.

Wilson, Carr & Stackhouse, for appellant.

GARRISON, J. This is an action by one physician against another for professional services rendered to a patient of the latter. The plaintiff visited the defendant's patient at the request of the defendant, who was the attending physician. There was no agreement between the two physicians either as to the amount to be charged for the plaintiff's visit or as to whether it was to be charged to the attending physician or to his patient. There was proof that the patient was the defendant's mother-in-law and a

member of his family at the time, and also that she was without means of her own. There was no proof of the value of the services rendered by the plaintiff, except his own testimony that in this instance he charged \$50 and entered it on his ledger, and that for similar services he frequently had charged as high as \$100. The defendant offered to prove a custom of the medical profession to the effect that, where a physician is called into consultation by the attending physician, the charge of such consulting physician is always made to the patient, and not to the attending physician, and that it is never the custom in the medical profession for the consulting physician to look to the attending physician for the payment of the consulting physician's charge. This offer was overruled by the district court, who, at the conclusion of the case, charged the jury that, if the plaintiff went down to Haddonfield and saw the patient, he had performed his work, and was therefore entitled to recover, and that he (the trial judge) thought that \$50 was an ordinary price.

The judgment must be reversed. There was no legal proof of the measure of damages the plaintiff was entitled to recover under the implied contract with the defendant, and on the question of such implied contract the offer of the defendant should have been received. It may be that the defendant would not have been able to prove the custom that he offered to show, but by overruling his offer the existence of the custom was admitted for the purposes of the case and only its pertinence to the issue denied.

The judgment of the district court of the city of Camden is reversed.

(75 N. J. L. 186)

EDWARDS et al. v. CURRIE.

(Supreme Court of New Jersey. June 10, 1907.)

1. JUSTICES OF THE PEACE—CERTIORARI—NECESSITY OF TRANSCRIPT.

On certiorari to a justice of the peace, an agreed statement of facts, without a transcript of the record of the justice, does not suffice to present a legal error requiring reversal of the judgment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 31, Justices of the Peace, § 795.]

2. SAME—DUTY OF COURT.

The court is not obliged to examine the original papers in the clerk's office, but may assume that the state of the case as furnished is complete.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 31, Justices of the Peace, § 798.]

(Syllabus by the Court.)

Action by Joseph Edwards and others against Duncan J. Currie. Certiorari to review judgment dismissed.

Argued February term, 1907, before GARLISON, SWAYZE, and TRENCHARD, JJ.

Edgar H. Cook, for defendant. Beckman & Spencer, for prosecutors.

SWAYZE, J. The papers presented to us fall to show any return by the justice to the writ. We have before us only a state of the case agreed upon by counsel. Such a statement can present no legal error requiring the reversal of the judgment. *Haynes v. Cape May*, 52 N. J. Law, 180, 184, 19 Atl. 176.

The state of the case does indeed set forth that the prosecutor perfected his certiorari as the law requires, but this is only the conclusion of counsel, and does not obviate the necessity of presenting a formal return. We ought not to reverse a judgment without having the opportunity even to examine the record. We may, perhaps, infer that some papers, records, and proceedings were sent up and returned by the justice; but there is nothing in the stipulation to enable us to determine what those papers, records, and proceedings were, nor whether they showed a final judgment, and counsel have expressly stipulated that the case shall be argued upon the agreed facts in lieu of the papers, records, and proceedings. It would be manifestly improper for us to allow counsel to substitute their agreement for the actual judgment rendered by the justice. Such a course would make the validity of a judgment depend upon what counsel happened to agree upon, whether in accordance with the record or not.

Our rules require copies of the state of the case to be furnished to the court, and we may assume that the copies furnished are complete. We are not obliged to look at the original papers in the clerk's office. This salutary rule has been stated by the Court of Errors and Appeals and is equally applicable to this court. *Davis v. Littell*, 64 N. J. Law, 595, 46 Atl. 631.

The writ of certiorari must be dismissed, with costs.

(74 N. H. 240)

SIPOLA v. WINSHIP.

(Supreme Court of New Hampshire. Hillsborough. May 7, 1907.)

1. VENDOR AND PURCHASER — FALSE REPRESENTATIONS—RESCISSION BY PURCHASER.

Where plaintiff purchased a farm, relying on the vendor's false representations as to the quantity of wood thereon and the extent of the tillage land, and after discovering the fraud continued to occupy the farm, so mismanaging it that it greatly deteriorated in value, he was not entitled to a rescission of the contract.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Vendor and Purchaser, § 209.]

2. SAME.

Though plaintiff was not entitled to a rescission of the contract, the fraud was ground for the cancellation of the purchase money note in whole or in part for want of consideration.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Vendor and Purchaser, § 359.]

3. JURY—RIGHT TO TRIAL BY JURY—CANCELLATION OF INSTRUMENTS.

Where the court had power to cancel a purchase money note given by the vendee of a farm, who was induced to purchase the same

through fraudulent misrepresentations of the vendor, the parties were not entitled under the Constitution to a jury trial of the question of the extent to which the note should be canceled, or of the amount of plaintiff's damages.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 81, Jury, §§ 35, 43, 71.]

4. CANCELLATION—GROUNDS.

The maker of a negotiable promissory note, having a defense thereto based on fraud of the payee in procuring the execution of the same, was entitled in equity to a cancellation of the instrument in whole or in part, where he was liable to be put at a disadvantage in making a defense to it in an action at law.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Cancellation of Instruments, § 13.]

5. VENDOR AND PURCHASER—FRAUD—CAVEAT EMPTOR.

Where a vendee does not know the extent of an acre as it appears on the ground, he may rely on representations of the vendor as to the number of acres in the tract.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Vendor and Purchaser, § 55.]

Bill by Henry Sipola against Adron Winship for the rescission of a sale of real estate on account of fraud. Bill dismissed, without prejudice. Transferred from the superior court. Case discharged.

The plaintiff purchased a farm of the defendant in 1904, for the price of \$2,500, of which he paid one-half in cash and gave his note secured by a mortgage of the farm for the balance, payable in annual installments of \$100 each. The first installment having become due, and its payment being refused by the plaintiff, the defendant brought a writ of entry to foreclose the mortgage, which action is pending. The bill alleges fraudulent misrepresentation as to the quantity of wood and timber on the farm and as to the extent of the tillage land, and the plaintiff's reliance upon the representations. The prayers of the bill are for a stay of the action at law during the pendency of this suit, for an injunction restraining the defendant from assigning the note and mortgage or any interest therein, for a decree rescinding the contract of sale or canceling the note and mortgage and enjoining the further prosecution of the writ of entry, for a decree for the damages to which the plaintiff is entitled in equity, and for such other relief as may be just. The defendant's answer, besides denying the fraud and demurring to the bill on the ground that the plaintiff had a plain and adequate remedy at law, alleges that the statements complained of were mere expressions of opinion, and were so understood by the plaintiff, who carefully examined the premises and had equal opportunity with the defendant to make accurate estimates upon those matters. The defendant alleges, in an amended answer, that the property conveyed to the plaintiff included stock and farming utensils which the plaintiff had used, worn out, and disposed of, and that he had carried on the farm in an unhusbandlike manner and consumed the crops. The plaintiff bought the farm relying upon the defendant's assertions, and of-

fers to warrant that the wood and timber on the farm were worth \$1,000. They were not worth over \$600, and this the defendant knew. The plaintiff's damages on account of this fraud are \$400. The defendant also represented that there were 45 acres of tillage land, when there were in fact only 18 acres, and the defendant well knew there were much less than 40 acres. The plaintiff examined the tillage fully, and had every opportunity to judge of its extent; but he had no definite idea of the extent of an acre of land. He saw and understood what land was included in the tillage sold to him. He relied upon the statement in the defendant's advertisement that there were 45 acres of tillage, and upon the oral assurances of both the defendant and his agent that there were 40 or 45 acres, and honestly believed that the area was as represented. The defendant intended that the plaintiff should rely upon the representations. It was found from these facts that the charges of fraud relating to the tillage were not established, and this finding was based upon the ruling that, upon the facts found, the plaintiff is not entitled, as matter of law, to rescission or damages upon that ground. To this ruling the plaintiff excepted. After discovering the fraud as to the wood and timber, the plaintiff continued to occupy the farm, and so mismanaged that it has greatly deteriorated in value. His acts and his delay in bringing this suit were such as to make a decree of rescission inequitable. The bill was dismissed without prejudice, upon the ground that, as the case for equitable relief had failed, the court had no jurisdiction to retain the bill for the assessment of damages caused by fraud. To this ruling the plaintiff excepted. The plaintiff also excepted severally to the denial of these motions: That the defendant be enjoined from further prosecuting his action for a foreclosure of the mortgage, and be ordered to indorse \$100 upon the note as of its date, and to pay the plaintiff the balance of the \$400 damages above mentioned and his costs; that the defendant be ordered to indorse \$400 upon the note as of its date, and prosecute his action no further, and to pay costs; and that the plaintiff have leave to amend by substituting for the bill in equity a declaration in case for deceit, and thereupon have judgment for \$400 and costs. The motions were denied, because to grant them would deprive the defendant of his right to a jury trial.

Sargent, Remick & Niles, for plaintiff.
George B. French, for defendant.

CHASE, J. The plaintiff seeks equitable relief for the defendant's fraud in making the sale of the farm to him, either by a rescission of the contract of sale, or by a cancellation of the note and mortgage which he gave in part payment for the farm, and which the defendant now holds and is at-

tempting to enforce by an action at law. It appears that, in making the contract of sale, the defendant defrauded the plaintiff to the extent of \$400 by false and fraudulent representations regarding the value of the wood and timber upon the farm. The effect of this fraud was substantial; and if the plaintiff, as soon as he discovered the fraud, had taken steps to have the contract of sale rescinded, and was able and willing to restore the defendant to his situation before the contract, no reason is perceived why the plaintiff would not be entitled to rescission. But the defendant, in his amended answer, set up, as a defense to the plaintiff's claim of rescission, the plaintiff's acts in consuming and disposing of portions of the property included in the sale and in carrying on the farm in an unhusbandlike manner. In other words, the defendant alleged that the plaintiff was not entitled to a rescission of the contract because by his own faulty acts he had disabled himself from restoring the defendant to his original situation. It was found by the superior court that, after discovering the fraud, the plaintiff continued to occupy the farm, and so mismanaged that it greatly deteriorated in value; and, further, that the plaintiff's acts and his delay in bringing this suit were such as to make a decree of rescission inequitable. No question was transferred relating to the correctness of these findings. Consequently, they must be regarded as adequately supported by the evidence that was submitted to the court. The question of law, then, is whether a party is entitled to rescission of a contract when rescission would be inequitable because of great deterioration in the property to be returned by the plaintiff, arising from fault on his part after discovering the fraud and because of his delay in instituting a suit for obtaining rescission. The statement of the question unerringly suggests the answer.

It is true that there are cases in which rescission has been decreed when the plaintiff had disabled himself from restoring the property received under the contract in the condition it was in when received; but in such cases it was practicable to shape the decree so as to do equity between the parties. *Thackrah v. Haas*, 119 U. S. 499, 7 Sup. Ct. 311, 30 L. Ed. 486. There is nothing in the record showing that it was practicable to make such a decree in this case. It might be inequitable to require the defendant to take the farm back, greatly deteriorated in value, even in connection with the payment of a sum of money to compensate him for the deterioration, or to take it back after so long a delay. As the case stands, it appears that a rescission, absolute or conditional, cannot be made that will be equitable between the parties. Such being the fact, law or equity does not entitle the plaintiff to rescission. Equity will not order that to be done which in and of itself is inequitable.

The cancellation which the plaintiff seeks

is not cancellation to effect rescission, but cancellation notwithstanding the contract of sale stands. His position, in substance, is that the note which the defendant received under the contract of sale, and which he now holds and is attempting to collect, is without consideration, in whole or in part, because of the defendant's fraud; and that equitable considerations require that the defendant should not be allowed to retain the note and accompanying mortgage as valid, subsisting claims against the plaintiff, and the farm. Story, in discussing the subject of the Cancellation of Instruments, independently of discovery or other equitable relief, says: "Whatever may have been the doubts or difficulties formerly entertained upon this subject, they seem by the more modern decisions to be fairly put at rest, and the jurisdiction is now maintained in the fullest extent, and these decisions are founded on the true principles of equity jurisprudence, which is not merely remedial, but is also preventive of injustice. If an instrument ought not to be used or enforced, it is against conscience for the party holding it to retain it, since he can only retain it for some sinister purpose. If it is a negotiable instrument, it may be used for a fraudulent or improper purpose, to the injury of a third person." 1 Sto. Eq. Jur. (13th Ed.) § 700. In *Hamilton v. Cummings*, 1 Johns. Ch. (N. Y.) 517, Chancellor Kent reviews the early common-law authorities upon the subject, and concludes that the weight of authority and the reason of the thing are equally in favor of the jurisdiction of the court, whether the instrument is or is not void at law, and whether it be void from matter appearing on its face, or from proof taken in the cause; and that these assumed distinctions are not well founded. He says further (page 523): "But while I assert the authority of the court to sustain such bills, I am not to be understood as encouraging applications where the fitness of the exercise of the power of the court is not pretty strongly displayed. Perhaps the cases may all be reconciled on the general principle that the exercise of this power is to be regulated by sound discretion, as the circumstances of the individual case may dictate; and that the resort to equity, to be sustained, must be expedient, either because the instrument is liable to abuse from its negotiable nature, or because the defense, not arising on its face, may be difficult or uncertain at law, or from some other special circumstances peculiar to the case and rendering a resort here highly proper and clear of all suspicion of any design to promote expense and litigation." See *Downing v. Wherrin*, 19 N. H. 9, 91, 92, 49 Am. Dec. 139. "The application for this species of relief is by a bill quia timet, and is addressed to the sound discretion of the chancellor upon the circumstances of the particular case; and the relief will ordinarily be afforded where injury may reasonably be apprehended, and it is made

to appear that the retaining of the title or claim is clearly against conscience." *Bel-lows, J., in Tucker v. Kenniston*, 47 N. H. 267, 270, 93 Am. Dec. 425. It was held, in *Stafford v. Welch*, 59 N. H. 46, that a bill in equity might be maintained for the surrender and cancellation of an overdue note, payment of which had been tendered to and refused by the holder. See, also, *Brooks v. Howison*, 63 N. H. 382, 389.

The case under consideration resembles, in some particulars, the case of *Montgomery v. McLaury*, 143 Cal. 83, 76 Pac. 964. In that case, the contract into which the fraud entered was for an exchange of farms, and included a note and mortgage given by the plaintiff to the defendant for the difference in the values placed upon the farms. There was controversy between the parties relating to the interpretation of the pleadings—whether the plaintiff's case was for a rescission of the contract, or for an affirmation of it, and for the damages resulting from the alleged fraud—but it seems that there, as here, pleadings are construed liberally, and although the plaintiff evidently intended to state facts entitling him to a rescission, and also facts entitling him to a cancellation of the mortgage and to damages, for both of which he prayed, it was held that the portions of the complaint relating to rescission should be treated as surplusage, after the facts had been found showing that rescission was impossible because of the defendant's acts. So far as can be judged from the case in hand, the plaintiff's bill is not subject to the criticism made of the pleadings in that case. The material facts appear to have been set forth in the bill, and the prayers are for a rescission of the contract, or for a cancellation of the note and mortgage. No objection was made to the form of the bill, and it is not apparent that any reasonable objection could be made under the practice in vogue in this state. There is no such inconsistency between the two kinds of relief sought as would be likely to lead to confusion or uncertainty on the trial. If rescission is denied, the contract necessarily stands, and the only remedies left to the plaintiff must be based on the theory of an affirmation of the contract. This does not disable him from maintaining that his outstanding promissory note is voidable in whole or in part for want of consideration, and ought to be canceled. The alleged fraud is ground for this relief, the same as for rescission. It was held, in the California case, that the note and mortgage should be canceled; and, this not affording the plaintiff adequate relief, that he should be awarded a sum equal to the additional damage he had suffered from the defendant's fraud, on the ground that, equity jurisdiction having attached for one purpose, complete relief would be afforded. *Hosleton v. Dickinson*, 51 Iowa. 244, 1 N. W. 550, is also a case much in point.

It appears from the authorities that, under certain circumstances, the court would have jurisdiction to cancel the plaintiff's note held by the defendant, to the extent that it represents the results of the defendant's fraud. The plaintiff moved, in effect, that the note be canceled to the extent of \$400 of its principal, by reason of the defendant's fraud relating to the wood and timber; that sum being the damage assessed by the court for the fraud. This motion was denied, for the specific reason that to grant it would deprive the defendant of his right to a trial by jury; but, the court having jurisdiction to cancel the note in whole or in part, it was necessary, in exercising the jurisdiction, to determine the extent to which the note should be canceled, or, which is the same thing, the extent of the plaintiff's damages. This the court might do directly, or by the agency of a master or a jury, in accordance with the usual equity practice. While the court may properly employ a jury to instruct his conscience regarding such questions (*Tasker v. Lord*, 64 N. H. 279, 8 Atl. 823), the parties have not a right under the Constitution to a trial of them by a jury (*State v. Saunders*, 66 N. H. 39, 25 Atl. 588, 18 L. R. A. 646; *Curtice v. Dixon*, 73 N. H. 393, 62 Atl. 492). The specific reason given for the denial of the plaintiff's motion indicates that the court did not consider the circumstances with a view of determining the question whether they called for a decree canceling the note in whole or in part. As has been seen, the power which a court of equity has in such cases "should be regulated by sound discretion as the circumstances of the individual case may dictate." If the note is not negotiable, and the plaintiff's defense against it growing out of the defendant's fraud will not be endangered or rendered unreasonably difficult—in short, if there is no good reason why equity should interfere in the premises—a decree of cancellation should be denied, and the plaintiff should be left to make his defense in the action at law. If, on the other hand, the note is negotiable, and the plaintiff is liable to be put at a disadvantage in making a defense to it in the action at law—if equity and good conscience require that it should be canceled in whole or in part—then the plaintiff should have a decree accordingly. The result is that the plaintiff's exception to the denial of the motion under consideration is sustained, provided it is found that under the circumstances of the case the note should be canceled in whole or in part; or, stating it in another form, the plaintiff's exception is sustained in case it is found that there is ground for granting equitable relief by a cancellation of the note in whole or in part.

Another exception of the plaintiff is to the court's ruling in regard to the defendant's representations relating to the area of the tillage land. The defendant, by advertisement, represented the area of this land to be 45 acres, and by oral statements of himself

and his agent he represented it to be 40 or 45 acres. He well knew it was much less than 40 acres. It was in fact only 18 acres. The defendant intended that the plaintiff should rely upon these representations, and the plaintiff did so in fact, honestly believing them to be true. The plaintiff saw and fully examined the tillage land, understanding what was included in that designation; but he had no definite idea of the extent of an acre. The court ruled, in substance, that upon these facts the plaintiff is not entitled, as a matter of law, to a rescission of the contract or to damages. It would seem from the language of the case that the representations purported, and were understood, to be statements of the defendant's knowledge—not statements of his opinion or judgment regarding the matter. This inference is strengthened when it is considered that the answer specifically alleged that the statements were mere expressions of opinion, etc. If such had been the finding, one would naturally expect it would be definitely stated in the case. Whether the statements related to the defendant's knowledge, or to his opinion, is a question of fact; and, as the case is understood, it was found that they related to his knowledge. It is therefore unnecessary to consider what would be their legal effect if they were mere expressions of opinion. That, undoubtedly, would depend somewhat upon the circumstances under which they were made and the plaintiff's conduct in view of them. It is conceivable that mere expressions of opinion might be made in such manner and under such circumstances as that they would naturally throw a man off his guard and induce action in reliance upon them, without raising an implication of want of care on his part; but questions of this kind can be more satisfactorily determined when presented in a concrete form. In this case, the defendant stated as a fact what he knew was false, and he did it with the fraudulent intent of deceiving the plaintiff, and thereby inducing him to purchase the farm. This was fraud. *Shackett v. Bickford*, 74 N. H. 57, 65 Atl. 252. The defendant attempts to avoid responsibility for the fraud by invoking the aid of the maxim "caveat emptor." He says that, as the plaintiff saw and examined the land and had an opportunity to ascertain its area, he was in fault for relying upon the defendant's statements regarding that matter. In *Pringle v. Samuel*, 1 Litt. (Ky.) 44, 13 Am. Dec. 214, the court say: "We do not remember any case where the maxim quoted ['caveat emptor'] has been used by the chancellor in such manner as to compel him to shut his ears against false representations, or to give latitude to a vendor of real estate to state facts untruly, without any responsibility." The case was a bill in equity praying for a perpetual injunction to restrain the defendant from enforcing a judgment recovered against the plaintiff upon a promissory note given in part payment for a farm. In the

negotiation for the sale of the farm, the defendant falsely and fraudulently represented that it contained 50 acres, when it contained only 37½ acres; and the court held that the plaintiff was entitled to a perpetual injunction against the collection of a part of the judgment corresponding in amount with the deficiency in the land. In *Stewart v. Stearns*, 63 N. H. 106, 56 Am. Rep. 496, the court of this state, in speaking of this maxim, say: "Where the statements are of material facts, essentially connected with the substance of the transaction, and not mere general commendations or expressions of opinion, and are concerning matters which from their nature or situation are peculiarly within the knowledge of the vendor, the purchaser is justified in relying on them; and, in the absence of any knowledge of his own, or of any facts which would excite suspicion, he is not bound to make inquiries and examine for himself. Under such circumstances, it does not lie in the mouth of the vendor to complain that the vendee took him at his word." *Coon v. Atwell*, 46 N. H. 510, was an action on the case for deceit, by which the plaintiff was induced to purchase a farm of the defendant. The deceit alleged in one count of the declaration was a representation that the farm contained 250 acres of land, when in fact it contained only 175 acres, which the defendant well knew. In support of a demurrer to the declaration, it was urged by the defendant that the representations set forth in the declaration were mere expressions of opinion not amounting to a warranty, and that with common prudence the truth might have been ascertained. It was held that this count stated a good cause of action, and that the demurrer was properly overruled. In the course of the opinion, the court said: "In each of these counts there is alleged a false affirmation, known by the defendant to be false, and in relation to a material matter, and by which the plaintiffs were deceived and injured, and in such a case an action lies." The law on the subject has been similarly decided in other states. *Twitchell v. Bridge*, 42 Vt. 68, a case much like the present case; *Stevens v. Giddings*, 45 Conn. 507; *Thomas v. Beebe*, 25 N. Y. 244; *Starkweather v. Benjamin*, 32 Mich. 305; *McGhee v. Bell*, 170 Mo. 121, 70 S. W. 493. See other authorities cited in 29 Am. & Eng. Enc. Law (2d Ed.) 629. The law seems to have been held differently in the earlier decisions in Massachusetts (*Gordon v. Parmelee*, 2 Allen, 212; *Noble v. Goggles*, 99 Mass. 231; *Parker v. Moulton*, 114 Mass. 99, 19 Am. Rep. 315); but in the later decisions the court have declined to extend the rule of the earlier cases, and have held in substantial accord with the law as held by the courts of other states (*Lewis v. Jewell*, 151 Mass. 345, 24 N. E. 52, 21 Am. St. Rep. 454, and *Roberts v. French*, 153 Mass. 60, 26 N. E. 416, 10 L. R. A. 656, 25 Am. St. Rep. 611, two cases much in point).

Upon authority, as well as upon reason, it

cannot be held as matter of law that the plaintiff was not in the exercise of common prudence in relying upon the defendant's representations in this case. Being ignorant of the extent of an acre as it appears upon the ground, he was obliged to obtain information as to the area of the tillage land from others. The maxim "caveat emptor" did not prohibit him from seeking it of the defendant. The law of the present day does not assume in all cases that vendors of property are endeavoring to defraud the vendees by false and fraudulent representations, and consequently require vendees to distrust such representations and seek the information elsewhere, or suffer the consequences. If the representations, as it seems was the fact in this case, purport to be statements of facts within the vendor's knowledge, and there is nothing in the surrounding circumstances to put the vendee upon guard in relation to them, considerations of justice and public policy alike will uphold the vendee in relying upon the representations. As has been said in some of the cases cited, a contrary course would have a tendency to promote and protect fraudulent dealing on the part of vendors. Vendors certainly have no valid reason for complaining that they are held responsible for their fraudulent representations, nor for criticising their vendees for relying upon them. Of course, each case must stand upon the facts peculiar to itself. It may appear in a case that the vendee was imprudent in relying upon the vendor's statements. If so, the maxim applies; but if, as a matter of fact, the statements are of material facts essentially connected with the substance of the transaction, and are not mere general commendations or expressions of opinion, and if the facts stated are such as might be known to the vendor, the vendee may safely rely upon them, unless there are circumstances attending the statements having a tendency to put him upon further inquiry regarding them. It does not appear that there was anything in this case having a tendency to cause the plaintiff to distrust the defendant's statements. The plaintiff's ignorance of the extent of an acre is no justification or answer to the defendant's fraud in knowingly and intentionally deceiving him as to the quantity of land, especially since he must have known of the plaintiff's ignorance, and intentionally availed himself of it to deceive the plaintiff. Although the fraud thus committed may not entitle the plaintiff to a rescission of the contract of sale, because rescission would be inequitable under the circumstances, it should be taken into consideration on the question of the cancellation of the note and mortgage, in case it turns out that equity requires cancellation. If the court's finding as to the plaintiff's mismanagement of the farm and delay in bringing this suit does not apply to the question of rescission of the contract of sale for this

fraud, the plaintiff may be entitled to rescission, notwithstanding he would not be entitled to it on account of the fraud relating to the wood and timber. This would depend upon facts that do not appear in the case. The plaintiff's exception to the ruling that the facts found do not constitute fraud for which there may be rescission or cancellation is sustained *de bene esse*.

As the decision of the foregoing questions is likely to result in the disposal of the case, the question whether the plaintiff would be entitled to a decree for the damages he has suffered from the defendant's fraud, without other relief of a distinctively equitable nature, and the question whether, if the action were amended by substituting for the bill a declaration in case for deceit, the defendant would be entitled to a jury trial, have not been considered.

Case discharged. All concurred.

(102 Me. 365)

MOODY v. PORT CLYDE DEVELOPMENT CO.

(Supreme Judicial Court of Maine, Feb. 5, 1907.)

1. BANKRUPTCY—EFFECT OF BANKRUPTCY ACT ON STATE INSOLVENCY LAW.

The very foundation of judicial proceedings is jurisdiction, and the question of jurisdiction may be raised at any stage of the proceedings by any suggestion that will apprise the court of the want of jurisdiction.

2. SAME.

In the case at bar a bill in equity was filed against the defendant corporation by one of its stockholders as provided by chapter 85, p. 85, of the Public Laws of 1905, and after hearing thereon a receiver was appointed for the defendant corporation under the provisions of the aforesaid chapter. At the time the aforesaid chapter was enacted, the present United States bankruptcy act of July 1, 1898 (30 Stat. 544, c. 541 [U. S. Comp. St. 1901, p. 3418]), was in operation and also was in operation at the time the aforesaid bill in equity was filed and also when the aforesaid receiver was appointed. Previous to the filing of the aforesaid bill in equity and the appointment of a receiver as aforesaid, a creditor had brought suit against the defendant corporation and made a general attachment of all the defendant corporation's real estate. After the appointment of a receiver as aforesaid, the attaching creditor filed a petition praying that the proceedings appointing the receiver and the receivership be dismissed, and that the petitioner be allowed to prosecute its suit without any interference or objection on the part of the alleged receiver. The petitioner contended that the state court had no jurisdiction in the matter of appointing the receiver, for the following reasons: First, because at the time of filing the bill in equity the defendant corporation was insolvent; second, because chapter 85, Pub. Laws 1905, under which the receiver purported to have been appointed, was in effect an insolvent law; third, because, when said receiver purported to have been appointed, the United States bankruptcy act of 1898 had been and was then in operation, and suspended and rendered inoperative the aforesaid chapter 85 of the Public Laws of 1905, which in practical effect was an insolvent law, and deprived the state court of any jurisdiction in the matter of appointing a receiver by virtue of said chapter 85. Hearing was had

on the petition, and the prayer of the petition was denied.

Held: (1) That at the time the bill in equity was filed the defendant corporation was insolvent.

(2) That chapter 85, Pub. Laws 1905, under which the receiver purported to have been appointed, was in effect an insolvent law.

(3) That the United States bankruptcy act of 1896 being in operation when said chapter 85 was enacted, said chapter 85 never went into operation.

(4) That under said chapter 85 the state court had no jurisdiction in the matter of appointing a receiver by virtue of said chapter.

(Official.)

Exceptions from Supreme Judicial Court, Cumberland County, in Equity.

Bill by William A. Moody against the Port Clyde Development Company for the appointment of a receiver of that corporation, under Pub. Laws 1905, p. 85, c. 85. Previous to the filing of the bill the Georges National Bank of Thomaston had commenced an action against defendant corporation, and after the appointment of a receiver therefor filed a petition praying that the proceedings appointing the receiver be dismissed, and that it be allowed to prosecute its suit without any interference on the part of the receiver so appointed. From a decree denying the prayer of the petition of the bank, the bank alleged exceptions. Exceptions sustained.

The Port Clyde Development Company is a corporation organized in 1902, under the laws of Maine, and located at Portland. On February 14, 1904, the Georges National Bank of Thomaston, Knox county, commenced an action at law against the defendant corporation. The declaration in the writ is as follows:

"In a plea of the case, for that the said defendant, at said Thomaston on the tenth day of February in the year of our Lord one thousand nine hundred and four by its note of that date, by it duly signed, for value received, promised said bank to pay it or its order the sum of four thousand dollars in thirty days after the date thereof, and said plaintiff says that said thirty days have long since elapsed, whereby an action hath accrued to the plaintiff to have and recover the same with interest of said defendant. Yet the said defendant, though requested, has not paid the same, but neglects so to do, to the damage of the said plaintiff (as it says) the sum of six thousand dollars which shall then and there be made to appear, with other due damages."

This writ was returnable at the April term, 1906, of the Supreme Judicial Court, Knox county. A general attachment of the defendant corporation's real estate was made on this writ on the day of its date. February 28, 1906, service of this writ was made on W. A. Moody, president of the defendant corporation.

On the 13th day of March, 1906, William A. Moody, the said president of the defendant corporation and one of its stockholders,

under the provisions of chapter 85, Pub. Laws 1905, filed in the Supreme Judicial Court, Cumberland county, a bill in equity against the defendant corporation, which said bill, omitting formal parts, is as follows:

"William A. Moody of St. George, county of Knox, state of Maine, complains against the Port Clyde Development Company, located at Portland, Cumberland county, Maine, and says:

"(1) That said William A. Moody is a stockholder and creditor of said Port Clyde Development Company.

"(2) That said Port Clyde Development Company is a corporation organized and existing by virtue of the laws of the state of Maine. That said corporation by its vote is located at Portland aforesaid.

"(3) That said Port Clyde Development Company has held all, including its last stockholders' meeting, in said Portland. That its property is situate in the town of St. George, county of Knox, state of Maine.

"(4) Said William A. Moody is informed and believes, and therefore alleges upon information and belief, that said corporation is in imminent danger of insolvency.

"(5) Said William A. Moody is informed and believes, and therefore alleges upon information and belief, that the estate and effects of said Port Clyde Development Company, through attachment and litigation, and other proceedings hostile to the interests of said Moody and other unsecured creditors and stockholders, are in danger of being wasted or lost.

"Wherefore, inasmuch as said plaintiff is remediless except in equity, he prays that full, true, and certain answers may be given to all the premises and paragraphs herein set forth, but not under oath, that said honorable court, if it finds that sufficient cause exists, will issue an injunction, both temporary and permanent, restraining said corporation, its officers and agents, from receiving any moneys, paying any debts, selling or transferring any assets of the corporation, or exercising any of its privileges or franchises until further order of the court.

"And that said court may also appoint one or more receivers to wind up the affairs of the company, and also that said court may make all decrees and orders that may be proper and necessary under the provisions of chapter 85 of the Public Laws of the state of Maine for 1905, or under any other law relating to the subject-matter of this bill of complaint.

"May it please your honors to grant unto your orator, this plaintiff, most gracious writ of subpoena in the form provided by law, directed to said Port Clyde Development Company.

"And as in duty bound your orator will ever pray."

To this bill the defendant corporation filed its answer, which, omitting formal parts, is as follows:

"And now the said Port Clyde Development Company, answering to the bill of complaint of William A. Moody against said company, dated March 8, 1906, says:

"(1) The truth of the allegation contained in paragraph 1 of said bill of complaint is admitted.

"(2) The truth of the allegation contained in paragraph 2 of said bill of complaint is admitted.

"(3) The truth of the allegations contained in paragraph 3 of said bill of complaint is admitted.

"(4) The truth of the allegation contained in paragraph 4 of said bill of complaint is admitted.

"(5) The truth of the allegation contained in paragraph 5 of said bill of complaint is admitted.

"And said corporation prays that in this proceeding right and justice may be done all parties interested, and that said corporation may be fully protected."

Hearing was had on bill and answer on the 16th day of March, 1906, and after hearing the presiding justice made a decree, which, omitting formal parts, is as follows:

"This cause came on for hearing on bill and answer, by agreement, this 16th day of March, 1906, the parties being represented by counsel, and all the allegations of the bill are admitted by the answer; and, upon consideration thereof, it is ordered, adjudged, and decreed that the allegations in said bill that said corporation is in imminent danger of insolvency, and that the estate and effects of said Port Clyde Development Company, through attachment and litigation, and other proceedings hostile to the interests of said complainant Moody and other unsecured creditors and the stockholders, are in danger of being wasted or lost, and also each and every allegation in said bill of complaint are sustained, and that a receiver should be appointed, and by agreement of parties, Chester W. Teel of St. George in the county of Knox, Me., a suitable person, is hereby appointed such receiver of said defendant corporation, to wind up the affairs of said corporation, with power to institute or defend suits at law or in equity in his own name as receiver, to demand, collect, and receive all property, books, papers, and assets of said corporation, to sell, transfer, or otherwise convert the same into cash, and to conduct and carry on the business of said corporation as ordered by this court, and to hold and use the assets of this corporation subject to and under the further order of this court.

"Also that pending the proceedings in this cause said defendant corporation, its officers and agents, be and they hereby are restrained from receiving any moneys, paying any debts, selling or transferring any assets of said corporation, or exercising any of its privileges or franchises until the further order of this court."

At the April term, 1906, of the Supreme Judicial Court, Knox county, the return term of the writ in the aforesaid action at law, the defendant corporation filed an answer to said action at law, setting forth the aforesaid equity proceedings and the decree appointing a receiver, and praying "that as said decree is in full force a sufficient suggestion hereof may be spread upon the docket and records of this court and that this plaintiff may be directed and allowed to proceed according to the decree, a copy of which is hereto attached as aforesaid, and that as this said plaintiff has an attachment dated February 14, 1906, at 4 o'clock in the afternoon and none other, the date of said attachment being less than 30 days prior to the filing of said bill in equity, in said court at Portland, Cumberland county, and no farther proceedings be had or allowed by said court in Knox county touching the matter, and that this cause may be dismissed on account of the equity proceedings herein set forth." The action at law was then continued.

On the 11th day of August, 1906, the Georges National Bank, the plaintiff in the aforesaid action at law, filed in the Supreme Judicial Court, Cumberland county, a petition directed to the justice who made the decree in the aforesaid equity proceeding, which said petition, omitting formal parts, is as follows:

"The Georges National Bank of Thomaston, Me., respectfully represents that it is a creditor of the Port Clyde Development Company, of St. George, Knox county, Me., to the extent of \$4,000 money loaned. That on February 14, 1906, said bank brought a suit against said development company and William H. Moody, a signer of said note, made an attachment of the real estate of said development company. On March 2d Isaac E. Archibald, having a judgment against said company, attempted to sell said real estate on an execution, but, as said bank claims, illegally, and that said sale and levy are invalid. Subsequently said development company was placed in the hands of a receiver on the petition of William A. Moody, its general manager.

"Said action of said bank is pending in the Supreme Judicial Court for Knox county, and will be in order for trial at the September term, when it claims that it should have judgment and protect its lien.

"Said development company files a defense, claiming that it is in the hands of a receiver, and that the attachment of said bank is dissolved, and that the company is insolvent, and that the receiver who was appointed should sell the property and pay to the creditors a pro rata percentage, distributing the assets among the creditors in the nature of a dividend in insolvency proceedings. Your petitioner says that said proceedings are illegal and the acts of the receiver would be in violation of the national bankruptcy

law; that the proceedings under which the said receiver acts and the statute under which the proceedings were instituted in which he is appointed receiver is in the nature of an insolvent law, which cannot exist during the existence of the national bankruptcy act.

"Wherefore the Georges National Bank respectfully moves that the proceedings appointing said receiver and said receivership be dismissed, and said bank be allowed to prosecute its suit without any interference or objection on the part of the alleged receiver."

After notice given to the receiver, a hearing was had on the petition before the justice to whom the petition was directed, who denied the prayer of the petition. Thereupon the petitioner, the Georges National Bank, took exceptions.

Argued before EMERY, C. J., and WHITEHOUSE, SAVAGE, POWERS, PEABODY, and SPEAR, JJ.

George E. Grant, for plaintiff. James O. Bradbury, for defendant. Joseph E. Moore, for petitioner.

SPEAR, J. The Port Clyde Development Company is a corporation established by the laws of Maine in 1902. The purposes of the corporation were very broad, including the right to carry on a general grocery business, and general shipbuilding and ship repairing business; to own and operate sawmills, carry on a general fish and canning business; to carry on a general ice business; to carry on a general real estate business; to carry on a general teaming, transportation, express, and forwarding business; and to do all things that may be incidental to the accomplishment of the foregoing objects.

On the 14th day of February, 1906, the Georges National Bank of Thomaston attached the real estate of said company and on the 28th day of February made service of a writ upon W. A. Moody, its president.

On the 13th day of March, 1906, William A. Moody, who is indetical with W. A. Moody, upon whom the writ was served, filed a bill in equity under the provisions of chapter 85 of the Public Laws of 1905, alleging, among other things, that he was a stockholder and creditor of the company; that he was informed and believed, and therefore alleged, that the corporation was in imminent danger of insolvency, and that the estate and effects of the company, through attachments and litigation, and through proceedings hostile to the interests of said Moody and other unsecured creditors and stockholders, were in danger of being wasted or lost. The bill in its prayer, among other things, asked for an injunction, both temporary and permanent, restraining the corporation, its officers and agents, from transacting any business until the further order of the court, and also for the appointment of one or more receivers to wind up the affairs of the com-

pany, and that the court would make all decrees and orders that might be proper and necessary under the provisions of chapter 85 of the Public Laws of 1905 or under any other law relating to the subject-matter of the bill of complaint.

On the 12th day of March, 1906, the company appeared by attorney, admitted the truth of every allegation in the bill, and on the 16th day of March, 1906, a decree of the court was filed, stating that the case came on for hearing and on bill and answer by agreement, the parties being represented by counsel, and that all the allegations of the bill were admitted in the answer. Whereupon it was "ordered, adjudged, and decreed that the allegations in said bill that said corporation is in imminent danger of insolvency, and that the estate and effects of said Port Clyde Development Company, through attachment and litigation, and through proceedings hostile to the interests of said complainant Moody and other unsecured creditors and the stockholders, are in danger of being wasted or lost, and also each and every allegation in said bill of complaint are sustained, and that a receiver should be appointed * * * to wind up the affairs of said corporation with power to institute or defend suits at law in equity or in his own name as receiver, to demand, collect, and receive all property, books, papers, and assets of said corporation, to sell, transfer, or otherwise convert the same into cash, and to conduct and carry on the business of said corporation as ordered by this court, and to hold and use the assets of this corporation subject to and under the further order of this court."

On the 11th day of August, 1906, the Georges National Bank, plaintiff in the above-mentioned suit, filed a petition in the nature of a bill in equity in the Supreme Judicial Court, directed to the justice thereof who made the above decree, alleging that it was a creditor of said bank to the extent of \$4,000 for money loaned; that on February 14, 1906, it brought a suit against said company and William H. Moody, signer of the note, and made an attachment on the real estate of said company; that subsequently the company was placed in the hands of a receiver on the petition of said Moody; that said action of said bank was pending in the Supreme Judicial Court for Knox county and would be in order for trial at the September term; that said company filed a defense, claiming that it was in the hands of a receiver and that the attachment of said bank was dissolved; that the company was insolvent, and that the receiver should collect and distribute the assets of the company and pay the creditors a pro rata percentage in the nature of a dividend in insolvency proceedings.

The petitioner further alleged that the Proceedings were illegal, and that the acts of the receiver would be in violation of the national bankruptcy law; that the proceed-

ings under which the receiver was acting and the statute under which the proceedings were instituted, in which he was appointed receiver, were in the nature of an insolvent law, which could not operate during the existence of the national bankruptcy act, and moved that the proceedings of appointing said receiver, and said receivership, be dismissed; that said bank be allowed to prosecute its suit without any interference or objection on the part of the alleged receiver.

Notice was ordered upon this petition and a hearing had on the 11th day of September, 1906, and the prayer of the petitioner denied. To this decree, denying the petition, the petitioner excepted and his exceptions were allowed.

The petitioner contends that upon this state of facts, and a proper interpretation of the statute under which the receiver was appointed, the court had no jurisdiction in the matter of appointing the receiver:

(1) Because at the time of filing of the petition for the receiver the development company was insolvent.

(2) Because the act of 1905, under which the receiver purported to have been appointed, was in effect an insolvent law.

(3) Because, when said receiver purported to have been appointed, the national bankruptcy law had been, and then was, in operation, and suspended and rendered inoperative the statutes of 1905, which in practical effect was an insolvent law, and deprived the state court of any jurisdiction in the matter of appointing a receiver by virtue of such statute.

In the future discussion of this case, the petitioning bank will be called the plaintiff, and the Port Clyde Development Company the defendant.

The first contention of the plaintiff, that the defendant, at the time of its petition for a receiver, was insolvent, appears to be well established, not only by the facts, but admitted by the allegations in the defendant's bill. Item 4 alleges imminent danger of insolvency. Item 5 goes further, and avers that the estate and effects of the defendant company, through attachments and litigation and other proceedings, are in danger of being wasted or lost. Item 4 does not technically allege insolvency; and, while item 5 does not use the word "insolvency" to express the condition of the company, it nevertheless employs, to express that condition, the language which defines the legal meaning of the word "insolvency." In other words, the defendant, instead of using the term, uses the definition. But the language of the bill used to express this condition so nearly comports with the phraseology employed in *Morey v. Milliken*, 86 Me. 464, 30 Atl. 102, to define insolvency, that a reasonable inference might suggest it to have been intended to follow that opinion. This case declares that insolvency exists in its application to persons engaged in commercial pursuits "when they can no long-

er continue in the ordinary course, securing to the existing creditors an equal division of the assets before they shall be wasted and frittered away in a hopeless struggle under conditions which compel disaster in the end."

The analogy between this definition of insolvency and the language of the bill describing the condition of the defendant will readily be seen by comparison. The bill says that the assets "are in danger of being wasted or lost." The case says that insolvency exists when the assets are in danger of being "wasted and frittered away." The phrases quoted are identical in meaning. The facts also clearly bring the defendant within the other definition found in this case, that insolvency exists when a party is unable "to pay his debts as they become due in the ordinary course of business." It will also be observed that the answer of the defendant does not traverse the allegation of insolvency averred in the plaintiff's petition, but by its silence confesses the truth thereof, and seeks to avoid its effect by averring the appointment of a receiver under the act of 1905.

That the defendant was insolvent may be regarded as established, not only by the facts, but by the pleadings.

The insolvency of the defendant having been established, we have occasion to examine the second contention of the plaintiff, that the act of 1905, under which the receiver for the defendant purported to have been appointed, was in effect an insolvent law for the settlement of the estate of the corporation for which a receiver might be appointed under the act.

Section 1 clearly sets forth the purpose for which the chapter was enacted. It provides: "Whenever any corporation shall become insolvent, or be in imminent danger of insolvency, or whenever through fraud, including the gross mismanagement of its affairs, or through attachment, litigation or otherwise, its estates and effects are in danger of being wasted or lost * * * upon application of any creditor or stockholder by a bill in equity filed in the Supreme Judicial Court * * * the court may issue both temporary and permanent injunctions" restraining the corporation from doing the business of collecting and disbursing funds, "and may at any time make a decree dissolving such corporation."

We have no occasion at this time to consider the clauses of the act which apply to a corporation whose charter has expired or been forfeited. We are considering only the clauses above recited. Whenever, therefore, a corporation falls within that proviso of the act when its estate is in danger of being wasted or lost, it then becomes insolvent. The phraseology of the act, as well as that of the bill, is practically identical with the language of the opinion in *Morey v. Milliken*, supra, employed to define the meaning of the word "insolvency." The act of 1905 was clearly intended in the language of the opin-

ion, "for the liquidation of business interests when they can no longer continue in the ordinary course." The scheme of the act was to accomplish this end. Its purpose could not have been more plainly stated. The law can be invoked when, in the language of the act, "its estates and effects are in danger of being wasted or lost." It is perfectly obvious that the clauses of the section now under consideration were intended to operate upon those corporations that had arrived at that state of financial decay which the law defines as "insolvent."

Section 2 provides that the court may appoint one or more receivers "to wind the affairs of the company," and that all attachments made within 30 days before the filing of the bill in equity wherein a receiver is to be appointed shall thereupon be dissolved. The first provision which authorizes the receiver to wind up the affairs of the company confers upon him as an officer of the court authority to take possession of the estate of the defendant, collect all of its debts, and distribute all its assets, thereby obliging the creditors to either accept the dividend in full, discharge their claim, or lose it. As a natural corollary of the first proviso, and having the form and analogy of the bankrupt law, the second proviso follows which vacates all attachments made within 30 days.

Section 3 invests the receiver with plenary power over all the assets of the company, and he is required to report to the court from time to time, and to distribute the assets as provided in section 79, c. 47, Rev. St. The allusion to this section has the effect of adopting it as a part of section 3, *mutatis mutandis*. This section clearly applies to the settlement of an insolvent estate.

Section 4 is, in terms, an insolvent provision. We quote it in full. "Whenever a receiver is appointed as above, the court shall limit a time, not less than four months, of which decree notice shall be given, within which all claims against said corporation shall be presented, and make such order for the manner of hearing and proving same as may be just and proper, and all claims not so presented shall be forever barred."

The chief difference between the provision of this section and that of the United States bankrupt law is that the latter gives a year and the former only four months, as the time within which all claims against the corporation shall be presented, and that all claims not so presented shall be forever barred.

While chapter 85 of the Laws of 1905 is not an insolvent law in title or express terms, it yet operates as such in all the essential features of taking charge of the property, bringing suits in law or equity, discharging the liabilities, barring all claims not presented, and distributing the assets of the corporation coming into the hands of the officer appointed by the court under its provisions.

Having analyzed the several sections of the

act for the purpose of determining their analogy to, and effect in comparison with, the provisions of the bankrupt law, we will now refer to the decisions of the different courts, state and federal, pertinent to the proposition under discussion.

It may be well at this point to further observe that the decision of the case at bar applies only to the operation of those statutes, or parts of statutes, which are calculated to perform the functions of an insolvent law. Whether receivers may be appointed to wind up the affairs of a corporation, or a debtor may make an assignment for the benefit of his creditors, under any other provisions of law, statute or common, we do not pretend to decide.

The principle of law applicable to the case under consideration is clear and succinctly stated in 5 Cyc. 240, D, note 16. "So far as the state law administers upon the estate of the insolvent as a proceeding in the courts, the proceeding deriving its potency and force from the law itself, and not from the voluntary act of the debtor, and, where the estate is wound up judicially and the debtor discharged, the state law is undoubtedly suspended by a national bankruptcy act, *ex proprio vigore*, as to all persons affected by the terms of the latter." It will be seen, however, that it is not an essential element of an insolvency law that the debtor be discharged.

Lyman v. Bond, 180 Mass. 291, is a case in which the defendant, owing the plaintiff the sum of \$1,000 in the form of a note, made an assignment under a New Hampshire statute for the benefit of all his creditors. The assignment was in due form. The plaintiff did not join the assignment, but proved his claim under the statute and received his dividend, a pro rata share of the estate from the assignee. The defendant contended that the plaintiff was barred by his action in receiving the dividends upon his claim.

The opinion of the court in full was: "The plaintiff was not barred of his action by an agreement of his own, because he has made no agreement to that effect. He is not barred by the proceedings under the statute of New Hampshire, because, if such should be the effect of proceedings under that statute, which we need not now decide, it is an insolvent law, the operation of which was suspended during the existence of the bankrupt act of the United States." The application of this opinion is that, if the plaintiff had been barred by the statute of New Hampshire, then the statute would have been an insolvent law. Acts 1905, c. 85, does expressly bar all claims not presented in accordance with section 4. It is therefore in effect under this opinion an insolvent law. The New Hampshire act, however, did not pretend to be an insolvent law, but simply a provision regulating an assignment for the benefit of creditors.

Mauran et al. v. Crown Carpet Lining Co.,

23 R. I. 324, 50 Atl. 331, is a case exactly in point. The act for the appointment of a receiver for the corporation, the essential features of which are quoted in the opinion is practically identical with the act of 1905. Upon representation "that the estate and effects of said corporation are being misapplied and are in danger of being wasted and lost and praying that said corporation might be dissolved," a receiver was appointed.

This is practically the language of section 1 of our own statute. It will be observed, also, that the petitioners for the appointment of a receiver in this case were also stockholders and creditors. The court held that this proceeding in the state court resulting in the appointment of a receiver was practically an insolvency proceeding. Its object was to collect and distribute its property in the estate, at least among its creditors. It was commenced by stockholders and creditors because its estate was being misapplied and was in danger of being wasted. The decree appointing a receiver was assented to by the corporation, and, while the petition does not in form allege insolvency, yet the cause alleged, the action taken, and the fact that in proceedings in voluntary bankruptcy filed 12 days after the preferring of the petition in the state court for a receiver it was declared bankrupt by the United States bankruptcy court, all show that the corporation was insolvent and that the proceeding in the state court was but an attempt to forestall action in the United States bankruptcy court, and, for some reason not known to the court, to have its affairs settled by the state tribunal.

It is unnecessary to give any analysis to show the precise analogy, in law and fact, of this case with the case at bar.

In *re Storek Lumber Company* (D. C.) 114 Fed. 360, is a case involving a petition for the appointment of a receiver under a Maryland statute which provided for the dissolution of a corporation and the appointment of a receiver of its estate and effects, who should be trustee for the benefit of the creditors and stockholders, and who should act under the direction of the court. The corporation filed its answer, admitting the truth of the allegations in the bill and consented to the appointment of a receiver, and on the same day the court entered its decree appointing receivers, who were authorized to take possession of all the assets, collect the outstanding debts, and convert all its property into cash, and bring the same into court for distribution to the creditors and stockholders according to their legal rights. The court held that the statute authorizing this transaction was in effect a state insolvent law and superseded by the bankrupt act of 1898. This case is also practically identical with the case at bar.

The contention might here be raised that a statute, in order to be regarded as an insolvent law, must provide for the discharge

of the debtor, and that, inasmuch as the law of 1905 does not so provide, it lacks an essential feature of such law. But such is not the interpretation given by the courts.

In *re Merchants' Insurance Company*, 17 Fed. Cas. p. 41, No. 9,441, is in point. The company was subject to state control under the insurance laws. The state statute did not provide for the discharge of debts, and the court held that to be no defense, as the winding up of the corporation discharged the debts, and that the statute was to all intents and purposes an insolvent law, although it may not authorize a discharge of the debtors from further liability on its debts.

Harburgh, Assignee, v. Costello et al., 184 Ill. 110, 58 N. E. 363, 75 Am. St. Rep. 147, is a case involving an Illinois assignment act. The court held that this was an insolvent law, and go on to say: "It is true that an insolvent law is a law for the relief of creditors by an equal distribution among them of the assets of the debtor, but does not necessarily involve the discharge of the debtor, while a bankruptcy law secures the relief of the insolvent debtor by his discharge."

In *re Salmon & Salmon* (D. C.) 143 Fed. 395, decided in 1906, involved the winding up of a bank under the state laws of Missouri, and the direct issue was whether it was an insolvent law. The creditors contended that the Missouri statute under which the proceeding was instituted in the state court was not an insolvency law, but an act under what is known as the reserve power or police power of the state for the purpose of exercising visitatorial supervision of the banking institutions of the state for the welfare of its citizens. But the court held that it was in legal effect an insolvent law, and, in regard to the necessity for a provision for the discharge of the debtor, said: "To render a state insolvency law inoperative because in contravention of the federal bankrupt act, it is not essential that the state act shall contain a provision for discharge of the debtor." See authorities cited.

It is here proper to observe that the last three cases apply, not only to the general proposition of the state law, whatever its name, authorizing a court to appoint an officer to take charge of the estate of a corporation and collect and distribute its assets, and that bars the debts which are not filed within the time ordered by the court, is an insolvent law, but also that it is not necessary for the act, in order to operate as such a law, to provide for the discharge of the debtor. The act of 1905 makes no provision for the discharge of the corporation from its debts, and therefore comes within the doctrine of these cases.

While there are numerous cases, state and federal, in harmony with the opinion in the above citations, and none, so far as we have been able to discover, opposed to them, we deem it unnecessary to further cite authorities in confirmation of the plaintiff's second

contention, and regard it as a well-settled rule of law that a state statute which authorizes the court to appoint an officer, whatever his title, to take charge of the estate with full power to bring suits in law or in equity, discharge the liabilities and distribute the assets either in full or upon a percentage of the claims proved, and which also bars all claims not proven within the time specified by the statute, or by the order of the court, is in effect and practical operation an insolvent law.

Such we determine to be the act of 1905 under consideration. Having determined that this act is in the nature of an insolvent law, we now come to the defendant's third proposition—that, when the receiver purported to have been appointed, the national bankruptcy law had been, and then was, in force, and suspended and rendered inoperative the statute of 1905, which in practical effect was an insolvent law, and deprived the state court of any jurisdiction in the matter of appointing a receiver by virtue of such statute. This contention, it is evident, raises the question of procedure as to whether jurisdiction of the state court can be attacked collaterally without invoking the aid of the United States bankruptcy law. This question seems to be settled in the affirmative by several very recent decisions in our own state, and by many decisions of other state and federal courts.

The effect of the national bankruptcy act in its operation of suspending the state insolvency law and ousting the jurisdiction of the state court by virtue of such law involves but a single proposition, as the question of suspension of the state law also embraces the question of jurisdiction.

National Bank v. Ware, 95 Me. 388, 50 Atl. 24, decided in 1901, is a case where the defendant went into voluntary insolvency under our state law. Composition papers were then prepared, and, having been signed by the number and amounts of creditors required by the insolvency law, the debtor was granted a certificate of discharge according to the provisions thereof. Subsequent to these proceedings the plaintiff brought action upon two promissory notes. The defendant contended as a defense to this action that he was effectually discharged from these notes by the decree of discharge dated November 27, 1898, in the insolvency proceedings. But the court held that the insolvency proceedings were taken July 8, 1898, at the time when the insolvency court had been deprived of all power and jurisdiction in the matter by the United States bankruptcy act enacted and put in force July 1, 1898.

Littlefield, Assignee in Insolvency, v. Gay, 96 Me. 422, 52 Atl. 925, decided in 1902, is a case in which the issue with respect to the operation of the United States bankruptcy act to suspend the state insolvency law, and oust the jurisdiction of the court, was sharply raised and contested.

Blackington, the insolvent debtor, owing less than \$1,000, was petitioned into insolvency in 1899 by his creditors, while the United States bankruptcy law was in force. The state insolvency court took jurisdiction, decreed him insolvent, and appointed the plaintiff assignee. This action is to set aside a conveyance by Blackington as a preference under the state law. This case holds that, under the bankrupt law, Blackington could have gone into bankruptcy voluntarily, but could not be forced by his creditors, under involuntary proceedings. He was asked to go in and refused. Under this state of the law and facts it was contended that the insolvency law might be invoked. But the court held that the test of jurisdiction under the state law did not rest upon the volition of the debtor, but that, "if his person or property are * * * or may be subject to the bankruptcy law, then as to him and his possessions the state insolvency law is in abeyance and powerless. * * * That, where a person falls within the purview of the bankrupt act, whether by voluntary or involuntary proceedings, the state insolvent law must be silent." And finally the court say: "It follows that the insolvent court was without jurisdiction in the case, and the appointment of plaintiff as assignee was unauthorized and void. He therefore has no standing in court."

It should be here observed that neither of these Maine cases involve contests between officers appointed under the state and United States laws, but are both brought by parties who attacked the jurisdiction of the state court on the ground that the state law was suspended and superseded.

Wescott v. Berry et al., 69 N. H. 505, 45 Atl. 352, is another case precisely in point, and almost identical in its facts with the case at bar. It involved a bill in equity, alleging that the plaintiffs are a corporation and organized under the laws of the state; that they were decreed to be insolvent debtors, upon a creditor's petition, filed in the probate court for the county, October 20, 1898, under the provisions of the state law; that the defendant Berry was appointed messenger, and as such claimed the plaintiff's property; and that the proceedings in the probate court were void. The court held that the act of Congress approved July 1, 1898, entitled "An act to establish a uniform system of bankruptcy," so far superseded the insolvency laws of the state from the time of its passage as to deprive the probate court of jurisdiction to entertain petitions filed after that date. See, also, *Parmenter Mfg. Co. v. Hamilton*, 172 Mass. 178, 51 N. E. 529, 70 Am. St. Rep. 258.

The discussion of this case up to this point has proceeded upon the assumption that the defendant corporation came within the bankruptcy act with respect to the institution of involuntary proceedings, section 4 of which provides that "any corporation engaged principally in manufacturing, trading, printing,

publishing, mining or mercantile pursuits owing debts to the amount of \$1,000 or over may be adjudged an involuntary bankrupt upon default or an impartial trial, and shall be subject to the provision and entitled to the benefits of this act." That the defendant corporation comes within the scope of this provision amply appears from the statement of facts in the first part of this opinion, and also by the allegation of the plaintiff's bill and the admissions by the defendant's answers.

But, notwithstanding this fact, the proposition might be plausibly suggested that a corporation which cannot become a voluntary bankrupt should be permitted to take advantage of a state law giving it authority of its own motion to wind up its affairs by dissolution, collection of debts, and distribution of assets. But the proposition is not tenable. That the defendant is denied the right to become a voluntary bankrupt is held to be immaterial in this class of cases. *Mauran et al. v. Crown Carpet Lining Co.*, 23 R. I. 324, 50 Atl. 331, and *Harburgh, Assignee, v. Costello et al.*, 184 Ill. 110, 56 N. E. 363, 75 Am. St. Rep. 147, already cited, were each cases involving the appointment of receivers for corporations.

It has been declared in the recent case, *In re Watts & Sachs*, 190 U. S. 1, 23 Sup. Ct. 718, 47 L. Ed. 933, that "the operation of the bankruptcy laws of the United States cannot be defeated by insolvent commercial corporations applying to be wound up under state statutes."

Upon the proposition that the insolvency law should take jurisdiction where voluntary proceedings cannot be instituted under the bankrupt act, the point being expressly raised, our own court, in *Littlefield v. Gay*, 96 Me. 422, 52 Atl. 925, *supra*, have held that the jurisdiction of the state court did not rest upon the volition of the debtor. It would seem, therefore, to be immaterial whether the debtor would not, as in the case cited, or could not, take advantage of the bankrupt act. But a complete answer to this proposition in the case at bar is found in the fact that the creditors of the defendant, if they deem it necessary to protect their interest, may institute involuntary proceedings.

Our conclusion is that chapter 95 of the Laws of 1905, with respect to the clauses herein considered, is in effect an insolvent law, and is suspended and superseded by the national bankrupt act of 1898, as to all insolvent corporations whose property may be subject, by either voluntary or involuntary proceedings, to the authority and jurisdiction of said act.

The only remaining question to be considered is the mode of procedure adopted by the plaintiff in its attack upon the jurisdiction of the state court. But no difficulty in this respect seems to be apparent. The very foundation of judicial proceeding is jurisdiction. The question of jurisdiction may

therefore be raised at any stage of the proceedings by any suggestion that will apprise the court of the want thereof.

Our court have said in *Powers v. Mitchell*, 75 Me. 364: "When it appears to the court that they have no jurisdiction of the case before them, they will not proceed in the suit, but will stay all further proceedings, though the objection is not taken by plea to the jurisdiction. *Lawrence v. Smith*, 5 Mass. 362. The objection to want of jurisdiction may be taken advantage of at any stage of the proceedings."

That the creditor is a proper party to raise the question of jurisdiction, see *In re Reynolds*, 20 Fed. Cas. p. 612, No. 11,723. It arose under the Rhode Island statute hereinbefore referred to. The creditor appeared to oppose *Reynold's* petition for the benefit of the insolvent laws of the state, and filed a motion to dismiss the petition, upon the ground that the jurisdiction of the court had been suspended by the bankruptcy act. The motion was granted and the method of procedure not questioned.

Day v. Bardwell et al., 97 Mass. 246, is a case involving precisely the same mode of procedure as that pursued in the case at bar.

We are unable to discover how the creditor in the case before us could enforce a consideration of his rights in any other way.

We deem it unnecessary to discuss the possible suggestion that the act of 1905 was passed after and while the national bankruptcy act was in force, and that consequently it could not technically be suspended or superseded; but the answer to this is that it was still-born, never had any life, and never went into operation.

Our opinion is that the court should have sustained the plaintiff's petition, dismissed the receiver, and discontinued the proceedings begun and prosecuted under chapter 85 of the Laws of 1905.

Exceptions sustained.

(213 Pa. 21)

HOODMACHER et al. v. LEHIGH VALLEY R. CO.

(Supreme Court of Pennsylvania. May 24, 1906. On Rehearing, April 29, 1907.)

1. DEATH—RIGHT OF ACTION.

An action for damages for injuries causing death must be brought by the person to whom the right is given by the statutes of the state where the cause of action arose.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Death, §§ 12, 36.]

2. SAME—VENUE.

In an action to recover for the death of a trainman, where the evidence showed that the negligence which was the proximate cause of his death began in Pennsylvania and continued until the accident in New Jersey, and the injured man was brought back to Pennsylvania where he died, an action for his death is properly brought in Pennsylvania by the widow for the benefit of herself and child.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Death, § 51.]

Appeal from Court of Common Pleas, Luzerne County.

Action by Mary E. Hoodmacher and Florence M. Hoodmacher against the Lehigh Valley Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed.

At the trial it appeared that the deceased, a flagman, was injured by an explosion of a locomotive belonging to the defendant, at Bloomsbury, N. J., on May 15, 1901. The evidence tended to show that the company had failed properly to inspect and repair the locomotive at the company's roundhouse in Easton, Pa.

Argued before MITCHELL, C. J., and FELL, MESTREZAT, POTTER, and ELKIN, JJ.

J. B. Woodward and H. W. Palmer, for appellant. John T. Lenahan and Charles Orion Stroh, for appellees.

MITCHELL, C. J. This case is ruled by *Usher v. West Jersey R. R. Co.*, 126 Pa. 206, 17 Atl. 597, 4 L. R. A. 261, 12 Am. St. Rep. 863, in which it was held that an action for damages for injuries causing death, being entirely statutory, must be brought by the person to whom the right is given by the statutes of the state where the cause of action arose. In the syllabus of that case the expression is that the action must be brought by the person to whom the right is given by the statutes of the "state where the injuries were inflicted." For the facts in that case the expression is entirely accurate, for the injuries and the death both occurred in New Jersey. But the more general expression, "the state where the cause of action arose," is the better one. The learned judge below appears to have been misled by the assumption that an exception to this principle has been established in *Derr v. Lehigh Valley R. R. Co.*, 158 Pa. 365, 27 Atl. 1002, 38 Am. St. Rep. 848. But no such question arose in that case, for the decedent, for whose death the action was brought, died in Pennsylvania, and, if an action lay at all, it was in this state and under our statute. In that case the injuries were received in New Jersey, and the action was sought to be sustained by showing that the negligence, which was the proximate cause, began in this state and continued till the injuries were actually inflicted. A nonsuit was sustained for the failure of evidence on this point. "Unless a negligent act or omission in Pennsylvania," said McCollum, J., "which was directly responsible for the injury received in New Jersey, is shown by the evidence, there is no question of jurisdiction to be considered. If the evidence is insufficient to warrant an inference of such negligence the nonsuit must be sustained."

In the present, as in the *Derr* Case, the plaintiff based the right of recovery on the evidence of the initial negligence of the de-

fendant in this state which continued and became part of the proximate cause of the death. In this case the jury so found. But this view overlooks the fact that in the present case that is not a controlling element. In the *Derr* Case, as already said, the death occurred in this state, and, if the proximate cause was negligence also occurring in this state, the conditions of the statute, giving the widow a right of action, would all have been met. But here the essential condition of death in the state is lacking. No matter how great the negligence of the defendant, nor where it began or continued, there was no cause of action to anybody until an injury was received. As soon as the decedent was injured he had a common-law right of action, which was transitory and enforceable in any common-law jurisdiction where defendant could be served. But when he died without having brought suit, his right died with him; there was no survivorship to any one. By statute a new right arose, derivative in its nature and not maintainable, when, if he had lived he could not have recovered, yet, nevertheless, a new right, resting entirely on statute, and vested in the party to whom it is given by the statute of the jurisdiction in which it arose.

Plaintiff's decedent having died in New Jersey, if there had been no statute in that state providing for a new action, there would have been no right in any one anywhere, but the statute having given the right to the decedent's representatives, they, and they alone, can assert it.

Judgment reversed.

On Rehearing.

On petition for reargument it was shown that decedent, after the accident in New Jersey, was brought back to Easton and died there.

MITCHELL, C. J. This case was tried in the court below, and on the first argument was argued here on the theory that the initial negligence of the defendant occurred in this state, and continued and became part of the proximate cause of the accident in New Jersey. Owing to this view of the case, the fact was not disclosed that the deceased, though injured in New Jersey, had been brought home and died in this state. The judgment was therefore reversed under the authority of *Usher v. West Jersey R. R. Co.*, 126 Pa. 206, 17 Atl. 597, 24 L. R. A. 261, 12 Am. St. Rep. 863. It being now shown to the court that the death occurred in Pennsylvania, the case is directly within *Derr v. Railroad Co.*, 158 Pa. 365, 27 Atl. 1002, 38 Am. St. Rep. 848, and was properly brought by the widow for the benefit of herself and child.

The order heretofore made, reversing the judgment of the court below, is now rescinded, and the judgment is affirmed.

(218 Pa. 54)

CAMBLIN v. PHILADELPHIA, W. & B. R. CO.

(Supreme Court of Pennsylvania. April 29, 1907.)

MASTER AND SERVANT—NEGLIGENCE OF SERVANT—DELEGATION OF POWERS.

Plaintiff, while at work in a blacksmith shop, was injured by a car which broke through the side wall and entered the shop. The car was being moved from defendant's track by a side track to an abutting coalyard by mules under charge of an employé of the person who had contracted with defendant to move such cars to and from all private sidings. *Held* that, in leaving the cars on such siding, the defendant was exercising its charter power in the operation of its road which could not be delegated so as to relieve it from responsibility for the negligence of the contractor's employé or defective appliances.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 1254.]

Appeal from Court of Common Pleas, Philadelphia County.

Action by Robert Camblin against the Philadelphia, Wilmington & Baltimore Railroad Company. Judgment for plaintiff. Defendant appeals. *Affirmed*.

Argued before MITCHELL, C. J., and MESTREZAT, POTTER, STEWART, and FELL, JJ.

Sharswood Brinton and John Hampton Barnes, for appellant. Henry J. Scott, for appellee.

FELL, J. The plaintiff, while at work in a blacksmith shop which adjoined a coalyard, was injured by a car which broke through the side wall and entered the shop. The car was loaded with coal and was being moved from the defendant's track on Washington avenue to a coalyard which abutted on the avenue by mules that were under the charge of an employé of C. H. Lafferty, who had contracted with the defendant to furnish teams and to move all cars on its tracks on the avenue, loaded or empty, and to and from all private sidings. He was directed to move the car by the defendant's dispatcher, and he testified that he was unable to stop it because of a defect in the brake.

The instruction to the jury was that the defendant was responsible if the accident was caused either by a defective brake or by the negligence of the contractor's employé who drove the mules. It is to the latter part of this instruction that exception is taken. That a railroad company cannot relieve itself from liability for negligence in the operation of its road by a contract for the movement of its cars was decided in *P. W. & B. Railroad Co. v. Hahn*, 22 Wkly. Notes Cas. 32, in which it was said: "It contracted for the operation of a part of its road by horse power, and under this contract asks to be relieved from all responsibility for the negligent acts of its contractor. We cannot agree with a proposition of this kind, for the principle, if established, might be the means

of relieving the company from all its charter duties, so far, at least, as concerns public safety. The mere question of the power by which its cars are to be moved is of no consequence. If it can contract for horse power, so may it for steam, and it follows that it might relieve itself of all responsibility by contracts with its engineers and conductors for the running of its locomotives and trains." In that case the cars at the time of the accident were being moved by the contractor on the defendant's tracks on the avenue. In this case a car was being moved on a siding which extended from the tracks on the avenue to a coalyard and was partly on private property. It is argued that the difference in the facts makes the decision in *Railroad Co. v. Hahn* inapplicable because the contractor was not performing any part of the public duty of the defendant in putting the car on a private siding. This position cannot be sustained. The defendant undertook to deliver the coal to the consignee by moving its car on a siding which connected his yard with its tracks. This siding was its property and a part of its system of tracks to the edge of the street at least, and was maintained for the mutual advantage of itself and the owner of the yard. In moving cars on the siding it was exercising its charter power in the operation of its road, and this could not be delegated so as to relieve it of responsibility.

The judgment is affirmed.

(217 Pa. 577)

ROBBINS et al. v. CITY OF SCRANTON.
(Supreme Court of Pennsylvania. April 22, 1907.)**1. EMINENT DOMAIN—COMPENSATION.**

Under Const. art. 16, § 3, compensation to property injured by public work is not limited to abutting property, but is extended to any work sufficiently near to make the injury immediate and substantial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Eminent Domain, § 239.]

2. SAME—REMOTE DAMAGES.

Remote or speculative loss in the conduct of a business do not constitute a legitimate basis on which to estimate damages to real estate by public works.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Eminent Domain, § 291.]

3. SAME—MEASURE OF DAMAGES.

A city built a viaduct to do away with a dangerous grade crossing, whereby access to a mill was cut off in one direction, but no land was taken from the owners. *Held*, that in estimating the damages the jury could compare the situation after the entire improvement was made, in connection with the viaduct, with that which existed before its construction.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Eminent Domain, §§ 853, 880.]

4. SAME—QUESTIONS FOR JURY.

Where a viaduct is built to do away with a dangerous grade crossing, and access to a mill is cut off in one direction, it is for the jury to determine whether the substitution of a safe way over the tracks, though a little longer, does not benefit the market value of the property by removing the dangerous method

of approach existing before the viaduct was built.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Eminent Domain, § 560.]

Appeal from Court of Common Pleas, Lackawanna County.

Action by C. W. Robbins and Frank M. Spencer against the city of Scranton. Judgment for plaintiffs, and defendant appeals. Reversed.

At the trial, when Henry Jifkins, a witness for plaintiff, was on the stand, the following offer was made: "Mr. Davis: We propose to prove by the witness on the stand that Schnell Court was widened to 50 feet before the completion of the viaduct; this to be followed by the testimony of the city clerk showing the legislation and the date thereof by the councils providing for the widening of Schnell Court. Mr. Warren: Tell us the legal purpose of the offer. Mr. Davis: The legal purpose of this is that the jury may offset any damages which may be claimed by reason of the cutting off of their access by reason of the additional access afforded plaintiffs' property by reason of the widening of Schnell Court. Mr. Warren: The counsel for the plaintiffs object to the offer as incompetent, immaterial, and irrelevant, not a legitimate and legal offset for the damages the plaintiffs may have sustained by reason of the construction of the viaduct, but at the maximum merely a general benefit to the public generally in the locality, in which plaintiff has the right to share, and for which he cannot be asked to account or to reduce his claim in the case now trying. Mr. Davis: We propose to follow this by testimony showing that the widening of Schnell Court was a direct and special benefit to the property of the plaintiffs in this case. The Court: It seems to me we ought to have the specific dates with reference to these two improvements and respective ordinances which authorized them, before passing upon this offer. Mr. Davis: The dates proposed to be proven by the defendant are as follows: That the ordinance providing for the construction of the viaduct, to wit, file of common council No. 31, 1900, was approved by James Moir, mayor, on November 17, 1900; that the date of the completion of the viaduct was August 5, 1904; that the resolution of council providing for opening of Schnell Court between Seventh and Eighth streets to a uniform width of 50 feet, and directing the director of public works to dispose of the buildings located upon the land necessary to be taken in the opening of said court, was approved March 14, 1904. Mr. Warren: You also agree that the ordinance providing for the construction of the viaduct in no way refers to any change in Schnell Court? Mr. Davis: Yes; also that the work of opening Schnell Court to a uniform width, in pursuance of the resolution of councils directing the same, was done in the month of July, 1904. The Court: I will

sustain the objection to the offer. It seems to me that the plaintiffs' damages were complete when the communication between Lackawanna avenue and Eighth street was completely cut off, and that the measure of damages must be ascertained according to the familiar rule of value before and after the injury, and that anything that was done subsequently to that by way of afterthought in an effort to reduce the damage to the plaintiffs' property cannot be considered in this case. The plaintiffs have a right to recover damages in money, and it is not within the power of the city to contribute or to confer any other benefit upon them that they would be bound to accept in lieu of damages in money; and for the further reason that the improvement offered to be shown on Schnell Court was a general public improvement conferring, no doubt, some benefit upon the plaintiffs, but conferring benefits upon all other property owners in the immediate vicinity as well, and conferring more or less benefit upon the traveling public. There is nothing in the original ordinance which provides for the viaduct, which shows any contemplated change upon this street or court in question as part of the proposed public improvement or change. Neither is there anything in the ordinance providing for the improvement for the court, showing that it has any reference whatever to the building of the viaduct. Therefore it seems to me that it is a separate proposition entirely, and one which cannot figure in the ascertainment of damages in this case, which it is alleged resulted from the building of the viaduct in question."

Defendant presented this point: "(6) If the plaintiffs are still afforded safe, reasonable, and convenient access to their property they cannot recover. Answer: The sixth point is refused; it is not necessary that I should read it to you."

Plaintiffs presented this point: "(4) The jury are to consider the subject-matter of this suit just as if they were called on to estimate the injury at the time of the construction of the viaduct, when access from Lackawanna avenue to Eighth street was affected by the construction of the viaduct, which was in May, 1903. Answer: I affirm that proposition."

Verdict and judgment for plaintiff for \$10,350.

Argued before FELL, BROWN, MESTREZAT, POTTER, and STEWART, JJ.

David J. Davis, City Sol., and H. R. Van Deusen, Asst. City Sol., for appellant. S. B. Price and Everett Warren, for appellee.

POTTER, J. This case was a feigned issue, on an appeal from the award of viewers appointed to assess damages by reason of the construction of a viaduct on West Lackawanna avenue, from Seventh avenue to Ninth avenue, in the city of Scranton. The proper-

ty of plaintiffs is not situated on Lackawanna avenue, but it is upon the west side of Eighth avenue, about 120 feet to the north of Lackawanna; the lot being 40 feet wide and extending from Eighth avenue to the railroad tracks, with which it connects by means of a switch in the rear of the building. The plaintiffs conduct a large flour and feed mill on the premises; much of the grain being shipped in, and the product out, over the railroad. Formerly the tracks of the Delaware, Lackawanna & Western Railroad crossed Lackawanna avenue at grade, and, as there were seven tracks in all, at this point, over which passed about 270 trains per day, it constituted a most dangerous grade crossing. For the purpose of removing this great menace to the lives of all who were compelled to use the crossing, the city constructed a viaduct. Previous to its erection, patrons from the west side of the railroad, who wished to drive to the mill of the plaintiffs, could, after crossing the railroad tracks at grade, turn to the left around the corner of Eighth avenue, and reach the premises in that way. Since the completion of the viaduct, the same class of customers must now cross the viaduct and continue one square farther to the east, to Seventh avenue, and thence, by way of Schnell street, go directly back one square to the property of the plaintiffs. They are enabled in this way to escape a dangerous grade crossing, but, in order to do so, are required to travel two squares farther; that is, go one square beyond, and then one square back, to the mill. In returning to the west side of the tracks, the same class of patrons, in addition to escaping the crossing of the tracks at grade, find the grade of Lackawanna avenue from the railroad to Ninth avenue has been very much improved by the construction of the viaduct.

The only reason which plaintiffs have for complaining of the improvement is the fact that access to Lackawanna avenue at grade at the end of Eighth avenue is, as we have just pointed out, cut off by the location of the viaduct, and patrons from the west side of the tracks are obliged to travel two squares farther in order to drive to the doors of the mill. Of course, the building of the viaduct did not in any way affect the approach of patrons who came from the east, or the north, or the south. Its only effect was upon those desiring to use Lackawanna avenue, as a means of travel, to and from the west. The ordinance providing for the erection of the viaduct was approved November 17, 1900, work upon it was begun April 27, 1903, and it was finally completed August 5, 1904; but access from the end of Eighth avenue to Lackawanna avenue, with teams and wagons, was no longer practicable after May 12, 1903. The sidewalks remained unobstructed, so that foot passengers could go and come in that way. Immediately opposite plaintiffs' mill, an alley 20 feet wide, called "Schnell Court," ran from Seventh to Eighth

avenue parallel with Lackawanna avenue. By resolution of councils, approved March 14, 1904, it was ordered that Schnell Court, between Seventh and Eighth avenues, be opened to a uniform width of 50 feet, and the work of widening was done in June or July, 1904, although the grading does not appear to have been completed until October, 1904. The result was to give plaintiffs the benefit of a street 50 feet wide, beginning directly across Eighth avenue from their property, and extending to Seventh avenue, which crossed Lackawanna avenue at grade, at the point where the elevation of the viaduct began.

The proceedings were somewhat prolonged, but the building of the viaduct and the widening and grading of Schnell street may, we think, under the evidence, be fairly regarded as part of the same general plan, by which it was sought to benefit the public, and minimize the inconvenience to the plaintiffs and other property holders in the vicinity as much as possible. There could have been no object in improving Schnell street, and converting it from a narrow alley into a wide thoroughfare, except to improve the means of access to the end of the viaduct. Schnell street led directly from plaintiffs' property to Seventh avenue, by which the viaduct could be directly gained. Necessarily, the viaduct had to be elevated, and, if the property on Eighth avenue was to get any advantage from the overhead crossing, an easy grade must be opened by which it could be reached. Schnell street afforded this approach.

This court held, in *Mellor v. Phila.*, 160 Pa. 614, 28 Atl. 991, that under a proper construction of article 16, § 8, of the Constitution, compensation for property injured by public works is not limited to abutting property, but applies to any works sufficiently near to make the injury proximate, immediate, and substantial. But unless the injury is so obvious as to admit of comparatively easy calculation as to the extent of the diminution of the value of the property, it may not fairly be considered as covered by the Constitution. Remote or speculative losses in the conduct of a business do not constitute a legitimate basis upon which to estimate damages to the real estate. In the present case, not an inch of ground was taken from plaintiffs, and there was no interference with the conduct of the business, except in so far as it was conjectured that some of the patrons upon the west side of the tracks might be deterred from driving to the mill, because they would have to use the viaduct which would carry them one square farther to the east, before turning to the mill, than when they were at liberty to risk the crossing at grade. It would seem to be a fair inference that this great public improvement, by which the grade crossing was avoided, would inure to the benefit of the patrons of the plaintiffs' mill, as much as to any other portion of the

public, and would rather tend to draw business to the mill from the vicinity west of the tracks, than otherwise; but, at any rate, the jury should have been allowed to compare the situation as it was after the completion of the entire scheme of improvements in connection with the viaduct, with that which existed before its construction. Admittedly, none of the plaintiffs' property was taken, and the only question was whether it was injured, and, if so, to what extent. The problem before the jury was to determine whether the effect of the improvements as a whole had been to work any proximate, immediate, and substantial injury to the value of the real estate. As we have said, before the viaduct was built, the patrons coming from the west had to run the gauntlet of the grade crossing; but, when that was passed, they could turn directly into Eighth avenue, and in that way reach the mill. After the viaduct was completed, they could cross the tracks in peace and comfort, but had to travel about two blocks farther in all, to pass over the viaduct and back to the mill. Was this a drawback as compared with the former method, and, if so, was it a substantial one, sufficient to depreciate the value of the real estate of the plaintiffs? Only the retail portion of the business was affected, and of that only the trade of the patrons on the west side of the tracks was concerned in the change. When the trial judge excluded the testimony in regard to the widening and grading of Schnell street, he prevented the jury from considering the situation as it actually existed when the whole scheme of improvements at that point was completed by the city. It was a fair question for the jury to determine whether or not the substitution of a safe way over the tracks, even though it were a little longer, did not fully compensate, in its effect upon the market value of the plaintiffs' property, for the taking away of the nearer, yet extremely dangerous, method of approach from the west, by means of the grade crossing as it existed before the viaduct was built. The beneficial effect of the viaduct in safeguarding the patrons of the mill, who approached from the west, and the possible injury to the trade by deflecting it from a direct approach, were so interwoven that it was not possible to ascertain one without considering the other.

The court below applied to this case the rule as to the time for estimating the damages, which properly applies when property is actually taken under the right of eminent domain; but no property was actually taken here, and the degree of injury, if any, which was inflicted, could only be determined after the entire plan of improvement had been worked out. We can see no good reason for attempting to confine the estimate of the injury to the conditions as they happened to exist on May 12, 1903. The scheme of improvement in connection with the building of the viaduct was by no means complete at

that time. If, as a result of the entire plan of improvement, the plaintiffs were afforded safe and convenient access to their property, they could not be said to have suffered any permanent, substantial, and proximate injury as the result of the change.

The first, third, and fourth assignments of error are sustained, and the judgment is reversed, with a *venire facias de novo*.

(217 Pa. 643)

In re COLKET'S ESTATE.

(Supreme Court of Pennsylvania. April 22, 1907.)

EXECUTORS AND ADMINISTRATORS — CLAIMS AGAINST ESTATE—EVIDENCE.

Claimant had made in decedent's lifetime four notes for \$5,000 each, indorsed by decedent, and decedent had made one note for \$5,000, indorsed by himself and claimant. The claimant paid all the notes after decedent's death and asked contribution for one-half thereof, and offered evidence that he and decedent were interested in a mining operation; that large amounts had been advanced, and when the notes were given there was need for more money; that deceased visited claimant's office and importuned him to raise the money, and suggested that the only way was to borrow it, which claimant consented to do; and that the note made by decedent was to save the bank which discounted it from exceeding its 10 per cent. limit. *Held*, that plaintiff was entitled to contribution against decedent's estate.

Appeal from Orphans' Court, Philadelphia County.

In the matter of the estate of George H. Colket, deceased. From a decree dismissing exceptions to adjudication, John W. Woodside appeals. Reversed.

Argued before MITCHELL, C. J., and FELL, MESTREZAT, POTTER, and STEWART, JJ.

Hampton L. Carson, for appellant. H. B. Gill, John R. Read, Silas W. Pettit, and Louis B. Runk, for appellee.

MESTREZAT, J. This litigation arises out of a mining venture in Arizona. It appears from the evidence that John W. Woodside, the appellant, and George H. Colket, now deceased, were stockholders and directors in the Mohave Gold Mining Company, a Delaware corporation, whose mining property was in Arizona. O. A. Turner, a practical mining man, was the president and general manager of the company, and in 1903 was in Arizona superintending the development of the property. After expending about \$300,000, it was discovered by Turner that more money would be needed. He had loaned the company \$100,000, and in the fall of 1903 wrote to some of the stockholders and directors, who reside in the East, advising them of the necessity of additional funds which he thought ought to be raised by the Eastern parties interested in the company. Among others, he wrote to Woodside, telling him that more money was needed to continue the development of the property. Twenty-five thousand dollars in installments of \$5,-

000 each was remitted to Turner by drafts drawn by him on Woodside. This money was obtained on five promissory notes, each calling for \$5,000, and the last renewals of which show one of them to have been made by George H. Colket, payable to his own order and indorsed by him and Woodside, and the other four to have been made by Woodside payable to his own order and indorsed by Colket. Three of the notes were payable at and discounted by the First National Bank of Huntingdon, Pa., and the other two were discounted, respectively, by the National Security Bank of Philadelphia and by the Windber National Bank of Windber, Pa. Before the last of the renewal notes became due Colket died, and Woodside was compelled to pay them. At the audit of the account of Colket's administrator, in the orphans' court, Woodside presented a claim for \$12,500, the one-half of the amount of money which was remitted by him to Turner for use in developing the Mohave company's mining property. Woodside claims that the money was raised by him and Colket at Colket's express request, for use of the company, and, having been obliged to pay the full amount of the notes upon which the money was raised, he is entitled to contribution from Colket's estate for the one-half of the amount he was compelled to pay. The claim was resisted by Colket's administrator, on the ground that Colket did not agree to join Woodside in raising the money which was sent West for the use of the company, that he in no way obligated himself for the payment of the money, and that there is not sufficient evidence tending to show that the liability for the money was other than that shown by the notes, which disclosed a primary liability on the part of Woodside. The auditing judge disallowed the claim and he was sustained by the court in banc. Woodside has taken this appeal.

The question here is one of contribution. If Colket and Woodside raised this money jointly for the use of the company, they would then, in the absence of evidence showing the contrary, each be liable for the one-half of it. It is therefore simply a question of fact, which must be determined from the evidence submitted to the auditing judge, whether Woodside and Colket were acting together and jointly in procuring and remitting the money to the company for use in the development of its mines. It is to be regretted that the facts upon which the question turned are not more clearly and definitely disclosed by the evidence. Colket's death has sealed the lips of Woodside, and the stories of both men in regard to the transaction must forever remain untold. The rights of the parties, therefore, must be determined by such other testimony as is available. Having presented this claim, the burden is upon Woodside to sustain it. As found by the learned auditing judge, "it may fairly be presumed that the money raised was used

for the benefit of the Mohave Company, and it is clear that both Mr. Colket and Mr. Woodside obligated themselves to the banks to pay the notes on which it was borrowed." The testimony clearly supports this finding. To sustain his claim, Woodside called several witnesses, and a brief reference to their testimony is necessary to determine the question of fact involved. George D. Woodside is a son of the claimant and was treasurer of the company, and he says he heard many conversations between Colket and his father, in the latter's office, with regard to raising the money. He testified that Colket suggested that the easiest and only way was to borrow the money; that his father objected to raising the money in that way, but "finally, rather than let the enterprise fall through for the small sum of \$25,000 to \$30,000 which might be necessary, they agreed together that Mr. Colket and he would raise the money on their joint notes." He says he heard all the details about raising the money discussed; that Colket came into the office every day to ascertain how they were getting along, physically and financially; that Colket suggested they could borrow the money from the Penn National Bank of Philadelphia or the bank at Huntingdon, Pa., and that he saw Mr. Colket sign each of the final renewal notes.

Carl N. Gage is a director of the First National Bank of Huntingdon. He testified that Colket arranged with him and his bank for the loan of the money; that "I think it was \$5,000 and then increased from that on"; that Colket said he would send "a note for himself and Mr. Woodside"; that the notes of January 16, 1905, and February 17, 1905, except the printed portions of them, were in Colket's handwriting; that the paper he agreed with Colket to discount was that in which the latter and Woodside were to join; that the note discounted by the Windber Bank was secured through his bank; that to avoid exceeding their 10 per cent. limit his bank required Colket to become the maker of one of the notes.

Meyer Schamberg was interested in the Mohave Company. He testified that he was in Woodside's office very frequently when Colket was there, and heard conversations about raising money for the Mohave Company; that on one occasion the latter said, "We will have to send out that money," to which Woodside replied that he did not care to furnish any more money; that Colket then said, "John, you cannot lay down now; we have gone too far for that; the money has to be sent out;" that Woodside again said he did not have the money, to which Colket said, "I will arrange for a note"; that Woodside said that he did not like to do that, but Colket said, "John, we have to do it;" that finally Woodside agreed and Colket brought in a note.

Benjamin A. Hazel, a director of the Mohave Company, heard many conversations be-

tween Colket and Woodside about raising the money. He testified that the company ran out of funds and the question daily arose as to how they were going to meet Turner's demand for more money; that Colket said to Woodside, "we would have to raise it; we cannot possibly let the matter go by default now when we have every assurance the mill will start shortly," and proposed that, if Woodside would make the note, he would indorse it and get the money from the bank at Huntingdon where he was a director, to which Woodside finally consented. He further says that one of the conversations took place in the fall of 1903, about the time of the completion of their mill, and that the amount mentioned was between \$20,000 and \$25,000.

O. A. Turner, the superintendent and general manager of the company, says he was on the company's property in Arizona in the fall of 1903. He testified that he went out there and found that a great deal more money was required to develop the property; that he had already loaned the company \$100,000, and wrote East to some of the other stockholders and directors to raise the additional funds; that he obtained the money by drafts on Woodside; that he drew for \$5,000 at a time.

The appellee called Jacob C. Donaldson, who testified that occasionally at Colket's request he got a check from Woodside for the discount of "I think probably Huntingdon notes." The appellee also offered in evidence copies of two letters written by Colket addressed to Woodside, which, it is claimed, show that Woodside paid interest or discount on the notes on which the money for the Mohave Company was raised.

Such is the material testimony in this case, and it is not contradicted. The credibility of the witnesses is not impugned, and we must regard their testimony as verity. As an appellate court, therefore, we are at liberty, notwithstanding the findings of the court below, to draw our conclusions and inferences from the facts. Phillips' Appeal, 68 Pa. 130; Cake's Appeal, 110 Pa. 65, 20 Atl. 415. We think it is apparent that there was a joint liability on the part of Colket and Woodside for the money raised and sent to Turner for the use of the Mohave Company. The testimony unmistakably shows that Colket manifested more interest and was more anxious that the money should be raised than Woodside or any of the other interested parties. He visited Woodside's office almost daily, and was continually importuning him to join in raising the money. Woodside hesitated. He thought he had already put enough money in the venture, but Colket insisted that the enterprise should not be permitted to fail by their failing to raise a small sum of money. It appears by the testimony, which is not contradicted, that Woodside reluctantly though finally agreed "that Mr. Colket and he would raise the money on their joint notes." Colket presented the notes to his own bank, se-

cured the money, and handed it to Woodside. He attended to discounting and rediscounting the notes. He said upon more than one occasion, addressing Woodside, that we would have to raise the money.

On the part of Colket's estate, it is claimed that four of the five notes show a primary liability by Woodside, and that other facts disclosed in the case shows the same liability on the fifth note. If this were a suit by the holder of the notes, he would be entitled to hold Woodside as the maker and Colket as the indorser of the four notes. Such is the liability of the parties as disclosed by the notes themselves. But, as we have already said, this is a claim for contribution for the money represented by the notes, and not a suit on the notes to enforce a liability against the maker or the indorser. The claimant, therefore, is at liberty to show, if he can, while he is primarily liable on the notes, yet by an agreement between him and Colket they were jointly liable for the money raised on the notes. In this view, the other testimony introduced in the case becomes important, and must be considered. The claimant having put in evidence the notes, showing a primary liability on himself, it was incumbent upon him, in order to support his claim for contribution, to establish an agreement disclosing a joint liability of himself and Colket for the money raised and remitted to Turner. It is true that George Woodside testified that the parties agreed that the money should be raised upon their joint notes, but, taking into consideration his whole testimony, it is apparent that he did not mean that they were to be the joint makers of the notes, but that the names of both parties were to be on the notes, thereby creating a joint liability, not on the notes, but for the money raised for the company. This is manifestly the meaning of the language used by the witness in view of the fact that his testimony discloses an intention on the part of Colket and Woodside to join in furnishing the money.

We do not regard the testimony of Donaldson or the letters offered in evidence as sustaining the appellee's contention. It is quite true that Donaldson says that on possibly a half dozen different occasions he went to Woodside at Colket's request and got a check to pay the discount on notes. But he further testifies: "Q. To what notes did these visits refer, to what particular notes? Do you remember? A. I think probably Huntingdon notes." It appears that Colket and Woodside were engaged in other business requiring the discounting of notes, and therefore it would be simply a guess whether or not under the witness' answer the discount received by him from Woodside was paid on the notes which were given to raise money for the Mohave Company. To be of assistance to the appellee, the testimony of Donaldson should have been sufficiently definite to identify the notes upon which the discount

was paid. The letters alluded to are equally uncertain and indefinite as to the notes referred to. In view of the fact that the two men were engaged in other transactions, requiring the discounting of their paper, the subject-matter of the letters is as applicable to other notes as to the notes presented by the claimant to the auditing judge. One of the letters refers to a \$4,800 note which certainly was not one of the original or renewal notes on which contribution is claimed. In fact, on the argument at bar, when the attention of counsel was directed to the discount referred to in the latter, it was understood that the notes spoken of in the letter were not those on which Woodside is claiming.

We do not regard the fact that the holdings of Woodside and Colket in the Mohave Company were greatly unequal as controlling or of much weight in determining whether they were jointly interested in raising the money for continuing the development of the mining property. Colket had comparatively a small interest, but the extent of the inequality of the interests of the two men does not appear. It is apparent, however, that from the large sum expended in developing the property, the parties regarded it as very valuable, and therefore Colket might, with reason, have thought that, "rather than let the enterprise fall through" and lose the money he had already invested in the venture, it would be better for him to assist in raising "the small sum" proposed and secure the full development of the property. While Colket's interest in the corporation might have been comparatively small, yet it might have been about all he was worth, and in his judgment, therefore, sufficient to justify the risk of a small additional sum to save it. At all events, the evidence discloses that Colket manifested more anxiety that the money should be raised than Woodside or any of the other stockholders of the Mohave Company.

After a consideration of all the evidence in the case, we are satisfied that Colket and Woodside agreed jointly to raise the \$25,000 for the Mohave Company, and that the notes presented to the auditing judge and those of which they were the last renewals were given with the understanding and agreement that the parties assumed a joint liability thereon. It follows that the claim presented by Woodside for contribution by Colket's estate should have been allowed by the auditing judge.

The decree of the court below is reversed, with instructions to allow the Woodside claim.

(118 Pa. 34)

BOND v. PENNSYLVANIA R. CO.

(Supreme Court of Pennsylvania. April 29, 1907.)

1. JUDGMENT—RENDITION NOTWITHSTANDING VERDICT.

Act April 22, 1905 (P. L. 286), authorizing the court on request for binding instructions

to have all the evidence taken, certified, and for judgment notwithstanding the verdict on the whole record, whereupon it should be the duty of the court to enter such judgment as should have been entered on the evidence, does not permit the judge to decide questions on conflicting evidence, but only to do subsequently on review what it would have been proper to do by a binding direction.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 80, Judgment, § 367.]

2. SAME.

Where, in an action against a railroad company for injuries at a grade crossing, a verdict has been recovered for plaintiff, and a motion for judgment for defendant notwithstanding the verdict has been made, and the court is of the opinion that the verdict was against the weight of the evidence, the proper remedy is a new trial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 80, Judgment, § 367.]

Appeal from Court of Common Pleas, Chester County.

Action by Winfield S. Bond against the Pennsylvania Railroad Company. Judgment for defendant notwithstanding the verdict, and plaintiff appeals. Reversed.

Argued before MITCHELL, C. J., and FELL, MESTREZAT, POTTER, and ELKIN, JJ.

A. M. Holding and John J. Gheen, for appellant. John J. Pinkerton, for appellee.

PER CURIAM. The plaintiff, about half-past 5 on a January afternoon, drove in an ordinary top buggy down Washington avenue in Downingtown towards the tracks of the defendant. He testified positively that, when about 30 or 35 feet from the track, he stopped, looked both ways, and listened, and, not seeing or hearing anything, he drove on "at a quiet gait," "just a jog trot," and when he got near the track he saw the engine coming, "and I guess the horse heard it or saw it about the same time, and he swung around and the engine hit the wagon and threw me out." He also testified that, if it had been daylight, he could have seen the engine several hundred feet away; but it was getting dark and the train was a freight, with no headlight on the engine. On this presentation the plaintiff had made out a case for the jury.

On the other hand, a number of witnesses testified that they saw the train plainly and heard the whistle; that plaintiff did not stop, but kept on until his horse shied and ran in front of the engine. The learned judge submitted the case to the jury in these terms: "Now, gentlemen, as I have said to you before, if the testimony of the plaintiff is the testimony that you can rely upon as giving you the facts and true circumstances under which this accident happened, he would be entitled to recover. If you disregard that testimony and credit that of the other witnesses which seem to conflict with it, and which showed that the accident, if you believe them, happened, not at Washington avenue crossing, but some 100 to 150 feet or

more south of it, and it was by reason either of this man driving under excitement or recklessly down along the track, and then attempting to cross in front of the train, or by reason of his inability to control his horse, it would constitute then an accident for which neither he nor the railroad company would be responsible, and your verdict in such case would be simply for the defendant." The jury found for the plaintiff, but the court subsequently entered judgment for the defendant non obstante veredicto. The ground of the judgment is concisely expressed in the passage: "It would seem clear from the testimony in the case that either the plaintiff did not stop, look, and listen where he said he did, or that, if he did, he must afterwards have proceeded in a negligent and careless manner until he was on the tracks and struck; and, having thus contributed to his own misfortune, cannot recover." It is manifest that the judge believed the witnesses on the part of the defendant, and regarded the verdict as clearly against the weight of the evidence. But the remedy for this is a new trial. The act of April 22, 1905 (P. L. 286), is not intended to change the relative functions of court and jury, so as to permit the judge to decide questions of conflicting evidence, but only to allow him to do subsequently on review of the whole case what it then appears it would have been proper to do by a binding direction at the trial. *Dalmas v. Kemble*, 215 Pa. 410, 64 Atl. 559.

For this error the judgment must be reversed, but, as it appears that the motion for a new trial has not been formally disposed of, it will be open to the court to consider that rule.

Judgment reversed, and procedendo awarded.

(215 Pa. 47)

NEW YORK FINANCE CO. v. UNITED SECURITY LIFE INS. & TRUST CO. OF PENNSYLVANIA.

(Supreme Court of Pennsylvania. April 29, 1907.)

INSURANCE — POLICY — ASSIGNMENT — SECURITY.

Under an endowment policy, the insured received at once the face value of the policy, and gave security for the payment of the ordinary premiums and interest. At the end of the endowment period, or the death of the insured, the latter or his legal representatives retained the money received, and the insurance company surrendered the security. An applicant for such insurance was at first refused, he being a substandard risk, but thereafter a policy was issued to him, and he gave his bond and assigned a life estate to secure the monthly payments of premiums and interest. He also assigned, without condition, a policy in another company. *Held*, that such other policy was reinsurance, assigned as security because he was a substandard risk, and that on the death of the insured the proceeds of the policy belonged to the company.

Appeal from Court of Common Pleas, Philadelphia County.

Action of the New York Finance Company against the United Security Life Insurance & Trust Company of Pennsylvania. Judgment for defendant, and plaintiff appeals. Affirmed.

Argued before MITCHELL, C. J., and FELL, MESTREZAT, POTTER, and STEWART, JJ.

Reynolds D. Brown, Malcolm Lloyd, Jr., and Charles H. Burr, for appellant. Henry La Barre Jayne and Biddle & Ward, for appellee.

FELL, J. The facts that appear from the case stated and the exhibits thereto are these: C. S. Costello applied to the defendant company for endowment life insurance under a plan by which the insured receives at once the face value of the policy and gives to the insurance company security for the payment at fixed periods of certain sums of money, which are made up of the usual life insurance premiums and simple interest on the money received. These payments are to continue until the end of the endowment period or the death of the insured, when the insured or his legal representatives retains the money received, and the insurance company surrenders the security given. If the insured fails to pay the premiums and interest, the policy lapses, and he is required to return to the insurance company the amount received, less the surrender value of the policy at the time of default. The defendant at first refused Costello's application on the advice of its medical examiner, but afterwards agreed to make the contract of insurance applied for, provided that he would obtain and assign to it an insurance policy of the New York Life Insurance Company for \$3,000. In pursuance of this plan, the defendant company paid Costello \$3,000, and he covenanted to make monthly payments of premiums and interest, and to secure the payments he gave his bond with warrant of attorney, and assigned a life estate worth \$1,000 a year, derived by will from his mother. He also obtained a policy of life insurance for \$3,000 from the New York Life Insurance Company, which he transferred to the defendant by an assignment, which on its face was absolute and without conditions. Costello subsequently assigned his life estate and the policy of the New York Life Insurance Company to G. E. Hackett, who assigned them to the New York Finance Company, the plaintiff in this action. Costello paid the interest on the money received and premiums on both policies from their date, October 26, 1898, until his death, in May 1904, when the defendant canceled his bond, but claimed the insurance money due by the New York Life Insurance Company. The controversy relates to the right to this money, and the decision of the case turns on the effect to be given to the assignment of the policy. If it was intended to secure the fulfillment of the condition of Costello's bond, to pay interest and premiums

to the defendant during the life of its policy, it becomes the property of the plaintiff; if it was reinsurance, it belongs to the defendant.

The intention of the parties must be gathered from their acts. The transaction was not the loan of money and the giving of collateral security for its repayment. It was an insurance differing from the ordinary endowment insurance in the respect before mentioned, and the only difference between the policy issued and that in general use was in the provisions to secure the payments stipulated for, which were necessary because of the special plan of insurance. Costello was under no obligation to return the money received. The condition of his bond was that he should pay interest and insurance premiums, and to secure these payments he assigned his life estate. This assignment was provided for by the policy, but no mention is made in it of other insurance to be obtained. If the risk had been one the defendant was willing to accept, the transaction would have ended with the giving of the bond, the assignment of the life estate, and the issuing of the policy. But Costello was what is known as a substandard risk. The expectancy of his life was equal to that of a much older person or of one engaged in a hazardous occupation, and the defendant was unwilling to insure him. It finally agreed to issue its policy to him on condition that he would obtain and assign to it the policy of another insurance company. The purpose in requiring this policy could not have been to secure the payment of interest and premiums during Costello's life. This had already been secured to the defendant's satisfaction. If he defaulted in his payments, its policy lapsed, and it could have recourse to his bond and sell his life estate. What it insisted upon was, not to be secured against a lapse of the policy, a risk it was willing to assume, but to be insured against the risk of substandard insurance; not against the risk of his failure to pay if living, but that of his death at a period earlier than the usual expectancy of the life of a person of his age. The policy of the New York Life Insurance Company was therefore not a pledge to secure the fulfillment of Costello's bond, but a reinsurance of his life for the benefit of the defendant.

The judgment is affirmed.

(215 Pa. 43)

BRAINE v. NORTHERN CENT. RY. CO.
(Supreme Court of Pennsylvania. April 29, 1907.)

1. RAILROADS—RIGHT OF WAY—ERECTION OF BRIDGES.

The right of a railroad company to build a bridge across a stream includes the right to place necessary piers on its banks and in its bed, and there is no liability on the proper exercise of this right, though there may be when special injury results from its negligent exercise.

2. SAME—LIABILITY FOR DAMAGES.

Plaintiff sued to recover for injuries to land caused by the negligence of a railroad company in building a bridge pier in a stream. *Held* error to charge that, though the railroad company had a right to bridge the stream, it would be liable for injury caused by any change in the natural flow of the water as permitting a recovery of injuries incidentally ensuing.

Appeal from Court of Common Pleas, Lycoming County.

Action by William W. Braine against the Northern Central Railway Company. Judgment for plaintiff, and defendant appeals. Reversed.

Plaintiff presented the following points:

"(1) The owner of a right of way across a stream of water has the right to bridge it, but he must so construct and maintain the bridge as not to change or modify the natural flow of the stream. And if he does interfere, to the injury of an owner, he is liable in damages. A. We affirm that as a general proposition." "(3) The jury are instructed that the bridge must be so constructed as not to interfere with the natural flow of the stream not only at its ordinary height, but also when the stream is swollen by flood, and if the jury believe that the railway company so constructed bridge 18 as to interfere with the natural flow of the water, to the injury of the plaintiff, he is entitled to recover. A. This is affirmed."

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, and STEWART, JJ.

Seth T. McCormick, for appellant. Haines & Peaslee and William H. Spencer, for appellee.

FELL, J. The defendant's bridge over Lycoming creek was partly destroyed by flood in 1839. In reconstructing it about 100 feet were added to its length, and this addition made necessary the building of a pier in the bed of the creek. The plaintiff's farm land, which abutted on the creek below the bridge and adjoined the defendant's right of way, was injured by a flood in 1901. The action was for negligence in the construction of the pier. It is alleged in the statement of claim that the overflow was caused by the building of the pier without proper care and skill obliquely to the course of the stream, which caused the natural channel to fill up and a new one to be formed, by which the water was diverted against the land of the plaintiff.

The question of fact at the trial was whether the injury to the plaintiff's land was caused by negligence of the defendant in the location and construction of the pier. This question was properly submitted to the jury, and the general charge was free from error. The learned judge, however, in affirming the plaintiff's first and third points instructed the jury that, although the owner of a right of way across a stream of water has a right to bridge it, he will be liable for any injury caused by any change or modification or in-

interference with the natural flow of the water at its ordinary height or at a time of flood. This instruction was too broad in that it would permit a recovery for injuries incidentally ensuing from the careful exercise of a legal right. In this action the defendant could be held responsible only for negligently placing the pier so that it would cause damage reasonably to be apprehended to the property of others. The right of a railroad company to build a bridge across a stream includes the right to place necessary piers on its banks and in its bed, and for the proper exercise of this right there is no liability, although there may be where special injury results from its arbitrary, wanton, or negligent exercise. *Clarke v. Bridge Co.*, 41 Pa. 147; *Railway Co. v. Gilleland*, 58 Pa. 445, 94 Am. Dec. 98; *Jutte v. Bridge Co.*, 148 Pa. 400, 23 Atl. 235; *Berninger v. Railway Co.*, 203 Pa. 518, 53 Atl. 361. In *Clarke v. Bridge Co.*, 41 Pa. 147, it was said: "But, to hold the grantee of a franchise to erect a bridge responsible for damages resulting from a mistake of judgment in locating the piers, to treat such a mistake as of course culpable negligence, is to take away from the grantee that discretion which the Legislature has conferred and transfer it to the jury. Such is not the doctrine of the cases referred to. To hold it would be to submit to the jury to find what would be the best location, or rather what would not be the best, instead of leaving the decision of that question where the law has put it." How far the instruction complained of, in view of the general charge in which the law was correctly stated, may have influenced the jury, it is impossible to tell. Since the verdict may have been based upon it, it is necessary that the judgment should be reversed.

The first and third assignments of error are sustained, and the judgment is reversed, with a *venire facias de novo*.

(217 Pa. 411)

COMMONWEALTH *ex rel.* KUTZ, Dist. Atty., *v.* WITMAN.

(Supreme Court of Pennsylvania. April 1, 1907.)

1. MUNICIPAL CORPORATIONS — CONTRACTS — INTEREST OF OFFICERS.

Act March 31, 1860, § 66 (P. L. 400), provides that no "member of any corporation" or public institution, or any officer thereof, shall be interested in any contract for the sale of supplies or materials for the use of any corporation, municipality, or public institution of which he is a member. *Held*, that the words "any member of any corporation" refer to the corporation purchasing the supplies, and of which the individual is a member or an officer or agent, and prohibits any such member, officer, or agent from being directly interested in furnishing supplies to the corporation, municipality, or institution with which he is officially connected.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, § 657.]

2. SAME—COUNCILMEN.

Act March 31, 1860, § 66 (P. L. 400), prohibiting any member of a municipality from

being interested in furnishing supplies to it, applies to a councilman who is interested in furnishing supplies for the use of such municipality.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, § 657.]

3. SAME.

Where a councilman, who is a co-owner with his brother of a quarry, assists in ratifying a contract with his brother to supply the city with stone from the quarry, he may be convicted of violation of Act March 31, 1860, § 66 (P. L. 400), forbidding any member, officer, or agent of the corporation or a municipality from being interested in furnishing supplies to it.

Appeal from Court of Common Pleas, Berks County.

Quo warranto by the commonwealth, on the relation of Ira G. Kutz, district attorney, against William Abbott Witman. Judgment for plaintiff, and defendant appeals. Affirmed.

Argued before MITCHELL, C. J., and FELL, BROWN, POTTER, and STEWART, JJ.

W. K. Stevens, C. H. Ruhl, and Wm. Abbott Witman, Jr., for appellant. Harry F. Kantner (Frederick W. Nicolls, on the brief), for appellee.

POTTER, J. The portion of section 66 of the act of March 31, 1860 (P. L. 400), which is here directly involved, provides as follows: "Nor shall any member of any corporation or public institution, or any officer or agent thereof, be in anywise interested in any contract for the sale or furnishing of any supplies, or materials to be furnished to, or for the use of, any corporation, municipality, or public institution of which he shall be a member or officer, or for which he shall be an agent, nor directly nor indirectly interested therein, nor receive any reward or gratuity from any person interested in such contract or sale."

It is contended by counsel for appellant that the words "any member of any corporation" signify a corporation other than the one to which the supplies are to be furnished. We do not so read the act. These words refer to the corporation purchasing or receiving the supplies or materials, and of which the individual is a member, an officer, or an agent. It is plainly intended to prevent any one who is a member, officer, or agent of any corporation, municipality, or public institution from being in any wise interested, directly or indirectly, in the furnishing of supplies or materials to the corporation, municipality, or institution with which he is officially connected. The statute intends to prohibit persons from occupying a position in which they will be virtually contracting with themselves. In dealing with this identical section, in *Com. v. Miller*, 31 Pa. Super. Ct. 309, Judge Rice said: "The object which the Legislature had in view was the prevention of the danger of temptation, incident to a relation in which the self-interest of the

officer of the corporation or municipality purchasing the supplies may come into conflict with the interest of the corporation or municipality." He also cites an apt statement from 8 Tomlin's Brown, 72, quoted and approved by this court in *Everhart v. Searle*, 71 Pa. 256, as follows: "No man can serve two masters. He that is intrusted with the interests of others cannot be allowed to make the business an object of interest to himself, because, from a frailty of nature, one who has the power will be too readily seized with the inclination to use the opportunity for serving his own interest at the expense of those for whom he is intrusted. The danger of temptation from the facility and advantage of doing wrong, which a particular situation affords, does, out of the mere necessity, work a disqualification."

We have no doubt whatever that the prohibition of section 66 of the act of March 31, 1860, applies to a councilman of a municipal corporation who is interested, directly or indirectly, in furnishing supplies to, or for the use of, the municipality of which he is an officer. The defendant in this case, being a councilman of the city of Reading, is clearly within the class of officials enumerated in the statute, who are forbidden to have any interest in furnishing supplies to the municipality. The attitude of this court has always been consistent with this view. Thus, in *Milford Boro. v. Water Co.*, 124 Pa. 610, 17 Atl. 185, 3 L. R. A. 122, it was said: "The act of 1860 is another and a valuable safeguard thrown around municipalities. It was passed to protect the people from the frauds of their own servants and agents." Chief Justice Sterrett said, in *Com. v. De Camp*, 177 Pa. 112, 35 Atl. 601: "Section 66 is virtually a transcript of sections 1 and 2 of the act of April 26, 1855 (P. L. 328, 329). As was doubtless intended by the revisers of our Criminal Code, its scope is broad and comprehensive." And in *Marshall v. Ellwood City Boro.*, 189 Pa. 348, 41 Atl. 994, Justice Green said: "The Criminal Code of 1860 prohibited a member of a municipality from being interested in a contract for furnishing supplies or materials to the corporation, and imposed personal penalties upon him if he violated the act."

The learned trial judge in this case well said: "There can, however, be no doubt that the term 'corporation' includes, in its legal as well as in its popular sense, an incorporated city. The sole ground upon which the argument that it is not to be so understood here rests is the omission of the term 'municipality' in the words of the second clause, 'nor shall any member of any corporation or public institution' etc. Yet it is clear that the joinder of 'corporation or public institution,' without anything more, indicates what sort of corporation is meant, i. e., corporations of a public nature, corporations in the nature of public institutions, ejusdem generis with such. The word 'cor-

poration,' therefore, in this phrase, standing alone, has virtually the same meaning as if the word 'municipality' were added to it. So true is this that it cannot, without going further, be regarded as including mere private corporations. If, then, the phrase 'any corporation, municipality or public institution' is descriptive of a certain class of corporations as the subject and the only subject of the legislation, and if the phrase 'any corporation or public institution' is, under accepted rules of interpretation, descriptive of the same class, it follows that the same meaning must be given to both, notwithstanding the insertion in the one, and the omission from the other, of a term which is fairly embraced in the more comprehensive of the terms occurring in both. It is, indeed, well settled that the same language repeatedly occurring in the same statute is to be understood in the same sense throughout. *Maxwell, Int. of Stat. p. 394.* And this means not only literally identical phraseology, but disregarding insignificant variations, phrases whose material constituents and legislative or legal import are the same. *Mayor, etc., of Phila. v. Davis*, 6 Watts & S. 269; *Murray v. Keyes*, 35 Pa. 384, Com. v. *Navigation Co.*, 66 Pa. 81. If the phrase 'any corporation or public institution' is fairly synonymous with 'any corporation, municipality or public institution,' then the addition to the former of the words 'or any officer or agent thereof' supplies the enumeration of 'councilman, burgess, trustee, manager or director of any corporation, municipality or public institution' in the first clause of the enactment, and it becomes perfectly clear that what in the second was intended to be prohibited, and must be understood to be prohibited, was *inter alia*, the interest of any councilman in any contract for supplies to which the municipal corporation he represents is a party."

The testimony as to the facts in this case is undisputed, and we take the statement of them from the opinion of the court below refusing a new trial, as follows: "In the spring of 1905, the defendant and his brother, John A. Witman, were co-owners of a tract upon which defendant operated a stone quarry and crusher. John was not concerned in this or any other quarry or crusher. Neither was he engaged in the business of contracting. He was a brakeman on a railroad. Defendant was and still is a member of the select council of the city of Reading. On May 22d councils passed, and a few days thereafter the mayor approved, a resolution authorizing the board of public works of the city to purchase flint spalls in such quantities as they should deem proper, for experimental use upon 'certain' streets. The board thereupon visited defendant's quarry, were by him shown about, and made acquainted with the mode of preparing the stone for use, the different sizes, and so on. Without any formal contract being entered into, the board,

through its subordinate officials, proceeded to order, and defendant furnished and delivered, spalls to such places, at such times, and in such quantities as he or his employees were directed by these officials, beginning on June 3, 1905, and continuing to some time in August, 1905, aggregating about 2,800 tons. John never appeared before the board, nor had any negotiations with it, relative to the supplying of spalls. The city put a weighmaster at defendant's quarry, who ascertained and reported the quantities of spalls taken away. The accounts were kept by the city, and the bills made in John's name. Warrants for payment at the rate of 84½ cents per ton were drawn and delivered to and receipted for by him, and the amounts called for therein paid to him. In the meanwhile, on May 25, 1905, John had handed into the board a proposal to furnish to the city, during the year beginning June 1, 1905, paving sand at such times, quantities, and places as should be required, at the price of 84½ cents per ton. The proposal was approved by the board and a formal contract drawn accordingly, which was executed upon its ratification on June 6th, by council in joint convention, defendant being present and aware of what was being done, and not marked 'not voting.' Sand to the amount of about 30 tons was subsequently ordered from and delivered by defendant in the same way in which spalls were ordered and delivered; the accounts being kept, bills made out, and warrants drawn, receipted for, and collected in the same way. Indeed, the contract for sand was treated and regarded as including spalls. On June 8th, defendant and John, in pursuance of an oral understanding dating back to about June 1st, entered into a written, sealed, and acknowledged agreement, whereby defendant was to furnish to John, during the period of one year ensuing, at the rate of 79½ cents per ton, 'all such sand and spalls as [John] may be desirous of purchasing.' The sand and spalls furnished by defendant to the city were by him charged to John; but, apart from the proposal and the subsequent execution of the formal contract of June 6th, John's active connection with the entire triangular transaction, both as regards sand and spalls, was confined to the receipt of the money due by the city from time to time, and the handing over to defendant of sums equal to 79½ cents per ton, retaining for himself 5 cents per ton. * * * That the furnishing of sand and spalls at 79½ cents per ton was profitable to the defendant is part of his own testimony."

The "interest" thus disclosed upon the part of the defendant, in the furnishing of supplies to the city, was, in the opinion of the trial judge, clearly such as is forbidden by the statute, to a councilman. The act provides that he is not to be interested "in any wise," either "directly" or "indirectly." As defendant was paid by the ton for the

materials which he delivered to the city, and at a profitable rate, it was certainly to his interest to promote the fulfillment of the contract, and both on reason and authority this is sufficient to constitute an interest in the contract. *Hunnings v. Williamson*, L. R. 11 Q. B. Div. 533, which was, as here, a case in which the contract was taken in the name of the brother. So, also, in *McElhinney v. City of Superior*, 32 Neb. 744, 49 N. W. 705, the city made a contract for electric light with one whose brother was a councilman of the city, and by reason of his joint ownership with his brother of the water power, which was to be used to generate the electricity, the court held that the councilman was "interested" in the contract. See, also, *Doll v. State*, 45 Ohio, 445, 15 N. E. 293; and *Bell v. Quin*, 4 N. Y. Super. Ct. 146. The only issue involved in this case was whether the defendant had such an "interest" in the matter of furnishing supplies to the city of Reading as was, under the statute, unlawful. The question of fraudulent intent, or unfairness in price, was not involved. *Com. v. Miller*, 31 Pa. Super. Ct. 300. There being no dispute as to the existence and terms of the contracts, nor as to the manner of their fulfillment by the defendant, it then became the duty of the court to deal, as a matter of law, with their interpretation and effect, in the light of the act of Assembly. With his conclusion that the admitted facts of this case convict defendant of having an interest prohibited by the statute, we are in entire accord.

The specifications of error are dismissed, and the judgment is affirmed.

(218 Pa. 32)

TISCHLER v. PENNSYLVANIA COAL CO. (Supreme Court of Pennsylvania. May 6, 1907.)

1. MINES AND MINERALS—FAILURE TO SUPPORT SURFACE—CAUSE OF ACTION.

In an action by the owner of the surface against the owner of the coal for injuries to the surface by the mining of the coal, the cause of action arises when the support of the surface was so weakened that it might fall.

2. SAME—RESERVATIONS IN DEED.

Where a person having no title to coal executes a deed to the land reserving a right to remove the coal without liability for damages to the owner of the surface, the real owner of the coal, not being a party in such deed, cannot avail himself of any reservation therein.

3. SAME—PRESUMPTION.

In an action for injuries to the surface of land by mining operations, plaintiff's statement admitted the ownership of the coal in defendant, and offered no evidence of title. *Held*, that it will be presumed that defendant was the owner without any special mining rights authorizing him to remove it without liability for any resulting injury to the surface.

Appeal from Court of Common Pleas, Luzerne County.

Action by Mary M. Tischler against the

Pennsylvania Coal Company. Judgment for plaintiff. Defendant appeals. Affirmed.

Defendant presented these points: "(3) Under the pleadings the burden was on the plaintiff to prove that the subsidence which affected the plaintiff's property was caused by mining directly beneath the said property or adjacent thereto within six years prior to May 2, 1902. This the plaintiff has failed to do, and the verdict must be for the defendant. Answer: Refused. (4) The plaintiff has failed to produce any evidence of mining directly beneath plaintiff's land by the defendant which affected her land, and she can recover no damages for the buildings thereon. Answer: Refused."

The court charged the jury in part as follows: "Mrs. Tischler, being the conceded owner of the property at the time in question, was not, as a matter of grace, but as an absolute right, entitled to have her property supported, not damaged, by the mining of coal from beneath this property. No deed, conveyance, or agreement of any kind, so far as the court recalls, has been put in evidence, showing the Pennsylvania Coal Company was the owner of any coal beneath this property or had any right to mine it. In most cases in which this question has arisen in the courts, the miner—that is, the company or person who mines and removes the coal—has put in evidence title to the coal and his right to mine and remove it, and also, generally, some paper showing the miner was free from liability for damages in letting down the surface. Except as to the Livingston lot, of which I shall speak hereafter, there has been no such paper presented here. Plaintiff's statement has not been offered in evidence. The court has not seen it before. We submit it to you that you can see what plaintiff, when she brought this suit, charged against the defendant in this particular: 'The defendant on the 13th of January, 1901, was the owner of the coal underneath the said above described lot and engaged in the business of mining and removing said coal, and, although said defendant owed to the said plaintiff the duty of leaving sufficient support to maintain the surface over said coal, the defendant negligently and carelessly so mined said coal that the support to the surface was insufficient to maintain the same, whereby the said surface of said above described lot, on said 13th day of January, 1900, fell in, destroying the surface to the amount of —, and damaged the said building erected on the said surface, to a certain amount.' Such was the charge of plaintiff at the time she brought the suit, and it would therefore be fair to assume plaintiff alleged the defendant at that time owned the coal."

Verdict and judgment for plaintiff for \$2,800. Defendant appealed.

Argued before MITCHELL, C. J., and BROWN, MESTREZAT, POTTER, and ELKIN, JJ.

J. B. Woodard and Willard, Warren & Knapp, for appellant. John T. Lenahan, D. O. Coughlin, and Edward A. Lynch, for appellee.

MESTREZAT, J. This is an action to recover damages which the plaintiff alleges she has sustained by reason of the defendant having mined and removed the coal from beneath and adjacent to the several lots of ground owned by her in the borough of Hughestown, Luzerne county. There were dwelling houses and other improvements upon the lots at the time of the injuries complained of. The defendant was the owner of the coal, the mining of which it is claimed caused the injuries to the plaintiff's property. In the original statement the plaintiff alleges that "the defendant negligently and carelessly so mined said coal that the support to the surface was insufficient to maintain the same, whereby the said surface of said above described lots, on the said 13th day of January, 1901, fell in, destroying said surface." In her amended statement she alleges that the defendant was engaged in mining and removing the coal from lands in the neighborhood and adjacent to the premises of the plaintiff, and, while so engaged, caused the supports under the plaintiff's premises to be so weakened that the same gave way, causing injuries to her property. The defense was that the plaintiff had failed to show that there was any coal mined directly beneath the premises within six years prior to the bringing of the suit which resulted in injury to the surface or the improvements thereon. The case was carefully tried by the learned judge of the court below, and, having been submitted to the jury, a verdict was returned for the plaintiff. On the trial of the cause, the court refused to direct a verdict for the defendant, and subsequently refused defendant's motion for judgment non obstante veredicto.

Judgment having been entered on the verdict in favor of the plaintiff, the defendant company has taken this appeal. The first, second, third, and fourth assignments are in substance that the court erred in not withdrawing the case from the jury, and, after verdict, in not entering judgment for the defendant on the ground that there was no sufficient evidence to support the allegations of the statement. We do not think this complaint is well taken. The learned judge in his charge and in his opinion on the motion for a new trial and for judgment for defendant clearly points out the testimony which justified the submission of the case to the jury. We need not refer to this testimony in detail, as it appears by the opinion of the trial court. The evidence consisted of the official maps of the different veins of coal which showed the mining, the mining operations, and the dates of mining beneath and adjacent to the plaintiff's surface, and also of the testimony of several witnesses. An

examination of the evidence convinces us that it was sufficient, at least, to send the case to the jury. The alleged causes of the injury to the plaintiff's surface were not only the withdrawal of proper supports for the surface within six years of bringing the suit, but also the negligent mining of the coal within the same time. If either or both of these causes were sustained by the testimony, the plaintiff was entitled to recover. *Pringle v. Vesta Coal Co.*, 172 Pa. 438, 33 Atl. 690. The court instructed the jury that the cause of action arose, not when the cave or subsidence took place, but when the support of the surface was so weakened that it might fall, and told them that the cause must have occurred within six years of bringing the suit. He further instructed them that, if there was work in the mines directly beneath the plaintiff's surface which caused the weakening of the supports to the surface within six years, the plaintiff could recover for injury to the land and the improvements thereon. He also instructed them that the plaintiff was entitled to lateral support of the surface in its natural state, and that she could recover compensation for the surface in its natural state only if the cave or subsidence was caused by taking away the lateral support. It is therefore clear that that the judge was accurate in his statements of the law as applicable to the case. Under this charge the plaintiff was entitled to recover if she showed to the satisfaction of the jury that the coal beneath her surface had been removed or that there had been negligent mining of the coal which, in either or both instances, resulted in injury to the plaintiff's surface and the buildings thereon; and was entitled to recover for the injury done the surface in its natural state only if such injury was caused by failure to give lateral support.

As appears by the evidence, the plaintiff's predecessors in title since 1871 were the owners of the surface, and not of the coal. One of these parties in the plaintiff's chain of title, Livingston, conveyed the property in 1897, excepting the coal, and reserving the right to remove it without liability for damages. At no time, so far as the evidence discloses, did Livingston have title to the coal. The exception, therefore, in his deed amounted to nothing, and the defendant company, which was a stranger to his title, could not

protect itself by the reservation to Livingston of the right to remove the coal. The third assignment of error has no merit.

The fourth assignment of error alleges that a part of the charge was misleading. The judge, overlooking the averment in the statement that the defendant was the owner of the coal, stated in the first part of his charge that there was no deed or other conveyance showing that the defendant company was the owner of the coal beneath the plaintiff's property or had any right to mine it, and said that in most cases of this character the miner defendant showed title to the coal and his right to mine and remove it. It is claimed that this part of the charge was misleading. But we think the court cured this statement in the subsequent part of his charge, in which, after referring to the fact that he had not seen the plaintiff's statement until it had just then been brought to his attention, he read that part of the statement which averred title to the coal in the defendant company, and then concluded by saying: "Such was the charge of the plaintiff at the time she brought this suit, and it would therefore be fair to assume plaintiff alleged the defendant at that time owned the coal." The jury would see by the averment in the plaintiff's statement that the title to the coal was in the defendant, and that, therefore, no proof of the fact on the trial was necessary. If the defendant company desired any further instructions as to its title or ownership of the coal and the right to remove it, it should have prayed for such instruction by proper points put to the court. It is apparent, however from the evidence in the case that the defendant company intended to rely upon its title to the coal as admitted in the plaintiff's statement. It did not offer, so far as we are able to see, any deed or other title conveying the coal or mining rights to it. Presumably, therefore, it was the owner of the coal without any special mining rights authorizing it to remove the coal, without liability for injury to the surface. The learned judge went to the extent warranted by the evidence in simply calling the attention of the jury to the admission in the plaintiff's statement that the title to the coal was in the defendant.

The assignments of error are overruled, and the judgment is affirmed.

(217 Pa. 491)

HEPPENSTALL v. LENG.

(Supreme Court of Pennsylvania. April 1, 1907.)

1. QUIETING TITLE—WHO MAY MAINTAIN SUIT.

A bill to quiet title may be maintained, where plaintiff has title to the premises and has sold them to another, who was in possession, but who refused to accept the title sold by reason of the adverse title in defendant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Quieting Title, § 44.]

2. EJECTMENT—WHEN LIES.

Ejectment will not lie, where plaintiff has sold the land to one who is in possession, as against one claiming adverse title, but who is not in possession.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Ejectment, §§ 67-70.]

3. QUIETING TITLE—COMPELLING ACTION OF EJECTMENT.

Plaintiff, who sold land to one who has gone into possession, but who will not accept title because of outstanding adverse claim of defendant, cannot compel defendant to bring ejectment under Act April 16, 1903 (P. L. 212; 2 Purd. [13th Ed.] 1304); the right being limited to a person in possession.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Quieting Title, § 60.]

Appeal from Court of Common Pleas, Allegheny County.

Bill by George T. Heppenstall against Christian F. Leng. Decree for plaintiff, and defendant appeals. Affirmed.

Argued before FELL, BROWN, MESTREZAT, ELKIN, and STEWART, JJ.

J. S. Ferguson and E. G. Ferguson, for appellant. Lyon, Hunter & Burke, for appellee.

MESTREZAT, J. The learned judge of the court below has so fully vindicated his conclusions on the merits of the case, in the able and exhaustive opinion filed by him, that we need not enter into a discussion to sustain his findings. He has found and stated the facts at length to which no error is alleged here by the appellant.

The right of a party in possession of, and claiming title to, real estate to invoke the aid of a chancellor in removing a cloud from his title is well settled. In Dull's Appeal, 113 Pa. 510, 6 Atl. 540, we held, as stated in the syllabus, that the jurisdiction of a court of equity to remove clouds from title is an independent source or head of jurisdiction, and that whenever a deed or other instrument exists which may be vexatiously or injuriously used against a party, after the evidence to impeach or invalidate it is lost, or which may throw a cloud or suspicion over his title or interest, and he cannot immediately protect or maintain his right by any course of proceedings, a court of equity will afford relief by directing the instrument to be delivered up and canceled, or by making any other decree, which justice or the rights of the parties may require. In Story's Equity Ju-

risprudence (12th Ed.) § 711a, it is said: "It is very common in courts of equity to entertain suits, for the purpose of removing a cloud resting upon the plaintiff's title. This is done upon the ground that it is for the interests of both parties that the precise state of the title to the estate be known if all are acting bona fide; and, if not, that a merely colorable and pretended claim is a fraud upon the real owner, and as such be extinguished." In speaking of the principle upon which a court entertains a bill quia timet, Mr. Bispham, in the seventh edition of his Principles of Equity (section 568), says: "The principle upon which the court acts in such cases is that justice sometimes requires that a man shall not be compelled to have hanging over him, or his title, for an indefinite time, some claim or demand or liability, which, if enforced, would subject him to loss; but that he is entitled to have the questions relating to his rights settled at once and forever, to have the claim against his rights immediately enforced, or to be presently made secure against any future liability."

We are clear that the bill filed by the plaintiff presents a case for equitable jurisdiction. The learned judge finds that "the plaintiff acquired title to land in this county which he subsequently, by written agreement, contracted to convey to the National Mortar & Supply Company, which entered into and retains possession, but refused to comply with the agreement of sale on account of an outstanding adverse title in the defendant, and this bill is filed to have said title declared void." It will therefore be observed that the plaintiff has title to the premises, that by an agreement he has sold the property to another who is in possession of it but refuses to accept the title sold him by reason of an outstanding adverse title, and that the adverse title is in the defendant. These facts make it apparent that only a court of equity can furnish a complete and adequate remedy for the plaintiff. It is conceded that the defendant's title is adverse and casts a cloud upon the plaintiff's title. If the defendant, or any one claiming under him, or any one claiming adversely to the plaintiff's title, was in possession of the premises, the plaintiff would be put to his ejectment. Here, however, as will be noticed, the defendant is not in possession of the premises, neither is the plaintiff in possession, and the party who is in possession claims through and by virtue of the plaintiff's title. Ejectment therefore will not give the plaintiff the remedy he desires and needs. He does not wish possession of the land nor to attack the title of the party in possession, but simply desires to convey a good title to his vendee, who refuses to accept a conveyance until the cloud which the defendant's title casts, is removed. Both the plaintiff and his vendee desire to complete the sale and have the

title conveyed according to the agreement. It therefore becomes necessary that the plaintiff have removed from his title the cloud which the defendant's title casts upon it, and his remedy is clearly within equitable jurisdiction.

It is further contended by the learned counsel of the defendant that the plaintiff cannot maintain a bill to quiet his title in a court of equity, but is required to proceed in the common pleas according to the provisions of the act of May 25, 1893 (P. L. 131). We will assume that the learned counsel means the act of April 16, 1903 (P. L. 212; 2 *Purd.* [13th Ed.] 1804), which repealed the first section of the act of 1893, and was in force at the time this bill was filed. The first section of the act of 1903 provides as follows: "Whenever any person, not being in possession thereof, shall claim or have an apparent interest in or title to real estate, it shall be lawful for any person in possession thereof, claiming title to the same, to make application to the court of common pleas of the proper county, whereupon a rule shall be granted upon said person not in possession, to bring his or her action of ejectment within six months from the service of such rule upon him or her, or show cause why the same cannot be so brought." The act then makes provision for the service and disposition of the rule, and directs that judgment shall be entered against the party served with the rule on his failure to appear and show cause why the ejectment cannot be brought. A moment's consideration will show that the plaintiff cannot invoke the aid of this act to remove the cloud from his title, or, as between him and the defendant, to have his rights to the real estate in question determined. It is, as will be seen, a jurisdictional prerequisite under this act that a party who seeks its assistance must be in possession of the real estate. "Any person in possession thereof" may obtain a rule upon a party claiming an adverse interest to appear and show cause why he should not bring an action of ejectment. A party out of possession has no standing to institute a proceeding under the act, for the obvious reason that he may maintain an action of ejectment at common law to assert his title against any one in possession claiming adversely to him. This and prior kindred legislation was enacted for the purpose of providing a person in possession of real estate with a remedy for quieting his title, which did not exist at common law, by compelling an adverse claimant out of possession to bring his ejectment, and, failing to do so, thereafter to be deprived of the right to bring the action and contest such person's title to the premises. In the case at bar, the learned trial judge has found as a fact, and it is indisputable, that the plaintiff is not in possession of the premises. That is a jurisdictional fact which defeats the plaintiff's right to proceed under the act of 1903. If he were

in possession, the act would apply, and he could rule the defendant to bring his ejectment; but, as he has neither the possession nor the right to the possession as against his vendee, the statutory remedy can afford him no relief.

The assignment of error is overruled, and the decree of the court below is affirmed.

(217 Pa. 561)

BECHTEL v. FRY.

(Supreme Court of Pennsylvania. April 22, 1907.)

1. COUNTIES—ATTORNEY'S SERVICES—LIABILITY.

A county is not liable for the services of a special attorney, as to matters given in charge of the county solicitor by Act May 22, 1896, unless there is a special contract entered into by the commissioners which must precede the services for which compensation is claimed.

[Ed. Note.—For cases in point, see *Cent. Dig.* vol. 13, Counties, § 186.]

2. SAME—CRIMINAL PROSECUTIONS.

County commissioners have no authority to employ additional counsel in criminal prosecutions.

[Ed. Note.—For cases in point, see *Cent. Dig.* vol. 13, Counties, § 176.]

3. SAME—COUNTY WARRANTS.

A county treasurer, knowing of the illegality of a warrant presented to him, should refuse to pay the same, though it has been approved by the county comptroller.

[Ed. Note.—For cases in point, see *Cent. Dig.* vol. 13, Counties, § 254.]

Appeal from Court of Common Pleas, Berks County.

Application of W. B. Bechtel for writ of mandamus to Henry H. Fry. From an order denying the writ, plaintiff appeals. Affirmed.

Argued before MITCHELL, C. J., and MESTREZAT, ELKIN, STEWART, and BROWN, JJ.

Walter S. Young and D. E. Schroeder, for appellant. George W. Wagner, for appellee.

BROWN, J. On December 23, 1905, two of the commissioners of the county of Berks issued to the appellant a warrant upon the county treasurer, payable to his order, for \$2,200. It appeared upon its face to be for "special attorney county cases." It was approved and countersigned by the deputy county controller. Upon presentation to the county treasurer payment was refused, and the holder of the warrant—this appellant—applied to the court of common pleas for a writ of mandamus to compel its payment. Edwin O. Ruth was the treasurer at the time the writ was applied for, but, his term of office having expired before the return day of the alternative writ, his successor, Henry H. Fry, was, upon the petition of the appellant, substituted as respondent. He made return to the writ. It was demurred to by the petitioner, and on the demurrer judgment was entered for the respondent.

The return averred that the warrant was

illegal, because neither the county commissioners in issuing it nor the county controller in approving it had authority in law for so doing, and it was without legal consideration. The third averment in the return was: "The defendant further avers that prior to the time that said warrant was presented to him for payment, Jacob Miller, the other county commissioner of Berks county, filed in the county treasurer's office a general notice dated December 23, 1905, notifying the treasurer as treasurer not to cash said warrant No. A4381; and also upon the same day that this general protest was filed the said Jacob Miller, as county commissioner, filed an additional protest against the payment of said warrant, in which second protest the said county commissioner gave notice to the defendant that W. B. Bechtel was never employed by the county commissioners, nor did the county commissioners ever authorize any one to employ him as counsel in any case of those for which payment was demanded by said warrant, excepting in the case of County of Berks v. F. F. Bressler, in which Mr. Shalters was the prosecutor; and also notifying the defendant that the said W. B. Bechtel was not entitled to draw any fees from the county for professional services—a copy of which two notices is hereto attached, marked, respectively, 'A' and 'B' and made part of this return." The eighth averment was that the "warrant was not founded upon a contract of the county of Berks with the said plaintiff, W. B. Bechtel, or issued in consequence of any liability of the county of Berks to the said W. B. Bechtel." In the statement of the questions involved the appellant says one is: "Has a board of county commissioners, having a county solicitor, regularly appointed under the provisions of the act of May 22, 1895 (P. L. 101), the power to employ special counsel to assist the county solicitor in certain specified litigation in which the county is a party?" This question was not passed upon by the court below, for the judgment in favor of the respondent was based entirely upon the fact alleged in the return, and admitted by the demurrer to be true, that the warrant was not founded upon any contract of the county of Berks with the appellant.

The act of May 22, 1895 (P. L. 101), authorizing the appointment of a county solicitor by the county commissioners, directs that such solicitor "shall commence and prosecute all and every suit and suits brought or to be brought by the county, wherein or whereby any of the rights, privileges, properties, claims or demands of the county are involved, as well as defend all actions or suits brought against the county, and shall perform all duties now enjoined by law upon county solicitors, and shall do all and every professional act, incident to the office, which may be required by the officers named in said board." In view of this direction, one of the contentions of the respondent was that all

the legal business of the county is to be attended to by the solicitor, and that the commissioners are without power or authority to employ and pay out of the county funds any special counsel in prosecuting or defending suits brought by or against the county. The learned and careful judge below expressly avoided passing upon this question, intimating, however, that there might be implied power in the commissioners to employ special counsel if necessity for such employment should arise, as, for instance, the sickness, absence, or adverse interest of the solicitor. What was decided, and properly decided, was that, as the act of 1895 imposes upon the solicitor selected by the county commissioners the duty of commencing and prosecuting all suits brought by the county wherein or whereby any of its rights, privileges, properties, claims, or demands may be involved, and to defend all actions or suits brought against the county, the commissioners cannot employ any one else to take the place of the solicitor, or act as his assistant generally; and if in any case they can employ special counsel it is only in specific matters to be distinctly pointed out, and a contract in all exceptional cases must be made by the county commissioners with special counsel and precede the rendition of the services for which compensation is claimed. This was manifestly correct, and nothing need be here added to the following taken from the opinion of the court below in speaking of the position of the respondent that in no case can special counsel be employed: "It is, however, not essential in this case to decide whether the extreme position taken by respondent is correct or not. Leaving that question open, it is certainly indispensable, in order to render the county liable for the services of additional or special counsel in matters committed by the act of 1895 to the charge of the county solicitor, if that can be done at all, that there be an explicit contract entered into by the commissioners with such counsel engaging his services in specifically designated matters, and that the services for which compensation is claimed have been rendered in pursuance of such contract of employment. In other words, the statute having designated a certain salaried officer to conduct the legal affairs of the county generally, it cannot be lawful for the commissioners to employ any one else, either to take his place, or to act as his assistant, generally, but only in specific matters to be distinctly pointed out. Next, the employment of such person must be by the commissioners acting as a board, not by the county solicitor or any one else acting by delegation from the commissioners, and the act of employment must be unequivocal and precise; not necessarily fixing the rate or amount of the compensation, nor evidenced by a written agreement or a record upon the minutes, but possessing all the elements of a contract binding, not only the county to accept, but

also the attorney to render the services in question. And, finally, that contract must precede the rendition of the services for which compensation is claimed. That this must be so seems to be the clear teaching of *Fulton v. Lancaster County*, 162 Pa. 294, 29 Atl. 763. That it is demanded by the settled policy of our law is even clearer. The Constitution, art. 3, § 11 forbids the Legislature to provide for the payment of any claim against the commonwealth not founded upon previous authority of law. The municipal act of 1889 (P. L. 282), in article 4, § 5, imposes, *mutatis mutandis*, the same restriction upon city councils. Manifestly counties are for the same reasons entitled to the protection of the same rule, and to this extent the doctrine of ratification must be deemed inapplicable to them. No fair-minded person can dispute the fact that the plaintiff here has rendered services to the county which were valuable and advantageous to it. Nor in this proceeding is the reasonableness of the compensation allowed him in dispute, if he is entitled to be compensated for his services. But if they were rendered, as the return avers, and as for present purposes the court must believe, without a distinct and binding antecedent employment with reference to the specific matters in which they were rendered, except in one particular, they must be treated as having been to that extent voluntarily rendered for the public good, without right to claim or authority to accord compensation therefor out of the county treasury."

Upon the assumption that the averment in the return that the county commissioners never authorized any one to employ the appellant as counsel in any of the cases for which payment was demanded, except in the case of *County of Berks v. F. F. Bressler* (which ought to have been, as appears in the sixth averment of the return, *Commonwealth v. F. F. Bressler*) might be construed as an admission that the county had employed the appellant in that criminal prosecution, the learned judge held that even if a valid contract can be entered into by the county for the employment of special counsel in civil cases no such contract can be entered into in a criminal case. It is not within the express power of county commissioners to employ special counsel in any case, civil or criminal, and, even if it be within their implied powers to do so in a civil case, there is no such power in criminal cases. The commonwealth itself administers its criminal laws. It commits to a special officer the duty of prosecuting offenders against its peace and dignity and bringing them to punishment, and a county has no more interest in public prosecutions than any private individual, and county commissioners, therefore, have no more right to take out of the public treasury moneys to pay for special counsel in criminal prosecutions than has an individual. The prosecution of *Bressler* may

have been instituted because he had criminally appropriated or withheld moneys belonging to the county, but the object of his prosecution was not to secure the return to the county of any moneys which it may have lost through him, but to vindicate public justice, and the county, as a county, had, therefore, no more direct interest in his prosecution than any individual. The rights, privileges, and properties of a county are no more involved in public prosecutions than the rights, privileges, and properties of an individual. That a county may pay the costs of public prosecutions makes no difference as to this. It pays such costs out of public moneys simply as the representative of the state, and because the state commands it to do so.

A second contention of the appellant is that a county treasurer, upon presentation to him of a county warrant, properly indorsed, regularly issued at a duly convened meeting of county commissioners signed by a majority of them and countersigned by the deputy controller, in payment of a debt or claim audited and approved by the controller, has no right to refuse payment of the same and to inquire into the regularity of the issuance of the warrant in the admitted absence of fraud or collusion. If a warrant be issued by county commissioners to pay the holder of it moneys which he is not entitled to receive from the county, and which the county commissioners have no authority to pay him, its approval by the county controller does not make it conclusive evidence of the county's liability. His duty is to approve claims "legally due" (Act June 27, 1895 [P. L. 403]); and if he approve a claim not legally due—which has no legal existence—his certificate cannot make it so. A warrant signed by a majority of or the entire board of county commissioners is no more conclusive evidence of the county's liability with the county controller's counter signature upon it than it was before the office of county controller was created. What was illegal then could not be enforced against the county even upon a commissioners' warrant and what is illegal now cannot be enforced with commissioners and controller all together a party to the warrant. This warrant having been illegally issued if it was not founded upon a contract between the county of Berks and the appellant, any taxpayer after its issuance could have filed a bill to enjoin its payment. Such bill would have been against the treasurer of the county. He was notified of the illegality of the warrant and warned not to pay it. If he had not been county treasurer, and the notice of its illegality had come to him as a citizen, a court of equity would have been open to him; but, being himself the treasurer of the county, what would have been sufficient to enjoin such officer from paying the warrant is sufficient to justify his refusal to pay it. He would hardly be expected to

file a bill against himself and upon the notice received by him it was his duty to refuse payment. "A county treasurer is not required to pay all warrants drawn upon him, but only such as are founded on orders of the board of supervisors for the payment of demands legally chargeable against the county and allowed by the board; and he may and should refuse to pay warrants known by him to have been drawn for claims not authorized by law, or expenditures beyond the power of the board to incur." 11 Ency. of Law and Procedure, 540. There was sufficient upon the face of this warrant to put the treasurer on notice and he might well have refused for this reason alone to pay it until satisfied that there had been a contract entered into by the county for the special services before they were rendered. When orders are issued appropriating public money to purposes that are illegal, and the county treasurer has knowledge or means of knowledge of their illegality it is his duty to refuse to pay them when they are presented. He is bound to know the extent and limit of the authority conferred upon him by the law under which he accepted his office. *Merkel v. Berks County*, *81 Pa. 505. In that case, as in this, express notice was given to the treasurer that the orders were drawn for illegal purposes.

The assignment of error is overruled, and the judgment of the court below is affirmed, without prejudice to the right of the appellant to recover for any services which he may have rendered in civil cases in pursuance of a legal contract with the county commissioners that he should render them.

(118 Pa. 50)

COMMONWEALTH ex rel. PENNSYLVANIA MUT. LIFE INS. CO. v. CITY TRUST, SAFE DEPOSIT & SURETY CO. OF PHILADELPHIA. Appeal of MILLER. (Supreme Court of Pennsylvania. April 29, 1907.)

BANKS AND BANKING—TRUST COMPANIES—DEPOSITS—INSOLVENCY—PREFERENCES.

A receiver deposited the moneys of his estate with a trust company, which was a surety on his bond, under an agreement that the money should bear interest and be subject to check with the counter signature of the trust company. Such moneys were mingled with the general funds of the company, which became insolvent. *Held*, that the receiver could not claim that he was entitled to have returned to him the whole of the balance of his account under a rule of court providing that all corporations approved as security shall keep all moneys received by them from the persons for whom they become sureties separate from all other funds and in a separate account.

Appeal from Court of Common Pleas, Philadelphia County.

Action by the commonwealth, on relation of the Pennsylvania Mutual Life Insurance Company, against the City Trust, Safe Deposit & Surety Company of Philadelphia. From a decree dismissing petition to pay balance in full, N. Dubois Miller, receiver of

the Pennsylvania Mutual Life Insurance Company, appeals. Affirmed.

Argued before MITCHELL, C. J., and FELL, MESTREZAT, POTTER, and STEWART, JJ.

N. Dubois Miller, John J. Ridgway, and J. Rodman Paul, for appellant. John Kent Kane, Murdock Kendrick, and Staake & Paton, for appellee.

FELL, J. The appellant was the receiver of the Pennsylvania Mutual Life Insurance Company, and made a written application to the City Trust, Safe Deposit & Surety Company requesting it to become surety on his bond. In this application he agreed that all assets coming into his hands as receiver should be deposited with the trust company, that his account should be subject to check only for the purposes of the estate, and that all checks should be countersigned by the trust officer of the company. The money deposited was to bear interest. On March 20, 1905, the appellant deposited with the trust company a check for \$17,768.52, which on the same day was deposited by the trust company in the Third National Bank, with other checks aggregating \$47,104. The trust company's account with the bank was a general one, and was increased and decreased from time to time. Its deposits with the bank at one time amounted to \$619,202, and included other money received by the trust company on the same conditions as that received from the appellant. The balance was reduced by withdrawals in the ordinary course of business to \$3,263. On June 21, 1905, when the trust company became insolvent, the balance to its credit in the Third National Bank was \$13,054, and in other banks \$420,000. At this date there were balances due to others who had made deposits with the trust company under the same circumstances that the appellant had, and whose deposits had been placed in the Third National Bank, aggregating \$20,369. The checks drawn by the appellant before the insolvency of the trust company were not paid out of the funds deposited by it in the bank, but out of funds received by it in the ordinary course of its business. It was the practice of the trust company to keep a separate and earmarked account of money and securities deposited with it as indemnity or counter security, but money deposited with it by a person occupying a fiduciary relation, subject to check with the counter signature of the officers of the trust company and bearing interest, was mingled with the general funds of the company.

The claim of the appellant was that the relation between the City Trust Company and him was not that of debtor and creditor, but that of trustee and cestui que trust, and that he was entitled to have returned to him out of the assets of the trust company the whole of the balance standing on the books to his credit as receiver of the insurance

company. This claim was not based on any arrangement made with him when the account was opened, but upon the fact that a rule of the courts of common pleas of Philadelphia provides that all corporations approved as surety shall keep all moneys and surety received by them from persons for whom they become security in separate and earmarked accounts, and that a stipulation to this effect was included in the general application of the trust company to the courts to be approved as surety. This claim was disallowed on the ground that the case presented by the petition and answer was not that of one whose money had been received by a fiduciary and mingled with other money, and could be traced, but of one who had made a deposit that bore interest, was subject to check, and was placed in the general funds of the trust company.

There was no error in refusing the prayer of the appellant's petition. His deposit was made on the same terms, except for the restriction mentioned as to countersigning checks as other deposits. That restriction was for the protection of the trust company as surety, and in no other respect affects the relation of the parties. If the rule of court applies to a deposit of this character, it was not observed, and no trust relation was established. If it had been established, the appellant would not have been entitled to a preference. His money was mingled in a deposit of \$619,000, over \$20,000 of which was deposited by other persons for whom the company was surety. The total fund was reduced to \$3,263. By no possibility could more than \$3,263 of the balance due by the bank to the trust company at the time of its failure be traced as a trust fund, and, even if it could be traced, the appellant would have no claim to it higher than the claim of others who had deposited on the same conditions.

The order of court is affirmed, at the cost of the appellant.

(217 Pa. 548)

In re NORRIS' ESTATE. (No. 1.) Appeal of HORWITZ et al.

(Supreme Court of Pennsylvania. April 22, 1907.)

WILLS—CONSTRUCTION.

Testator gave five-sixths of his estate to trustees for five sons, and created a spendthrift trust in favor of his son J. in one-sixth. His son H. survived his other brothers and died without issue. The will provided that if H. died without leaving a child or children, or grandchildren at his death, one of the said five-sixths parts of the land should be equally divided among testator's other sons, not including J., or such of them as should be then living, and the trustee for his son J., so that the survivors and the trustee should take equal shares thereof, subject to the restrictions mentioned in the will. *Held*, that the trustee of J. took the whole interest of H., to the exclusion of the descendants of the other brothers.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, § 1183.]

Mestrezat, J., dissenting.

Appeal from Court of Common Pleas, Philadelphia County.

In the matter of the accounts of Henry Norris, trustee under the will of Joseph Parker Norris. From the decree dismissing exceptions to auditor's report, Orville Horwitz and others appeal. *Reversed*.

The spendthrift trust in favor of Joseph Parker Norris, created by the will of his father, was as follows: "Item. I do hereby give and devise unto my executors hereinafter named and the survivors and survivor of them and the heirs of such survivor the other and remaining one full equal and undivided sixth part (the whole into six equal parts to be divided) of and in all and singular my said lands tenements and premises called Fairhill in trust to let and demise the same for the best rent that can be gotten therefor and to take collect and receive the said rents issues and profits thereof as the same shall become due and payable and the net annual rents and income thereof after paying thereout one sixth part of the taxes of the said premises and of all necessary and proper repairs and one like sixth part of my said wife's annuity and also all the costs and charges attending the execution of this trust to pay apply and dispose of to and for the maintenance and support and benefit of my son Joseph Parker Norris junior for and during all the term of his natural life in such way and manner however as that the same or any part thereof shall not become subject or liable to the payment of any of his debts present or future and so that no creditor present or future of my said son Joseph shall ever be able to take seize or enjoy the same or any part thereof and from and immediately after the decease of my said son Joseph then as for and concerning the said one-sixth part of my said lands tenements and premises called Fairhill to and for the use and behoof of the child and children of my said son Joseph born and to be born that shall be living at his death and the lawful issue of such as may be then dead and in such parts shares and proportions and for such estate and estates use and uses as he my said son Joseph by his last will and testament shall direct limit or appoint and in default of such last will or appointment then in trust to and for the only proper use and behoof of all and every the children of my said son Joseph lawfully begotten born and to be born that shall be living at his death and the lawful issue of such as shall be then dead and their heirs and assigns forever equally to be divided among them part and share alike as tenants in common so always however that such surviving children of my said son Joseph shall take per capita and such issue shall take together in equal parts the share that his her or their parent would have taken if then living. Provided however that no division of this share of my said Fairhill Estate shall be made among the children of my said son Joseph in any event until the youngest of his

children born and to be born shall have attained the age of Twenty-one years but that after the decease of my said son Joseph the net annual rent or income thereof after deducting thereout as aforesaid shall be applied by the said trustees to the maintenance support and education of the children of my said son Joseph at their discretion and according to their best judgment until the youngest of his said children born and to be born shall have attained the age of twenty-one years." The auditor awarded the fund among the descendants of the sons of testator per stirpes. The descendants of Joseph Parker Norris, Jr., claimed the whole fund and filed exceptions to the report. The exceptions were overruled.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

George Qulutard Horwitz and John G. Johnson, for appellants. Samuel Dickson, Henry S. Drinkler, Jr., and H. Gordon McCouch, for appellees Henry Norris and others. John J. Ridgway, for appellee J. Parker Norris. Hampton L. Carson and Wm. Felix Norris, for descendants of George W. Norris, deceased. M. Hampton Todd, for appellee Jane McKee Norris. William Brooke Rawle and Francis William Rawle, for estate of Henry Pepper Norris, deceased.

BROWN, J. Joseph Parker Norris, the testator, whose will, executed in 1838, is before us on these appeals, died in 1841. He left six sons and seven daughters. Among his possessions were two large estates, known as "Fairhill" and "Sepviva." He gave Sepviva to his daughters and Fairhill was devised to his sons, Charles, Samuel, Isaac, George, Henry, and Joseph Parker, Jr. His residuary estate was given to all of his children, with the exception of Joseph, who, for reasons stated by the testator, was excluded from participation in it. The interests in Fairhill devised to Charles, Samuel, Isaac, George, and Henry passed to trustees for each of them under clauses in the will which are identical. The testator created a spendthrift trust for Joseph, and devised a one-sixth interest in Fairhill to his executors in trust for him. They were not the trustees for the other five sons. The clause to be now interpreted is as follows: "And upon this further trust that he my said son Henry Norris shall have full power and authority by his last will and testament to devise and settle one of the said five-sixth parts of the lands tenements and premises aforesaid called Fairhill to and on all or any of his issue lawfully begotten in such way and manner and under and subject to such restrictions and limitations or for such estate and estates use and uses as he my said son Henry may deem proper and in default of such last will or appointment then in trust as to that one of the said five-sixth parts of the said lands tenements and premises called

Fairhill to and for the only proper use and behoof of all and every the children of my said son Henry Norris that shall be living at his death and the lawful issue of such as may be then dead and their heirs and assigns forever equally to be divided among them part and share alike as tenants in common so always however that such surviving children of my said son Henry shall take per capita and such issue shall take together in equal parts the share that his her or their parent would have taken if then living and if he my said son Henry shall die without leaving a child or children or a grandchild or grandchildren living at his death then that one of the said five-sixth parts of the lands tenements and premises aforesaid called Fairhill shall go to and be equally divided among my said other sons Charles Samuel Isaac and George or such of them as shall be then living and the trustees hereinafter mentioned for my said son Joseph Parker Norris junior in equal parts so that the then survivors of my said four sons Charles Samuel Isaac and George shall each take one equal share and the trustees for my said son Joseph shall take the other equal share thereof each of which said equal shares shall pass to and vest in the trustees herein appointed and their heirs respectively subject to the restrictions and limitations and for the uses herein declared in like manner as if the same had been so devised in the first instance, that is to say the Trustees for my said sons Charles Samuel Isaac George and Henry to take in trust for the use of my said sons Charles Samuel Isaac and George in equal parts and for the uses hereinbefore mentioned and the Trustees for my said son Joseph to take in trust for the like uses that hereinafter mentioned." Joseph Parker Norris, Jr., died in January, 1863, leaving children; Samuel Norris died in December, 1866, without issue; Charles Norris died in June, 1868, intestate, leaving children; George Norris died in 1875, testate, leaving children; Isaac Norris died in July, 1890, testate, leaving children; and Henry Norris died in December, 1904, without issue.

The fund for distribution represents Henry's one-sixth interest in Fairhill, devised to trustees for him by his father, and the one-fifth of the one-sixth which passed to them for him upon the death of Samuel. In the court below this fund was awarded to the issue of all of the testator's deceased sons per stirpes. The descendants of Joseph Parker, Jr., claimed the entire fund, to the exclusion of the descendants of their father's three brothers, and this claim of the appellants, disallowed below, is now before us. Whether it is to prevail must depend upon the proper interpretation of the will of the testator, which makes the ultimate disposition of the interest in the Fairhill estate enjoyed by Henry at the time of his death.

After the death of Samuel Norris in 1866, proceedings were instituted for the partition

of the interest in Fairhill devised by his father in trust for him. The surviving brothers and the representative of Charles, then also deceased, sought to exclude the children of Joseph Parker, Jr., from participation in this estate, contending that, under the limitation in the will of the testator, the share of Samuel in Fairhill was divisible among the surviving sons and the children of Charles, to the exclusion of the children of Joseph Parker Norris, Jr. It was held by this court unanimously that the children of Joseph Parker, Jr., were entitled to a one-fifth share of Samuel's interest. *Horwitz v. Norris*, 60 Pa. 261. The court, however, divided upon an interpretation of the will, the majority so interpreting it as to give to the appellants what they now claim; and one of their contentions is that, as their right to the one-fifth of Samuel's share enjoyed by Henry and his own one-sixth is *res adjudicata*, the whole fund must be awarded to them under the doctrine of *stare decisis*. It is not necessary for us to decide whether the claim of the appellants is *res adjudicata*. I do not think it is, because the question now before us was not and could not have been before the court then. Henry was then living, as were Isaac and George, and the question of where his interest should go if he should die childless was not then a matter for the court's determination, for it was not involved in the controversy before it. We differ, however, as to this, but the majority of the court agree in adopting the interpretation of the will as made by Mr. Justice Agnew, while not binding upon us in deciding the question before us, as the only one that we can now give to the will if we are to read it as the testator wrote it and are to direct that what is left of Fairhill shall go where he said it should go; and we adopt bodily what Judge Agnew says as expressive of our views in this contention. His interpretation is unanswerable, because he read the will just as the testator had written it in words free from all doubt. If the appellees are to participate in this fund, they must point to their right to do so in the will. The court below properly sustained their contention that it is no part of the residuary estate of the testator; and, if it is not, what clause in the will gives any of it to them? The only clause to be read in determining where the fund shall go is the one quoted. The clauses as to the other sons under whom the appellees claim are exactly like it. The words of the testator are that, upon the death of Henry, "without leaving a child or children or a grandchild or grandchildren living at his death then that one of the said five-sixth parts of the lands tenements and premises aforesaid called Fairhill shall go to and be equally divided among my said other sons Charles Samuel Isaac and George or such of them as shall be then living and the trustees hereinafter mentioned for my said son Joseph Parker Norris junior in equal parts so that the then survivors of my said four sons

Charles Samuel Isaac and George shall each take one equal share and the Trustee for my said son Joseph shall take the other equal share thereof." No child of a deceased son can possibly take under these words. They are not contradictory or nor irreconcilable with any other clause of the will, and stand out alone as the clearly expressed intention of the testator, which will not down even before theories of distinguished and learned judges that would override them. The testator twice declares in the same clause, in disposing of Henry's interest in Fairhill, that it shall be divided among the surviving brothers and the trustees of Joseph, and what he means by his surviving sons is not open to any other interpretation than his sons who might be living at the time of Henry's death, for he designates them as the sons "then living" and the "then" surviving sons. How, under a theory that, as the testator must have meant equality among his children, any other than their plain and literal meaning can be given to these words, and how they can be held to embrace children of sons who at the death of Henry were not "then living," were not "then" surviving, ought to be inconceivable to the judicial mind. No theory of what a testator meant can receive judicial consideration, when what he says can have but one meaning, whether read by layman or lawyer. We need not follow what was said in *Horwitz v. Norris* to show that the testator may not have intended equality, as, for instance, in devising Sepviva to his daughters, there is greater inequality, "even more glaring than as to Fairhill"; nor need we refer to the reasons given by the court which may have led the testator to make a distinction in favor of the children of his son Joseph. He had a right to distribute his estate unequally, and he had a right to do so for any reason that may have seemed sufficient to him, without stating it in his will. He must have had some reason for disposing of Fairhill as he did; but whether he had or had not is not a question at all for us. We are to determine only what was his intention as expressed in the words of his will, and, if their meaning is free from all doubt, the intention expressed by them must be carried out.

If the testator had intended that the children of a son dying before his childless brother should participate in the interest of such deceased childless son, he naturally would have said that such share should be divided among the surviving sons and the issue of such as were deceased *per stirpes*. In disposing of Sepviva to his seven daughters and in providing what should become of the share of a daughter dying without issue and without exercising her power of appointment, he gives an interest to the children of surviving daughters, and, in doing so, directs that the lawful issue of any child or children that may be dead shall take with the surviving children such share as their parent

would have taken if living. This is only corroborative, but strongly so, that he intended by his words as to Fairhill to include only surviving sons. If he had intended to embrace the issue of deceased sons, he would certainly have said so, as he did in the clause following in which he disposes of Sepviva. But it is not for us by any effort to attempt to show that Henry's share can go only to his surviving brothers and the trustees of Joseph, for such an effort would in itself cast doubt upon the meaning of the words absolutely free from it. They speak for themselves, and need no interpretation. The testator directed that, if his son Henry should die without leaving a child or grandchildren, whatever interest he enjoyed in Fairhill at the time of his death "shall pass to and vest in the trustees herein appointed and their heirs respectively subject to the restrictions and limitations and for the uses herein declared in like manner as if the same had been so devised in the first instance"; and it is argued that this means that, upon the death of a son without issue, his share must be regarded as never having been in trust, but as having been devised by the testator in the first instance to the trustees for the other sons. The answer to this is that the will directs it to go to the trustees, who are to hold it subject to the same restrictions and for the same uses as the devise of the one-sixth to each of the sons. At the death of Henry there was no trustee for Charles or Isaac or George. The trust for each brother, except Joseph, ceased at his death with issue. It is further contended that the testator did not intend to exclude the issue of a deceased son from the distribution of a childless son's share, because he added: "That is to say the trustees for my said sons Charles Samuel Isaac George and Henry to take in trust for the use of my said sons Charles Samuel Isaac and George in equal parts and for the uses hereinbefore mentioned and the trustees for my said son Joseph to take in trust for the like uses that hereinafter mentioned." The meaning of these words is also clear. Immediately preceding them is a direction that the surviving sons shall each take an equal share with the trustees for Joseph of the interest of the deceased childless son; and that he might not be misunderstood as giving such share to the sons absolutely, but to trustees for them, the testator proceeds to say, "That is * * * the trustees for my said sons," emphasizing his intention that the shares of the sons, whether coming to them in the first instance upon his death or through the death of a childless brother, should not vest absolutely in them, but should go to the trustees named for them. While only surviving sons can, through their trustees, participate in the share of a deceased

childless son, no such restriction is placed upon the trustees of Joseph's share. What is *res adjudicata* in *Horwitz v. Norris*, concurred in by the whole court, is that, as to Joseph's share, though he was dead at the time Samuel's share was being divided, the trust as to his share continued to exist as a *scintilla juris* to pass the estate to his descendants. That trust continues to pass Henry's share in Fairhill into the same channel, and the trustees of Joseph alone can take it, for no other son of the testator survives and nothing passes to his descendants. But one interest out of five that might partake in the share of a son dying without issue now remains, and, under the express words of the will, there it must go.

The decree of the court below is reversed, and it is directed that the record be remitted that distribution may be made in accordance with this opinion.

MESTREZAT, J. (dissenting). I concur in holding that the claim of the appellants is not *res judicata*, but I do not agree with the majority of the court in holding that Henry Norris's share in Fairhill passes entire to the trustees of Joseph Parker Norris, Jr., for the latter's descendants. This, in my judgment and with deference to the views of the majority of the court, is a strained and artificial construction of the will, not warranted by the settled rules of interpretation, and manifestly defeats the intention of the testator. It gives force and effect to an assumed meaning of one part and disregards the explicit language of the other part of the very clause of the devise which passes the estate in controversy. It ignores equality among children, the primal thought of every parent, and creates a distinction among them without any apparent reason whatever, a direct violation of a universally recognized rule of construction. It gives the estate to the descendants of a discredited son to the exclusion of the descendants of other sons who were in equal if not greater favor with the testator.

I think it clear from the language used in this clause of the will and from the tenor of the entire instrument that the testator intended equality among his sons and their descendants in Fairhill, and that upon the death of either of the sons without issue his share should vest in the trustees, distributable among the remaining sons and the issue of deceased sons. The able and convincing opinion of Mr. Justice Sharswood, concurred in by Chief Justice Thompson, in *Horwitz v. Norris*, 60 Pa. 261, leaves nothing to be said in support of the conclusion of the common pleas in this case, and for the reasons there given I would affirm the decree of the court below.

(217 Pa. 559)

In re NORRIS' ESTATE. (No. 2.)
(Supreme Court of Pennsylvania. April 22, 1907.)

Appeal from Court of Common Pleas, Philadelphia County.

In the matter of the accounting of Henry Norris, trustee of the Fairhill estate of Henry Norris, filed by his executors. From the decree dismissing exceptions to the auditor's report, Charles C. Norris and others appeal. Dismissed.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

Thomas Leaming, for appellant Charles Camblos Norris, M. D. William Draper, for appellant Elizabeth N. Brown. Henry S. Drinker, Jr., H. Gordon McCouch, and Samuel Dickson, for appellants Charles Norris et al.

BROWN, J. As these appellants have no interest in the fund to be distributed, for reasons given in the opinion in the appeals of Orville Horwitz et al. (filed herewith) 68 Atl. 993, these appeals are dismissed, with costs.

(217 Pa. 560)

In re NORRIS' ESTATE. (No. 3.)
(Supreme Court of Pennsylvania. April 22, 1907.)

1. WILLS—CONSTRUCTION OF DEVISE.

Testator gave his sister a specified amount and also one-half of his residuary estate. By a codicil he gave to two nieces and a nephew "the legacy which I have left to my sister," share and share alike. *Held*, that the word "legacy" will be construed to include, not only the money legacy in the will, but the gift of half of the residuary estate.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, § 985.]

2. SAME — INTENTION TO DISINHERIT — PRESUMPTIONS.

The presumption against an intention to disinherit heirs is without obligation, where it is apparent that the intent of the testator was to favor some to the exclusion of others, as where he excluded four-fifths of his relatives from any participation in his personal estate.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, § 968.]

Appeal from Orphans' Circuit Court, Philadelphia County.

In the matter of the estate of Henry Norris, deceased. From a decree dismissing exceptions to the adjudication, John Lambert and Elizabeth Norris appeal. Reversed.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

G. W. Pepper, for appellants Sarah E. Hale, John Lambert, and Elizabeth Norris. George Quintard Horwitz and Layton Martin Schoch, for appellees Lella H. Sharpless, Orville Horwitz, and George Quintard Horwitz. Samuel Dickson, for appellees Charles Norris, Charles Norris, the younger, Doro-

thea Clapier Norris, Fanny Norris, Joseph P. Norris, and Mary Norris Cochran. John J. Ridgway, for appellee T. Parker Norris. W. Drayton, for appellees Elizabeth Brown, Mary Brown, Fanny Brown, Emily H. Glover, B. Dawson Coleman, Edward B. Coleman, Fanny B. Coleman, Harriet Glover, and Anne C. Carvello, children and grandchildren of Deborah Brown, a sister of testator. Hampton L. Carson, for appellees Lewis H. Parsons and Mary N. Parsons. Thomas Ridgway for appellee Charles Camblos Norris. Isaac Norris, for appellee Isaac Norris, M. D.

FELL, J. The disposition of these appeals depends upon the meaning to be given the word "legacy" in the second codicil of the testator's will. The will and the codicils thereto were written by the testator, who was an intelligent man, experienced in the business management of estates. At the date of his will, April 29, 1891, his nearest of kin were two sisters. His nephews and nieces and grandnephews and nieces numbered about 50. His estate consisted of personal property only. He gave to each of his sisters \$200,000, to each of three nieces and nephews and to one grandnephew \$50,000, and to each of the three grandnieces \$25,000. He gave to a friend \$25,000, and to four charities \$5,000 each. The residue of his estate, approximately \$3,000,000, he gave to his sisters. He attempted by his will to dispose of a large estate known as Fairhill, in which he had only a life interest. This he gave to the children of four deceased brothers. Upon the death of one of his sisters in 1899 he wrote the first codicil to his will, in these words: "I give and bequeath to the daughters of my sister, Sally N. Pepper, the legacy which I have left to her, share and share alike." Upon the death of his other sister, who died unmarried and without issue in 1901, he wrote the second codicil, as follows: "I give and bequeath to my nieces, Sarah E. Hale and Elizabeth Norris, and to my grandnephew, John Lambert, Jr., the legacy which I have left to my sister, Emily Norris, share and share alike." In the same year the testator made two other codicils. By one he gave small legacies to household servants, and by the other he gave to the wife and son of a nephew who had died the legacy which he had given to him. The testator died in 1904.

It is conceded that the act of May 6, 1844 (P. L. 564), secures to the children of Mrs. Pepper the legacy given her by the will. The question in the case is whether the word "legacy" in the second codicil refers only to the bequest of \$200,000 to Miss Norris, or whether it includes the gift of one-half of the residuary estate. If restricted to the first, it follows that there was an intestacy as to one-half of the residue. In seeking the intention of a testator, the exact words he has used should first be considered, and in

doubtful cases they should be given their technical meaning on the presumption that he used them in that sense. A legacy is a testamentary gift of personal estate. It is a generic term, and includes residuary as well as general, specific, and pecuniary bequests. As used in the act of 1844 in relation to bequests to brothers and sisters of a testator who die in his lifetime leaving issue, and in its strict technical sense, it applies to any testamentary gift of personal estate. In its appropriate and technical use it includes everything the testator bequeathed to his sister. From the use of this word in the body of the will we find no indication of an intent to give it a restricted meaning in the codicils. Its first use is in the plural in the clause, "I give and bequeath the following legacies." This is followed by the naming of legatees and the amounts given to each and by the residuary clause. Its second use is in the direction that all these legacies shall be paid clear of the collateral inheritance tax. If this direction had preceded the gift of the residue, it would indicate a separation of it in the mind of the testator from the preceding gifts; but, since it follows it, all the gifts are left in the same class under the head of legacies, although the burden of the tax is placed on the residue.

The scheme of the testator's will is very clearly defined. He separated what he regarded as his purely personal estate from an estate which he had derived from his father, which he supposed he could dispose of. He gave the first, excepting \$45,000, to his sisters and to 10 favored relatives. He gave the second to the children of his deceased brothers. He knew very clearly what he wanted to do with his estate, and he disposed of the whole of it by a will that was entirely free from ambiguity. At the death of Mrs. Pepper he naturally desired that her children should take what he had given to her. He was an old man when he made his will, and in the course of nature his sister would not long survive him to enjoy the gift. Her children were the persons who would be benefited ultimately by the gift. If he wrote the first codicil with knowledge of the act of 1844, he was making more secure the disposition he had in mind of the whole gift. It cannot be assumed that he intended to divide it into two parts, and have the word "legacy" apply to one and leave the other to the operation of the act of assembly. If he wrote the codicil in ignorance of the act, and intended the word "legacy" to apply only to the bequest of \$200,000, he meant not to continue the gift to his sister of one-half of the residue to her children, but to die intestate as to \$1,500,000 of his estate. The word was used in the second codicil in the same sense as in the first. The reason for continuing the gift to particular persons is not so manifest, but their selection was a matter of personal preference. The consequence of the separation of the gift

into two parts, by limiting the word "legacy" to the pecuniary bequest only, would be the same, an intestacy as to one-half of the residue. The natural presumption that, when a man makes a will, he intends to dispose of his whole estate, unless the words he uses will not admit of such a construction, is strengthened by the fact that the testator in clear and unambiguous terms made a final disposition of all he possessed. The presumption against an intention to disinherit heirs is weakened by the fact that by his will the testator excluded four-fifths of his relatives from any participation in his personal estate. This presumption has force where no clear disposition has been made and one is to be inferred from some provision of a will. It is without application where it is apparent that the real intention of the testator was to favor some to the exclusion of others.

Our conclusion is that the testator used the word "legacy" in the second codicil of his will in its broader sense, and that it includes the whole gift to his sister, Miss Norris.

The decree of the court is reversed, and distribution will be made in accordance with this opinion.

(MS Pa. 73)

FOTTERALL v. ARMOUR.

(Supreme Court of Pennsylvania. May 6, 1907.)

LANDLORD AND TENANT — SURRENDER OF PREMISES—NOTICE.

Where a tenant is notified by the city of its intention to take a part of the leased premises, and such taking did not render the balance valueless to the tenant, a statement to the landlord by the tenant that he would have to vacate the premises, with a request to accept rental to a date mentioned, with a suggestion of an agreement for the future, without any statement as to when the premises would be vacated, is insufficient notice of surrender.

Appeal from Court of Common Pleas, Philadelphia County.

Action by Stephen B. Fotterall against Jonathan O. Armour. Judgment for plaintiff, and defendant appeals. Affirmed.

It appeared at the trial that the letters of July 14 and August 10, 1898, were in full as follows:

"July 14th, 1898. 7 & 9 Manhattan Market, N. Y. Mr. S. B. Fotterall, No. 622 North 19th St., Phila., Pa.—Dear Sir: On my return to New York I found your letter of July 7th returning check for \$668.68. As you are undoubtedly aware, the city of Philadelphia will evict us from these premises on the first day of August next, and in consequence of their taking part of the premises at that time, it will be necessary for us to vacate them, and after that date we will, together, have a claim against the City of Philadelphia for this rent. In any event we can probably arrange this satisfactorily and amicably at the time of appearing before the City's jury to assess damages, and we will be pleased to have you accept this check as pay-

ment of rent, up to and including the first day of August, and then I have no doubt we can make an amicable arrangement for the future. Very respectfully yours, P. B. Adams."

"7 & 9 Manhattan Market, N. Y. Aug. 10, 1898. Mr. S. B. Fotherall, 2001 Chestnut St., Phila., Pa.—Dear Sir: We inclose you herewith our checks for \$999.99 and also a postage stamp for two cents, being for rent in full for premises at No. 40 South Delaware Avenue, Phila., Pa. for the months of April, May, June, July, August and Sept. and would be pleased to have you send us proper receipt therefor. We have delayed sending you check for August and September thinking that it would be agreeable for you to make the claim against the city for the rent, in our place. However, we inclose you rent up to the first of October, and as we will be compelled to vacate the premises within a very short time, under the city's notice to quit, we will try to make some further arrangement with you at the time of meeting of the city's jury to assess the damages. Yours respectfully, P. B. Adams. [Inclosures.]"

Argued before MITCHELL, C. J., and FELL, MESTREZAT, POTTER, and STEWART, JJ.

Dinner Beeber and J. Levering Jones, for appellant. Ruby R. Vale and Edward W. Magill, for appellee.

MESTREZAT, J. By a lease dated September, 1885, Stephen B. Fotherall, the plaintiff, leased to Jonathan O. Armour, the defendant, "all the property known as No. 400 S. Delaware Ave. and No. 401 Penn St. for the term of five years to commence and be computed from the first day of January, 1886." The two properties are on the south side of and adjacent to Pine street, the first fronting 18 feet on Delaware avenue and the other fronting 20 feet on Penn street, and the buildings are separated by a brick wall in the rear. The annual rental was \$2,000, payable quarterly. The lease provides that, if the lessee shall hold over after the expiration of the term, it shall be deemed and taken to be a renewal of the lease "for the term of another year and so on from year to year, until either party shall give three (3) months' previous written notice to the other of an intention to determine the tenancy at the end of any year." The lessee entered into possession of the premises, cut a passage-way through the wall between the properties, and used them together as one property in the meat business of Armour & Co. He held over after the expiration of the five year term. On May 10, 1898, the city of Philadelphia gave to the tenant a notice that "the city of Philadelphia, at the expiration of three months from the date of this notice, will require for public use that portion of the property occupied by you as tenant, lying within the bed of Delaware avenue as estab-

lished between Vine and South streets." This would take from the east front of 400 Delaware avenue a strip of the width of 1 foot 10 inches at the south and 4 feet 4¼ inches at the north side. About the same time the landlord received a similar notice from the city. On July 2, 1898, the New York attorney of the tenant sent to the landlord a check for the rent of the property up to August 1, 1898. The landlord refused to accept the check and returned it. On July 14th, the attorney again wrote the landlord, acknowledging the return of the check, and said: "As you are undoubtedly aware, the city of Philadelphia will evict us from these premises on the first day of August next, and in consequence of their taking part of the premises at that time it will be necessary for us to vacate them, and after that date we will, together, have a claim against the city of Philadelphia for this rent. In any event we can probably arrange this satisfactorily and amicably at the time of appearing before the city's jury to assess damages, and we will be pleased to have you accept this check as payment of rent, up to and including the first day of August, and then I have no doubt we can make an amicable arrangement for the future." In reply, the landlord wrote the attorney that Armour's claim was against the city of Philadelphia and requested a check for the rent due April 1st and July 1st. The attorney wrote the landlord again under date of August 10, 1898, inclosing a check for the rent due for the months of April, May, June, July, August, and September, and added: "We have delayed sending you a check for August and September, thinking that it would be agreeable for you to make the claim against the city for the rent in our place. However, we inclose you rent up to the first of October, and, as we will be compelled to vacate the premises within a very short time, under the city's notice to quit, we will try to make some further arrangement with you at the time of meeting of the city's jury to assess the damages." The tenant vacated the premises in the latter part of September, 1898, but the landlord had no notice of this fact until some time after January 1, 1899. This action was brought to recover the rent due for the last quarter of 1898 and for the year 1899, aggregating the sum of \$2,500. On the trial of the cause the tenant claimed that the letters of July 14 and August 10, 1898, constituted a sufficient written notice of an intention to terminate the tenancy under the terms of the lease, and that, therefore, he was not liable for the rent. The court denied this position, held that the notice was not sufficient under the terms of the lease, and the jury under proper instructions found that there was no such eviction as to warrant the tenant in leaving the premises before the end of the year, because the part taken did not render valueless what was left. In other words, according to the finding of the jury, the taking of the small part of the

premises did not destroy their use for the purposes for which the tenant had rented and used them. A verdict for the whole amount of the landlord's claim was rendered by the jury, and, judgment having been entered thereon, the tenant has taken this appeal.

There are three assignments of error; but, as the second and third have no exceptions to support them, they cannot be considered.

The first assignment alleges error by the court in holding that the tenant, the defendant, did not give sufficient notice of his intention to vacate the premises more than three months prior to the end of the current term or year. The only question, therefore, for consideration here is, as stated by the learned counsel for the defendant, whether or not the defendant's letters to plaintiff, dated, respectively, July 14, and August 10, 1898, constituted a sufficient written notice under the terms of the lease of his intention to terminate the tenancy at the end of the year 1898, so as to relieve the defendant of the rent for the year 1899. What is a sufficient notice between landlord and tenant as to vacating the demised premises is stated in the several text-books on the law of landlord and tenant, and there does not seem to be any material difference as to what the notice should contain. There are no particular words or form prescribed for such notice. It must, however, state clearly, positively, and unequivocally the intention of the landlord to repossess the premises, or of the tenant to vacate or surrender the premises at a fixed time. The notice must be certain and definite as to the premises, the intention to vacate, and the time when the surrender or vacation of the premises is to take place. It must be positive, decisive, and without ambiguity. In brief, the language of the notice must be such as to convey to the landlord the intention of the tenant positively and unequivocally to vacate the premises at the time specified in the notice. Such substantially are the essential elements of a sufficient notice from a tenant to a landlord of his intention to surrender the demised premises. The opinions in the English Case of *Gardner v. Ingram*, 61 *Law Times* (N. S.) 729, discuss the essentials of a sufficient notice of an intention to quit the premises given by a tenant to his landlord. The notice in that case was held insufficient; Lord Coleridge, C. J., and Bowen, J., delivering opinions. In the opinion of the latter it is said: "I think it is very necessary that in a notice to quit there should be plainness of speech; that is, it must be plain and unequivocal in its terms, leaving no doubt as to the intention of the party giving it. The effect of such a notice is to put an end to the relation of landlord and tenant. Therefore the landlord has a right to know whether the tenant is really going or not. If instead of adopting that course, the tenant uses language which is ambiguous, makes use of expressions which leave matters at the conclu-

sion of the term contingent on something to be done or some arrangement to be made, there is no sufficient notice to quit. We are asked to place a business construction upon this notice. In my opinion there was no business intended by it. The tenant used language on which the landlord could not safely act."

Turning now to the letters of July 14th and August 10th, which contain the notice given, it will be observed that they do not express a certain and fixed intention of the defendant to determine the tenancy at the end of the year or at any other time. It must be conceded that the letter of July 2d, read in connection with the letters in question, shows that the latter referred to the demised premises. The two letters of July 2d and 7th, immediately preceding the letters in question, had reference solely to the payment of the rental. The letter of July 14th, as will be observed, acknowledges the return of the check for the rent due up to August 1st. It then contains what the defendant claims to be a notice of an intention to determine the tenancy. It says that it will be necessary for the defendant to vacate the premises by reason of the intention of the city to take a part of them, "and after that date we will, together, have a claim against the city of Philadelphia for this rent." This is not a notice that the defendant intends to quit the premises, but a reason why it might become necessary for him to vacate them at some time not designated. The notice of the city was to the effect that a part of the premises would be taken, and it did not necessarily follow that the premises could not still be used by the defendant for the business for which he rented it. In fact, as will be observed, the jury found that the taking of the small part of the premises by the city did not render the balance valueless for his purposes. The mere statement by the defendant, therefore, that it would be necessary for him to vacate the premises, was not a positive notice that he would surrender the tenancy at a fixed date on which the landlord could rely or would be justified in reletting them to another. The main idea apparent, however, on the face of the notice, is that the communication was more particularly concerned with the rent, and not as a notice by the defendant of his intention to quit the premises. This is made more apparent by the next clause of the letter which says: "In any event, we can probably arrange this satisfactorily and amicably at the time of appearing before the city's jury to assess damages, and we will be pleased to have you accept this check as payment of rent, up to and including the first day of August, and then I have no doubt we can make an amicable arrangement for the future." The thought of the writer throughout the communication, therefore, was to arrange then for the payment of the rent, and to leave to the parties to "make an amicable arrangement for the future," as to the occupa-

tion of the premises by the tenant. While the defendant had a right to rely upon the notice given by the city that it would take part of the premises in three months, yet he may have thought, from information in his possession, that the taking would be deferred, and the time when the city would actually appropriate might be delayed; and hence he would not exercise his right at that time to positively determine the tenancy. The language used by him in the letter clearly carries out this thought. It is not a positive notice that upon a certain date or at the end of the then present term the tenancy would be determined.

It is also claimed that the letter of August 10th conveys a like notice of an intention to determine the tenancy, or, possibly, that taken in connection with the letter of July 14th discloses such an intention. Again, it will be observed that that letter is concerned primarily with the question of rent. It is true that it says it remits the rent, "and as we will be compelled to vacate the premises within a very short time, under the city's notice to quit, we will try to make some further arrangement with you at the time of meeting of the city's jury to assess the damages." This, however, does not strengthen that part of the former letter which, it is contended, contains a notice of an intention to quit the premises. It shows, on the other hand, that the time when the defendant will vacate the premises is uncertain, and that further arrangements between the parties would be made at a subsequent date. From this letter it will be observed that the time of vacating the premises by the defendant is left in entire uncertainty, and that both communications anticipate a future arrangement between the parties which we must construe to be in regard to the surrender of the premises, and, possibly, in regard to the rentals of the premises. At all events, it is clear that the two communications, taken separately or together, contain no express and unequivocal determination to surrender the premises at the end of the then existing tenancy or any other definite date. As suggested above, it did not necessarily follow that the defendant would be compelled to leave the premises because the city intended to take a very small portion of them. The purpose of the taking was to widen Delaware avenue, and hence the premises would remain abutting on the same, although a wider, street. The taking might occasion a temporary inconvenience, but the premises could easily be restored so as to make the property equally desirable for the purposes for which it was rented. In this contest between the landlord and the tenant it is well to note that the intended act of the city would not take the whole of the premises which would necessarily have compelled the defendant to vacate. The letters should be read in the light of this fact. If such had been the notice of the city, they might, although, with not

much reason, have warranted a different interpretation. Here, however, the city gave a notice that it intended to take such portion of the premises as would not materially affect their use by the defendant, and therefore the action of the city did not necessarily mean the vacation or surrender of the premises by the defendant.

It will be noticed that the letters were written by the attorney of the defendant. It must, therefore, be assumed that he understood the character of the notice required to determine the tenancy as well as the import of the language which he used in the letters he addressed to the plaintiff. If it was his purpose to give notice of the defendant's intention to quit he well knew that that notice must be clear, certain, and unequivocal as to such intention and as to the date of the determination of the tenancy. He knew that nothing less would satisfy the terms of the lease and end the tenancy. With this knowledge he wrote the letters in question. They are neither certain, definite, nor unequivocal as to the intention to quit the demised premises or as to the date on which the tenancy would be determined. It cannot therefore be presumed that the defendant's attorney intended that the letters should be a notice of the determination of the tenancy. On the contrary, it is rather to be assumed that he left that matter with the question of rentals and the damages to be secured from the city for future arrangements between the parties.

We cannot concern ourselves, as suggested by defendant's counsel, with what view his attorney took of any decisions he may have read prior to writing the letters of July 14th and August 10th to the plaintiff. We must construe and rely upon the letters themselves, and not upon an intention of the writer undisclosed in the letters. The rights of the parties depend upon their written contract. Either party could determine the tenancy by a three months' previous written notice. Each had a right to rely upon that provision of the agreement and to act towards the premises with the assumption that it would be observed. The importance of the notice to the landlord is obvious. Until he received a notice, he had the right to assume that the defendant would continue to be his tenant. He could not relet the property until he was notified of the time when the tenant would vacate it. If he received three months' notice as required by the lease, he then had an opportunity as well as sufficient time to relet them before the end of the existing tenancy. Had he, however, let these premises after the correspondence between him and the defendant's attorney, he would have done so on the uncertainty of their being vacated by the defendant. The latter, thinking the premises still sufficient for his business, might have changed his mind and continued to occupy the property, and, had he done so, the landlord would have been liable to any other par-

ty to whom he had rented the premises. It was therefore of the utmost importance to the landlord, if the tenant did intend to vacate the premises, that he give a positive and unequivocal notice of such intention and of the date when the tenancy would end.

Our conclusion is that the letters of July 14 and August 10, 1898, did not contain a positive and unequivocal notice of an intention to terminate the defendant's tenancy of the premises at any fixed date, and hence the notice was insufficient under the terms of the lease.

The judgment is affirmed.

(218 Pa. 29)

SCHMELZER v. CHESTER TRACTION CO.
(Supreme Court of Pennsylvania. April 29, 1907.)

1. PLEADING—AMENDMENT.

In an action by a passenger against a street railway company for personal injuries sustained while alighting from a car, plaintiff may at the trial two years after the accident amend his statement by changing averment that there was no stop of the car at all to an averment that there was an insufficient stop.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, §§ 653, 659.]

2. HUSBAND AND WIFE — DESERTED WIFE — RIGHT OF ACTION.

Under Act June 11, 1879 (P. L. 126), providing that, where a wife has been deserted or abandoned by her husband, she may sue any person as if she were unmarried, and under Act June 8, 1893 (P. L. 344), providing that earnings of a married woman shall belong to her, a deserted wife may sue in her own name for injuries to her earning powers in the future, sustained through injuries to her person.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Husband and Wife, § 768.]

Appeal from Court of Common Pleas, Delaware County.

Action by Annie Schmelzer against the Chester Traction Company. Judgment for plaintiff, and defendant appeals. Affirmed.

At the trial the court charged that the plaintiff would be entitled to be compensated, if the jury found for her "for the loss of her earning power, both before the trial and after." Verdict for plaintiff for \$2,366, on which judgment was entered for \$1,500; all above that amount being remitted.

Argued before MITCHELL, C. J., and FELL, MESTREZAT, POTTER, and ELKIN, JJ.

W. B. Broomall, for appellant.

Joseph H. Hinkson, for appellee.

MITCHELL, C. J. Two questions arise in this case: First. Was the amendment properly allowed? And, secondly, was the charge correct in regard to the plaintiff's right to recover for loss of her earning power?

Plaintiff was injured in alighting from a car. The first statement averred that the defendant was negligent, in that it did not "slacken the car and stop the same, * * *

but immediately after the arrival of the said electric car at the public crossing at Market street, in the said city of Chester, and while the said plaintiff with the consent and permission of the said defendant and with all due care and diligence was alighting from the said electric car, the said defendant caused the same to be suddenly and violently moved and started, by means thereof the said plaintiff was violently thrown therefrom to the ground, by means whereof," etc. At the trial an amendment was allowed charging the negligence to consist, in this "that the said defendant stopped the said electric car at Market street aforesaid, so that the said plaintiff could alight and depart therefrom, but after the arrival and stopping as aforesaid of the said electric car at the public crossing at Market street, in the said city of Chester, and while the said plaintiff, with the consent and permission of the said defendant and with all due care and diligence, was alighting from the said electric car, the said defendant caused the same to be suddenly and violently moved and started, by means thereof the said plaintiff was violently thrown," etc.

When the amendment was offered and allowed, more than two years had elapsed, and defendant objected on the ground that the statute of limitations, which was pleaded, had run, and no amendment could be allowed which changed the cause of action. The rule is undisputed, but it was not violated in this case. Briefly expressed, the difference between the two statements is that the first avers there was no stop of the car at all, while the second avers an insufficient stop. Both relate to the same injury, at the same time, the same place and the same circumstances, except for the difference in regard to the stop. But on the question of negligence there is no legal difference between no stop and no sufficient stop. The inference is the same in both cases. A difference might arise on the question of contributory negligence of the plaintiff, but both statements expressly negated that by the averment of due care. As a material fact it was as necessary for plaintiff to show a case clear of her own negligence under one statement as under the other, and as a defense it was equally open to evidence from defendant under both. The amendment cannot be regarded as a change of the cause of action, but only as a restatement in a different form which did the appellant no injury. *Stoner v. Erisman*, 206 Pa. 600, 56 Atl. 77.

Secondly. The plaintiff was a married woman who sued in her own name, without joining her husband. At the trial she gave evidence that her husband had deserted her, and the jury found this fact in her favor. Defendant objected that her earnings belonged to her husband, and therefore the loss of the power to earn in the future could not be included in the verdict. It may be noted that, as the statute of limitations had run

since the accident, no action could be maintained by the husband even if he should return. And also that the assignment of error in this regard refers not to earnings, but to earning power. Neither of these matters, however, is material in the present case. The act of February 22, 1718 (1 Smith's Laws, 99), empowered the wives of mariners who had gone to sea, leaving their wives at shop-keeping or to work for their livelihood, to sue without naming the husband. And the act of May 4, 1855 (P. L. 430), provides that wives whose husbands have deserted them "shall have all the rights and privileges secured to a feme sole trader, under the act of the 22d of February, 1718." The act of June 11, 1879 (P. L. 126), provides that, "in all cases where a wife has been deserted, abandoned or driven from her home by her husband, it shall be lawful for her to bring suit in any of the courts of this commonwealth, against her husband or any other person or persons, without the assistance of intervention of a trustee or next friend, * * * in same manner and with like effect as if she were sole and unmarried." The act of June 3, 1887 (P. L. 332), provided that property owned, acquired, or earned by a married woman shall belong to her, and not to her husband. Under this act it was held that wages of her labor were included. *Lewis's Est.*, 156 Pa. 337, 27 Atl. 35. And under the act of June 8, 1893 (P. L. 344), which supplied the act of 1887, it was held that, though the word "earnings" does not appear in the later act, personal services are a species of property, and earnings acquired by them are equally within the act. *Nuding et al. v. Urich*, 169 Pa. 289, 32 Atl. 409. Under these statutes and decisions it is clear that a deserted wife may sue separately in her own name for compensation for her services and earnings, and, if she may thus recover for what she has acquired as her property in the past, she may certainly recover for the loss of capacity to acquire other property of the same kind in the future.

Judgment affirmed.

(218 Pa. 123)

BREHONY et al. v. POTTSVILLE UNION TRACTION CO.

(Supreme Court of Pennsylvania. May 6, 1907.)

CARRIERS — ASSAULT ON PASSENGER — NEGLIGENCE.

In an action by a woman, a passenger on a street car, to recover against the railroad company for injuries received from an intoxicated passenger, where the only negligence alleged was allowing the man to enter the car when he appeared intoxicated, it was error to submit the case to the jury where the evidence showed that there was no appearance of intoxication until he was asked to pay his fare.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, § 1307.]

Appeal from Court of Common Pleas, Schuylkill County.

Action by William Brehony and Della Brehony against the Pottsville Union Traction Company. Judgment for plaintiffs. Defendant appeals. Reversed.

Argued before MITCHELL, C. J., and FELL, BROWN, POTTER, and STEWART, JJ.

R. H. Koch, for appellant. George M. Road and M. A. Kilker, for appellees.

STEWART, J. A passenger, more or less under the influence of drink, who had refused to pay his fare when demanded, and thereupon became disorderly in resisting the conductor who was attempting to eject him, gave a violent kick directed at the conductor, but which struck the plaintiff, Mrs. Brehony, a married woman occupying a seat opposite in the car, and seriously injured her. The action was brought by the injured woman and her husband, William Brehony, against the traction company to recover damages for the injuries sustained, on the ground that the company unlawfully and negligently permitted the person who inflicted the injury to get on the car and ride therein while visibly intoxicated. This is the only negligence charged in the statement filed. We must assume, therefore, that in ejecting the unruly passenger the conductor was strictly in the line of his duty, and that he used no greater violence and created no greater disturbance than the circumstances made necessary.

We have the single question presented, whether it was negligence in the conductor to admit to the car the passenger who afterwards inflicted the injury. The averment in the statement of cause of action is that this person was visibly and plainly intoxicated. The evidence supported the averment. Several of the witnesses say he was drunk. Others say he was visibly intoxicated, and others that they thought he was somewhat intoxicated, but not to a serious degree. All spoke from what they saw of his behavior after he was on the car, and all but one or two derived their opinion from his behavior while in altercation with the conductor. None spoke of his conduct while approaching the car or entering it, and all say that while seated, and up until the altercation arose, he was conducting himself properly, giving no offense to any. It is impossible from the evidence to determine the degree of the man's intoxication. We have simply the case of a man intoxicated by liquor. As that expression is commonly used, it indicates nothing as to the degree. It may mean much, or may mean very little. One thing is clear, the man was not so intoxicated as to require help. He entered the car unaided, and in a way that attracted no attention and excited no comment. The same is true of his conduct in the car until the controversy began. One of plaintiffs' witnesses says that she saw him running to the crossing in order to take the car. The case was submitted to the jury in a charge which did not with suf-

ficient clearness confine the inquiry to the point really in issue; and, in view of the great latitude allowed them, it is impossible to know certainly what the jury found with respect to the intoxication, if anything. In the view we take of the case, it is not material that we should know. The case did not call for a submission. It is the duty of a conductor to exercise a watchful care for the safety of his passengers; and this duty may require him under certain conditions to refuse to admit into his car a person applying. The measure of care he is bound to exercise in doing so we are not now called upon to consider. If one applying for admission bears upon his persons signs convincing to the ordinary mind that he is afflicted with a dangerous and contagious malady, it is manifestly the duty of the conductor to exclude him. If one evidently a maniac applies, the duty to reject is quite as manifest. If it be said these are extreme cases, the answer is that only in extreme and exceptional cases does the duty arise. In the cases we have mentioned common prudence should inform the conductor that the admission of either would be attended with danger to the other passengers, and it would be negligence in him to allow it. But such danger cannot be affirmed of admitting a person who is simply intoxicated. Intoxication is not infectious; nor does it so ordinarily express itself in violence that disturbance of the peace of the car is to be reasonably apprehended when an intoxicated person is admitted. There may be, and doubtless are, exceptional cases where the intoxication is so gross, the conditions resulting therefrom so offensive, the conduct of the individual so unbecoming and violent, as to justify, and indeed require, his exclusion. If this was the condition of the offending passenger here, so obvious that the conductor should have observed it, such facts should have been made to appear as part of the plaintiffs' case. It was essential to a recovery. The case went to the jury to determine the question of the conductor's negligence from the testimony of witnesses, none of whom saw anything in the appearance or conduct of the man as he entered the car to attract attention or excite suspicion. These witnesses agree in saying that he subsequently gave unmistakable evidence of being intoxicated; but their evidence is in entire accord that up to the time the altercation with the conductor arose he was conducting himself peaceably and inoffensively. That the jury rendered a verdict for the plaintiffs can only be explained on the theory that, under the latitude allowed by the court in the charge, they rested the conductor's negligence upon something not charged, and therefore outside the case. The only question was whether it was negligence to admit this passenger. Defendant's ninth point was: "Under all the evidence in the case the verdict of the jury must be for the defendant." Its refusal is made the subject of the fifth as-

signment of error. This assignment is sustained.

Judgment reversed.

(213 Pa. 36)

COMMONWEALTH v. DEITRICK.

(Supreme Court of Pennsylvania. April 29, 1907.)

1. HOMICIDE—BURDEN OF PROOF.

On trial for murder, it is reversible error to instruct "that the burden is upon the defendant to convince you beyond a reasonable doubt that the killing of the deceased was purely accidental before he should be acquitted upon that ground."

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Homicide, §§ 275, 276.]

2. SAME—APPEAL—PREJUDICE.

Where, on a trial for murder, the defense was that the killing was accidental, the court on appeal cannot say that error in an instruction as to the burden of proof on such issue was not prejudicial to defendant.

Appeal from Court of Oyer and Terminer, Montour County.

Peter Deitrick was convicted of murder, and appeals. Reversed.

Argued before MITCHELL, C. J., and BROWN, MESTREZAT, ELKIN, and STEWART, JJ.

Fred Ikeler and Wm. Kase West, for appellant. H. M. Hinckley and Chas. P. Gearhart, Dist. Atty., for the Commonwealth.

ELKIN, J. At the trial in the court below on an indictment charging murder, under the plea of not guilty, the defendant relied upon the defense of accidental killing. The learned trial judge charged the jury as follows: "We further say to you that the burden is upon the defendant, Deitrick, to convince you beyond a reasonable doubt that the killing of Jones was purely accidental before he should be acquitted upon that ground." And this instruction has been assigned for error. Under the plea of not guilty the defendant may show that the killing was accidental, and, if the testimony satisfies the jury that the killing was the result of an accident, they should return a verdict of not guilty. We are not familiar with any authority which holds that, when such a defense is set up, the burden rests upon the defendant to show that the killing was accidental beyond a reasonable doubt. Such a rule would shift the burden of proof from the commonwealth, whose duty it is to establish the guilt of the defendant in all cases beyond a reasonable doubt. The defense of accidental killing is clearly distinguishable from that of an alibi or insanity, in which cases it has been held that the burden of proving such defenses is on the defendant. No Pennsylvania cases have been called to our attention in which the exact question raised by this appeal has been decided, but the rule recognized by many text-writers and established in some jurisdictions is that the burden in homicide cases where the defense

of accidental killing is set up does not shift, but rests on the commonwealth to show that the killing was willful and intentional.

In *State v. McDaniel*, 68 S. C. 304, 47 S. E. 384, 102 Am. St. Rep. 661, the court said: "But we do not think that a defense that the homicide was accidental was in any sense an affirmative defense. It is distinguishable from self-defense as a plea which admits an intentional killing, and sets up as a justification a necessity to kill in order to save the accused from death or serious bodily harm, whereas a defense of homicide by accident denies that the killing was intentional." In *State v. Cross*, 42 W. Va. 253, 24 S. E. 996, the rule was laid down in the following language: "Accidental killing is not such matter of defense as throws on the accused the burden of proving it by a preponderance of evidence. It is the duty of the state to allege and prove that the killing, though done with a deadly weapon, was intentional or willful. But, when the evidence taken as a whole raises a reasonable doubt in the minds of the jury as to whether the killing was accidental or intentional, they must acquit the accused for the reason that the state has failed to sustain its case." This, it seems to us, is the correct rule when such a defense is set up. The burden is always on the commonwealth to prove beyond a reasonable doubt all of the facts necessary to constitute the crime of murder. It is not sufficient to prove the killing alone, or that it was done with a deadly weapon, but such facts must be shown as will warrant a jury in finding that it was intentional or willful. If the killing was accidental, although done with a deadly weapon, it could not be said to be either intentional or willful, and, if neither intentional nor willful, the crime of murder is not made out. But, even if this should be held not to be the correct rule, the instruction of the learned trial judge

cannot be sustained because it is in plain violation of a rule of law in another respect. It is settled law that even if those cases in which the burden of proof is on the defendant to sustain an affirmative defense set up, as, for instance, insanity or an alibi, it is only necessary to establish it by a preponderance of the evidence, and it is not required that it should be proven beyond a reasonable doubt. *Meyers v. Commonwealth*, 83 Pa. 131. In that case the defense was insanity, and the learned court below instructed the jury that they must be satisfied beyond a reasonable doubt that the prisoner was insane at the time the act was committed. This court held that the instruction was too stringent, and threw upon the prisoner a degree of proof beyond the legal measure of his defense, which only required that he must satisfy the jury that he was insane, and that this result flows from the preponderance of the evidence.

The instruction of the learned trial judge relating to the accidental killing was clearly erroneous, and this seems to be conceded; but it is contended that this error was cured by other parts of the charge wherein the jury was instructed generally that it was the duty of the commonwealth to establish the guilt of the prisoner beyond a reasonable doubt. While we agree with the suggestion of the learned counsel for the commonwealth made at the argument that courts will not be astute to sustain technical objections in the trial of such cases when substantial justice has been accorded the defendant, it, however, has never been held that, where clear error appears in the instructions to the jury upon the vital and controlling defense set up, the appellate court can judicially say no harm was done the defendant and therefore no reversible error was committed.

Judgment reversed and a venire facias de novo awarded.

(6 Pen. 363)

WILMINGTON CITY RY. CO. v. WHITE.

(Supreme Court of Delaware. June 18, 1907.)

1. NEGLIGENCE—QUESTION FOR COURT AND JURY.

In an action for injuries, it is for the court to say whether there is any evidence from which negligence or contributory negligence can be reasonably and legitimately inferred; but it is for the jury to say whether, from the evidence adduced, when submitted to them, any negligence, and whose, ought to be inferred.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, § 282.]

2. STREET RAILROADS—INJURIES TO TRAVELER—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

In an action for injuries to the driver of a coach in a funeral procession, caused by a collision with a street railway car, evidence held to require submission of the question of defendant's negligence and of plaintiff's contributory negligence to the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Street Railroads, §§ 251-257.]

3. SAME—EVIDENCE—CUSTOM—PLEADING.

In an action for injuries to the driver of a coach in a funeral procession, caused by a collision with a street car, evidence that for a long time prior thereto it had been the custom of the operators of street cars as a matter of privilege to permit funeral processions to pass without a break in the line, and that plaintiff, with knowledge of such custom, relied thereon at the time he crossed the track in front of the car, was admissible, though not pleaded.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Street Railroads, § 225.]

4. CUSTOMS AND USAGES—DISTINCTION.

Usage, in its most extensive meaning, includes custom; but in its narrower signification it refers to a general habit, mode, or course of procedure.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Customs and Usages, §§ 1, 2.]

5. SAME—PLEADING.

A general custom need not be pleaded, but a custom obtaining only in a particular district or neighborhood must be.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Customs and Usages, § 40.]

6. STREET RAILROADS—INJURIES TO TRAVELERS—EVIDENCE—PLEADING.

In an action for injuries to the driver of a coach in a funeral procession by a collision with a street car, evidence as to the condition of travel on the street for two hours, including the time of the accident, was admissible, though not pleaded.

7. PLEADING—COUNTS.

It is no objection that plaintiff's cause of action be stated in several counts, if the privilege is fairly and reasonably exercised.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, § 114.]

8. PLEADING—MATTERS TO BE PROVED.

The pleadings in a case are not evidence of the matters pleaded.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, §§ 1217, 1218.]

9. APPEAL—PREJUDICE.

A count in a declaration on which issue has been taken, but respecting which no evidence is introduced, is harmless to defendant on the merits of the case, though not stricken out on motion.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 4113.]

Error to Superior Court, New Castle County.

Action by James R. White against the Wilmington City Railway Company. From a judgment for plaintiff, defendant brings error. Affirmed.

Argued before NICHOLSON, Ch., and SPRUANCE and BOYCE, JJ.

Walter H. Hayes and Ward & Gray, for plaintiff in error. Levin Irving Handy and Herbert L. Rice, for defendant in error.

BOYCE, J. This action was brought in the Superior Court for New Castle county by James R. White, the plaintiff below, against the Wilmington City Railway Company, the defendant below, for the recovery of damages for personal injuries alleged to have been occasioned by the negligence of the defendant company. The plaintiff, in his declaration, containing, as amended, three counts, alleged that the defendant company negligently and carelessly (1) omitted to give reasonable notice of the approach of one of its cars in time to avoid a collision with a coach driven by the plaintiff; (2) so operated the car as to collide with the coach, whereby the plaintiff was hurled from the coach to the surface of the street and injured; and (3) used the car with defective brakes, and by reason thereof the collision and injury occurred. The injuries complained of were caused by the collision of a car of the defendant company with a coach driven by the plaintiff in a funeral procession, at the intersection of Tatnall street and West Fourth street, in the city of Wilmington, between the hours of 2 and 3, on the afternoon of April 27, A. D. 1904. The plaintiff's coach was the fifth in order behind the hearse, and the procession was moving slowly and northward along Tatnall street, with four or five feet of space between the horses of one coach and the rear of the coach ahead. The car was approaching Tatnall street on the eastward-bound track of the defendant company on West Fourth street. West street is west of, next to, and parallel with Tatnall street. It is conceded that the distance between Tatnall and West streets is about 190 feet, and that the fall or downgrade on Fourth street from West to Tatnall is $10\frac{3}{10}$ feet in each 100 feet of the distance between them. The day upon which the accident occurred was said to be drizzly and rainy. Tatnall street, from building line to building line, was shown to be 49 feet wide, and Fourth street 32 feet 6 inches wide. The defendant company has two tracks laid on Fourth street.

The plaintiff testified that he was an experienced driver; that he was sitting on the outside, and on a level with the top of his coach; that he first saw the car when he passed the building line on the southerly side of Fourth street; that the car was then stopped, with the hind part at the crossing on the east side of West street; that he then

looked towards Market street and saw a car coming west; that he did not watch the car at West street; that just before he reached the corner on the southerly side of Fourth street the driver ahead of him held out his hand to that part of the hill and signaled to the car to stay there, judging from the way he held his hand; that after he glanced at the car he did not look at it again until he heard the ringing of the bell, when his front wheel was on the first rail of the east-bound track and his horses had cleared the track; that the car was from 8 to 15 feet away from him; that he first heard the bell just before the car hit him. The speed of the car, coming down the hill, was said to be from 8 to 12 miles an hour. The plaintiff, against objections and exceptions, was permitted to introduce evidence of a custom or usage of the defendant company to stop its cars to allow a funeral procession to pass across its tracks without interruption or break in the line; that he knew of the existence of the custom; and that between 2 and 3 o'clock in the afternoon the wagon travel on Tatnall street, at and near Fourth street, was heavy. There was some conflict of testimony respecting facts material to the issue.

When the plaintiff had rested his case, counsel for the defendant moved: "First. That the third count of the plaintiff's declaration, as to defective machinery and appliances, be struck out, because there had been no evidence to support it; or, second, that as to the third count a nonsuit be entered for the lack of evidence to support it; or, third, that the jury be instructed to find a verdict for the defendant on the third count." The court overruled each of said motions, and exceptions were noted. The defendant having closed its testimony, counsel for the plaintiff abandoned the third count in his declaration. Respecting the said count the court said, in part: "The third count, as to defective machinery is not before the jury and not to be considered by the jury." Counsel for the defendant then requested "the court to give the jury binding instructions to find a verdict for the defendant on the remaining counts." The request was not granted, and the plaintiff had a verdict. To the refusal of the court to give binding instructions and to certain rulings as to the admission of testimony the defendant took a bill of exceptions; and its counsel have assigned eleven errors.

The first of these is: "The court below erred in refusing to instruct the jury to find a verdict for the defendant"—because, as it was contended, the evidence disclosed (1) that the plaintiff was guilty of contributory negligence, and (2) that there was not any breach of duty on the part of the motorman in charge of the car which the defendant owed to the plaintiff. It was conceded that the court below stated correct propositions of law in that part of its charge to the jury as follows: "While the speed of trolley cars is

not limited by law, yet in approaching such crossing it was the duty of the motorman to make the descent at such reasonable speed as not to put the car beyond his control; and as the danger of collision increased, if he saw or could see the danger, it was his duty to use all the means in his power to check or stop the car. *Price v. Warner Co.*, 1 Pennewill (Del.) 472, 42 Atl. 699. This does not impose upon the motorman, however, an impossibility. If he in fact did all that he could to control the speed of the car, under the circumstances, the company would not be liable. It was, however, equally the duty of the plaintiff, the driver of the team, to use all reasonable care and precaution to prevent the accident. We will not attempt to specify the precise acts of precaution which are necessary to be done or omitted by one in the management of an electric car, or by one in the management of or driving a wagon approaching a railway crossing. Such acts must depend upon the circumstances of each case, and the degree of care required differs in different cases. The general rule is that the person in the management of the car and the person driving the wagon are bound equally to the reasonable use of their sight and hearing for the prevention of accidents, and to the exercise of such reasonable caution as an ordinarily careful and prudent person would exercise under the circumstances of a particular case. A person approaching a railway crossing with which he is familiar is bound to avail himself of his knowledge of the locality and act accordingly. If the approach of the railway to the crossing be down a steep grade, whereby it is more difficult to stop or check a car, the driver of the vehicle should exercise more care than might be necessary where the approach of the railway was by a slight decline, upon a level, or by an ascending grade. If, as he approaches the crossing, his line of vision is unobstructed, he is bound to look for approaching cars in time (if possible) to avoid collision with them, and if he does not look, and for this reason does not see an approaching car until it is too late to avoid a collision, he is guilty of negligence. *Brown v. Railway Co.*, 1 Pennewill (Del.) 836, 40 Atl. 936; *Snyder v. People's Ry.*, 4 Pennewill (Del.) 148, 149, 53 Atl. 433. Both the company and the driver of the team, the plaintiff in this case, were required to use such reasonable care as the circumstances demanded; an increase of care on the part of both being required when there is an increase of danger. The right of each one using the highway must be exercised with due regard to the right of the other, and in a reasonable and careful manner, so as not unreasonably or unnecessarily to abridge or interfere with the right of the other. Some of the witnesses have testified that they heard the car bell ring coming down the hill; others, that they did not hear it ring. The testimony of the former witnesses is, of course, of more weight

than that of those who merely say that they did not hear the bell ring, which might reasonably be attributed to a want of attention at the time. Such negative testimony is usually of little value. *Q. A. R. R. Co. v. Reed* (Del. Sup.) 59 Atl. 863."

It was contended that these instructions, applied to the facts in the case, entitled the defendant to the peremptory instruction requested. In every action for negligence two things are requisite to entitle the plaintiff to a recovery: (1) Negligence on the part of the defendant; and (2) due care on the part of the plaintiff. In every such action, the question, "Whose negligence was the proximate cause of the injury complained of?" is one which must be determined from the evidence, under all the facts and circumstances of the particular case. It is for the court to say whether there is any evidence from which negligence on the part of the defendant, or contributory negligence on the part of the plaintiff, can be reasonably and legitimately inferred; but it is for the jury to say whether, from the evidence adduced, when submitted to them, any negligence, and whose, ought to be inferred. *Queen Anne's R. R. v. Reed*, 5 Pennewill (Del.) 228, 59 Atl. 860; *Creswell v. W. & N. R. R. Co.*, 2 Pennewill (Del.) 210, 43 Atl. 629. Whether the court should (1) submit the case to the jury upon the evidence; or (2) should order a nonsuit when the plaintiff has rested his case, or direct a verdict for the defendant if the plaintiff should decline to take a nonsuit; or (3) should direct a verdict for either the plaintiff or the defendant at the close of the testimony—must depend upon the state of the evidence in the particular case, at each stage thereof. If in the absence of contributory negligence on the part of the plaintiff, there is any evidence of negligence on the part of the defendant upon which the jury can properly find a verdict, or if the conclusion to be drawn therefrom is debatable, or rests in doubt, though the facts are undisputed, or if the evidence is conflicting in regard to any material fact, the case should be submitted to the jury. If the plaintiff fails to produce any evidence of negligence on the part of the defendant, or if, as it has been said, it is manifest as a conclusion of fact or by necessary inference that those acts which the law regards as negligent have not been shown, or if proof of contributory negligence arise out of the testimony of the plaintiff in the first instance, it is the duty of the court to nonsuit the plaintiff. If, notwithstanding proof of the negligence of the defendant, it obviously appears at the close of the testimony that the injury complained of was due to the fault or negligence of the plaintiff, it is the duty of the court to direct a verdict for the defendant. It is quite impossible to lay down any well-defined rule by which to determine whether the question of contributory negligence should be found, as a conclusion of law, upon the facts presented; and

the court will not decide the question without the aid of the jury, if the conclusion to be drawn therefrom is doubtful and uncertain. *Queen Anne's R. R. v. Reed*, supra. The court, in submitting this case to the jury, charged them upon the law of negligence as follows: "The gist of this action is negligence, and the burden of proving the negligence of the defendant company rests upon the plaintiff in this case. If there was no negligence on the part of the company, your verdict should be for the defendant. Even if there was negligence on the part of the defendant, yet if the negligence of the plaintiff contributed to the accident, or was the proximate cause thereof, your verdict should be for the defendant; for he would, in that case, be guilty of contributory negligence. If you believe that at the time of the accident each party was using such reasonable care as the circumstances demanded, then the collision was simply an unavoidable accident, and the plaintiff could not recover."

The third, fourth, fifth, sixth, and seventh assignments of error were considered together. They each related to the admission of evidence on behalf of the plaintiff, against objections and exceptions, respecting "a custom, general and uniform, established by the defendant company for its trolley cars to stop and allow a funeral procession to pass across its tracks without interruption." The custom was not pleaded, and it was contended that it was not competent to prove it without being pleaded. In overruling the objection the court said: "In the case of *Foulke v. Wilmington City Railway Company*, 5 Pennewill (Del.) 363, 60 Atl. 973, we admitted this same question upon the ground that while there was no duty resting upon the defendant company to stop and allow funeral processions to pass, yet if they had been in the habit of doing it, and thereby induced, on the part of the drivers who were familiar with the custom, the belief that they would stop, it entered into the question of the driver's negligence. * * * We do not think it is necessary to be alleged in the declaration." And in their charge to the jury respecting this matter the court further said: "We know of no law requiring a trolley car to stop at the intersection of streets and wait until a funeral procession has passed; nor of any law giving to a funeral procession the right of way over cars or other vehicles or persons properly using a highway of this state. If by courtesy such privilege has been given by trolley cars and by others using the highway, such courtesy imposes no duty upon the person extending the courtesy, nor does it in any manner relieve such person from all reasonable care and precaution in so using the highway as to prevent accident or injury. If you should find from the evidence in this case that the uniform and continuous usage or practice of the defendant company had been to stop its cars at crossings and wait until a funeral procession

passed by, and that such usage was known to and relied upon by the driver, the plaintiff in this case, at the time of the accident, we say to you that such method of dealing with the public on the part of the company, and so known to the driver, may be taken into account by you in estimating the degree of diligence required of the plaintiff in looking out for an approaching car before he crossed the railway track; for in such case he might reasonably presume or infer the continuance of that usage. To justify such presumption, however, such usage must have been uniform and continuous. Even then the failure to observe such usage would not amount to negligence on the part of the defendant company. It would not relieve the driver of reasonable care in making such crossing. He would have no right so to presume, if he actually saw the car coming down upon him, or if by the reasonable use of his senses he might have seen its approach. It may be stated that, as a general rule, no legal right can grow out of mere courtesy, however uniform and long-continued; nor will such courtesy impose a legal obligation upon the person extending it."

We will add that the word "custom" is sometimes used synonymously with "usage," meaning a course of dealing which derives its legal force from assent, express or implied; again, as something which by long usage or judicial sanction has acquired the force of law, and is binding without regard to the question of assent. 29 A. & E. Ency. of Law, 367. Usage, in its most extensive meaning, includes custom; but in its narrower signification it refers to a general habit, mode, or course of procedure. 12 Cyc. 1030. Customs are of two kinds, general and particular. *Stimmel v. Brown*, 7 Houst. (Del.) 219, 30 Atl. 996. A general custom need not be pleaded, but a custom obtaining only in a particular district or neighborhood must be pleaded. *Templeman v. Biddle*, 1 Harr. (Del.) 522. The alleged practice of the defendant company to stop its cars and permit a funeral procession to pass without interruption was not a custom or usage which had the force and effect of a law, binding upon the defendant company. It was a course of conduct, if it existed, in the nature of an accommodation, indulgence, or courtesy, prompted, doubtless, by considerations of respect, and, if known among drivers in funeral processions to exist, it was competent to prove it, though it was not pleaded. In the case of *Martin v. B. & P. R. R. Co.*, 2 Marv. 128, 42 Atl. 442, it was held that, where a traveler knows that a flagman is habitually stationed at a crossing, and upon looking finds that the flagman is not at his post giving signals of danger, he has a right to assume that a train is not about to pass. But the absence or negligence of the flagman will not excuse the person about to cross the track from using every reasonable precaution that an ordinarily prudent and care-

ful person would use. It appearing that the plaintiff had knowledge of the existence of the alleged usage or practice on the part of the defendant company, at and before the time of the accident, evidence of such practice was properly admitted, in order that the jury might determine, from all the facts and circumstances surrounding the case, whether the plaintiff was, at the time of the accident, in the exercise of due care and caution. What will constitute negligence or want of due care may depend upon the observance or nonobservance of a usage or practice known to exist under particular circumstances.

The eighth, ninth, and tenth assignments of error were considered together. They each related to the admission of evidence on behalf of the plaintiff, against objections and exceptions, respecting "the condition of travel on Tatnall street, whether said street was much used at its intersection with West Fourth street, on or about the 27th day of April, 1904, between 2 and 4 o'clock in the afternoon." The matter of travel was not pleaded. It was not necessary to do so in order to give evidence of it. As tending to show the necessity for a greater degree of care on the part of the servants of the defendant company at the time and place of the accident, the evidence was competent.

The eleventh assignment of error relates to the action of the court in overruling the said motions made by counsel for the defendant respecting the third count in plaintiff's declaration. In practice, a variety of counts often occurs in respect of the same cause of action; the law not having set any limits to the discretion of the pleader, in this respect, if fairly and reasonably exercised. *Steph. on Plead.* 258. The pleadings in a case are not evidence of the matters pleaded. And a count in a declaration upon which issue has been taken and respecting which no evidence is introduced at the trial is harmless to the defendant upon the merits of the case. In this case, the count was abandoned by the plaintiff, and the jury were instructed by the court to disregard the count altogether. For any reason shown, the court did not err in overruling the said several motions respecting the said count. After a careful examination and consideration of the record and briefs of counsel, and in view of the conflict of testimony with regard to some material facts in issue, it is not obvious that there was such an entire absence of negligence on the part of the servants of the defendant company on the one hand, or that there was such contributory negligence on the part of the plaintiff on the other, as that it was the duty of the court to direct a verdict for the defendant.

Under all the circumstances surrounding this case, it is the opinion of this court that the question as to whose negligence, if any, was the proximate cause of the accident, was properly submitted to the jury under

the instructions given by the court below; and the judgment of the court below is therefore affirmed.

(6 Pen. 80)

PUSEY & JONES CO. v. LOVE et al.

(Supreme Court of Delaware. June 1, 1906.)

CONSTITUTIONAL LAW—OBLIGATION OF CONTRACT—STOCKHOLDERS' LIABILITY.

Gen. St. Kan. 1868, c. 23, § 32, provided that, on return nulla bona of an execution against a corporation, it might be issued against any stockholder to an extent equal in amount to the stock held by him. An act approved in January 1899 (Laws 1898-99, p. 85, c. 10), amending the former statute, provides that on the return of an execution nulla bona a receiver shall be appointed, who shall sue all the stockholders for the benefit of all creditors. *Held* that, as against a creditor of a Kansas corporation who obtained a judgment prior to the latter statute and was seeking to satisfy his claim under the former statute, the latter was inoperative, as impairing the obligation of contract.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Constitutional Law, § 474.]

Error to Superior Court, New Castle County.

Suit by Charles Love and another against the Pusey & Jones Company. Judgment in favor of plaintiffs, and defendant brings error. Affirmed.

Argued before NICHOLSON, Ch., and SPRUANCE and GRUBB, JJ.

Benj. Nields, for plaintiffs in error. Harry Emmons, for defendants in error.

NICHOLSON, Ch. This was an action brought in the Superior Court for New Castle county by Charles Love and Grant Hornaday, assignees of the Bank of Ft. Scott, plaintiff below, against the Pusey & Jones Company, a corporation of the state of Delaware, asserting its liability under the provisions of the Constitution and laws of the state of Kansas for a debt due to the plaintiff below, as assignee of the Bank of Ft. Scott, from the Parkinson Sugar Company, a corporation of the state of Kansas, in which the defendant was a stockholder, being the owner and holder of six shares of the capital stock, of the par value of \$100 each. The Constitution of the state of Kansas provided (article 12, § 2) as follows: "Dues from corporations shall be secured by individual liability of the stockholders to an additional amount equal to the stock owned by each stockholder, and such other means as shall be provided by law, but such individual liabilities shall not apply to railroad corporations, nor corporations for religious or charitable purposes." The General Statutes of 1868 of that state (chapter 23) contained the following provisions:

"Sec. 82. If any execution shall have been issued against the property or effects of a corporation, except a railway or religious or charitable corporation, and there cannot be found any property whereon to levy such execution, then execution may be issued

against any of the stockholders, to an extent equal in amount to the amount of stock by him or her owned, together with any amount unpaid thereon; but no execution shall issue against any stockholder, except upon an order of the court in which the action, suit or other proceeding shall have been brought or instituted, made upon motion in open court, after reasonable notice in writing to the person or persons sought to be charged; and, upon such motion, such court may order execution to issue accordingly; or the plaintiff in the execution may proceed by action to charge the stockholders with the amount of his judgment."

"Sec. 40 [as amended in 1883 by Laws 1883, p. 88, c. 46]. A corporation is dissolved—first, by the expiration of the time limited in its charter; second, by a judgment of dissolution rendered by a court of competent jurisdiction; but any such corporation shall be deemed to be dissolved for the purpose of enabling any creditors of such corporation to prosecute suits against the stockholders thereof to enforce their individual liability, if it be shown that such corporation has suspended business for more than one year, or that any corporation now so suspended from business shall for three months after the passage of this act fail to resume its usual and ordinary business."

"Sec. 44. If any corporation, created under this or any general statute of this state, except railway or charitable or religious corporations, be dissolved, leaving debts unpaid, suits may be brought against any person or persons who were stockholders at the time of such dissolution, without joining the corporation in such suit; and if judgment be rendered, and execution satisfied, the defendant or defendants may sue all who were stockholders at the time of dissolution, for the recovery of the portion of such debt for which they were liable, and the execution upon the judgment shall direct the collection to be made from the property of each stockholder respectively; and if any number of stockholders (defendants in the case) shall not have property enough to satisfy his or their portion of the execution, then the amount of deficiency shall be divided equally among all the remaining stockholders and collections made accordingly, deducting from the amount a sum in proportion to the amount of stock owned by the plaintiff at the time the company dissolved."

The plaintiffs' amended declaration, after reciting the above constitutional and statutory provisions, alleges as follows: "That the said the Parkinson Sugar Company was incorporated and organized for manufacturing purposes, and was not a railway, religious, or charitable corporation. That it had a capital of one hundred and seventy-five thousand dollars (\$175,000), divided into seventeen hundred and fifty shares, of the par value of one hundred dollars each. That the said the Pusey & Jones Company, the defend-

ant in this action, at the time of the dissolution of the said the Parkinson Sugar Company, hereinafter mentioned, and for ten years last past, was and has been the owner and holder of six shares of the capital stock of the said the Parkinson Sugar Company. That on or about the fifteenth day of August, 1896, an action was commenced in the district court of Bourbon county, in the state of Kansas, in which the said the Parkinson Sugar Company was defendant. That said action was founded upon certain promissory notes held by said plaintiff against the said defendant, to secure the payment of which said notes certain mortgages were executed and delivered by said defendant to said plaintiff, which said mortgages were secured upon certain pieces and parcels of land situate in Bourbon county aforesaid. That on the twenty-fourth day of September, 1896, a judgment was entered upon said action in said court, in favor of said plaintiff, the Bank of Ft. Scott, and against the said defendant, the Parkinson Sugar Company, for the sum of fifteen thousand eight hundred and seventy dollars and eighteen cents (\$15,870.18), with interest thereon from said date at the rate of 10 per centum per annum, and said mortgaged premises were charged with the payment of said judgment. That on the sixteenth day of November, 1896, an order of sale was issued upon said judgment, known under the Kansas practice as a 'special execution,' for the purpose of selling the real estate described in said judgment. That on the twenty-first day of December, 1896, said order for sale was enjoined by an injunction issued by Hon. Frederick Scoville, probate judge of Bourbon county, state of Kansas, which said injunction was afterwards dissolved. That on the twenty-fifth day of August, 1899, the Bank of Ft. Scott regularly assigned its aforesaid judgment against the said the Parkinson Sugar Company unto the said Charles Love and Grant Hornaday, the plaintiffs in this action. That on the fourth day of September, 1899, an alias order of sale was issued to sell the real estate described in said judgment of said plaintiffs against the said the Parkinson Sugar Company, under which alias order said real estate, which constituted all the property of the said the Parkinson Sugar Company, was sold for the sum of thirteen thousand and fifty dollars, (\$13,050.00), which said sum of thirteen thousand and fifty dollars, less two hundred and thirteen dollars and thirty cents (\$213.30) costs, was on the eighth day of October, 1899, applied as a credit upon said judgment, leaving a balance of seven thousand four hundred and ninety-seven dollars and five cents (\$7,497.05) due thereon. That on the eighteenth day of June, 1900, the first general execution was issued upon said judgment to collect the balance due thereon, and on the thirteenth day of August, 1900, the sheriff made return of said execu-

tion, as follows: 'Received this writ June 18, 1900. I made diligent search and inquiry for property of the within defendant on which to levy, and there cannot be found any property whatever to levy this execution belonging to the within defendant, the Parkinson Sugar Company. I return this execution wholly unsatisfied. No property found. This 13th day of August, 1900. W. B. Brooks, Sheriff, J. E. Ball, Deputy Sheriff.' That the said the Parkinson Sugar Company continued in business until the ninth day of October, 1899, on which date it suspended business, which it has never since resumed.'

Upon this statement of facts the plaintiffs claim that under the provision of the Constitution and statutes of the state of Kansas, above recited, they are entitled to recover from the defendant the sum of \$600 (that being the par value of his stock in the said the Parkinson Sugar Company), with interest thereon from the 1st day of September, 1901, as and for the said defendant's individual liability as a stockholder of the said sugar company for the dues or debts of the said company. The defendant by leave of the court filed special pleas to the plaintiffs' amended declaration, setting forth at length the provisions of an act passed by the Legislature in December, 1898, and approved January 7, 1899, by which the defendant claims that the Legislature of Kansas amended the above-recited act of 1868, so as to repeal the provisions upon which the defendant's liability depends, and denies any liability under the provision of the Constitution of Kansas, above quoted, independently of legislation. Laws 1898-99, p. 27, c. 10. The amending statute is quoted, as follows:

"Sec. 14. That section 32, chapter 23, of the General Statutes of 1868, be and the same is hereby amended to read as follows: 'Sec. 32. If any execution shall have been issued against the property or effects of a corporation, and there cannot be found any property upon which to levy such execution, such corporation shall be deemed to be insolvent, and upon application to the court from which said execution was issued or to the judge thereof, a receiver shall be appointed, to close up the affairs of said corporation. Such receiver shall immediately institute proceedings against all stockholders to collect unpaid subscriptions to the stock of such corporation, together with the additional liability of such stockholders equal to the par value of the stock held by each. All collections made by the receiver shall be held for the benefit of all creditors, and shall be disbursed in such manner and at such times as the court may direct. Should the collections made by the receiver exceed the amount necessary to pay all claims against such corporation, together with all costs and expenses of the receivership, the remainder shall be distributed among the stockholders from whom collections have been made, as the

court may direct; and in the event any stockholder has not paid the amount due from him the stockholders making payment shall be entitled to an assignment of any judgment or judgments obtained by the receiver against such stockholder, and may enforce the same to the extent of his proportion of claims paid by them.'

"Sec. 15. That section 46, chapter 23, of the General Statutes of 1868, be and the same is hereby amended to read as follows: 'Sec. 46. The stockholders of every corporation, except railroad corporations or corporations for religious or charitable purposes shall be liable to the creditors thereof for any unpaid subscriptions, and in addition thereto for an amount equal to the par value of the stock owned by them, such liability to be considered an asset of the corporation in the event of insolvency, and to be collected by a receiver for the benefit of all creditors.'"

"Sec. 17. Sections 6, 9, 24, 32, 41, 44 and 46 of chapter 23 of the General Statutes of 1868 are hereby repealed."

The plaintiffs demurred to all the special pleas, and the court sustained the demurrer, and on election of the defendant's attorneys a final judgment was entered in favor of the plaintiffs.

A precisely similar action was brought in the Circuit Court of the United States for the Southern District of New York prior to the passage of the act of 1898-99 which amended the statute of 1868 as above, and final judgment was entered for the plaintiff. 76 Fed. 697. That judgment was affirmed by the Circuit Court of Appeals. 51 U. S. App. 536, 83 Fed. 288, 28 C. C. A. 404. The defendant thereupon applied for and obtained a writ of certiorari (168 U. S. 710, 18 Sup. Ct. 950), and finally in the Supreme Court all the questions involved were exhaustively discussed and settled in an elaborate opinion by Mr. Justice Brewer. *Whitman v. Oxford National Bank*, 176 U. S. 562, 20 Sup. Ct. 477, 44 L. Ed. 587. It was held by the Supreme Court in that case that the liability which by the Constitution and laws of Kansas (statute of 1868) was declared to rest upon the individual stockholder was not "open to judicial condemnation," was "contractual in its nature, though statutory in its origin," and that "an action therefor could be maintained in any court of competent jurisdiction." That case leaves nothing open to discussion with regard to the liability of the defendant prior to the passage of the act of 1898, and the only question before us under this writ of error is as to how far, if at all, the act of 1899 could validly operate to repeal the right of action in favor of creditors given by the Kansas statute of 1868, so far as creditors are concerned whose debts accrued prior to the repeal. If construed so as to affect such creditors, would it "impair the obligation of the contract," in violation of the Constitution of the United States, and be to that extent in-

valid, as contended by the plaintiff below, respondent above? In other words, must the statute of 1898-99 be given prospective operation only?

The accepted principles by which all courts are guided in the application of that provision of the federal Constitution are given by Judge Cooley on pages 344-346 of his treatise on Constitutional Limitations: "Any law which in its operation amounts to a denial or obstruction of the rights accruing by a contract, though professing to act only as a remedy, is directly obnoxious to the prohibition of the Constitution." *McCracken v. Hayward*, 2 How. 608, 11 L. Ed. 397: "Whatever belongs merely to the remedy may be altered according to the will of the state, provided the alteration does not impair the obligations contracted, and it does not impair it, provided it leaves the parties a substantial remedy, according to the course of justice as it existed at the time the contract was made. *Cooley, Const. Lim. (8th Ed.) 346, Bronson v. Kinzie*, 1 How. 316, 11 L. Ed. 148, and a multitude of authorities cited in the notes." Cases applying these principles are as numerous as the statutes that seem to be near the dividing line so described, a line which in the very nature of things it is most difficult to draw in many cases.

In the case before us the constitutional question is left open for this court to pass upon, because, although it has been presented to the only tribunal which can conclusively decide it—the United States Supreme Court—that court declined to express an opinion upon it, deciding the case presented upon other grounds. *Evans v. Nellis*, 187 U. S. 280, 23 Sup. Ct. 74, 47 L. Ed. 173. We also find that the courts of Kansas have not passed upon it. In the first of the two cases in which the present question is raised in the state of Kansas (*Waller v. Hamer*, 65 Kan. 174, 69 Pac. 187) action was brought by the receiver under the act of 1898-99, and the court says: "One other question is argued by counsel for plaintiff in error which may arise upon a future trial. It is contended that the act of 1898, as applied to the facts in this case, is retroactive in its operation and impairs the obligation of the contract sued on in this case. Suffice it to say that, as to the plaintiff in error, it does not impair his obligation or deprive him of any right he had prior to its passage." In the second and last Kansas case (*Henley v. Stevenson*, 67 Kan. 7, 72 Pac. 519) the court says: "As the judgment against the corporation in the case at bar was not rendered until February 15, 1900, or more than a year after the remedy by motion for order awarding execution against stockholders in corporations for the collection of corporate judgments was repealed, and as the record in this case is silent as to any contractual liability existing between *Stevenson* and the corporation prior to the taking effect of the act of 1898, it follows of necessity that the

order was without authority of law, is erroneous, and must be reversed."

Now, although this may be construed to be an intimation on the part of the Kansas Supreme Court that its decision would have been different had the judgment been entered, or had a contractual liability been shown to exist prior to the taking effect of the act of 1898, yet it cannot be taken as an authority for the proposition that the act of 1898 could have no retroactive effect. These two cases, the only Kansas cases in which the effect of the statute of 1898 is involved, contribute so little to the solution of the question that it is not worth while to state them at greater length; but in the case of *Woodworth v. Bowles*, 61 Kan. 569, 60 Pac. 331, the reasoning of the court in holding another somewhat similar statute to be invalid, so far as it was meant to be retroactive, would seem to involve a similar ruling upon the statute now before us. This case of *Woodworth v. Bowles* is cited at considerable length in the only case in which the precise question before us under this writ of error is discussed and decided. *Evans v. Nellis* (C. C.) 101 Fed. 920 et seq., the same case that was referred to above as having been carried to the Supreme Court (187 U. S. 271-280, 23 Sup. Ct. 74, 47 L. Ed. 173). This was an action brought in the Circuit Court of the United States for the Northern District of New York by the receiver of a Kansas corporation appointed in accordance with the provisions of the act of 1898-99, and in every essential particular is identical with the case before us, raising the same issues; the only difference being that in the case of *Evans v. Nellis* the action was brought against a stockholder of an insolvent Kansas corporation under the statute of 1898-99, while in the case before us it was brought under the statute of 1868. *Crissey and Street* were the two judgment creditors of the insolvent corporation in that case and the court, after stating the points decided by the Supreme Court in the case of *Whitman v. Oxford National Bank*, above cited, proceeds to analyze and contrast the statutes of 1868 and 1898-99 as follows:

"Applying the law of the *Whitman* Case directly to the facts now before the court, it will be seen that the defendant was only under obligation to pay the *Crissey and Street* judgments and such other debts as were reduced to judgment. If he had a defense against any of these judgment creditors, he could assert it. If he were required to pay, he could himself compel other stockholders to contribute. Having paid all the judgment creditors, his obligation ceased. *Hoyt v. Bunker*, 50 Kan. 574, 32 Pac. 128. On the other hand, *Crissey and Street* were vested with certain important and valuable rights under the contract between them and the stockholders. They, as individuals, could enforce their judgments against any stockholder wherever found. They were not called upon

to share the amount so recovered with simple contract creditors, or to pay any part thereof to a receiver, or as costs and fees of the officers of the court. If one of these judgment creditors were the first to sue a solvent stockholder whose liability was equal to the amount of the judgment, his debt was safe. This, then, was the situation when the law of 1899 went into operation. The new law wrought a sweeping and radical change. New liabilities are created and new remedies are provided. Section 23, as amended, provides for the appointment of a receiver upon an execution being returned *nulla bona*. The receiver so appointed shall close up the affairs of such corporation and shall immediately institute proceedings against all the stockholders to collect unpaid subscriptions and the additional liability. The money thus collected shall be held for the benefit of all the creditors and shall be used under the direction of the court to pay the costs and expenses of the receivership and all claims against such corporation. Any judgment obtained by the receiver against a stockholder who has not paid the amount due from him may be assigned to the stockholders who have paid, and enforced by them against the delinquent stockholder for his proportionate amount. Section 46, as amended, provides that the stockholders shall be liable to the creditors for unpaid subscriptions, and in addition thereto an amount equal to the par value of the stock owned by them, such liability to be an asset of the corporation, to be collected by a receiver for the benefit of all the creditors. Under the former law the stockholder's additional liability was an obligation to pay the judgment creditor who was unable to collect his debt from the corporation. Under the present law this liability is an asset of the corporation for the benefit of all the creditors. Under the former law the right to collect his judgment rested with the judgment creditor. He could act immediately. Nothing but his own laches could impair this right. Under the latter law the judgment creditor has no advantage over the most negligent and supine contract creditor. All alike must trust to the discretion of the receiver. If he fails in duty, the debt of the judgment creditor is lost. In one case the entire indebtedness of the stockholder was applied without diminution upon the judgment. In the other case the entire amount collected may by order of the court be devoted to the payment of the receiver's commissions, costs, and expenses. Under the former law the stockholder could avail himself of any defense, counterclaim, or set-off he might have against the pursuing creditor. These defenses no longer exist. Under the former law, when he had paid the judgment creditors, the liability of the stockholder ended. Now he must pay the entire amount to the receiver, even though it be twice the amount necessary to pay the corporation's debts. Whether any of the balance be re-

turned or not depends largely upon the economy, prudence, and honesty of the receiver. In short, the new law destroys absolutely all rights which the judgment creditor, qua a judgment creditor, possessed, takes away all right of independent action, and compels him to share pro rata with all the creditors. As to the stockholder, it deprives him of defenses which would defeat the former action, compels a full payment when a partial payment was oftentimes sufficient, and devotes the amount recovered to the payment of obligations not mentioned in the former statute. It is not difficult to suppose a case where a stockholder, absolutely safe from pursuit under the former act, may be financially ruined under the present act. For instance, where a stockholder was sued for, say \$10,000, by the only judgment creditor, if the judgment creditor owed the stockholder the sum of \$10,000, it is manifest that he could not recover. Or, assume a situation where the entire amount recovered is consumed in paying the expenses of the receivership. In the first of these instances the receiver takes money which could not be collected under the former act; in the second, he applies the money collected to the payment of obligations which are created for the first time by the act of 1899, and which are not 'dues from corporations.' *Ward v. Joslin* (C. C.) 100 Fed. 676. It is true that under the prior statute in certain circumstances an equal amount might be recovered; but the stockholder might discharge his entire obligation by paying much less than the full amount. Under the present law his liability is increased by compelling him to pay the full amount and by applying it in payment of an entirely new class of obligations.

"Since the trial of this action the Supreme Court of Kansas, in the case of *Woodworth v. Bowles*, 60 Pac. 331, 81 Kan. 569, has declared unconstitutional similar provisions of the Kansas statute relating to the liability of stockholders in banks. Section 55, c. 47, p. 119, of the act of 1897, provides that the receiver shall, after the expiration of one year, institute the proper proceedings in the name of the bank for the collection of the liability of the stockholders to be distributed pro rata among the creditors. No action by creditors against stockholders shall be maintained unless it shall appear to the satisfaction of the court that the receiver has failed to begin the action as required by law. The court held that if the statute were given a retroactive construction it was invalid, because it deprived creditors of their right to maintain proceedings against the stockholders, or, at least, postponed that right for a year. The court says: 'The act of 1897 does not assume to abrogate the contract or relieve the stockholder from liability, but it does assume to do two other things: First, to suspend for one year the pursuit by the creditor of the special remedy afforded by the laws in existence at the time of the

making of the contract; and, second, to deprive the creditor of such remedy altogether if the receiver at the end of the year should institute an action for him and for the other creditors, in which last-mentioned case the fund collected by the receiver is to be distributed pro rata between all the creditors. * * * If, however, the new enactment, although not designed to affect the substantial right, does nevertheless embarrass or substantially delay the creditor in the collection of the debt, it will be held to have impaired the obligation of the contract. We deem section 55 of the law of 1897, in its application to existing contracts between stockholders and creditors, to be an enactment of the latter kind. * * * If the receiver should institute an action and collect the liability, even though every stockholder should be solvent and should discharge his liability in full, the creditor might, nevertheless, not receive full payment of his claim. He must share with other creditors. * * * Vigilance and diligence on the part of a creditor in the pursuit of one or the other of his remedies in one or another of the contingencies stated, might avail to secure the payment of his claim in full. Under the statute as it now exists, vigilance and diligence may avail nothing.'

"It is thought that the logic of this opinion when applied, in similar circumstances, to the law of 1899 in its retroactive aspect, must result in a similar judgment. In *Bronson v. Kinzie*, 1 How. 311, 11 L. Ed. 143, the Supreme Court decided that, where a mortgage contained a power to the mortgagee to sell on breach and thereby pay the debt, a subsequent law giving the mortgagor 12 months to redeem and prohibiting the property from being sold for less than two-thirds its appraised value, so altered the remedy as to impair the obligation of the contract. *Barnitz v. Beverly*, 163 U. S. 118, 16 Sup. Ct. 1042, 41 L. Ed. 93. It is true that a law will not ordinarily be declared unconstitutional on the objection of one whose interests are not injuriously affected by the objectionable features. If the accusations against the act in question were only those which might be presented by the judgment creditors, whose rights have manifestly been invaded, there might be more difficulty in declaring it invalid. There are, however, exceptions to the general rule which are stated by Judge Cooley to be found in cases 'where it is evident, from a contemplation of the statute and of the purpose to be accomplished by it, that it would not have been passed at all, except as an entirety, and that the general purpose of the Legislature will be defeated if it shall be held valid as to some cases and void as to some others.' *Cooley*, Const. Lim. (4th Ed.) 219. It would, indeed, be strange anomaly if the statute in question were held valid when attacked by stockholders and invalid when attacked by judgment creditors. Such a construction would lead to endless confu-

sion and injustice. But, as has been seen, the contractual rights of the stockholders have been impaired equally with those of the judgment creditors. It is undoubtedly true that whatever belongs merely to the remedy may be changed as the Legislature may direct; but the court cannot believe that this familiar rule is applicable to a law which makes such fundamental changes in the terms of the contract."

The court concludes "that the law in question (Acts 1898-99, p. 27, c. 10) impairs the obligation of the defendant's contract, if construed to act retroactively and to that extent is invalid."

The case of *Evans v. Nellis* came afterwards, as we have already seen, to the United States Supreme Court from the Circuit Court of Appeals for the Second Circuit; instructions being desired upon the following questions certified by the Circuit Court of Appeals to the Supreme Court: "First. Are sections 14 and 15, c. 10, pp. 84, 35, of the Laws of Kansas of 1898-99, valid in view of the provision of the Constitution of the state of Kansas respecting the individual liability of the stockholders of corporations, or are they invalid as subjecting such stockholders to liabilities other than 'dues from corporations'?" Second. Do sections 14 and 15 aforesaid contravene the Constitution of the United States by impairing the contractual liability of the defendant previously existing as a stockholder of a corporation of the state of Kansas? Third. Is the plaintiff, as a receiver appointed as aforesaid, entitled to maintain an action in the Circuit Court of the United States for the Northern District of New York?" Mr. Justice White delivered the opinion of the court, and considers only the third question. He concludes: "The third question will be answered 'No,' and it is unnecessary to answer the other questions." This conclusion of the Supreme Court sustains the court below whose opinion is quoted above at such length, and in declining to pass upon the constitutional question the court only observed the general rule that a court will not "pass upon a constitutional question and decide a statute to be invalid unless a decision upon that point becomes necessary to the determination of the case." *Cooley, Const. Lim.* 196.

This lengthy review and analysis of the contrasted statutes of 1868 and 1899 renders it unnecessary to enter into further detailed discussion of them. The statute of 1899 "is not open to judicial condemnation, any more than was the statute of 1868 which received that negative approval from the Supreme Court in the case of *Whitman v. Bank*, cited above. Its merits or demerits, however, are not in question before us; for it is manifest from simple inspection that it wiped out completely every remedy against stockholders

that existed at the time the contract came into force under the statute of 1868, and left no vestige of a remedy of any sort that existed prior to its passage, while, on the other hand, the new remedies which it provided for the enforcement of the constitutional liability failed to include any proceeding that can be set in motion by any individual creditor or any number of creditors. The hands of creditors are completely tied by it, and the proceedings it prescribes are analogous to those provided in insolvency and bankruptcy acts, or to proceedings in courts of equity for the winding up of insolvent corporations. This analogy will assist us to a clearer apprehension of the arguments against the validity of the act in relation to contracts existing prior to its passage. In fact, in the light of that analogy the arguments seem conclusive.

When Chief Justice Marshall, in the great leading case of *Sturges v. Crowninshield*, 4 Wheat. 122, 4 L. Ed. 529, put upon the constitutional provision which prohibited the states from passing laws "impairing the obligation of a contract" an interpretation which once for all rendered invalid the insolvent laws of the states so far as they sought to affect pre-existing contracts, debts existing at the time of their passage, he also first laid down and defined the distinction between statutory provisions affecting only the remedy and those affecting the substance of the contract by materially impairing the power of enforcement. On the other hand, federal bankruptcy statutes are valid as to debts contracted before the passage of the law, as well as afterward, only because the federal Constitution does not forbid Congress to pass laws impairing the obligations of a contract. And, finally, when we come to consider the scope of the jurisdiction of courts of equity in the matter of insolvent corporations, we find that there could be no question of retroactive or prospective effect in such cases, because the court of chancery has been so long appointing receivers with those powers, from which has been gradually evolved the whole complicated modern system, that practically we may say that its jurisdiction has existed for that "time whereof the memory of man runneth not to the contrary."

We think that, from these considerations and from the reasoning of the cases we have cited, the conclusion is inevitable that the statute of 1899 does impair the obligation of the defendant's contract, if considered to be retroactive in violation of the Constitution of the United States, and is to that extent invalid, as is contended by the plaintiffs below, respondents above.

We think there was no error in the rulings of the court below, and therefore the judgment of the court below, is affirmed.

(102 Me. 390)

STATE v. WINSLOW et al.

(Supreme Judicial Court of Maine. Feb. 8, 1907.)

1. CRIMINAL LAW—TRIAL—OBJECTIONS TO EVIDENCE.

Objections to testimony, to be available upon exceptions, must be specific.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1634, 1636.]

2. SAME—APPEAL—REVIEW—EXCEPTIONS TO CHARGE.

Where a bill of exceptions states that "the charge is to be referred to as to what was said by the presiding justice instead of the paragraphs quoted in the exceptions," and no part of the charge is printed or presented to the law court, the exceptions to the charge cannot be sustained.

(Official.)

Exceptions from Supreme Judicial Court, Lincoln County.

Edward A. Winslow and others were convicted before a trial justice on search and seizure proceedings, and on appeal were again convicted, and filed exceptions. Exceptions overruled.

The defendants filed the following bill of exceptions:

"The state offered evidence to show the defendants' guilt that upon the premises searched was a bar and empty glasses, which evidence was objected to by defendants but allowed by the court.

"The defendants also except to the following in the judge's charge to the jury: 'If you see a man with a scythe upon his shoulder going into a field in the middle of July, you would assume that he was going to mow. When you find two barrels of empty beer bottles upon the premises searched, what is the presumption?'

"The evidence, writ, charge of the judge to be made a part of these exceptions, the charge to be referred to as to what was said by the presiding justice instead of the paragraphs quoted in the exceptions."

The evidence in the case and the charge of the presiding justice were neither printed nor furnished to the law court.

Argued before EMERY, C. J., and WHITEHOUSE, SAVAGE, POWERS, and PEABODY, JJ.

Weston M. Hilton, Co. Atty., for the State.
L. M. Staples, for defendants.

POWERS, J. The first matter stated in the exceptions is that at the trial of the defendants on a search and seizure process evidence was admitted, against the defendants' objection, that upon the premises searched was a bar and empty glasses. Objections to testimony, to be available upon exceptions, should be specific. Harriman v. Sanger, 67 Me. 442. Indeed the counsel for the defendants seems to have had this rule in mind, as he does not state in his exceptions that he excepts to the ruling of the presiding justice admitting the evidence, nor

ask that any exception be allowed thereto. It may, however, be a satisfaction to the defendants to know that the evidence was clearly admissible for the purpose of showing the intent with which the liquors seized were kept by them. State v. Burroughs, 72 Me. 480.

The rest of the exceptions relate to what is there alleged to be a part of the charge of the presiding justice. It is stated in the exceptions that the evidence and charge are made a part of the exceptions, "the charge to be referred to as to what was said by the presiding justice instead of the paragraphs quoted in the exceptions." Neither the evidence nor the charge is printed. Exceptions have never been allowed to the alleged part of the charge contained in the bill of exceptions. That part of the charge to which exceptions were allowed the defendants have not presented to the court. Under such circumstances there is nothing before the court for its consideration.

Exceptions overruled.

(102 Me. 397)

PERSSON v. CITY OF BANGOR.

(Supreme Judicial Court of Maine. Feb. 8, 1907.)

1. MUNICIPAL CORPORATIONS—CHANGE OF STREET GRADE—ASSESSMENT OF DAMAGES.

To sustain a complaint to the Supreme Judicial Court to assess damages for the raising or lowering of a street or way under Rev. St. c. 23, § 68, a previous application in writing for the assessment of such damages must have been made to the municipal officers.

2. SAME.

The mayor and aldermen constitute the municipal officers of cities.

3. SAME—APPLICATION.

Such an application addressed to the mayor and city council, comprising not only the mayor and aldermen, but also all the members of the common council, is not sufficient to authorize such complaint to the Supreme Judicial Court. (Official.)

Report from Supreme Judicial Court, Penobscot County, at Law.

Action by Anders Persson against the city of Bangor.

Complaint under Rev. St. c. 23, § 68, to have the damages determined alleged to have been caused by the raising of Heller street adjoining the complainant's land in the city of Bangor. At the conclusion of the testimony the case was reported to the law court "for determination upon so much of the evidence as is legally admissible." Complaint dismissed.

Argued before EMERY, C. J., and STROUT, SAVAGE, POWERS, PEABODY, and SPEAR, JJ.

A. H. Harding, for plaintiff. E. P. Murray, for defendant.

POWERS, J. On report. This is a complaint under Rev. St. c. 23, § 68, to have the damages determined caused by the raising

of Hellier street adjoining the complainant's land in Bangor. The case shows that on October 13, 1903, and again on May 10, 1904, the Bangor Stone Ware Company, of which the plaintiff was the proprietor, applied in writing to the mayor and city council of Bangor, reciting the raising of said street thereby causing a strain and pressure to the wall of its factory, and asking the city council to examine the premises and cause repairs to be made, or a new wall to be built. On each application the city council on November 10, 1903, and on August 9, 1904, respectively, gave the petitioner leave to withdraw, and thereupon this complaint was entered at the January term, 1905, of this court in Penobscot.

Several objections are made to these proceedings. By said section it is provided: "When a way or street is raised or lowered by a road commissioner or person authorized, to the injury of an owner of adjoining land, he may, within a year, apply in writing to the municipal officers and they shall view such way or street and assess the damages, if any have been occasioned thereby, to be paid by the town, and any person aggrieved by said assessment, may have them determined, on complaint to the Supreme Judicial Court."

It will be noted that only those can complain to the court who are aggrieved by the action of the municipal officers on such written application to them to assess the damages. Without determining whether the application in this case is in other respects sufficient, it was addressed to the mayor and city council, and not to the municipal officers as required by the statute. The two are not the same. The mayor and aldermen constitute the municipal officers of cities (Rev. St. c. 1, § 6, par. 25), while in Bangor the city council includes not only these, but also the 21 members of the common council. This proceeding by complaint to the Supreme Judicial Court is authorized only after written application to the municipal officers. Upon them alone, and not upon another body of which they form a part, the statute has conferred the power to act in such cases; and their action must be separate. *Atwood v. Biddeford*, 99 Me. 78, 58 Atl. 417. The complainant never invoked their action, but directed his application to another tribunal. This objection being fatal, it is unnecessary to look for others.

Complaint dismissed.

(80 Conn. 48)

COWLES v. NEW YORK, N. H. & H. R. CO., et al.

(Supreme Court of Errors of Connecticut.
June 7, 1907.)

1. RAILROADS—CONSTRUCTION—RIGHT TO ESTABLISH GRADE CROSSINGS.

A grade crossing or the condition existing by reason of such an intersection of two highways is in the nature of a nuisance, and cannot

lawfully exist unless in pursuance of state authority.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, § 280.]

2. SAME—RESPONSIBILITY OF RAILROAD FOR INJURIES.

When a grade crossing is authorized by the state, neither the railroad, as charged with the maintenance of the railroad highway, nor the town or other corporation, as charged with the maintenance of the carriage highway, is responsible for the dangers resulting solely from such a construction of the two highways. The only duty they owe travelers is the statutory duty of maintaining in a safe condition the highway as established.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, § 959.]

3. SAME—OBSTRUCTION OF VIEW—NEGLIGENCE.

The mere neglect of a railroad company to cut down trees on its right of way in the vicinity of a grade crossing is not in itself actionable negligence, in the absence of any statute requiring it to keep its right of way free from unnecessary obstructions to a view of the tracks by persons using an adjacent highway, although it may be considered with other circumstances in determining whether the company exercised care in the operation of its cars at a particular time.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, § 965.]

Appeal from Superior Court, Hartford County; Edwin B. Gager, Judge.

Action by Walter G. Cowles, administrator of Nellie F. Cowles, against the New York, New Haven & Hartford Railroad Company and others. From a judgment for plaintiff, defendants appeal. Reversed and remanded.

The defendants own and operate a railroad running from Middletown, crossing the Connecticut river upon a bridge, and thence running easterly to the village of East Hampton and beyond. About three miles westerly from East Hampton the railroad crosses at grade the main highway between Middletown and East Hampton. The place is called "Taylor's Crossing." The railroad at this point is double tracked. The railroad runs in a straight line for a distance of 900 feet westerly of the crossing and 500 feet easterly. The highway is substantially parallel to the railroad from East Hampton to Taylor's Crossing, near which place it takes a north-westerly direction, and crosses the railroad at an angle upon the southeast of about 45 degrees. The tracks at the crossing are laid upon an embankment some 18 feet high, and for approaching the crossing from the southeast an embankment has been built in the highway commencing some 250 feet from the tracks and rising from the natural level of the highway at its commencement to the grade of the tracks. There is a similar embankment on the other side of the crossing. The highway at Taylor's Crossing is 4 rods in width, and the approach or embankment in the highway is some 25 feet in width at the top. This approach is fenced upon each side by a four-board whitewashed fence, which connects at the crossing with the cattle guard on each side. On the land adjoin-

ing the southwesterly side of the highway, for a distance of about 500 feet from the crossing, trees and shrubbery have been planted, extending to the intersection of the southerly line of the railroad right of way with the line of the highway at a point about 50 feet south of the southerly track. From this point to within 10 feet of the southerly track, trees and bushes have grown on a piece of land which lies within the limits both of the defendants' right of way and of the highway, and which is westerly of the four-board whitewashed fence on the westerly side of the approach. The trees and shrubbery on the land of adjoining proprietors and trees and bushes on the land within the defendants' right of way together form a continuous material and substantial obstruction to the view of defendants' tracks to the west and of trains approaching thereon to the traveler approaching said tracks from the southeast. On October 7, 1905, Walter G. Cowles, with Nellie F. Cowles, his wife, Richard G. Cowles, their son five years of age, and Lyde A. Keagy, sister of Mrs. Cowles, were riding in an automobile, the property of Mr. Cowles, from East Hampton to Middletown, along said main highway. At East Hampton said highway passes under said railroad, and at a point about a mile easterly of Taylor's crossing passes over said railroad, and the railroad is in plain view at frequent intervals and for considerable distances between Taylor's crossing and East Hampton, and within some 800 feet before reaching the crossing a high embankment of the railroad upon a curve toward the south is in full view from said highway, and about 300 feet nearer to Taylor's Crossing a side highway runs northerly, crossing the railroad at grade at a distance of some 300 feet, and the main highway bends northwesterly toward the railroad, intersecting it at Taylor's Crossing at a distance of about 500 feet. At about 6 p. m. Mr. Cowles drove his automobile, which was being operated under his personal direction and supervision by his servant, upon the south track at Taylor's Crossing at the same time an express train of the defendants' passed to the east over the same track. The train was driven at the rate of 28 miles an hour, the automobile at the rate of 15 miles an hour. As a result of the collision Mrs. Cowles and her son were killed, and Lyde A. Keagy was seriously injured. The automobile was rendered useless. On October 30, 1905, Mr. Cowles was appointed administrator of the estate of his wife, and on the following February 3d as such administrator brought this action to recover damages for the injury to Mrs. Cowles alleged to have been caused by the negligence of the defendants. The defendants suffered a default and filed a written notice, in pursuance of the statute, that upon the hearing in damages they would offer evidence to disprove their negligence as alleged and to prove contributory negligence. Upon a hearing in

damages the court found that the injury to Mrs. Cowles was due to the negligence of the defendants, and was also due to the negligence of Mr. Cowles, and held that the plaintiff as administrator on Mrs. Cowles' estate was entitled to recover substantial damages notwithstanding the injury to his intestate was caused by the concurring negligence of the defendants and Mr. Cowles. Thereupon the court assessed substantial damages at the sum of \$5,000, and rendered judgment that the plaintiff recover that amount. The reasons assigned by the defendants in this appeal from that judgment are first, that the court based its finding of actionable negligence wholly upon an erroneous proposition of law, and that upon the facts as found by the court the alleged actionable negligence was as a matter of law disproved; and, second, in holding that the negligence of Mr. Cowles was not in legal effect equivalent to the contributory negligence of Mrs. Cowles. On the same day that this action was brought Mr. Cowles, as administrator on the estate of his son Richard G. Cowles, brought an action against these defendants to recover damages for the injury to his son. Lyde A. Keagy brought an action to recover damages for the injury to herself, and Walter G. Cowles brought an action to recover damages for his loss of the services of his wife, for the money expended by him for her medical treatment, for the loss of the services and earnings of his son, and for the injury to his automobile, alleged to be a 30-horse power car of the value of \$4,000. The defendants suffered a default, giving notice of hearing in damages in each of these three cases. They were tried together with the present case, and one finding was made for the four cases. In the case brought by Mr. Cowles in his own name nominal damages were assessed, and the plaintiff appealed. In the other two cases substantial damages were assessed, and the defendants in each appealed.

John T. Robinson and Lucius F. Robinson, for appellants. William Bro Smith and Robert C. Dickenson, for appellee.

HAMERSLEY, J. (after stating the facts). The trial court finds that the defendants were guilty of negligence in permitting the existence without cause or necessity, of trees and bushes upon their right of way which caused an obstruction to a view of the defendants' tracks by a traveler in the highway approaching the public crossing, and finds that the defendants were guilty of no other negligence than that of permitting said bushes and trees to grow within their right of way.

The essence of actionable negligence is the infringement of the legal right of another, or, in other words, the violation of a duty imposed by law in respect to another. *Wilmot v. McPadden*, 79 Conn. 373, 85 Atl. 157. The acts charged in the complaint as an in-

fringement of the plaintiff's legal right and a violation of the defendants' legal duty in respect to the plaintiff are substantially these: (1) A careless and negligent manner of maintaining the tracks at Taylor's Crossing, so that the plaintiff could not know of the presence of said tracks or crossing until directly upon the same. The court finds that this charge is disproved; that the tracks at the crossing were laid upon a level and the iron rails could not be seen by an approaching traveler because the highway approaches said track at a considerable ascending grade; that any person traveling on the highway ought in the exercise of reasonable care to know or apprehend that he is approaching a grade crossing; and that the defendants maintained at the crossing a warning board as required by law plainly visible at a distance of at least 300 feet, which for that distance made known to approaching travelers the existence of a grade crossing. (2) Negligently, carelessly, and unskillfully operating the defendants' engine by driving the same at a high rate of speed across the highway without sounding the engine bell or whistle. The court finds this charge disproved; that the engine approached the crossing at a speed of 28 miles an hour; that the customary crossing whistle was twice sounded in the manner required by law, and the engine bell rung as the train approached the crossing. (3) Negligently and carelessly permitting bushes and trees to grow upon the land of the defendants' within its location or right of way which obscured from travelers on the highway a view of the defendants' tracks. The court finds that the defendants did, without cause or necessity, permit bushes and trees to grow upon their land which obscured from travelers on the highway a view of the tracks, and also finds that the railroad commissioners have never ordered the removal of obstructions to sight nor additions to such warning to travelers as actually existed at said crossing. If the neglect to cut down these trees and bushes is a violation of a duty imposed by law upon the defendants in respect to travelers in the highway, then the conclusion of the court that the defendants are guilty of actionable negligence may be sustained; but, if they owe no such legal duty to travelers in the highway, then they have infringed no legal right of the defendants, and the only legal judgment upon the facts found is a judgment for nominal damages.

A difference is to be noted between the duties imposed by law upon a railroad corporation as a body politic acting as the agent of the state in pursuance of the state's directions in the establishment, construction, and maintenance of a railroad highway for a public use as well as its private profit, and as a private corporation conducting the business of a carrier of goods and passengers through the operation of cars upon the highway thus established. The former are mainly created

by statute, which also determines the consequences of their violation. The latter are mainly created by force of the common law, and are similar in character and consequences of violation to those imposed by the common law upon all persons engaged in a similar business. The location and establishment of a railroad highway, as well as of other highways, is an act of state sovereignty exercised by state agents appointed for that purpose. When a railroad highway and a carriage highway intersect at a common grade, the "grade-crossing" thus formed is established by the state through its agents. A grade crossing or the condition existing by reason of such an intersection of two highways is in the nature of a nuisance, and cannot lawfully exist, unless in pursuance of state authority. *State v. Branford*, 59 Conn. 402, 405, 22 Atl. 336; *New York & N. E. R. Co.'s Appeal*, 62 Conn. 527, 530, 540, 26 Atl. 122. Such a subjection of public safety in the use of both highways to public convenience and necessity can only be directed by the state. When so directed, neither the railroad corporation as charged with the maintenance of the railroad highway, nor the town or other corporation as charged with the maintenance of the carriage highway, are responsible for the dangers resulting solely from such a construction of the two highways. *Hoyt v. Danbury*, 69 Conn. 341, 352, 37 Atl. 1051; *Newton v. New York & H. R. Co.*, 72 Conn. 420, 429, 44 Atl. 813. At the time of such a construction, or at any time thereafter, the state may order these corporations as its agents to alter the construction by a separation of grade or otherwise, and may impose upon them new duties in respect to the performance of which they may be made liable as far as the statute points out; but without such state action, they do not, so far as concerns the condition of the roadbed, the crossing, and of its approaches, owe any legal duty to travelers using the highway beyond the statutory duty of maintaining in safe condition the highway as established by the state. It may well be that the railroad company as owner of land adjacent to the highway, as well as other owners of adjacent land, might by acts of commission or omission on their land somewhat lessen to travelers using the highway the dangers incident to the use of the grade crossing as authorized, and that these acts might involve so little trouble that many men would say the landowners ought to do this much for those exposed to the necessary dangers of the highway. Conceding this, it does not follow that the traveler in the highway has any legal right to the performance of such a duty by the landowner; and it can make no difference in the nature of such a duty that the railroad company and the traveler use the highway at the grade crossing at the same time, assuming the duty imposed by law upon each of exercising ordinary care in the use of the highway under such circumstances.

In the present case the defendants in driving their cars over the grade crossing were in the lawful use of a public highway, but they were under a legal duty to Mr. Cowles, as well as to every traveler in the use of the same highway, to exercise ordinary care in the operation of their cars, and the nature and degree of the care was affected by all the circumstances of the case, including the nature of the approaches and the fact that the land adjacent to the highway on one side was covered with trees and bushes for a distance of 500 feet from the crossing, including 40 feet of land owned by the defendants within its location or right of way, so that an approaching traveler could not upon that side of the highway see the defendants' tracks or a train upon them until he came within a few feet of the crossing, and Mr. Cowles owed a like duty of ordinary care to the defendants. It was within the province of a trial judge to determine whether the defendants exercised ordinary care in the operation of their cars in view of these circumstances, especially of the circumstance that Mr. Cowles in approaching the crossing, in order to ascertain whether a train was in fact approaching, was confined to the sense of hearing, and could not have used that of sight to any material advantage if he had been so inclined. To this extent—that is, as affecting the nature and degree of care required of the defendant in the operation of its cars—and to this extent only, could the existence of trees upon the land of the defendants support a conclusion of actionable negligence in this case. We think that the mere neglect to cut down such trees, whether causeless or not, whether they could be cut down with slight trouble and expense or not, is not, in the absence of any statute requiring railroad companies to keep their right of way free from unnecessary obstructions to a view of their tracks and trains by persons using an adjacent highway, in itself actionable negligence. The duty of a railroad company and a traveler in respect to each other, when both are in the exercise of a lawful right to the use of a public highway, to exercise ordinary care in that use, is a mutual legal duty by force of the common law in connection with any modifying statute that may exist. No such relative mutual duty can arise between a traveler in the lawful use of a highway and a railroad company in the lawful use and occupation of its adjacent land. Any duty to use such land for the benefit of the traveler would be one resting on the railroad company as an absolute duty not involving a reciprocal duty from the traveler, and such absolute duty does not exist by force of the common law.

Any duty (not relative and mutual but absolute) of a railroad company as an agent of the state charged with the maintenance of a railroad highway to restrict the lawful use of its land within the limits of its location or right of way in any specific manner or

by the use of ordinary care, so as to minimize the dangers necessarily incident to the use by the traveling public of an adjacent highway, is not a legal duty unless made so by statute. The view of the trial court that the neglect of the defendants to cut down the trees and bushes upon their land which obstructed a view of their tracks from travelers passing on the highway was in itself a violation of the defendants' legal duty, and therefore constituted actionable negligence, finds support in some authorities. *C. & E. I. R. R. Co. v. Tilton*, 26 Ill. App. 362, 366; *T. H. & P. R. R. Co. v. Barr*, 31 Ill. App. 57, 60; *2 Thompson on Negligence*, §§ 1507, 1508. The contrary view finds support in *Cordell v. N. Y. C. & H. R. R. Co.*, 70 N. Y. 119, 26 Am. Rep. 550; *Nashville C. & St. L. R. R. Co. v. Witherspoon*, 112 Tenn. 128, 78 S. W. 1052; *A. T. & S. F. R. R. Co. v. Hawkins*, 42 Kan. 355, 22 Pac. 322; *C. R. I. & P. Ry. Co. v. Hinds*, 56 Kan. 758, 44 Pac. 993; *Shearman & Redfield on Negligence*, § 478; *Baldwin on American Railroad Law*, p. 402. We have never before had occasion to discuss this question, and must therefore treat it as an open one. For the reasons above suggested, we are satisfied that, while trees growing upon land adjacent to the highway, including land owned by the railroad company, which substantially obstruct the view of a traveler approaching the grade crossing, is clearly one of the circumstances, to be considered in determining whether the railroad company exercised ordinary care in the operation of its cars at a particular time, yet the mere neglect of the company to cut down trees on its own land although proper to be considered with all the surrounding circumstances affecting the care required at that time is not in itself a violation of any legal duty the company owes to a passing traveler (unless so made by statute), and is not therefore in the absence of any other negligence a neglect which constitutes actionable negligence.

We need not now discuss the range of possible circumstances proper to be considered in determining the use of ordinary care by a railroad company in operating its cars at a grade crossing in any instance; nor the possible precautionary measures at crossings of peculiar and exceptional danger such ordinary care may require. In this case the finding of the court shows that the defendants did exercise ordinary care in the operation of their cars in view of the character of the crossing as it existed at the time of the accident, and the court also finds that the defendants had, without cause or necessity, permitted trees to grow upon their land within their right of way for a distance of some 50 feet from the crossing, which for that distance obstructed the plaintiff's view of an approaching train until he came within some 10 feet of the railroad tracks. It seems to us that this fact, the defendants being found guilty of no other negligence, does not constitute actionable negligence, and there-

fore, upon the facts found, the trial court should have assessed nominal damages.

There is error. The judgment of the superior court is set aside, and the cause remanded for the assessment of nominal damages. The other Judges concurred.

(80 Conn. 58)

COWLES v. NEW YORK, N. H. & H. R. CO. et al.

(Supreme Court of Errors of Connecticut. June 7, 1907.)

Appeal from Superior Court, Hartford County; Edwin B. Gager, Judge.

Action by Walter G. Cowles, administrator of Richard G. Cowles, against the New York, New Haven & Hartford Railroad Company and others. From a judgment for plaintiff, defendants appeal. Reversed and remanded.

John T. Robinson and Lucius F. Robinson, for appellants. William Bro Smith and Robert C. Dickenson, for appellee.

HAMERSLEY, J. In this appeal the defendants claim that the trial court erred in assessing substantial damages upon a hearing in damages after default accompanied with a statutory notice. The case is governed by the preceding case of Cowles, Administrator of Nellie F. Cowles, v. Same Defendants, 66 Atl. 1020, in which upon substantially the same record we held that the trial court should have assessed nominal damages.

There is error. The judgment of the superior court is set aside, and the cause remanded for assessment of nominal damages.

(80 Conn. 58)

COWLES v. NEW YORK, N. H. & H. R. CO.
(Supreme Court of Errors of Connecticut. June 7, 1907.)

Appeal from Superior Court, Hartford County; Edwin B. Gager, Judge.

Action by Walter G. Cowles against the New York, New Haven & Hartford Railroad Company. From a judgment granting plaintiff inadequate relief, he appeals. Affirmed.

William Bro Smith and Robert C. Dickenson, for appellant. John T. Robinson and Lucius F. Robinson, for appellee.

HAMERSLEY, J. The judgment in this case is based upon the same facts stated in the preceding case of Cowles, Administrator of Nellie F. Cowles, v. Same Defendants, 66 Atl. 1020. The plaintiff claims in his reasons of appeal and in his brief that the court erred in assessing nominal damages because upon the facts as found by the court the defendants must be held guilty of negligence and the plaintiff free from contributory negligence. It is obvious that the assessment of nominal damages is correct, and that the judgment must stand, if upon these facts

either the conclusion of the law is that the acts of the defendants do not constitute actionable negligence, or the trial court might properly infer the plaintiff's contributory negligence.

In the preceding case mentioned we decided that these defendants were not in law guilty of actionable negligence, and that it was therefore the duty of the trial judge to assess nominal damages. That decision, for the reasons given in the opinion, governs this case. As it appears from the record that the defendants were not in law liable to the plaintiff for damage to him resulting from the acts complained of, the trial court did not err in assessing nominal damages.

There is no error in the judgment of the superior court.

(80 Conn. 58)

KEAGY v. NEW YORK, N. H. & H. R. CO. et al.

(Supreme Court of Errors of Connecticut. June 7, 1907.)

Appeal from Superior Court, Hartford County; Edwin B. Gager, Judge.

Action by Lyde A. Keagy against the New York, New Haven & Hartford Railroad Company, and others. From a judgment for plaintiff, defendants appeal. Reversed and remanded.

John T. Robinson and Lucius F. Robinson, for the appellants. William Bro Smith and Robert C. Dickenson, for appellee.

HAMERSLEY, J. In this appeal the defendants claim that the trial court erred in assessing substantial damages upon a hearing in damages after default accompanied with a statutory notice. The case is governed by the preceding case of Cowles, Administrator of Nellie F. Cowles, v. Same Defendants, 66 Atl. 1020, in which upon substantially the same record we held that the trial court should have assessed nominal damages.

There is error. The judgment of the superior court is set aside, and the cause remanded for assessment of nominal damages.

(80 Conn. 68)

PARSONS v. UTICA CEMENT MFG. CO.

(Supreme Court of Errors of Connecticut. June 7, 1907.)

1. **BILLS AND NOTES—BONDS—BONA FIDE PURCHASER—ACTION—BURDEN OF PROOF.**

Where, in an action on negotiable bonds, it was undisputed that plaintiff got them from her husband and that he obtained them from their owner fraudulently and without consideration, under the express terms of Gen. St. 1902, §§ 4222, 4229, the burden fell upon her to prove she was a holder in due course in good faith and for value; her possession not placing the burden on defendant to show she was not a bona fide holder.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Bonds, § 222.]

2. INTEREST—NEGOTIABLE BOND.

Where no funds were placed in the bank at which negotiable bonds were payable to meet them and their interest coupons, and the maker's treasurer had been directed not to pay them, under the express terms of Gen. St. 1902, § 4240, no demand for payment was necessary, and interest was recoverable on the bonds and coupons from their maturity.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 29, Interest, §§ 95, 98.]

3. NEW TRIAL—ACTION ON BONDS—EVIDENCE—WEIGHT.

Under the evidence in an action on negotiable bonds, held the trial court did not abuse its discretion in setting aside a verdict for plaintiff as being against the weight of the evidence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, New Trial, §§ 9, 10, 146.]

Appeal from Superior Court, Hartford County; George W. Wheeler, Judge.

Action by Hannah G. Parsons against the Utica Cement Manufacturing Company. Plaintiff appeals from an order setting aside a verdict for her, and defendant brings exceptions from instructions given. No error. Defendant's exceptions sustained in part.

Action on two bonds, for \$1,000 each. A verdict for the plaintiff was set aside by the court as against the evidence, and the plaintiff appealed. The defendant filed a bill of exceptions to certain of the instructions given to the jury. The coupons were of the following form: "Hartford, Conn., January 1, 1885. \$30.00. On the first day of July, A. D. 1888, we promise to pay to the bearer thirty dollars at the Charter Oak National Bank of Hartford, Conn., for value received, being for interest due on that day on bond No. 41, dated January 1, A. D. 1885. Utica Cement Manufacturing Company, by J. S. Parsons, Treas."

Henry T. Richardson, for appellant. John H. Buck, for appellee.

BALDWIN, C. J. This is a suit brought in 1906 on two negotiable coupon bonds for \$1,000 each, issued by the defendant in 1885 and payable in 1890, to recover on each the principal and also the interest for two years, as evidenced by the four coupons which were the last to mature. Both bonds and coupons were payable to bearer. The answer avers that the bonds in 1887 were owned by the Continental Life Insurance Company, and were then fraudulently taken from its possession by the plaintiff's husband, who was its president, without any consideration moving to the company, and came into her possession with notice of that fact, without any consideration moving from her, and that she was never a bona fide holder. These allegations were denied by the reply.

The bonds were negotiable instruments. Gen. St. 1902, § 4171. The plaintiff, as the holder, was to be deemed prima facie to be a holder in due course, but under the statute, when it is shown that the title of any person who has negotiated such an instrument was defective, "the burden is on the holder to

prove that he, or some person under whom he claims, acquired the title as a holder in due course." Gen. St. 1902, § 4229. This provision abrogates so far forth the general rule of pleading that it is for him who pleads facts to prove them. *Johnson County v. Walker*, 79 Conn. 349, 65 Atl. 132. That the plaintiff got these bonds from her husband, and that he got them fraudulently and without consideration from their owner, was undisputed. It had, therefore, been shown that she received them from one having a defective title, and so by law the burden fell on her to prove that she was a holder in due course. To sustain this burden, it was necessary for her to show that she took the bonds in good faith and for value, and without notice of any defect in her husband's title. Gen. St. 1902, § 4222. It follows that the trial court erred in instructing the jury, as it did in substance, that, as the plaintiff had possession of the bonds, the burden of proof was on the defendant to show that she was not a bona fide holder, and that to do this it must satisfy them by a fair preponderance of evidence that she acquired the bonds either without paying any value, or knowing that her husband had taken them from the insurance company improperly and fraudulently. It being undisputed that her husband's title was defective, the burden was upon her to show value paid or want of notice of the defect, and not on the defendant to show no value paid or the existence of notice. The first exception of the defendant to the charge is therefore well taken.

The second exception is that the jury were told that, if they found for the plaintiff, she was entitled to recover interest on the principal of each bond from the date of its maturity, and also on each coupon from the date of its maturity. We have held that coupons similar in form bore interest at least after demand of payment. *Fox v. Hartford & West Hartford R. R. Co.*, 70 Conn. 1, 11, 38 Atl. 871. As a place of payment was named in those in suit, had it been shown that the defendant was able and willing to pay them there, as they matured, no interest on them would have been recoverable. Gen. St. 1902, § 4240. The testimony offered by the defendant, and not contradicted by any evidence offered by the plaintiff, went to show that no funds had ever been placed in the Charter Oak National Bank to meet the bonds or coupons, and that the treasurer of the defendant had before July 1, 1888, been directed not to pay them. No demand for payment of either bonds or coupons had ever been made before the institution of this suit. Under these circumstances, the charge was correct. Each coupon was a negotiable instrument, expressing an absolute undertaking to pay the bearer a certain sum on a certain day. The provision for its payment at a certain bank was rendered unimportant by the failure to place funds there to meet a demand. No demand was necessary to give

a right of action. Gen. St. 1902, § 4240. The defendant has had the use of the money since the debts matured. A corresponding loss has fallen on the plaintiff, if she be a holder in due course, which is properly measured by interest on each coupon from the date of its maturity, added to interest on each bond from the date of its maturity.

We have examined with care the evidence upon which the verdict was rendered. That introduced by the plaintiff tended to show that she purchased four bonds of the cement company for \$1,000 each from the insurance company in good faith in consideration of her transfer to it of shares in the cement company to an equal amount at their par value, and that the business was transacted through her husband, who died in 1897. The evidence introduced by the defendant tended to show that the plaintiff had no shares of stock to deliver at the time which she testified to be that of her purchase; that her husband was then the treasurer of the cement company and the president and manager of the insurance company; that she never disclosed her ownership of the bonds in suit to those who in 1888 succeeded him in the management of the company until this suit was brought; and that she never demanded the two other bonds from him or them. The stock ledger, stock transfer book, and stock certificate book of the cement company were produced on the trial, and have been sent up with the record for our inspection. They tend strongly to show that the plaintiff, while she had once owned shares in its capital stock to the par amount of \$4,000, had parted with them several months before the time when, according to her testimony, she turned them over to her husband and received from him the bonds in exchange. The trial judge, in his memorandum of decision on the motion for a new trial, observes that it seems plain to him that the jury did not appreciate the significance and force of this and other documentary evidence which was before them. Giving, as we must, every reasonable presumption in favor of the correctness of his conclusion that the verdict was against the evidence, we cannot say that it appears that he exceeded the limits of that discretion which the law intrusted to him. *Loomis v. Perkins*, 70 Conn. 444, 39 Atl. 797.

There was no error in granting the motion to set aside the verdict.

(80 Conn. 71)

HART v. ROBERTS et al.

(Supreme Court of Errors of Connecticut, June 12, 1907.)

APPEAL—REVIEW—RESERVED QUESTIONS.

Under Gen. St. 1902, § 751, questions of law may be reserved for the advice of the Supreme Court of Errors where appeal could be taken had judgment been rendered. *Held* that, on a trustee's complaint for an order authorizing him to sell trust property and reinvest the proceeds, the Supreme Court of Errors will

not advise whether the superior court has power to authorize the acceptance of an offer for the property, which it does not appear that either the court or trustee deems an advantageous one, and other questions which may not enter into the determination of the case.

Baldwin, C. J., dissenting.

Case Reserved from Superior Court, Hartford County; George W. Wheeler, Judge.

Action by Elijah Hart, trustee, against William Henry Roberts and others. Complaint, under sections 552 and 1035 of the General Statutes of 1902 for an order authorizing the plaintiff trustee to sell and convey certain real estate held by him in trust for a sum specified, and to duly reinvest the proceeds. Facts found in part, and the cause reserved by the court for the advice of this court as to the power of the trial court. Remanded without advice.

The complaint alleged, and the answer of all parties admitted, the following facts: May 22, 1898, William W. Roberts, of Hartford, died testate and owning certain real estate in the city of Hartford described in the complaint. At his decease he left as his heirs at law and next of kin a son William Henry Roberts, who is unmarried, and a grandson, Henry Roberts Williams, both now living and parties defendant. Said Henry Roberts Williams is married and has three children, all minors and parties defendant. By his will and its codicils the testator gave the residue of his estate, consisting of real and personal property and including the real estate in question, to the plaintiff trustee in trust for the life of said William Henry Roberts. By the terms of said trust the principal thereof was to remain intact, certain provisions out of the income were made in favor of said son and of said grandson and of the surviving children of said grandson in the event of his death before that of said William Henry, and any balance of income allowed to accumulate as a part of the corpus of the fund. The gift over upon the termination of the trust was made, one half to the children of William Henry, share and share alike, and the other half to said Henry Roberts Williams, or, if he should have died, to his children, or, if either said William Henry or said Henry Roberts Williams should have died leaving no one to take the share set out to them, respectively, then that share to go to those entitled to take the other share. The court has found true the allegations of the complaint which set out at length and in detail the facts thus briefly summarized. The complaint further alleged, and the answers admitted, that it was for the best interests of said trust estate and of the beneficiaries thereof that the real estate described in the complaint be sold, and the avails thereof invested according to law; that \$225,000 had been offered by a responsible party therefor; that said offer was a full and fair one; and that the plaintiff believed that it was for the best interest of said trust

estate and of the beneficiaries thereof that the premises should be sold, and the avails thereof invested.

The court did not pass upon any of these allegations, but found that said Roberts and Williams and the guardian ad litem of the latter's minor children, being all of the defendants, desired to have a sale of the premises made, and believed it for the best interest of all concerned that a certain offer be accepted and expressly reserved the question of the advisability of accepting said offer for further hearing after the advice of this court should be obtained upon the following questions of law, which were thereupon reserved for the determination of this court, to wit: "(a) Whether this court has, in view of the terms of the will and codicils thereto, power to decree a sale of said premises. (b) Whether this court has, in view of the terms of the will and codicils thereto, power to decree a sale upon terms other than cash. (c) Whether this court has, in view of the terms of the will and codicils thereto, power to decree a sale upon the terms named in the offer attached and marked 'Exhibit B.'" The offer thus referred to was one that the purchaser pay \$45,000 in cash, assume a first mortgage of \$83,000 already on the property, and give a note for \$97,000 payable in specified installments, bearing interest at the rate of 5 per cent. payable semi-annually and secured by a mortgage upon the property subsequent to said first mortgage. Before action had been taken by the court as above recited, the state's attorney for Hartford county had, pursuant to the provisions of section 553 of the General Statutes of 1902, been directed to appear and to investigate the allegations of the complaint, and to do all things necessary and proper to protect all interests involved in the action and not actually represented in court by counsel, and he had reported that he was of the opinion that it was for the best interests of the trust estate and of the beneficiaries thereof that a sale be made conformably to the terms of said offer.

Charles Welles Gross and Charles E. Gross, for plaintiff. Henry R. Williams, in pro. per. Walter S. Schutz, for defendants Beatrice H. Williams et al.

PRENTICE, J. (after stating the facts). If the advice of this court upon the questions propounded be given, and a negative reply be returned to all of them, such advice would result in a final judgment dismissing the action, and such judgment could be directed by this court. If, on the other hand, an affirmative reply be given to one or more of the questions, the cause would have to be remanded for a further hearing and the exercise by the trial court of its reasonable discretion as to what action it ought to take upon the facts as found before the judgment stage would be reached. The judgment when rendered might then be one in favor of either

party, would be one which this court could not direct, and might not be one which was conformable to any advice given, since the questions upon which advice was given might not enter into the action of the court at all. If, upon the return of the cause, the trial court should after its hearing decide either that a sale, a sale for other terms than cash, or a sale upon the terms of the particular offer contained in the record, would not be advantageous, this court would find itself in the position of having given advice upon a question or questions which were purely academic, and could serve no helpful purpose in the decision of the cause. The language of the statute (section 751) is, doubtless, comprehensive enough to permit this court to entertain reservations of questions of law, where the advice given will not be decisive of the final judgment to be rendered in the cause. Doubtless, also, such reservations have been entertained, and possibly not infrequently. Such, however, has not been the case of late; repeated rulings having been made in open court to the contrary. *State v. Feingold*, 77 Conn. 326, note, 59 Atl. 211. See, also, *New York, H. & W. R. Co. v. B. H. & E. R. Co.*, 36 Conn. 197. But whatever authority the terms of the statute may confer, and whatever practice may be discovered to have at some time existed, it is certain that the statute did not contemplate, and ought not to be construed to permit, that every question which a trial court may encounter in the progress of a cause, much less every one which it may anticipate that it may encounter, might be brought here at once upon its being either met or scented from afar and its determination had for the guidance of the trial court. Such a practice would inevitably result in this court being called upon to formulate principles of law which would never enter into the determination of a cause, to formulate such principles in an abstract form suited to more or less general application, and not as related to a concrete state of facts and narrowed and simplified by such relation, to create a mass of dicta embodying statements of abstract general principles which might some day rise up to harass judicial action, and to unnecessarily multiply the number of appearances in this court which an action might have before final disposition was made of it.

We do not, however, wish to be understood as saying that no reservation ought to be made or entertained until the case is ready for final judgment. Situations have arisen, and may well arise, where such action would be in the interest of simplicity, directness, and economy in judicial action. Such situations, however, will be those exceptional ones where the advantages resulting from such proceeding are manifest and distinct, and the question upon which advice is asked is one which will quite certainly enter into the determination of the cause. The situation in the present case is not one

of the exceptional character indicated; far from it. Our advice is asked upon three points, each involving considerations more or less foreign to the others. Whether any one of them will ever become pertinent cannot be told until the trial court has performed its functions. The slender thread by which one at least of them is hung to the case is apparent, and the vice of anticipatory abstract adjudications is well illustrated by that example. We are asked to advise whether the court has the power to authorize the acceptance of a certain offer which it does not appear that either the court or the trustee deems an advantageous one. It is quite possible that this request for advice involves the determination of an important question, or questions having far-reaching consequences, and yet the withdrawal of the offer, the receipt of a better one, or an adverse finding as to the wisdom of acceptance for other cause, would quite likely remove them entirely from the case. Furthermore, if the advice asked should be given, and that advice should be favorable to the power of the court in any of the respects enumerated, the subsequent action of the trial court upon its hearing, and in its exercise of its discretion, would conceivably furnish ground for the reappearance here of the cause. The discretion which the trial court would in the end be called upon to exercise would not be an absolute but reviewable one, and the hearing preliminary to its exercise might be productive of reviewable rulings.

If we look for advantage to be anticipated from the giving of the desired advice to set off against the apparent disadvantages attending it, our search for anything substantial will be in vain. It would be a simple process for the court to pass upon the question of fact as to the desirability of making a sale upon the terms of the offer made or upon other terms and of reinvesting the proceeds, to exercise its discretion in either disapproving or approving one in some form and upon some conditions, and thereupon either rendering judgment, or, having thus exhausted its functions preliminary to judgment, reserving the cause for the advice of this court as to the judgment to be rendered upon the situation thus clearly defined. Thus the cause would come here with all possible questions pertinent to its final determination presented, with all questions having no such pertinence eliminated, with all questions narrowed to the precise situation in the case, and in such form that final judgment in conformity to our advice would follow and could be directed. Such a procedure would be the simplest and most direct one conceivable for the determination of the matters at issue, and avoid all possible circuitry of action and the rendition of irrelevant and needless advice.

The cause is remanded, without advice, to be proceeded with in the superior court. In

this opinion HAMERSLEY, HALL, and THAYER, JJ., concurred.

BALDWIN, C. J. (dissenting). Whether the advice asked for in this case by the superior court ought to be given depends upon the true meaning of Gen. St. 1902, § 751, by which the General Assembly has exercised the authority committed to it by the Constitution (article 5, § 1) to define by law the powers and jurisdiction of all courts, subject only to what may be implied from the names of the two courts which the Constitution itself recognizes and establishes. In the summary of our judicial establishment prefaced to the first volume of the Connecticut Reports, after describing the practice which had grown up of reserving motions for a new trial for the advice of the nine judges of the superior court, of whom this court was then constituted, it states (page xxv) that: "Questions of law arising in any form and appearing from the files or from written documents in causes before the superior court in the circuits, may also be referred at the discretion of the court or by consent of the parties to the nine judges for their advice. These cases are then argued by counsel at one of the stated terms of the Supreme Court of Errors, and the opinion of the judges, though given in the form of advice, will govern the superior court at the following sessions in the circuits from which the cases were brought, and will be regarded generally as the highest evidence of the law of the land." That the court at this period felt free to entertain questions of law "arising in any form" is indicated by the causes reported. In the first volume of the Connecticut Reports, for instance, there was a reservation upon a demurrer to a bill in chancery, and we advised that the bill was insufficient. *Judah v. Judd*, 1 Conn. 309, 312. A few years later, on a similar reservation, our advice was that the demurrer be overruled. *Stebbins v. Cowles*, 10 Conn. 399, 409. This, under the settled rules of chancery practice left the defendant free to answer over, and therefore did not necessarily make a final disposition of the cause. So, in the volume last cited, a reservation was entertained on a demurrer to a plea in abatement. *Hoyt v. Brooks*, 10 Conn. 188, 192. That the advice asked for would not be refused because it might not determine the event of the cause is strikingly shown by our opinion in *Johnson v. Sanford*, 18 Conn. 461, 466, 469. This was a bill in chancery, which on demurrer had been adjudged sufficient. A committee had been then appointed, and the question reserved was as to the proper action to be taken on their report. We advised that it be rejected. The defendant's counsel claimed that the bill was insufficient, but was not allowed to be heard on that point; the court observing that this would be to anticipate the decision of a

question that might thereafter be presented on a writ of error from the final judgment.

The ancient practice upon reservations, which has been thus outlined, received the sanction of the Legislature in 1855, when the court was put upon a new and separate foundation. It was then enacted that "the superior court may reserve questions of law arising in cases tried before said court, for the advice of the Supreme Court of Errors in the same manner as such questions are now reserved; and the superior court shall conform to the advice of the Supreme Court of Errors in the judgment, decree or decision made or rendered in such cases." Public Acts 1855, p. 38, c. 28, § 6. It will be observed that these provisions contemplated the giving of advice not only as to judgments and decrees, but as to the "decision" of a question of law arising in cases tried. This word "decision" has been retained in all our revisions of this statute, nor does that now in force (Gen. St. 1902, § 751) differ in any respect from the act of 1855, except in embodying the successive statutory extensions of the power to reserve such questions in favor of judges of the superior court, sitting at chambers, and any inferior courts over which we may have direct appellate jurisdiction. The practice as to the nature of the questions that could be reserved continued, after 1855, to be precisely what it had been before. Thus, in the reservations heard in 1857, there was one as to the disposition of a plea in abatement, upon which our advice was that it should be overruled; that is, that the cause should be heard on its merits. *Canfield v. Wooster*, 26 Conn. 384, 385. Another arose on a demurrer to a plea in bar, and our advice was that it was insufficient. *Bacon Academy v. De Wolf*, 26 Conn. 602. Another on a demurrer to a criminal information. *State v. Gager*, 26 Conn. 607, 608.

An examination of our report, from the fifty-fourth to the sixty-third volume, inclusive of each, shows 30 reservations upon which we gave advice, of interlocutory questions, a decision of which would not necessarily determine the final judgment in the cause. Of these questions, two arose on motions to erase from the docket; two on motions to quash; one on demurrer to a plea in abatement; two on demurrer or answer to an application for a writ of mandamus; eight on demurrer to a complaint; one on a motion to compel an amplification of the complaint; one on demurrer to a quo warranto information; four on demurrer to an answer; one on demurrer to a reply; three on objection to the acceptance of the report of a committee. Of these causes, one (*State ex rel. Morris v. Bulkeley*) was the most important ever decided by this court. In our opinion we said (61 Conn. 376, 23 Atl. 186, 14 L. R. A. 657) that, while the information as it stood was insufficient, if the relator should thereafter amend it in a particular way, it would be

sufficient. Another of them seems almost the precise analogue of that now before us. A railroad company had applied to the railroad commissioners to approve the location of a station upon a highway. The commissioners were of opinion that they had no jurisdiction to approve the taking of a highway for such a purpose. To an application to compel them to act, and so either approve or disapprove, they answered denying their power to act. The question of their power was thereupon reserved. We decided that they had the power, and the location was subsequently approved. *State v. Railroad Commissioners*, 56 Conn. 308, 315, 15 Atl. 756.

Against these precedents, which might be multiplied indefinitely, may be cited several of recent date, which may seem to look in a different direction. The only one appearing in our reports is *State v. Feingold*, 77 Conn. 326, 327, 59 Atl. 211, in which we were asked to advise as to the proper ruling on a demurrer to a complaint for the violation of a statute; the contention of the defendant being that the statute was unconstitutional. Advice that the complaint was insufficient would have left the defendant free to answer over (Gen. St. 1902, § 1513), and deny the facts charged. A court does not pass upon a defense founded on the unconstitutionality of a statute, except in a case of necessity. It was the opinion of a majority of the court that, to present such a case, counsel should file a stipulation that a ruling on the demurrer would end the controversy, and this was accordingly done. In two or three other cases, not reported, coming before us in recent years, a hearing has been refused on reservations of questions of law presented by demurrer to the complaint. This action has been taken by vote of a majority of the court, in view of the special circumstances apparent upon the record presented. I was not one of the majority; but, as no reasons were announced for those decisions, there was no occasion for stating my dissent. Of other reservations for advice, presenting circumstances of quite a similar character, and coming before us at about the same time, we assumed jurisdiction. See *Boothe v. Armstrong*, 76 Conn. 530, 534, 57 Atl. 173; *Downer v. Clark*, 77 Conn. 187, 200, 58 Atl. 735; *New York, N. H. & H. R. Co. v. Offield*, 77 Conn. 417, 422, 59 Atl. 510; *Id.*, 78 Conn. 1, 60 Atl. 740; *McGovern v. Mitchell*, 78 Conn. 536, 537, 540, 63 Atl. 433.

The opinion of the court in the case at bar is that the advice asked should be refused, because it does not present such questions as are contemplated by Gen. St. 1902, § 751. It asserts that reservations ought not to be made or entertained in cases not ready for final judgment, unless exceptional situations are presented, where the advantages resulting from such a proceeding are manifest and distinct, and the question upon which advice is asked is one which will quite certainly enter into the determination of the cause. I

do not find any such limitation of jurisdiction in the statute, and the long-continued practice of the court, down to 1904, seems to me quite inconsistent with the construction so put upon its terms. For more than half a century before the act of 1855, re-enacted in Gen. St. 1902, § 751, the statutes of the United States had provided that questions occurring in any case before a Circuit Court of the United States, when held by two judges, upon which their opinions were opposed, might be certified to the Supreme Court of the United States for its final decision, without, however, preventing proceeding in the cause in the Circuit Court, if this could be done without prejudice to the merits. In 1872, on account of the press of business in the Supreme Court, this mode of proceeding was confined to criminal cases; continuing as to them until the establishment of the Circuit Court of Appeals, in 1891. See 2 Stat. U. S. 159; Rev. St. §§ 650-652 [U. S. Comp. St. 1901, p. 527]. Jurisdiction to decide points so certified was never declined by the Supreme Court of the United States because they might not be decisive of the cause. "Certificates of division" were passed upon, for instance, when the question was as to whether some out of a greater number of grounds of demurrer (the others not having been passed upon by the Circuit Court) were well taken (*United States v. Waddell*, 112 U. S. 76, 5 Sup. Ct. 35, 28 L. Ed. 673), and when it was one occurring on a motion for a temporary injunction, but going to the merits of the case (*United States v. Chicago*, 7 How. [U. S.] 185, 191, 12 L. Ed. 660). If a cause, in the course of proceedings in which a question had been certified up and decided, at a later stage passed into judgment, and exceptions were taken to the judgment for causes unconnected with the question certified, a writ of error lay upon them. *Daniels v. Railroad Co.*, 3 Wall. [U. S.] 250, 255, 18 L. Ed. 224. The practice under this legislation of the United States was familiar to the bar of Connecticut, by one of whom the act of 1855 must have been drafted, when that act was passed. Our own practice since this court assumed a strictly judicial character in 1807 was still more familiar, and that has now been maintained for a full century, with no other interruption than that furnished by our action in the case of *New York, H. & N. R. Co. v. Boston, H. & E. R. Co.*, 36 Conn. 196, and the few recent rulings to which reference has been made none of which were accompanied or followed by any statement of the reasons for making them.

In my judgment, when a point of law is sent up by a reservation for our advice at the request of all the parties to the cause, and with the approval of the trial court, it is as much our duty to decide it, as if it were presented on an appeal. The remedy is a cheap and speedy one. It avoids the rendition of many judgments, which would be liable to reversal. It is, no doubt, possible

that questions so reserved may be trivial, or such as ultimately prove to be immaterial to the final disposition of the case; but, if it be desirable to change our practice so as to avoid the necessity of answering them, such a change, in my opinion, should come only from the General Assembly.

(106 Md. 107)

TWILLEY v. TOADVINE et al.

(Court of Appeals of Maryland. May 15, 1907.)

WILLS—CONSTRUCTION—ESTATES IN TRUST.

Where a will directed the executor to pay a certain share of the estate to a trustee in trust for the use of a daughter of the testatrix, the balance of the funds remaining in the trustee's hands after the daughter's death belonged to the daughter's estate, and did not pass under a residuary bequest.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, § 1389.]

Appeal from Circuit Court, Wicomico County, in Equity; Charles F. Holland, Judge.

Action by Ida Toadvine and others against Eugene Oliphant, trustee, John B. Twilley, and others. From a decree for plaintiffs, Twilley appeals. Affirmed.

Argued before BRISCOE, SCHMUCKER, PEARCE, BOYD, BURKE, and ROGERS, JJ.

James E. Ellegood, for appellant. E. Stanley Toadvine, for appellees.

ROGERS, J. This is an appeal from a decree of the circuit court for Wicomico county, in equity. It appears from the record in this case that one Mary A. Twilley, of said county, on the 25th day of May, 1900, executed her last will in due form, and, after directing that certain just debts, funeral expenses, and costs of administration should be paid, by the second clause of her will, directed and empowered her executor therein named to sell and convey all of her estate, both real and personal, upon the best terms he might deem best. By the third clause, over the construction of which this controversy arose, she declared: "I hereby direct that my executor pay one eighth of my estate after the expense of administration has been paid to Eugene Oliphant in trust for the use of my daughter, Arabella Trader, who is now insane, but if the said Arabella Trader shall become of sound mind, then I direct that the above named amount be paid to the said Arabella Trader, and I further direct that in the event of the death of the said Arabella Trader before the execution of this my last will and testament that the above mentioned amount be paid in equal parts to my other seven children share and share alike." And by the fourth clause of her will she bequeathed as follows: "I bequeath the balance of my estate in equal amounts to my seven children, namely," and names them, "share and share alike." And this court is asked to construe the said third clause, and to declare what estate the said Arabella Trader took under the will of her mother,

the testatrix, Mary A. Twilley. It appears from the record in this case that Arabella Trader survived her mother, and it also appears from the record that Arabella Trader remained non compos until her death, which occurred in February, 1906. It also appears that Eugene Oliphant was duly appointed committee of said Arabella Trader by the circuit court for Wicomico county and qualified as such, that said committee has made a final report to said circuit court, and that said report and account has been duly ratified by said circuit court for Wicomico county, and that there remains in the hands of said Eugene Oliphant the sum of \$284.32 subject to the order of said court.

On the 14th of March, 1906, Sidney L. Trader, husband of Arabella Trader, Ida Toadvine, and Sanford A. Toadvine, her husband, William B. Trader, and Annie E. Ellis, and Samuel M. Ellis, her husband, filed in the circuit court for Wicomico county their petition against Eugene Oliphant, trustee and committee of Arabella Trader, lunatic, and the other seven children of Mary A. Twilley, deceased, alleging that the aforesaid sum of \$284.32 remains in the hands of Eugene Oliphant, trustee, and that Arabella Trader died in February, 1906, owing no debts, and that the said Ida Toadvine, William B. Trader, and Annie E. Ellis are the only heirs at law of Arabella Trader, and that they are all adults, and that they, together with Sidney L. Trader, are entitled to said sum now in the hands of Eugene Oliphant, trustee, and pray process against the seven other children of Mary A. Twilley, naming them. To this petition the other seven children of Mary A. Twilley filed their answer, alleging that they are advised that the fund of \$284.32 now in the hands of Eugene Oliphant does not belong to the children of Arabella Trader, deceased, and her husband, but that they (the seven children of Mary A. Twilley) are entitled to the said sum. The case was submitted without testimony, and the learned judge below filed an opinion in which he declared that the said sum of \$284.32 belonged to the husband and children of Arabella Trader, and signed a decree in conformity with those views. And we are asked in this appeal to review that opinion and decree, and, as this involves a construction of the will of Mary A. Twilley, we will proceed to do so.

From an inspection of that instrument, it will appear: (1) That one-eighth of the estate of Mary A. Twilley was to be paid over to Eugene Oliphant in trust for the use of Arabella Trader, and we have shown that this was done. (2) But if the said Arabella Trader shall become of sound mind, then the above amount was to be paid to the said Arabella Trader. Now, this event never happened, for the record shows that Arabella Trader remained non compos until the day of her death, so the second contingency is eliminated from our consideration. (3) "That

in the event of the death of Arabella Trader before the execution of this my last will [meaning probate] and testament that the above mentioned amount be paid in equal parts to my other seven children share and share alike"; but this event did not occur within the time specified in the will, for it is a conceded fact in this record that Arabella Trader survived her mother, Mary A. Twilley, several years, so that we find from the record that only one of the three contingencies happened, as named in the will, namely, that the one-eighth part of the estate of Mary A. Twilley was paid over to Eugene Oliphant in trust for the use of Arabella Trader, who did not recover her mind, and who also outlived her mother, so that we hold that the funds in the hands of Eugene Oliphant, trustee and committee, belongs to the estate of Arabella Trader, and must be paid over to her administrator when duly appointed and qualified.

It follows from what we have said that the decree appealed from must be affirmed.

Decree affirmed, with costs to the appellee above and below.

(30 Vt. 177)

FLEET v. WAIT.

(Supreme Court of Vermont. Windsor. June 5, 1907.)

1. COVENANTS — COVENANTS OF TITLE — BREACH.

A grantor conveyed land by a deed containing covenants. Two years before he had agreed to give to a city five feet of the land for widening a street, on condition that the work should be done that year. There was nothing to show when the city entered on the premises to claim the five feet. *Held*, that the grantor was not liable for breach of covenant on entry after the time limited by the agreement.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Covenants, §§ 96, 111.]

2. SAME—COVENANTS AGAINST INCUMBRANCES—BREACH.

An agreement by an owner of lots abutting on a street to give the city five feet for widening the street, on condition that the work should be done during that year, does not constitute an incumbrance within a covenant against incumbrances in a deed executed two years thereafter.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Covenants, § 111.]

Exceptions from Windsor County Court; William H. Taylor, Judge.

Action by Lindley M. Fleet against Otis H. Wait. Heard on demurrer to the declaration. There was a judgment sustaining the demurrer pro forma, and plaintiff excepts. Affirmed, and cause remanded.

Argued before POWELL, C. J., and TYLER, MUNSON, and WATSON, JJ.

W. F. Stephens and Harvey, Harvey & Harvey, for plaintiff. Frederick C. Southgate and Stickney, Sargent & Skeels, for defendant.

MUNSON, J. The declaration is for breach of the covenants in a deed of certain lots in Brockton, Mass., in two counts, and is demurred to generally. Both counts allege an eviction by the city under an agreement of the defendant to give five feet from the front of said lots for widening the street. This is set up in the first count as a breach of each of the several covenants, and in the second count as a breach of the covenant against incumbrances. The defendant's agreement, as set up in both counts, is dated April 10, 1897, and is upon condition that the work be done that year. His deed to the plaintiff is dated September 9, 1899. There is no allegation of the time when the city entered upon the premises. If the entry was after the time limited, it was not by virtue of any right conferred by the agreement. The agreement did not constitute an incumbrance when the deed was given, for the time allowed for an exercise of the right had then expired.

Judgment affirmed, and cause remanded.

(80 Vt. 179)

ABBOTT v. SANDERS et al

(Supreme Court of Vermont. Addison. June 5, 1907.)

1. MORTGAGES—REQUISITES—DEED AS MORTGAGE.

A conveyance conditioned for the support of the grantor will be treated as a mortgage, and, in case of breach by the grantee, equity may grant relief by foreclosure forfeiting and extinguishing the grantee's right.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 35, Mortgages, § 53.]

2. SAME—OFFER TO DO EQUITY.

In an action by a grantor to foreclose a conveyance conditioned upon her support, and to have the grantee's rights extinguished, where there was a persistent and aggravated abuse of the grantor for the purpose of driving her from the premises, without facts that could furnish any excuse, it is not necessary to aver readiness to do equity, since the rules of equity would not afford relief to the grantee.

Appeal in Chancery, Addison County; Willard W. Miles, Chancellor.

Action by Eliza E. Abbott against John D. Sanders and wife. Order overruling pro forma a demurrer to the petition, and defendants except. Affirmed and remanded.

Argued before ROWELL, C. J., and TYLER, MUNSON, and WATSON, JJ.

Davis & Russell, for appellants. W. H. Bliss, for appellee.

MUNSON, J. The bill sets up a conveyance of real and personal property from the oratrix to the defendant husband, conditioned that the grantee support the oratrix during her life; alleges a substantial breach of the condition; and prays for a decree declaring the defendants' rights forfeited, and their title and equity extinguished and foreclosed. The bill is demurred to.

The defendants contend that the case presented is one of forfeiture by breach of a con-

dition subsequent, and that forfeitures will not be enforced by a court of equity. It is held, however, with substantial unanimity, that equity will afford relief from conveyances given for support, on nonperformance of the agreement to support, although there is great disagreement as to the grounds and form of the relief. 13 Cyc. 710; 2 Pom. Eq. Rem. § 686, and notes; *Glocke v. Glocke*, 113 Wis. 303, 89 N. W. 118, 57 L. R. A. 458. In many cases in different jurisdictions, deeds given to secure the grantor's support have been annulled on general grounds of equity, without much attempt to refer the relief to any specific rule. *Peck v. Hoyt*, 39 Conn. 9; *Penfield v. Penfield*, 41 Conn. 474; *Jenkins v. Jenkins*, 8 T. B. Mon. (Ky.) 327; *Reeder v. Reeder*, 89 Ky. 529, 12 S. W. 1063; *Patterson v. Patterson*, 81 Iowa, 626, 47 N. W. 768; *Dodge v. Dodge*, 92 Mich. 109, 52 N. W. 296; *Rexford v. Schofield*, 101 Mich. 480, 59 N. W. 837; *Wilfong v. Johnson*, 41 W. Va. 283, 23 S. E. 730. In Illinois the court rescinds the transaction, presuming, if necessary to the relief, that the conveyance was obtained with fraudulent intent. *Frazier v. Miller*, 16 Ill. 48; *Oard v. Oard*, 59 Ill. 46; *Cooper v. Gum*, 152 Ill. 471, 39 N. E. 267. In Oregon it is considered that rescission is not permissible, and the grantor's support is secured by making it a charge upon the property. *Watson v. Smith*, 7 Or. 448; *Patton v. Nixon*, 33 Or. 159, 52 Pac. 1048. In Rhode Island a reconveyance is decreed, upon the theory that the deed creates a continuing obligation in the nature of a trust, and that the failure to support is a renunciation of the trust. *Grant v. Bell*, 26 R. I. 288, 58 Atl. 951. In Indiana the agreement to support is considered a condition subsequent, the breach of which entitles the grantor to re-enter and maintain a suit to quiet the title. *Richter v. Richter*, 111 Ind. 456, 12 N. E. 698; *Cree v. Sherfy*, 138 Ind. 354, 37 N. E. 787. In Wisconsin it was formerly considered that this ground of relief was not tenable, but this view is repudiated in the recent case of *Glocke v. Glocke*, 113 Wis. 303, 89 N. W. 118, 57 L. R. A. 458. It is said in that case that the property conveyed is held on condition subsequent; that upon a breach of the condition the title will revert, at the election of the grantor, without judicial aid; and that the grantor can have in equity "such appropriate relief as may be necessary to judicially establish his status as regards the property and quiet his title thereto."

The form that the equitable remedy will take in this state is determined by our holding regarding conditional deeds. With us, a conditional deed is treated as a mortgage to secure the grantee's performance of the condition contained in the deed. *Austin v. Downer*, 25 Vt. 558; *Ford v. Steele*, 54 Vt. 562; *Moulthrop v. Farmers' Mut. Ins. Co.*, 52 Vt. 123. In the case last cited the holder of an insurance policy gave a deed of the insured property, with a condition that, if

the grantee failed to pay him a certain sum as provided in the condition, the deed should become null and void. The question was whether this avoided the insurance under the clause prohibiting alienation. The court could not see wherein this differed from the ordinary case of the conveyance of an absolute title with a mortgage back to secure a payment of purchase money, saying that here the defeasance was inserted in the deed of conveyance, while in the ordinary case of conveyance and mortgage the defeasance is inserted in the latter, but that in such a case both instruments are construed together as one and the same contract, effectuating the conveyance of a defeasible title to the purchaser. So the insured's deed was held an alienation of the property, avoiding the insurance. The situation being the same as if the condition were omitted from the oratrix's deed and contained in another deed, given back by the defendant husband, it is clear that the rights of the defendants may be foreclosed by bill. In this state, a conveyance conditioned for the support of the grantor is treated as a mortgage, whatever the form in which the support is to be furnished. *Austin v. Austin*, 9 Vt. 420; *Henry v. Tupper*, 29 Vt. 858; *Ottaquechee Sav. Bk. v. Holt*, 58 Vt. 168, 1 Atl. 485.

It appears from the bill that this deed was for an expressed consideration of \$300, and that the defendant husband paid some over that amount in discharge of a mortgage on the premises. There is no further allegation regarding this, and it is claimed that the bill is demurrable for want of an offer to do equity. The bill sets up a persistent and aggravated abuse of the oratrix, alleges that this was inflicted with intent to drive her from the premises, and discloses no fact or circumstance that can operate by way of excuse or palliation. The rules of equity do not permit any relief of the defendants on the case presented, and it was therefore unnecessary to aver a readiness to do equity.

Pro forma decree affirmed, and cause remanded.

(80 Vt. 15)

NORTH TROY GRADED SCHOOL DIST. v. TOWN OF TROY et al.

(Supreme Court of Vermont. Special Term. May 10, 1907.)

1. WILLS—TRUSTS—CONSTRUCTION—DESIGNATION OF SHARES—DIVISION AMONG MEMBERS OF CLASSES.

A will left certain property to the town of T., in trust for the school districts and fractional school districts therein, the interest to be divided by the selectmen of the town each year, so that each fractional part of a school district should receive one-half as much as a whole district and each whole district to draw the same amount. At that time there were nine whole and four fractional school districts in T., but subsequently the whole town became a single district under a statute, and later the orator district was created by act of the Legislature, comprising less than half of two of the old districts; its grand list being

about a third as much as that of the rest of the town. *Held*, that the orator district was entitled to one-half the interest, as there are but two districts in the town.

2. SCHOOLS AND SCHOOL DISTRICTS—FUNDS—BEQUESTS—STATUTES—CONSTRUCTION.

The act of 1894, incorporating the school district of North Troy, providing that it should have the same share of income from bequests to the town for the benefit of the public schools of the town that it would by law receive as an unincorporated district, means that it should receive the same share that it would if it were a school district not incorporated by special act.

3. TRUSTS—EXECUTION—SUPERVISION BY COURTS.

Where a will left funds to a town in trust, the income thereof to be divided by its selectmen among its school districts in a certain manner, the action of the selectmen in making a division is not final, but may be reviewed by the courts, since they derived their authority from the will and it directs the method of division, which must be made accordingly.

4. ESTOPPEL—EQUITABLE ESTOPPEL—CHANGE OF POSITION.

Where a defendant school district made no change in its situation on account of the orator's conduct in not claiming its proper share of the income from trust funds of which defendant was one of the cestui que trust, the orator is not bound by its conduct in that respect.

(*Ed. Note.*—For cases in point, see Cent. Dig. vol. 19, Estoppel, § 142.)

5. ABATEMENT—ACTION AGAINST OFFICER—EXPIRATION OF TERM.

Where certain officers of a town were cited as such as defendants, but the bill made no case against them until an amendment was filed after their respective terms had expired, the bill will be dismissed as to them, with costs on appeal.

6. TRUSTS—EXECUTION.

Where a town was the trustee under a will of certain funds, the income from which was to be divided by its selectmen among its school districts, a decree against one of the selectmen as to the manner of dividing the income will be as effective as one against all of the board, since their authority is private, and all must concur in its execution.

7. SAME—ACTIONS—PARTIES.

Where a town was made trustee of certain funds, the interest thereon to be divided by its selectmen among the school districts thereof, the town was a proper and necessary party to an action to restrain an improper execution of the trust, since it was the conferee of the trust, and held the legal title to the property.

8. MUNICIPAL CORPORATIONS—CREATION BY IMPLICATION.

If powers and privileges are conferred by legislative act upon the inhabitants of a district, and duties imposed that cannot be exercised and enjoyed without corporate capacity, such capacity will be created by implication if such appears to be the intention of the Legislature.

9. SCHOOLS AND SCHOOL DISTRICTS—STATUS OF DISTRICT.

A town school district under the statute is a corporate body by necessary implication, separate and distinct from the town, since it has creation by name, in effect, perpetuity of existence, unity of person, and governing boards elected at town school district meetings.

10. INTEREST—AMOUNT—INTEREST ON RECOVERY—TIME OF BEGINNING.

In an action against a town as trustee under a will and a town school district as a cestui que trust for money improperly paid to the school district, in which there was a recovery, the district should pay interest from the time it was made a party and the original

bill was served upon it, though the original bill was against the town alone, since the district knew from the bill that the orator was seeking the recovery of the money it had received.

Appeal in Chancery, Caledonia County; John H. Watson, Chancellor.

Action by the North Troy graded school district against the town of Troy and others. From a decree for orator, defendants appeal. Reversed and remanded, with mandate for decree upon proper amendment.

Argued before ROWELL, C. J., and TYLER and MUNSON, JJ., and HALL, Superior Judge.

J. W. Redmond and O. S. Annis, for orator. Young & Young, for defendants.

ROWELL, C. J. On March 7, 1890, Moses Dodge, who then was, and for 40 years had been, a resident of the town of Troy, made his will, whereby he gave the residue of his estate to said town in these words: "The residue and remainder of all my estate, both real and personal, I give to the town of Troy in trust, and all of the same to be held in trust by said town for all the school districts and fractional school districts in said town, and all that may hereafter be in said town; the same to be known and forever called the Moses Dodge Fund, and all of the same to be kept at interest by said town forever, and the interest on all of the same to be divided each year by the selectmen of said town on the Friday next before the last Tuesday of March of each year hereafter forever after my death between the school districts and the fractional parts of school districts in said town as aforesaid, each fractional part of a school district, one half as much as a whole district, and each whole school district to draw the same amount each year." The testator died at Troy on October 3, 1890, and his will was duly probated, and the residue of his estate, amounting to \$13,272.62, was paid to the town under the will, and the town still holds it. Before and at the time in question, and up to the time the town system was adopted by the act of 1892, the several district system prevailed in Troy, under which, at the time in question, the town was divided into nine whole districts and four fractional districts; and so, when the town became a single district under said act, as it did, there being no other district in town, it was entitled to the whole income of said fund. But in 1894 the Legislature, at the special instance and request of the inhabitants of the incorporated village of North Troy, incorporated that part of the town comprising the territory of said village as a graded school district, with all the powers, duties, and privileges granted by law to such districts, and giving it the same share of the public money and the same share of income from bequests and legacies to the town for the benefit of the public schools of the town that by law it would receive as an

unincorporated district. This district is the orator, and consists of considerable less than half of the territory of old school districts Nos. 1 and 10 as they existed before and at the time the act of 1892 took effect, and does not include all of either of said districts. The orator's grand list is about a third as much as that of the rest of the town. Up to and including 1905 the income of said fund has been divided between the orator and the town district on the basis of two-elevenths to the orator and nine-elevenths to the town district. But now the orator claims one-half of said income, because there are but two school districts in town, and seeks a decree to that effect, and also to recover what it has been deprived of by the divisions that have been made.

The testator never lived in what is now the orator district, but most of the time in one of the smaller districts of the town. He was fully conversant with the division of the town into school districts, and knew in what subjects the law required instruction to be given in the schools maintained therein. The defendants claim that a school district, like the orator, incorporated by special act of the Legislature, was not in the contemplation of the testator when he made his will, nor what he meant by the words "school districts," as therein used; but that he contemplated, and that the will should be construed to mean, only school districts created under the general law of the state, such as he had always known and been accustomed to. But when we read the will in the light of the circumstances in which it was written, and consider, as we may, that the testator knew that the town could make and unmake, unite, and divide its school districts at pleasure, and thereby increase or diminish their number, and not only that, but could abolish them altogether, and adopt the town system, as the law had been for 20 years, and that the Legislature could, and for a long time had, created graded school districts by special act, and could, in fine, control the whole system of public schools, and especially when we consider that his gift was to go on forever, and that he could not foretell what changes might take place—it can hardly be supposed that he undertook to divine whether the school district system would go on in the town as long as his gift, and made his will upon the theory that it would; but rather that he knew he could not foretell how that would be, and adopted a basis for dividing the income that would be likely to fit any change that might be made in that regard, and so took no note of population, average attendance, school age, territorial extent, nor any other thing save only the number of districts, which he knew was liable to change at any time, as the language of his will shows. He did not seem to care how many school districts there were, and why should he care whether they were formed under general or special

law. For his purpose a school district was a school district, however formed. Suppose the town itself, as the testator knew it might as the law then was, had made the orator's territory into a district, and all the rest of the town into another, would it be said that the testator did not contemplate that, and that the income could not be divided between them on the basis of the will? Hardly that, we think. Then why say that merely because the orator was created by special act? It is clear that you cannot. It is unnecessary to say that the language of the will must control, and that language is that each whole school district shall draw the same amount each year forever. But the defendants say this is inequitable. If that is so, nevertheless, the language of the will must control, and no warrantable construction can make it otherwise.

The defendants also say that, though the orator is entitled to one-half under the will, its charter limits it to a less amount, if, indeed, it is entitled to anything thereunder, because of the provision that it shall receive the same share of the income that by law it would receive as an unincorporated district, under which they say, strictly speaking, it could receive nothing, because, as the law then stood, it had, and could have, no existence as an unincorporated district. But, that aside, they suggest a division in proportion to the number of scholars of the same grade in the two districts; but claim that a proper construction of the charter would limit the orator to the same proportion that it received as an unincorporated district before the adoption of the town system, which should in no event exceed two-elevenths, and in the future that that amount should be reduced in the proposition that the scholars resident in that part of Nos. 1 and 10 not included in the orator bears to the scholars resident therein.

The orator contends that its charter means that it is to receive the same share of the income that it would receive were it a school district not incorporated by special act—a school district without a special charter, an unincorporated school district. And this seems to us to be the fair import of the act. The other view, although worthy of consideration, does not strike us as tenable. The obvious purpose of the Legislature was, not to say definitely what share of the income from bequests and legacies the orator should receive, but, as a basis for determining that, to give it the same share in all cases that it would receive were it an unincorporated district, and leave that to be determined under the general law applicable to the particular case. The inquiry is, then: What share of the income in question would the orator receive were it, what its charter assumes it to be for this purpose, an unincorporated district? And the answer is, as we construe the will, one-half, for then there would be, as there are now, only two school

districts in town, and the orator would be one of them.

But the defendants object that, as there is in the will no suggestion of appeal from the action of the selectmen in dividing the income, their division, made in good faith, is final and conclusive between the parties, especially as the money has been accepted and received thereunder and appropriated; that, if the orator intended to question the correctness of their decision, it should have declined to receive the money, and brought suit for a construction of the will and directions to the selectmen; but, not having done that, but having accepted and used the money distributed to it by the selectmen, it is bound by their decision and its own conduct, and precluded from relief in respect of past divisions. The defendants do not claim that the selectmen were acting in their official capacity in making the division, but expressly say they were not, and were in no sense the agents of the town, and had no power to bind it, but were acting solely as the appointees of the testator; and this we think is the correct view of the matter. This being so, the proposition contended for cannot be maintained, for the will cannot be construed to give finality to an erroneous division by the selectmen. They derive their authority solely from the will, and that directs just how the division shall be made, and it must be made accordingly; and, if it is not, it is without authority and void, and neither binds the parties nor precludes the courts, but is subject to revision and correction. Whether the orator is bound or not by its conduct is principally a question of the inequity of permitting its claim for the money to be enforced—an inequity based upon some change in the situation of the defendants made in reliance upon that conduct. But, as it does not appear that any such change was made, it cannot be said that the orator is bound by its conduct in the respect claimed.

The defendants Hunt and Wheeler claim that they should have been hence dismissed with costs. The decree takes no note of them in any way. The claim is based upon the idea that they were not made parties until the amended bill was filed, when they had ceased to be selectmen by the expiration of their term of office, and hence were not even proper parties. But the fact appears to be that they were cited in nearly a year before that, when they were in office, under an order for that purpose following a decision on demurrer that they were necessary parties. After being thus cited, they appeared, and moved to dismiss because the bill as it then stood made no case against them; and thereupon, on hearing, it was ordered that the motion be sustained, and the bill dismissed, with costs, unless the orator amended its bill in the respects complained of in such a time, and thereupon the amended bill was filed, though not within the time limited, but no objection appears to have

been made on that account. It is a general rule that no one should be made a party defendant to a bill who has no interest in the subject-matter of the suit and against whom no decree can be made. But here these defendants could have been decreed against while in office by way of directing them how to divide the income, and enjoining them from dividing it otherwise, and so they were proper parties, at least, when cited in. But now, having gone out of office, which they did before the amended bill was filed, no decree can be made against them, for they could not obey it if there should be, and the court will not do a nugatory thing, as is often said in mandamus proceeding, in which the court never commands the doing of a thing by one who would have no power to do it if commanded. Therefore we think that the bill should be dismissed as to these defendants, with costs in this court, but whether with costs below or not we leave to be there determined. The defendant Peck is still a selectman, and has been since before the bill was brought; and, although he is the only member of the board who is a party to the suit, yet a decree against him will be as effective as one against all the members of the board, for their authority is private, and not public, and therefore all must concur in its execution.

The town claims that it is neither a necessary nor a proper party, for that it has received none of the income in question, and therefore is not liable for it; that the selectmen in dividing it were not its agents, but the agents of the testator, and that it is not liable for what they did, however erroneous, nor for the results of it; that the only duty the will imposes upon it is to take the bequest, invest it, and pay the income to those designated by the men acting as its board of selectmen, all which it has done. But this claim fails to note that the town's trusteeship gives it the legal title to the fund, and therefore makes it a proper party at least, and the general rule is that, when the suit is by or against the beneficiaries, the trustee is a necessary party. Story's Eq. Pl. § 207. And, besides, as the town is the conferee of a trust and not the donee of a mere power, it can be directed and restrained in respect of its duty sufficiently to insure a proper execution of its trust, and for this reason also it is a proper party. Bacon v. Bacon, 55 Vt. 248, 249. But this does not determine whether the town is liable or not, for that depends upon whether or not the town and the town district are separate and distinct legal entities; for, if they are, the town district being the one that has received the money, is the one liable for it. Now it is settled law that though in this country corporations, public and private, are created by statute, as they are in England, though there they may be created otherwise also, yet that no particular form of words nor technical mode of expression is necessary to their creation;

but, if powers and privileges are conferred upon a body of men or the inhabitants of a district and duties imposed that cannot be exercised, enjoyed, and performed without corporate capacity, such capacity is created by implication, if such appears to be the intention of the Legislature or other authority granting the powers. Thus in the case of Sutton Hospital, 10 Co. 23, 28, to the objection that in the license there were not words of fundare, erigere, facere, it was resolved that notwithstanding that the grant was good, for that to the essence of a body politic two things only are requisite, namely, a corporation and a gift, and not only words of fundare, erigere, and stabilire, nor words to such effect; for no such words were contained in the said grant of H. 4, and yet it was adjudged a good chauntry, lawfully incorporated and founded, and, if such words had been necessary and requisite in law, the judgment ought to have been against the chauntry, because they were omitted in the king's grant. In the Conservators of the River Tone v. Ash, 10 B. & C. 349, the plaintiff claimed to be a corporation by act of Parliament for making and keeping the Tone navigable, whereby it was enacted that the persons therein named and their successors should be conservators of the river, and should have power to cleanse, scour, open, and keep the river navigable, and to cut and make a new channel, if need be, through the ground of other persons, making compensation to the owners. They were also empowered to do divers other things touching the performance of their duties under the act, among which was the making of contracts binding the whole body, and to sue and be sued by the name of the conservators of the river Tone in the county of Somerset. It was held that as it manifestly appeared from the act that the conservators should take land by succession, and not by inheritance, although they were not created a corporation by express words, they were by implication, and therefore entitled to sue in their corporate name for injury to their real property.

It has been held in this state that, when a public grant emanates from the same power that can create a corporation, the grant itself creates and gives the capacity to take, and, as a corporation, if necessary to that end. Lord v. Bigelow, 8 Vt. 445. In the Inhabitants of the Fourth School District of Rumford v. Wood, 18 Mass. 193, the question was whether the plaintiff had sufficient corporate capacity to maintain the action, which was for the breach of a contract to build a schoolhouse on the defendant's land, and to lease the land to the district. The statute did not expressly incorporate the district, but empowered it to raise money by majority vote to erect, repair, or purchase a schoolhouse, and to determine its site; and it was held that by necessary implication the district had the authority requisite to execute the purpose of its creation, and

therefore could maintain the action. In *Broking v. Van Valen*, 56 N. J. Law, 85, 27 Atl. 1070, the question was whether two villages were incorporated. The statute relating to them created a board of trustees as a governing body, and conferred corporate powers upon them. The powers were limited, but they were corporate powers usually conferred upon municipalities of that grade. The court said it was not necessary that all kinds of municipal powers should be conferred, nor that the powers bestowed should be conferred by express legislative grant, in order to create a body politic and corporate, that such express words are wanting in many instances, but if, from the whole statute, incorporation is inferred, it is enough, and that in that case it seemed conclusive, under the ordinary interpretation of the language of statutes, that corporate powers were conferred; that the power to issue bonds in the name of the village was a corporate power, and, if they were not possessed of that power, the words of the statute giving the power were meaningless. In *Levy Court v. Coroner*, 2 Wall. 501, 17 L. Ed. 851, the question was whether the levy court of Washington county, in the District of Columbia, had a legal capacity to sue in a court of justice. It was the body charged with the administration of the ministerial and financial duties of the county. It was charged with the duty of laying out and repairing roads, building bridges, and keeping them in good order, providing poorhouses, and the general care of the poor, laying and collecting taxes necessary to enable it to discharge its duties, and to pay the expenses of the county. "Held, if not a corporation in the full sense, yet it was a quasi corporation, and could sue and be sued in regard to any matter in which it had rights to enforce or obligations to fulfill; that this principle, a necessary one in the enlarged sphere of usefulness that such bodies are made to perform in modern times, is well supported by adjudged cases. In *Thomas v. Dakin*, 22 Wend. (N. Y.) 9, the question was whether certain associations formed under an act to authorize the business of banking were corporations, and it was held that they were. Judge Cowen said that it was impossible for him to see the force of the argument that, because the Legislature had constantly avoided calling the associations a corporation, they could not be adjudged so; that if they had the attributes of corporations, and were so in the nature of things, the court could not refuse to regard them so any more than it could to regard natural persons as such because the Legislature in making some provision for them had been pleased to designate them as belonging to some other species. In *Commonwealth v. West Chester R. R. Co.*, 3 Grant, Cas. (Pa.) 200, it is said that a grant to perform corporate acts implies a grant of corporate powers. And in *Delaware Division Canal Co. v. Commonwealth*, 50 Pa. 399, it is said that it mattered not that the terms of

incorporation were less formal than usual, since it was apparent from the act that a corporation was intended, and manifest that such an organization was absolutely necessary to the management and enjoyment of the property. In *Mahoney v. Bank of the State*, 4 Ark. 620, the question was whether the bank was incorporated. It was contended that the act in question was a mere abstraction and nonentity, as it declared only that a bank should be established, designated by name. The court said that it was true that there were no express words incorporating any particular persons, still the fund was placed under the management and control of a directory, who were required to be elected by the Legislature, and the usual powers of banking were conferred upon them; that, though the act was vague, it was capable of being understood; and that, taking it altogether, no doubt could be entertained that it was the intention of the Legislature to incorporate the directory, and that the powers and authority conferred upon them could not exist unless they were incorporated. In the *Commissioners of the Town of Bath v. Boyd*, 23 N. C. 194, it was held that a legislative grant of land to the inhabitants of a town for a common ipso facto created them a body politic for the purposes of the grant, though it did not appear that they had before been created a corporation. But, where a corporation is not necessary for the purposes of the act, one will not be implied. *Walsh v. Trustees of the New York and Brooklyn Bridge*, 96 N. Y. 427. Thus it appears that the test is, in the absence of express words, whether the powers and privileges conferred and the duties imposed are essentially corporate in their nature. If they are, corporate capacity will be implied, as necessary to carry out the purposes of the act; but, otherwise, there will be no such implication. Among the most important characteristics of a corporation are continuance of existence and unity of person, by which a perpetual succession of individuals is capable of acting for the promotion and accomplishment of the particular object in view.

We will paraphrase, as far as necessary, some of the provisions of our various statutes upon the subject of town school districts, to see whether they disclose a necessary implication of corporate capacity, as the statute contains no express words to that effect. Each town in the state shall constitute one district for school purposes, and the division of towns into school districts is abolished. School districts incorporated by special acts, and school districts in unorganized towns and gores, are not affected by the above provision. Voters in districts incorporated by special acts cannot vote in town meetings for the officers of, nor upon any matter pertaining to, the schools of the town district. A town school district in a town in which there is an incorporated school district may hold its annual school meeting at

any time other than the annual town meeting, provided it so votes at a previous town meeting; notice of the proposed change being inserted in the warning of the annual town meeting at the request in writing of 10 legal voters of the town school district. Each town shall take charge of the schoolhouses within its limits, and the property belonging thereto, and shall pay all outstanding debts for the purchase of land, and the erection of schoolhouses and repairs thereon, and shall provide and maintain suitable schoolhouses, the location and construction of which shall be under the control of the board of school directors, which each town must have, consisting of three citizens of the town, one of whom shall be elected at each annual meeting of the town for such a term. That board has the care of the school property of the town and the management of its schools; keeps the schoolhouses repaired and insured; determines the number and location of schools; employs and discharges teachers, and fixes their compensation by majority vote, examines and allows claims arising therefrom, and draws orders upon the town treasurer for the payment thereof; designates the schools that shall be attended by the various pupils in the town; and makes regulations not inconsistent with law for carrying its powers into effect. The board is required to appoint a clerk, who must keep a permanent record of their proceeding, and, under V. S. 728, he was to call all special town meetings for the consideration of school matters, and, in case of his absence, inability, or neglect to act, some member of the board was to call them; but now, under Act No. 60, p. 46, Acts 1898, the selectmen are to call all such meetings in the same way that other special town meetings are called. Each town is required to maintain schools therein at the expense of the town. The grand list of town districts is made up of the ratable polls and real and personal estate therein. The selectmen must annually appropriate for school purposes a sum not exceeding one-half nor less than one-fifth of the grand list of the town district, and assess a tax to meet the appropriation; and a town district may by special vote raise a larger sum for school purposes. The town treasurer is required to keep a separate account of the moneys appropriated or given for the use of schools, and to pay thereout orders drawn by the board of school directors for school purposes. The selectmen of a town having within its limits a school district incorporated by special act are required to divide the public school money in the treasury of the town between the town district and the incorporated district on a specified basis. There is a body of special provisions relating exclusively to school districts in unorganized towns and gores and school districts incorporated by special acts, and to their schoolhouses, and the maintenance of schools by them, and to their taxes and school money.

It is important to note, in this connection, the indiscriminate use the statute makes of the word "town," which it often uses as synonymous with "town school district," thereby creating doubt and uncertainty whether the town school district is a legal entity, separate and distinct from the town itself. But, notwithstanding this, the meaning of the statute is not past finding out; for there is, when taken as a whole, a reasonably clear intent running through it all. Thus, when it says that each town in the state shall constitute one district for school purposes, it does not mean that, for there are many towns in which there are school districts incorporated by special acts, and they are no part of the town for school purposes. It must mean, therefore, and does mean, that that part of each town composed of abolished school districts shall constitute one district for school purposes. So, when it says that each town shall take charge of the school houses within its limits, and provide and maintain schoolhouses, it means that the town school district shall do that, for the schoolhouses in incorporated school districts, although within the limits of the towns, are not within their jurisdiction to take charge of and maintain. So, when it says that every town shall maintain schools therein at the expense of the town, it means that the town school district shall do that, for the town cannot maintain schools at the expense of the whole town when there is an incorporated school district within its limits. There are other similar instances of the incorrect use of the word "town," but it is unnecessary for present purposes to specify them. On the other hand, there are many instances in which the statute uses the words "town district," or "town school district," and, when it does, they obviously mean an entity separate and distinct from the town itself, as they do when it says that a town school district in a town in which there is an incorporated school district may hold its annual school meeting at any time other than the annual town meeting; so when it says that the grand list of town school districts shall be made up of the ratable polls and the real and personal estate therein; so when it says that a town district may by special vote raise a larger sum for school purposes than that appropriated by the selectmen; so when it says that an incorporated school district may surrender its charter and become a part of the town school district, and that a town school district may merge in an incorporated district. Our statute is so much like the New Hampshire statute of 1885, adopting the town system of schools, as to induce the belief that ours was modeled upon it. It had the same verbal inaccuracies of which we have been speaking, and in *Sargent v. School District*, 63 N. H. 528, 2 Atl. 641, the Supreme Court of that state had occasion to construe it in respect of those inaccuracies, and gave

it the same construction that are here given our statute. Thus it appears that we have for our town school districts (1) creation, and by name in effect, as, in this case, the town school district of Troy; (2) perpetuity of existence, for their duties are continuous, and will ever be, unless they are relieved therefrom by the same power that imposed them; (3) unity of person, else they could not maintain schools at the public expense, nor vote taxes for school purposes, nor do many other things that they are required to do; and (4) governing boards, elected, the statute says, at town meetings, but it means at town school district meetings, and it is common knowledge that they are there elected. Now, these functions are essentially corporate in their nature, and cannot be performed without corporate capacity, and hence the necessary implication is that the Legislature intended to confer that capacity, that the districts might fulfill the purpose of their creation. This is the same principle by which, when you make a grant, you are taken to grant every thing you can grant necessary to the beneficial use of the thing granted. Indeed, it may be said in a general way that the machinery that runs the town is not adapted to running the town district, especially when they are not coterminous, and cannot be made so under the law. We hold, therefore, that a town school district under the statute is a corporate body by necessary implication, separate and distinct from the town, whether coterminous with it or not, and all the more so if it is not. This is the construction that New Hampshire has put upon its statute. *Sargent v. School District*, 63 N. H. 528, 2 Atl. 641; *Wheeler v. Alton*, 68 N. H. 477 38 Atl. 208.

It is claimed that it was error to allow the orator full costs, for that the order of February 26, 1904, by which the orator had leave to amend its bill on terms that it should "pay into court for the defendants their costs to the date of amendment," which was April 18, 1904, restricted the orator to costs from that time. But the order does not say that the orator shall take no costs to that time. It is silent as to its costs, and does not restrict them even by implication.

It is claimed that it was error to charge the town district with interest before the amended bill was filed. But we think it should pay interest from the time it was made a party and the original bill was served upon it; for, although that bill was against the town alone, yet the district knew from it that the money the orator was thereby seeking to recover was the very money it had received and appropriated to its own use, and then it knew that it was retaining the money against the will of the orator, and from that time on it was its duty to pay.

It is claimed that the bill does not support the decree, and that is so largely, for the decree makes the town district pay the money, whereas the bill alleges nothing

against it in regard to the money, but only against the town. Nor does it pray for relief against the district, except by the general prayer, but only against the town. But this will not defeat the bill, for the case having gone to the extent of settling the facts, and they showing that the orator is entitled to relief, it will not be turned out of court, but be allowed to amend its bill, so it can obtain the relief to which it is entitled.

Decree reversed and cause remanded, with mandate that on proper amendment of the bill a decree be entered for the orator like the one appealed from, except as to costs, and except as far as necessary to alter the same in order to make it conform to and effectuate the views here expressed.

Let the question of costs below be there determined.

(80 Vt. 109)

CLOYES et al. v. MIDDLEBURY ELECTRIC CO. et al.

(Supreme Court of Vermont. Addison. May 15, 1907.)

1. WATER COURSES—OBSTRUCTION—EQUITY JURISDICTION.

Equity has jurisdiction in general of a suit to restrain the unlawful obstruction of a water course, whereby the lands of riparian owners are flooded, where the injury is necessarily continuous in character and operates prospectively so that the complainants have no adequate remedy at law.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Waters and Water Courses, §§ 260, 261.]

2. SAME—HEALTH—DANGEROUS CONDITIONS.

It is not necessary to the maintenance of such suit that the bill should charge that the conditions resulting from the obstruction were dangerous to health.

3. SAME—RIGHT AT LAW—ESTABLISHMENT.

In a suit by riparian owners to restrain the unlawful obstruction of a stream, it is not necessary that the landowners' right should be first established at law; their title to the riparian lands having been admitted.

4. SAME—BILL—DEMURRER.

In such a suit, the fact that complainants have not established their right at law is not ground for demurrer.

5. PARTIES—JOINED—MULTIPLICITY OF SUITS.

Where a large number of riparian proprietors owning land on a stream above a waterfall were all similarly injured by defendant's unlawful obstruction of the stream at the falls by a dam, and the injury to each was of such a character that each, though claiming under a separate right, could have resorted to a court of equity for the establishment and protection thereof, and the obstruction affected each in the same way, though not necessarily to the same extent, they were all entitled to join in a bill, in order to prevent a multiplicity of suits.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Parties, §§ 15, 16; vol. 48, Waters and Water Courses, § 244; vol. 19, Equity, §§ 260-270.]

6. WATER COURSES—ARTIFICIAL CHANNEL—RIPARIAN RIGHTS.

In 1804 complainants' predecessors in title owning riparian lands above a waterfall in a natural stream entered into a contract with de-

defendants' predecessors, who owned a water power at the falls, whereby, in consideration of \$1,000 paid to the latter, and of another \$1,000 to be used to improve the stream, all of which was raised by an assessment levied on the benefited riparian lands, defendants' predecessors agreed to remove all obstructions that they had put on the falls as a dam to obstruct the water, and to reduce the falls one foot on a certain level by the removal of rocks, etc., for the purpose of draining the upper riparian land. These improvements having been accomplished, the land so drained was improved, and the stream remained in its altered condition until defendant electric company acquired an interest in the water power in 1893, when it raised the water at the falls two feet by the construction of a dam. *Held*, that defendants were estopped to so alter the fall of the stream in its artificial improved channel to the injury of complainants.

Appeal in Chancery, Addison County; John H. Watson, Chancellor.

Bill by P. B. Cloyes and others against the Middlebury Electric Company and others. From a decree overruling a demurrer to the bill for want of equity, defendants appeal. Affirmed.

Argued before ROWELL, C. J., and TYLER, MUNSON, WATSON, HASELTON, POWERS, and MILES, JJ.

Ira H. Laffeur and Stickney, Sargent & Skeets, for appellants. W. H. Davis and W. H. Bliss, for appellees.

POWERS, J. We learn from this bill that a natural water course known as "Otter Creek" flows northerly through Rutland and Addison counties, and empties into Lake Champlain at Vergennes. The orators, 88 in number, are the owners in severalty of certain farms and lowlands lying along the stream in the town of Middlebury and other towns south of Middlebury and higher up on the stream. There is a natural falls at Middlebury village, which has for a great many years furnished power for various industries, and which is now owned and utilized by the defendants. In 1804 the parties then owning the riparian lands above said falls (a part of which are now owned by the orators) entered into an arrangement with the parties then owning the power and rights on the falls, pursuant to which they procured the passage of an act of the Legislature assessing a tax on such riparian lands according to the benefits thereto of the improvements contemplated by said arrangement, appointing assessors to appraise such benefits, a collector to collect such tax, and a committee of five to receive and to expend the money so raised, for the purpose of carrying out the provisions of the contract hereinafter set forth. The assessors proceeded to appraise said benefits, and assessed a tax on said lands sufficient to raise the sum of \$2,000, which was collected and paid over to the committee named in the act. Thereupon the parties then owning said lands appointed this committee of five as their committee to represent them in the making and execution of a contract with the

owners of said power and rights. Pursuant to this arrangement the committee and power owners on the 10th day of March, 1806, made, executed in the presence of two witnesses, and caused to be recorded in the office of the town clerk of Middlebury, a contract, which so far as material here, reads as follows:

"Whereas, the waterworks situated in Middlebury falls upon Otter creek cannot at all times have sufficient supply of water without a dam on said falls; and whereas, it is supposed that such dam on said falls by raising the creek above the falls does a material injury to the lowlands on said creek; and whereas, the owners of lowlands between said falls in Middlebury and Sutherlands' falls in Rutland conceive that it would prove highly beneficial to said lands to lower said falls in Middlebury so as to reduce said creek to its natural level: Therefore, for the mutual accommodation of the owners of said waterworks and the owners of said lands, it is agreed mutually by and between Gamaliel Painter, Artemas Nixon, Daniel Henshaw, John Warner and Jonathan M. Young, owners of said waterworks, and Daniel Chipman, Darius Matthews, Henry Olin, Benejah Douglas and Levi Walker, a committee appointed by said landowners, that the said owners of said works will, during the summer of the year of our Lord, 1806, remove all obstructions which they have put on said falls as a dam to stop the water between the southwest corner post of said Gamaliel's mill and Daniel Henshaw's flume; that they will reduce the falls one foot on a level below a certain mark made on said falls by Henry Olin and Benejah Douglas; that they will remove certain rocks that project out below the top of said falls towards the south side of said creek so that the water may fall from the top without obstruction; that they will lower their flumes so as never to place any dam or obstruction on said falls, and that they will at all times permit any of said land owners, or any person by them appointed, to remove any obstructions which may accidentally or otherwise be lodged on the rocks at the head of said falls between the said post at the southwest corner of said Gamaliel Painter's mills, as now erected, and the flume of the said Daniel Henshaw, as they now stand. For which the owners of said lands agree to pay the said mill owners one thousand dollars, one half of which shall be paid by the first day of July next, and the other half by the first day of October, A. D. 1806; that is to say, the one half of said one thousand dollars to be paid to Gamaliel Painter, and the other half to be paid Artemas Nixon, Daniel Henshaw, John Warner and Jonathan M. Young; provided the said work shall then be completed. And it is further agreed that the landowners shall, during the summer of 1806, and 1807, make the stream as convenient for rafting logs from against the northeast

corner of Ebenezer Markham's farm (as it now stands) to the lower side of the bridge, as it would be if the rocks at the head of the falls were not to be reduced. And it is further agreed that the said landowners at any and at all times hereafter have liberty to lower the rocks and rapids in said creek as they shall think proper at any place or places above the lower side of the bridge now erected across said creek near the falls, and that William Goodrich, William Young and Nathaniel Ripley be appointed as a committee to say whether any, and if any, what and how much, shall be done to the channel on each side of the creek to make it as good for rafting logs as if the rocks on the head of said falls were not altered; and if by death or any other accident either or all of said committee be unable to attend said business, the Supreme Court of this state on application of either or both of said parties to this contract have power to appoint, at any session of said court in the county of Addison, one or more person or persons to take his or their place or places and execute said charge. And it is further agreed that the said landowners shall indemnify and save harmless the said mill owners from all damages they may sustain by being sued or prosecuted by any person or persons for lowering said falls."

The water power owners thereupon removed from the falls the obstructions thereon, broke off and removed the projecting rocks, and lowered the falls in accordance with the requirements of this contract. The result was that the aforesaid lowlands were drained and made tillable, and became and are very valuable for agricultural purposes. After the falls were lowered in this way, they remained as that work left them for a period of more than 80 years, during all of which time said lands have been used, cultivated, and occupied by their respective owners under a claim of right to have them so remain. The Middlebury Electric Company, one of the defendants, having purchased an interest in said water power, erected at the head of said falls in 1893 a wooden dam, and thereby raised the water upon said falls about two feet higher than it had been accustomed to flow since the removal of the obstructions as aforesaid, in consequence of which said lowlands were overflowed and rendered valueless for agricultural purposes, and unwholesome effluvia and miasma caused to arise therefrom rendering the dwellings of the orators unhealthful and unfit for occupancy. The other defendants are the owners of certain interests in said power, and all are now maintaining the dam aforesaid. The orators have frequently protested to the defendants against the maintenance of the dam, and have even attempted to remove it by force, without avail. The bill alleges that each of the orators suffers a common injury by the alleged wrongful maintenance of the

dam, that the cause of complaint is common to all and the same to each, that any defense made will be common to all the orators, and that the testimony, proofs, and decrees will be alike as to all the orators except as to the amount of damages. The prayer is for a decree establishing the orators' right to have the falls continue free from dam or obstructions, as left in 1806, ordering the defendants to remove the present obstruction from the falls, restraining them from erecting or maintaining any such obstructions, for an accounting of damages with each of the orators, and for general relief. The bill is demurred to.

1. That a court of equity has jurisdiction of the subject-matter of this suit cannot well be questioned. The character of the injury caused by the unlawful obstruction of a water course, whereby the lands of riparian owners are flooded, is usually such as to bring the matter within the jurisdiction of that court. To be sure, it must appear in such cases that the remedy at law is inadequate; but such remedy is inadequate, in a legal sense, when the injury suffered by the landowner is necessarily continuous in character and operates prospectively and indefinitely (*Lyon v. McLaughlin*, 32 Vt. 423) or is of such a character that if continued would ripen into a right (*Canfield v. Andrew*, 54 Vt. 1, 41 Am. Rep. 828). So, though it is not in every case of this kind that a court of equity will interfere, when the injury is substantial rather than trivial, and permanent rather than temporary, it will readily lend its aid to one whose rights have been so invaded. And that is the case made by this bill, without regard to the allegations showing conditions dangerous to health, which of themselves make a proper cause for equitable interference. 2 *Farnh. Wat.* § 582; *Holsman v. Spring Co.*, 14 N. J. Eq. 335. Nor, in a case like this, is it necessary that the right should be first established at law. The title to the riparian lands being admitted by the demurrer, the right to have the waters of the stream flow through them free from unlawful obstruction is clear, and the necessity for immediate action urgent. In these circumstances a court of equity will not hesitate to take jurisdiction. *Lockwood Co. v. Lawrence*, 77 Me. 297, 52 Am. Rep. 763; *Olmsted v. Loomis*, 9 N. Y. 423; *Reid v. Gifford*, *Hopk.* Ch. 416; *Robeson v. Pittenger*, 2 N. J. Eq. 57, 32 Am. Dec. 412; *Vaughn v. Law*, 1 *Humph. (Tenn.)* 123. Besides, it is held that the fact that the complainant has not established his right at law is no ground for a demurrer. *Lockwood Co. v. Lawrence*, *supra*; *Sohtau v. De Held*, 2 *Sim. (N. S.)* 133. This is shown by *Griffith v. Hilliard*, 64 Vt. 646, 25 *Atl.* 427, where it is held that, even in cases where the orator's title is disputed, the court of chancery may proceed and determine which party has the better title. And once equity has taken jurisdiction of a

case like this, it will retain it for all purposes and dispose of the whole matter, even to the assessment of damages. *Whipple v. Fairhaven*, 63 Vt. 221, 21 Atl. 533; 6 Pom. Eq. § 562; *Roberts v. Vest*, 126 Ala. 355, 28 South. 412. The fact that the parties are numerous is not an insurmountable embarrassment. It did not deter the court of chancery from working out the rights of the parties in *Waterman v. Buck*, 58 Vt. 519, 3 Atl. 505.

2. Can the orators join in the bill? If they can, it is solely upon the ground of preventing a multiplicity of suits. Prof. Pomeroy reduces all possible conditions in which a multiplicity of suits can arise to four classes. His third class is: "Where a number of persons have separate and individual claims and rights of action against the same party, A., but all arise from some common cause, are governed by the same legal rule, and involve similar facts, and the whole matter might be settled in a single suit, brought by all these persons uniting as co-plaintiffs, or one of these persons suing on behalf of the others, or even by one person suing for himself alone." His fourth class is the converse of this: "Where the same party, A., has or claims to have some common right against a number of persons, the establishment of which would regularly require a separate action brought by him against each of these persons, or brought by each of them against him, and instead thereof he might procure the whole to be determined in one suit brought by himself against all the adverse claimants as codefendants." 1 Pom. Eq. § 245. In discussing the cases which properly fall within these classes, he says (section 269a) that, "under the greatest diversity of circumstances and the greatest variety of claims arising from unauthorized public acts, invasion of property rights, violations of contract obligations, and, notwithstanding the positive denials by some American courts, the weight of authority, is simply overwhelming that the jurisdiction may and should be exercised, either on behalf of the numerous body of separate claimants against a single party, or on behalf of a single party against such a numerous body, although there is no 'common title' or 'community of right' or of 'interest in the subject-matter' among these individuals, but where there is and because there is merely a community of interest among them in the questions of law and fact involved in the general controversy, or in the kind and form of relief demanded and obtained by or against each individual member of the numerous body." "In a majority of the decided cases," he says, "this community of interest in the questions at issue and in the kind of relief sought has originated from the fact that the separate claims of all the individuals comprising the body arose by means of the same unauthorized, unlawful, or illegal act or proceedings." "Even this external feature of unity, how-

ever," he continues, "has not always existed, and is not deemed essential. Courts of the highest standing and ability have repeatedly interfered and exercised this jurisdiction, when the individual claims were not only legally separate, but were separate in time, and each arose from an entirely separate and distinct transaction, simply because there was a community of interest among all the claimants in the question at issue and in the remedy." If all this be so, individuals could join in a bill, regardless of whether they could severally resort to equity. This proposition is vigorously denied in *Tribette v. Railroad Co.*, 70 Miss. 185, 12 South. 32, 19 L. R. A. 680, 35 Am. St. Rep. 642, wherein it is said that there is no such doctrine in the books, and that Prof. Pomeroy's zeal to maintain a theory has betrayed him into error, and so blinded him as to cause him to confound two distinct things—joinder of parties, and avoidance of a multiplicity of suits. The true doctrine is there said to be that the mere fact that there is a community of interest in the questions of law and fact presented by a given controversy, or in the kind and form of relief demanded by or against each of several individuals, will not warrant equitable interposition, unless the questions involved are of equitable cognizance; that, when each of several so situated may proceed or be proceeded against in equity, their joinder as plaintiffs or defendants is not objectionable. Mr. Freeman, in his note to *Woodward v. Seeley*, 11 Ill. 157, 50 Am. Dec., at page 452, apparently approves the Pomeroy rule, for he quotes a part of the language above set forth, and says that Prof. Pomeroy discusses this whole subject of the equity jurisdiction to prevent a multiplicity of suits with great learning, clearness, and vigor.

It is not necessary to a determination of the question now presented that we should become involved in any controversy over the true scope and extent of the rule under discussion, for here the matters involved are, as we have seen, of equitable cognizance, and the injury complained of is of that character that each of the orators could have resorted to the court of equity for the establishment and protection of his rights. Nor is it necessary that we adopt the rule, even as modified by the Mississippi court, and approve the statement that the jurisdiction exists when the individual claims arise from entirely separate and distinct transactions; for here we need only go to the extent of holding that, in order to warrant the joinder, the wrongful act, being of equitable cognizance, must also be of such a character as to necessarily fall upon all the orators simultaneously, affecting all in the same way, though not necessarily to the same extent. And by "simultaneously" is here meant, not at the very same instant, but at substantially the same time. This proposition is, we feel confident, safely within the authorities, and embraces the case made

by this bill. Indeed, a more apt illustration of the proper application of the rule could hardly be found. From the vast number of cases to which this rule has been applied by the courts of this country, the following are selected by way of example: In *Murray v. Hay*, 1 Barb. Ch. 59, 43 Am. Dec. 773, it was held that two persons owning separate tenements, which are injured or rendered uninhabitable by a common nuisance, or which are rendered less valuable by a private nuisance which is a common injury to the tenements of both, may join in a suit to restrain such nuisance. To the same effect are *Madison v. D. S. C. & I. Co.*, 83 S. W. 658, 113 Tenn. 331, and *Grant v. Schmidt*, 22 Minn. 1. In *Cadigan v. Brown*, 120 Mass. 493, it was held that several persons owning distinct properties to which there was a common right of way could join in a suit to prevent the obstruction of such right of way. In *Parker v. Nightingale*, 6 Allen (Mass.) 341, 83 Am. Dec. 632, it was held that the several owners of lots on Hayward Place, holding under titles which provided that no buildings except dwellings should be erected thereon, could join to prevent the defendant from violating the restriction. In *Rafferty v. Traction Co.*, 147 Pa. 579, 23 Atl. 884, 30 Am. St. Rep. 763, the separate owners of property fronting on High street in the city of Pittsburgh were allowed to join in a bill to restrain the defendant from operating a cable railway on that street. In *Lonsdale v. City of Woonsocket*, 44 Atl. 929, 21 R. I. 498, it was held that, where several persons have a common interest in the prevention of the diversion of the waters of a stream from their respective mill privileges, they may join in a bill to enjoin it, though they hold under distinct titles and claim independent interests. In *Reid v. Gifford*, Hopk. Ch. (N. Y.) 416, the separate riparian and mill owners were allowed to join in a bill to prevent the diversion of the waters of the stream. In *Strobel v. Salt Co.*, 164 N. Y. 303, 58 N. E. 142, 51 L. R. A. 687, 79 Am. St. Rep. 643, it was held that riparian proprietors, each owning distinct parcels of land on a natural water course, have a common grievance which entitles them to join in a suit to prevent the pollution of the stream. In *Gillespie v. Forrest*, 18 Hun (N. Y.) 110, it was held that all whose lands were overflowed and injured by the erection of piers in a stream could join a bill against the party erecting them. In *Turner v. Hart*, 71 Mich. 128, 38 N. W. 890, 15 Am. St. Rep. 243, it was held that separate riparian owners could join in a bill to restrain the maintenance of a dam causing their several lands to be overflowed and practically destroyed.

It is true that, of these cases, *Murray v. Hay*, *Grant v. Schmidt*, and *Turner v. Hart* show that an accounting could not be had in such cases in the jurisdiction where those cases arose. But under our practice in equity such accounting can be had as an in-

cident of the general relief granted. The "community of interest" between the complainants in the foregoing cases is much like that between the plaintiffs in *Coryton v. Lithebye*, 2 Saund. 115, and the *Tunbridge Wells Case*, 2 Wils. 423, in which cases, even in actions at law—where all agree the rule is less liberal—the plaintiffs were held properly joined. In the former, the plaintiffs owned separate mills, and had acquired by custom the right to have ground at the one mill or the other all the grain of the tenants of the manor of Calliland. The defendant, one of the tenants, withheld his grain from these mills, and procured it to be ground elsewhere. Whereupon the plaintiffs brought an action for damages. In the latter, the plaintiffs, 12 in number, were dippers at the *Tunbridge wells*, chosen by the freeholders of the manor and approved by the lord of the manor. Their business was to attend the wells and deliver the water to those who resorted there. Their profits arose solely from the voluntary contributions of the visitors. When the defendant, not being properly appointed a dipper, dipped of the waters, the other joined in an action for damages. The same rule applies to the joinder of defendants, as where several riparian owners, acting independently, discharge mill refuse into a stream to the injury of a lower proprietor. *Lockwood Co. v. Lawrence*, 77 Me. 297, 52 Am. St. Rep. 763. Such a case was *Waterman v. Buck*, supra. And, conversely, it is held that, when several plaintiffs have separately sued the same defendant in actions at law for a continuing trespass, and his liability in each action depends upon the same facts, equity has jurisdiction to enjoin the multiplicity of actions and have them consolidated in the same suit. *Railroad Co. v. Garrison*, 81 Miss. 257, 32 South. 996, 95 Am. St. Rep. 469.

3. The removal of the obstructions to the flow of the stream pursuant to the contract hereinbefore set forth created an artificial condition in the channel, and the rights and liabilities of riparian owners in respect of artificial water courses are not necessarily the same as in the case of natural streams, though they may be. This depends upon the circumstances under which the artificial condition was created or continued. If an artificial channel is substituted for a natural one, or if it is created under such circumstances as indicate that it is to be permanent, riparian rights may attach to it. *Pollock, C. B.*, in *Wood v. Waud*, 3 Ex. 779; *Railway Co. v. Keys*, 55 Kan. 205, 40 Pac. 275, 49 Am. St. Rep. 249. If such change is made by joint or mutual action of riparian proprietors, the rights and duties with respect to the artificial channel will be the same as though it was the natural one. 3 Farnh. Wat. § 827a. This principle might suffice for the disposition of this question, but we are not content to place it there. This change was made by the concurrent action of the parties under a

contract mutually agreed to and executed on both sides, at least so far as it related to the changes in the stream; but it was all on the lands of the defendants' grantors, and the contract, as such, was not binding on these defendants. Some of the cases hold that, after the artificial channel has been maintained for the statutory period, reciprocal prescriptive rights to have it continued arise. *Mattheweson v. Hoffman*, 77 Mich. 420, 43 N. W. 879, 6 L. R. A. 349; *Smith v. Youmans*, 70 N. W. 1115, 96 Wis. 103, 37 L. R. A. 285, 65 Am. St. Rep. 30; *Kray v. Muggli*, 86 N. W. 882, 84 Minn. 90, 54 L. R. A. 478. But the agreement here negatives the adverse character of the right enjoyed by the orators and their grantors, and the technical doctrine of prescription is inapplicable. It is said that there is a much more impregnable ground on which to put such decisions, and that is the ground of estoppel. And if a landowner makes a change in the course of a stream which to all appearances is permanent, and holds out to the world the representation that such condition is permanent, he will be bound by his acts; and, after other persons have acquired rights by changing their positions upon the faith of such representation, he will be estopped from denying that it was true, or claiming that the stream is not flowing in its true channel. 3 Farnh. Wat. § 827c. This reasoning is in entire harmony with our decisions in cases of like character. In *Woodbury v. Short*, 17 Vt. 387, 44 Am. Dec. 344, it was held that, when the course of a stream, running through the land of the defendant to that of the plaintiff, was changed by a sudden flood, so as to run upon the defendant's land without passing over that of the plaintiff, and the defendant permitted it to flow in the new channel for a period of 10 years, he could not turn it back into the old channel. This decision was put upon the ground of acquiescence, and the court said that, if the defendant would restore the stream to its original channel, he must act within a reasonable time and before new interests would naturally be acquired in the new course in which he had permitted it to run. In *Ford v. Whitlock*, 27 Vt. 265, the same question, except that the change in the stream was made by the owner of the land—a stronger case against its restoration—again came before the courts, and the right to restore the stream to its natural channel to the injury of other riparian owners was denied. "It seems to us," says Judge Redfield in the opinion, "analogous to the rules of law which have been applied to dedications to public use of land or the use of land; and it seems to be highly equitable and just that, where one has by his own act, either originally changed the course of the stream, or suffered it to remain in a channel cut by some sudden convulsion, until others have expended money in erections, as in the present case, in faith of the stream running in the new

channel, or, as in the case of *Woodbury v. Short* may be supposed to have done so, that the stream should not then be allowed to be restored to its former channel to the detriment of other riparian proprietors. * * *

But the law as to running streams is also analogous to public rights like highways and commons, inasmuch as a large number of persons have an interest in fresh water streams, and they are therefore quasi of public concern, and the rules of public dedications have been applied to an acquiescence in a new bed for such stream; and one who cuts such bed on his own land, and thereby renders the use of the stream beneficial to other proprietors, in a different mode, is bound to the same extent, and in as short a period, as if he alters the fence on a highway or common, and thereby gives privileges to the public. He cannot often recall them after the shortest term. Any term is sufficient which satisfies the jury that the public were justified in treating it as a dedication."

This is the doctrine of *Delaney v. Boston*, 2 Har. (Del.) 439, wherein it was held that riparian proprietors had a right, by dedication and substitution, to have the waters of a stream flow through an artificial channel which had been cut by a lower owner 50 years before. It makes no difference that the changes here were made within the channel of the stream, instead of by making a new channel. The rule is precisely the same. 3 Farnh. Wat. § 827c. The riparian owners are entitled to the benefit of any such change which may have been made, if they were apparently intended to be permanent, and such owners have acted upon the faith of the conditions so remaining. In *Paige v. Canal & Irrig. Co.*, 83 Cal. 84, 21 Pac. 1102, 23 Pac. 875, it was held, upon the authority of *Woodbury v. Short* and *Ford v. Whitlock*, that a riparian owner is entitled to the benefit of the removal of obstructions from the head of the stream which had prevented the water from flowing down to his land. *Chapman v. Mfg. Co.*, 13 Conn. 269, 33 Am. Dec. 401. It matters very little whether we call it a dedication or an estoppel, for the underlying principle of each is the same—the injustice of allowing one to deny the existence of conditions, which by his conduct he has induced another to believe exist, in reliance upon which that other has changed his position.

The artificial conditions created in the creek at Middlebury became the natural conditions, not prescriptively, nor by lapse of time, nor by grant contained in the contract, nor by force of the contract, as such, at all, but by force of the circumstances under which they were created—by dedication and substitution. The contract (which gained nothing by being recorded, since it was not entitled to record) affords evidence of the intention to make the changes permanent—a dedication for all time. The right of the then riparian owners to have the new condi-

tions continue attached at once upon the completion of the work. It attached to all the riparian lands, and became rooted in them, whether owned by those who were parties to the contract or not. It now belongs to the orators by virtue of their ownership of riparian lands, as an incident to such ownership, whether they derived their title from those who then owned the lands or not. It came to them as the fertility of the soil came to them, not because it was expressly granted, but as a natural appurtenant.

The pro forma decree overruling the demurrer and adjudging the bill sufficient is affirmed, with costs to the orators. The decree for the orators according to the prayer of the bill is reversed pro forma, and the cause is remanded.

(74 N. H. 222)

PORTSMOUTH SHOE CO. v. CITY OF PORTSMOUTH.

(Supreme Court of New Hampshire. Rockingham. May 7, 1907.)

1. TAXATION—EXEMPTIONS—MANUFACTURING CORPORATIONS.

Pub. St. c. 55, § 11, providing that towns may, by vote, exempt from taxation, for a term not exceeding 10 years, any manufacturing establishment proposed to be erected therein and the capital to be used, does not confer authority to exempt an owner of property who is not entitled to such exemption from taxation on the same because it is leased to another who is so entitled.

2. SAME.

That the manufacturing company entitled to the exemption agreed in the lease to pay the taxes does not affect the question of exemption.

Transferred from Superior Court, Rockingham County; Chamberlin, Judge.

Petition by the Portsmouth Shoe Company against the city of Portsmouth for an abatement of taxes. Facts agreed, and case transferred from the superior court and heard on plaintiff's motion for a rehearing. Case discharged.

Early in 1903 the Gale Shoe Manufacturing Company, a Massachusetts corporation, desired to come to Portsmouth and there engage in business. On April 27, 1903, the city councils voted to exempt that corporation from taxation for 10 years upon "the manufacturing establishment, factory, and plant occupied by it, with its property and assets, and the capital to be used in operating the same." The Gale Company then leased for the term of five years the shoe factory and machinery owned by the plaintiffs, and covenanted to pay all taxes assessed upon the leased premises. In 1904 the assessors levied a tax upon the leased property against the plaintiffs, for which they seek an abatement. They are entitled to such abatement if the property was legally exempted; otherwise, they are not. If the exemption is not sustained, the case is to be discharged.

Page & Bartlett, for plaintiff. John L. Mitchell, for defendant.

WALKER, J. "Towns may by vote exempt from taxation, for a term not exceeding ten years, any manufacturing establishment proposed to be erected or put in operation therein, and the capital to be used in operating the same, unless such establishment has been previously exempted from taxation by some town." Pub. St. c. 55, § 11. It is argued that this statute authorized the city councils of Portsmouth to pass the vote of April 27, 1903, by which it attempted to exempt the Gale Shoe Manufacturing Company from taxation upon "the manufacturing establishment, factory, and plant occupied by it, with its property and assets, and the capital to be used in operating the same," and that this vote covered the property in question, which it subsequently leased of the Portsmouth Company. One question presented, therefore, upon the plaintiff's contention, is whether the city councils could exempt the Portsmouth Company's property from taxation under the vote exempting the Gale establishment. Did the Legislature intend to confer authority upon towns to exempt property owned by A., but leased to B., and used by the latter in his exempted establishment? Until the property was turned over to the lessee, it was taxable in Portsmouth. Its owner held it subject to that burden. And after the lease it remained taxable to the owner, if it was taxable at all. It could not be taxed to the lessee without the latter's consent. Pub. St. c. 56, § 14. In short, it remained the property of the lessor, whose claim is, in effect, that it is not legally taxable as the owner of it, because it is used by the lessee whose property is exempt. But, unless a somewhat liberal construction of the statute is to be adopted, this conclusion cannot be sustained. "The language of the statute strongly supports this conclusion, and so does the uniform current of authority, that, taxation being the rule and exemption the exception, the exemption is to be strictly construed, and will never be permitted to extend, either in scope or duration, beyond what its terms clearly require." *Boody v. Watson*, 63 N. H. 320. See, also, *New London v. Academy*, 69 N. H. 445, 46 Atl. 743; *Williams v. Park*, 72 N. H. 305, 811, 53 Atl. 463, 64 L. R. A. 33.

It is certain that the language of the statute does not clearly disclose an intention to allow the exemption of one man's property from taxation because it is used by another, under some contractual arrangement between them, in a business which enjoys an exemption. If the mere use of the property, without regard to its ownership, had been intended to be the test to determine whether it could be exempted under the statute, it would be natural to expect more explicit language to such a purpose. The "manufacturing establishment" referred to in the statute means,

or relates to, the property of the proprietors of the industry, who receive the benefit conferred by the statute, and not the property of others having no interest in the prosecution of the business. The city councils of Portsmouth had no power to vote to exempt the property of the plaintiff upon the condition that it should lease it to another manufacturing company. Though the vote did not directly take that form, that is the practical effect of it, as claimed by the plaintiff. A construction of the statute supporting such a transaction would be an encouragement, not of manufacturing industries, which is the fundamental purpose of the statute (Opinion of the Court, 58 N. H. 623), but of the business of leasing manufacturing property. Any benefit derived by the lessee in such a case from the exemption would be indirect and remote, depending not upon the statute, but upon the leasing contract. As said by the court in *County v. Bell*, 43 Minn. 344, 345, 45 N. W. 615, 616: "The lessors claiming the benefit of the exemption in this case are mere private owners of the property, and the exemption is not for the lessees, * * * and it can only be claimed arguendo to be for their benefit in an indirect and collateral way." Evidently, under the usual rules for the construction of tax-exempting statutes, the legislative purpose to relieve property from the tax burden cannot be found by indirection and surmise. The plaintiff's property was legally taxable. The fact that the Gale Shoe Company agreed in the lease to pay the taxes does not affect the question of the statutory exemption. *People v. Assessors*, 32 Hun (N. Y.) 457; *Black v. Brooklyn*, 51 Hun, 581, 4 N. Y. Supp. 78; *Humphries v. Little Sisters of the Poor*, 29 Ohio St. 201, 207; *Travelers' Ins. Co. v. Kent*, 151 Ind. 349, 50 N. E. 562, 51 N. E. 723; *Douglas County Society v. County*, 104 Wis. 429, 80 N. W. 140; *Laurent v. Muscatine*, 59 Iowa, 404, 13 N. W. 409; *Armand v. Dumas*, 28 La. Ann. 403. This result makes it unnecessary to consider other arguments in support of the legality of the tax.

Case discharged. All concurred.

(74 N. H. 225)

HUTCHINS v. BERRY et al.

(Supreme Court of New Hampshire. Carroll. May 7, 1907.)

1. NEW TRIAL — WATER RIGHTS — CHANGED CONDITIONS.

Where the extent and capabilities of a reservoir formed by a dam in a stream had previously been determined in proceedings to adjust the water rights of riparian proprietors, error could not be predicated on the refusal of the court to reopen the question and grant plaintiff a new trial on an application alleging that, with the gates and physical conditions as they existed at the time the rights were determined, it was not now possible to draw the amount of water to which he was entitled from the reservoir.

2. WATERS AND WATER COURSES — CHANGES OF PLANT.

Where plaintiff was awarded the right to a certain amount of water collected in a reservoir

by a dam in a stream for the operation of a gristmill, he was entitled to make such changes as were necessary to change the mill into an excelsior factory, which would not prevent the letting down of the amount of water which it had been previously determined represented the capacity of the original reservoir.

3. APPEAL — FINDINGS — CONCLUSIVENESS.

A finding that a change in plaintiff's plant prevented the letting down of an amount of water equal to the original capacity of the reservoir, in violation of a prior decree establishing water rights, was conclusive on plaintiff.

4. JUDGMENT — CONCLUSIVENESS — PERSONS NOT PARTIES.

Where the owner of a gristmill right was not a party to proceedings in which an order limiting another privilege to 38 cubic feet per second when the water did not run over the wasteway of the dam, and it was thereafter determined that the gristmill was entitled to require all the other mills to shut down when the water fell six inches below the top of the wasteway, the millowner was not affected by an order modifying the limitation on the 38 cubic feet privilege.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, §§ 1230-1233.]

5. SAME.

Where, in proceedings to establish rights to the use of the waters of a reservoir formed by the damming of a stream, both parties excepted to the court's findings, orders, and decrees, which exceptions were overruled, the decrees thereby became judgments conclusively establishing the rights of the parties.

6. WATERS AND WATER COURSES — RIGHTS IN WATER — ACTION — MODIFICATION OF ORDER.

Where, by a modified order, a sawmill drawing water from a reservoir formed by a dam in a stream was permitted to draw down the water below the top of the wasteway, without limitation as to amount, while plaintiff's gate was set so as to draw only 17 feet, to which he was entitled when the water was at the top of the wasteway, the order was erroneous as depriving plaintiff of the water according to his right, when the water in the reservoir fell below the top of the wasteway.

7. APPEAL — AMENDMENT TO PLEADING — DISCRETION.

Whether, in a proceeding to determine water rights, justice required that plaintiff should be permitted to amend his petition so as to present for adjudication his right to use water previously appropriated for a gristmill for other purposes, was a question of fact, the denial of which presented no question of law for review by the Supreme Court.

Transferred from Superior Court, Carroll County; Chamberlin, Judge.

Petition by Frank Hutchins against Oliver P. Berry and others, for interlocutory orders in certain controversies as to water rights previously adjudicated in the cases of *Horne v. Hutchins*, 71 N. H. 117, 51 Atl. 645; *Horne v. Hutchins*, 72 N. H. 211, 55 Atl. 361; *Berry v. Hutchins*, 73 N. H. 310, 603, 61 Atl. 550, 554. Case transferred from superior court. Discharged.

See 63 Atl. 787; 65 Atl. 1117.

The plaintiff alleged that, not desiring to use the water of the reservoir below the four-foot point at this time, he proposes to change the physical condition of dam A. so that no water can be drawn below the four-foot point, and to substitute gates above the four-foot point for those heretofore in use, and

asked the court to fix and determine the size of the proposed gates. Under this allegation the plaintiff proposed to retry the question of the capacity of the reservoir, claiming that, with the gates and physical conditions as they were in 1854, it was not possible to draw the amount of water now required to be drawn from the reservoir, namely, 130 cubic feet per second. Subject to exception, the court refused to retry the question of the capacity of the reservoir, to revise the order as to the draft of water, to hear evidence as to the physical condition at dam A prior to the improvements made by lowering the outlet of the reservoir, or to determine the size of the gates; but ruled that the plaintiff might make such changes as he wished which would not interfere with existing orders as to the draft from the reservoir. The court found that the experience under the existing order was not sufficient to determine whether the amount required to be daily drawn was greater or less than the capacity of the reservoir in the average year. The plaintiff also alleged that the existing orders as to the use of water at dam C were in conflict with the opinions of the Supreme Court, and that the third order, filed December 14, 1903, was not now in force as matter of law. Subject to exception, the court refused to make any change in those orders. The plaintiff offered evidence that he now intends to remove the gristmill machinery, to put in machinery for the making of excelsior, and to use all the water the gristmill wheels can now use—about 69 cubic feet per second—and asked leave to amend his petition by alleging his present intention to use the gristmill for other purposes. The defendants were not prepared to try such questions of fact as might be necessary to determine the rights of the parties as to the proposed use of the gristmill, and the court declined to order the defendants to a trial of these questions. The court refused to rule upon the right of the plaintiff to use the gristmill power otherwise than for a gristmill, and the plaintiff excepted.

James A. Edgerly, Arthur L. Foote, Felker & Gunnison, and Charles B. Hibbard, for plaintiff. Leslie P. Snow, Sewall W. Abbott, and Oscar L. Young, for defendants.

PARSONS, C. J. Upon trial of the question of the extent of the defendants' reservoir right, that right has been found to be a reasonable use of the reservoir until it is drawn down four feet below the top of the dam, and such reasonable use has been found to consist in letting down not exceeding 130 cubic feet per second for 10 hours each working day until that point is reached. *Horne v. Hutchins*, 72 N. H. 211, 214, 215, 55 Atl. 361; *Berry v. Hutchins*, 73 N. H. 310, 312, 61 Atl. 550; *Hutchins v. Berry*, 73 N. H. 611, 613-616, 63 Atl. 787. Upon the trial of that question of fact evidence as to the amount of water that could be drawn under previously

existing conditions as the limit of practicable use was approached would be competent; but, if the parties were engaged in a trial of the fact as to the capacity of the reservoir right attached to the Pickering dam, the exclusion of evidence of measurements of the flow of the stream under a claimed reproduction of conditions existing prior to the Lake company improvements would not be error of law. *Cook v. New Durham*, 64 N. H. 419, 13 Atl. 650. The difficulty of ascertaining all the conditions which might have then affected the flow of the stream, and of determining whether they had been correctly reproduced, might be so great that an attempted investigation of the collateral question would tend to confuse rather than to elucidate the issue between the parties. Even, therefore, if the question as to the flow of the stream had been under investigation, the refusal of the court to fix and determine the size of gates such as existed in 1854 would not present anything for consideration here; but, if the law were otherwise, the extent and capability of the reservoir having been already determined, error of law cannot be predicated upon the refusal of the court, upon the facts stated, to reopen the question and grant the plaintiff a new trial, which it is found was the object of the motion, and which must of necessity have been its purpose if any result was expected to follow the desired investigation. *Hutchinson v. Railway*, 73 N. H. 271, 284, 60 Atl. 1011; *Ela v. Ela*, 72 N. H. 216, 55 Atl. 358. The plaintiff has the right, as was ruled by the superior court, to make any changes he desires which will not prevent the letting down of the amount of water which it has been determined represents the capacity of the original reservoir. While the latter finding stands, any change made by him which prevents the flowing of that amount of water, it must be conclusively presumed, is the creation of a condition different from what originally existed. As to whether there should now be a further trial and the reception of additional evidence, experimental or otherwise, the fact has been found against the plaintiff. Such finding is conclusive.

The plaintiff excepted to the refusal of the court to change the order made and now in force for managing the water or wheels of the different mills. The only order to which objection has been made here is the third order, filed December 14, 1903. That order is objected to so far as it modifies the first order, filed July 25, 1902, which limited the Berry privilege to 38 cubic feet per second when the water did not run over the wasteway. The modification objected to provided that the limitation of the Berry privilege should not take effect until the water fell 18 inches below the top of the wasteway. In the original brief, the plaintiff bases his objection to the modification upon the preferential right of the gristmill. As the owner of

the gristmill was not a party to the proceedings in which the order now objected to was made, and as it has since been determined that the gristmill has the right to require all the mills to shut down when the water falls six inches below the top of the wasteway (*Hutchins v. Berry*, 73 N. H. 603, 611, 613, 61 Atl. 554, 63 Atl. 787), the order does not affect the gristmill, and there is no occasion to modify it for the protection of the gristmill right. In a brief filed since the hearing the plaintiff objects to this modification as an invasion of his right as the owner of the leather board mill, heretofore called the "box factory privilege."

Horne v. Hutchins, 72 N. H. 77, 54 Atl. 1024, was a bill in equity to determine to what extent and in what manner water was actually used at the box factory October 26, 1872, such use having been held to be the measure of the box factory right. *Horne v. Hutchins*, 71 N. H. 128, 137, 51 Atl. 651. In the former case it was found that, as between the sawmill and the box factory, there was no preference; that the water wheel in the sawmill could use 38 cubic feet of water and the penstock of the box factory could deliver 17 cubic feet of water per second when the water in the pond stood at the level of the wasteway. The amount to which the Horne privilege was entitled having been determined in another case to be 13 cubic feet per second, it was ordered that the gates to the respective penstocks be set so as to permit only 13, 17, and 38 cubic feet, respectively, to be drawn when the water stood at the top of the dam and did not run over the wasteway. Both parties excepted to these findings, orders, and decrees. The exceptions were overruled. The decrees therefore are judgments establishing the rights of the parties. The order of December 14, 1903, removing the limitation upon the use by the Berry privilege until the water fell 18 inches below the top of the wasteway, also provided that the stops on the Hutchins wheel or gate should remain as before. The occasion for this modification does not appear. As there was no preference between the sawmill and box factory, the plaintiff cannot complain in behalf of his leather board mill that the sawmill is permitted to draw down the water in the pond; but if, as seems to be the effect of the existing order, the sawmill is permitted to draw down the water below the top of the wasteway without limitation as to the amount, while the plaintiff's gate is set so as to draw only 17 feet when the water is at the top of the wasteway, it is manifest that the plaintiff will as the water falls receive less than the 17 feet to which it has been adjudged he is entitled, and that the sawmill will receive more. In the absence of any findings sustaining the change ordered December 14, 1903, the same appears to be erroneous, and the exception to the refusal to change the same to accord with the judgment in *Horne v. Hutchins*, 72 N. H. 77, 54

Atl. 1024, is sustained. As the relative right between the leather board mill and sawmill is determined to be in the ratio of 17 to 38, it is immaterial to the plaintiff Hutchins whether the amount taken as the measure of the rights of the two—17 plus 38 cubic feet—is excessive as against the right of the Horne privilege.

Whether justice required that the plaintiff should be permitted to amend his petition, so as to present for adjudication his right to use the water for the gristmill for other purposes, is a question of fact. The denial of the motion presents no question of law.

It was said in *Hutchins v. Berry*, 73 N. H. 603, 604, 61 Atl. 554, a bill in equity brought by the plaintiff to determine the gristmill right, that, "in the absence of a definite specification of the amount of water excepted or the manner of its application to produce power, it must be understood the parties contracted with reference to the manner and extent the water was then at the date of the deed actually used for the purpose specified." It appears to be well settled that, when a right exists to use a certain quantity of water, a change in the mode and objects of the use without increasing the quantity is no violation of the right. *Fuller v. Daniels*, 63 N. H. 395; *Dow v. Edes*, 53 N. H. 183, 194; *Wiggin v. Wiggin*, 43 N. H. 561, 563, 80 Am. Dec. 192; *Whittier v. Company*, 9 N. H. 454, 458, 32 Am. Dec. 382; *Johnson v. Rand*, 6 N. H. 22. The sole question, then, is whether by the reservation in the Colby deed the parties understood the matter reserved was merely a right to operate a gristmill, and not the right to use a certain part of the water for power. It was said in *Fowler v. Kent*, 71 N. H. 383, 394, 52 Atl. 554, that "it would require very explicit language to overcome the natural inference that a person would not accept a deed of a mill privilege subject to the condition that his water rights should become forfeited if any change was made in the manner, purpose, or place of use." But, whether the question is simple or difficult, the interpretation of the Colby deed is not now before the court. The superior court has ruled that the defendants ought not now to be compelled to litigate the question. This court cannot assume that there may not be some evidence which the parties can present which will aid the interpretation. Neither can they assume that all the facts bearing upon the question have been presented in the numerous cases between the present and other parties, involving this water power, that have been before the court. If that fact could properly be assumed, the court would not take the time to search the voluminous record in these cases, which presents many other questions, for facts that may be material upon this. If the question is to be intelligently considered, it should be presented upon a record which contains in itself all the facts which either party

conceives to be material. The evidence as to the modification of the original order regulating the flow of water to the Berry privilege should have been received; and, unless facts appear authorizing a change, the original order should be restored.

Case discharged.

YOUNG, J., did not sit. The others concurred.

(74 N. H. 238)

GILES v. SMITH.

(Supreme Court of New Hampshire. Hillsborough. May 7, 1907.)

WITNESSES — COMPETENCY — TRANSACTIONS WITH DECEDENT.

Under Pub. St. 1901, c. 224, §§ 16, 17, prohibiting the adverse party to an action against an executor from testifying to facts occurring in the lifetime of deceased, unless the executor elects so to testify, or unless it clearly appears that injustice may be done without such testimony, plaintiff in an action for breach of contract of defendant's testate to employ plaintiff for a year, defendant not electing to testify, is barred from testifying, not only as to what deceased did or told plaintiff, but as to the contents of plaintiff's letters in reply to letters of an employé of deceased asking plaintiff to take a position with deceased, unless it be shown that deceased had not seen the letters, and therefore could not have testified in respect to them.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, §§ 663-682.]

Transferred from Superior Court, Hillsborough County; Peaslee, Judge.

Assumpsit by Nelson A. Giles against Alice G. Smith, executrix of Charles G. Smith, deceased, for a breach of a contract of deceased to employ plaintiff for a year on the Manchester News. Plaintiff excepted to exclusion of testimony. Exception overruled.

There was evidence tending to prove the following facts: At about the time Smith came into possession of the newspaper, he asked for the plaintiff's address, so that Mellows, the managing editor, might write to him, with a view of employing him to take charge of the circulation department. The address was found, the plaintiff came to the News office and took charge of the circulation department, his name was placed upon the payroll at \$18 per week, and he was paid off with the other persons employed upon the paper. On one occasion when Smith was paying off the employés he said to the plaintiff: "Your case is the worst of the lot. I will try and see that you do not lose anything by it." The plaintiff was permitted to introduce in evidence letters from Mellows to him, stating that Smith had bought the News and was in want of a circulation manager, describing the situation, and asking the plaintiff to take the place, and a later letter saying, "Your terms are accepted." The plaintiff offered to show that Mellows is now of parts unknown, and then offered himself as a witness to testify to the contents of his letters in reply to those received from Mellows, and also that, when he came to Man-

chester, Smith said that Mellows was authorized to hire him. The executrix did not elect to testify. The plaintiff's testimony was excluded, subject to exception.

David W. Perkins, for plaintiff. Irving T. George and Burnham, Brown, Jones & Warren, for defendant.

PARSONS, C. J. As the executrix did not elect to testify, the plaintiff was properly excluded as a witness to all facts occurring in the lifetime of the deceased as to which the deceased could have testified if living. Pub. St. 1901, c. 224, §§ 16, 17; *Parsons v. Wentworth*, 73 N. H. 122, 59 Atl. 623; *Perkins v. Perkins*, 63 N. H. 284, 38 Atl. 1049. Under the settled construction of the statute, the plaintiff could not testify to what Smith did or told him; nor to the contents of the letters, if Smith had seen them, and therefore could have testified to their contents. *Welch v. Adams*, 63 N. H. 344, 351, 1 Atl. 1, 56 Am. Rep. 521. The plaintiff's testimony was not competent unless the contrary appeared. *Harvey v. Hilliard*, 47 N. H. 551; *Fosgate v. Thompson*, 54 N. H. 455; *Parsons v. Wentworth*, supra.

Exception overruled. All concurred.

(74 N. H. 252)

PAGE v. HAZELTON.

(Supreme Court of New Hampshire. Grafton. May 7, 1907.)

1. EVIDENCE—BOOKS OF ACCOUNT—ADMISSIBILITY.

The entries of a testator's cash book, exceeding \$6.87, are not admissible as items of book charge in favor of his executor.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 1451.]

2. SAME.

Where, in a suit to establish a claim against a decedent, the claimant put in evidence decedent's books of account, and claimed that specified entries therein proved a debt due from decedent at his death, other entries rebutting the inference of the existence of the debt and showing that the transaction was a payment on account were competent.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 453, 1480.]

3. APPEAL—ADMISSION OF EVIDENCE—PREJUDICIAL ERROR.

Where the inference of a debt due from a decedent to a claimant could not be drawn from entries in decedent's books of account offered in evidence by claimant in his suit to establish the claim, the admission in evidence of other entries to rebut that inference was not prejudicial.

4. EVIDENCE—ADMISSIONS—CONDUCT.

In a suit to establish a claim against the estate of a decedent, evidence that at the time claimant asserted that decedent, then living and solvent, was indebted to him claimant stated to a witness that he was unable to pay his note, which the witness had signed as surety, was admissible to discredit the claim of indebtedness.

5. SAME—REMOVEDNESS OF RELEVANT TESTIMONY.

It is not error to admit relevant evidence, though the same might have been properly excluded because too remote.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 434.]

6. EXECUTORS AND ADMINISTRATORS—CLAIMS—ESTABLISHMENT—ACTIONS—EVIDENCE.

In a suit to establish a claim against a decedent, the testimony of a bank cashier as to payments made by decedent to the bank on notes signed by himself and claimant was competent, though whether the payments were available in defense would depend on other evidence.

7. SAME.

Where one seeking to recover from a decedent \$600, being the consideration for the sale of real estate by himself and decedent, offered in evidence a deed from himself and decedent to a grantee, in which the consideration was stated to be \$600, and claimed that the consideration had been received by decedent, it was competent as explaining the transaction to offer in evidence a bond for a deed given by claimant and decedent to a third person and assigned to the grantee, when, if payments were made according to the terms of the bond, the decedent received the money at an earlier date than the claimant charged him with receiving.

Transferred from Superior Court, Grafton County; Chamberlain, Judge.

Action by Samuel T. Page against George W. Hazelton, executor of Charles G. Smith, deceased, to establish a claim against the deceased. There was a verdict in the superior court for defendant, rendered on appeal from the allowance of the claim by the probate court, and the cause was transferred. Plaintiff's exceptions overruled.

The specification contained items of cash which the plaintiff claimed were for money loaned. The testator's books of account were produced by the executors at the plaintiff's request and were put in evidence by the plaintiff. Some of the items of the specification appeared on the testator's cash book; and the plaintiff claimed that such entries and certain checks introduced in evidence and bearing the testator's indorsement were proof of loans to the testator and of a debt due at his death to the plaintiff. As bearing upon the probability of the items found in the cash book evidencing an indebtedness to the plaintiff, the defendant was permitted to introduce other items in the cash book, each exceeding \$6.67, showing an account of long standing between the plaintiff and the testator; and to this ruling the plaintiff excepted. The plaintiff also excepted to testimony of a bank cashier as to payments made by the testator to the bank upon notes signed by himself and the plaintiff. As bearing upon the question of the existence of an indebtedness to the plaintiff from the testator at the time of the latter's death and long before, one Danforth was permitted to testify, subject to the plaintiff's exception, that in 1900 and 1901, and at different times, the plaintiff said he was unable to pay his note which the witness had signed as surety. The statements testified to were made during the lifetime of the testator, and when he had sufficient property to pay all his debts. The plaintiff claimed to recover \$600, being the consideration for the sale of real estate known as the "Peaked Mountain farm," with interest from June 27, 1900, and offered in evidence a deed of the premises from himself and the testa-

tor to one Hunt, in which the consideration was stated to be \$600. As tending to explain the transaction, the defendant introduced in evidence a bond for a deed of the same premises, given by the testator and the plaintiff to one Andros and assigned to Hunt. It appeared that Hunt made payment to the testator, and that the testator and the plaintiff conveyed for the consideration stated in the bond, which was \$600 and interest agreeably to the note of Andros for that sum, payable \$50 January 1, 1895, and \$100 each year thereafter. The plaintiff excepted to the admission of the bond.

Moodybell S. Bennett and David S. Conant, for plaintiff. Hosford & Wright, for defendant.

PARSONS, C. J. The entries on the testator's cash book were not admissible as items of book charge in favor of his executor, because they were money items each of which exceeded \$6.67. *Remick v. Runery*, 69 N. H. 601, 45 Atl. 574; *Bailey v. Harvey*, 60 N. H. 152; *Rich v. Eldredge*, 42 N. H. 153, 158; *Bassett v. Spofford*, 11 N. H. 167. If the defendant could have made all the contents of the books evidence by attaching such a condition to the plaintiff's examination of them (*Wentworth v. McDuffie*, 48 N. H. 402; *Huckins v. Insurance Co.*, 31 N. H. 238), no such condition was imposed. The items offered, therefore, were not admissible as direct evidence in behalf of the defendant. But they were not so offered or admitted. They were admitted merely as bearing upon the probability of the inference sought to be drawn by the plaintiff from the items which he put in from the book. It is to be presumed the items of cash claimed in the plaintiff's specification and found on the deceased's cash book represent money delivered by the plaintiff to the defendant's testator, Smith. If from those items it could be inferred the money delivered was a loan, other entries in the same account, rebutting that inference and tending to show the transaction was a payment on account, were competent. The entries made by Smith and offered by the plaintiff were admissible as the statement of a party. Proof by one party of a statement made by the other entitles the latter to give in evidence any part of the statement which has not been already offered, which tends to qualify, limit, or explain that portion of the statement already in proof. *Wentworth v. McDuffie*, 48 N. H. 402; *Whitman v. Morey*, 63 N. H. 448, 2 Atl. 899; *State v. Saldell*, 70 N. H. 174, 46 Atl. 1083, 85 Am. St. Rep. 627. This principle applies to a statement made by a party in his books of account, 3 Wig. Ev. § 2116; *Dewey v. Hotchkiss*, 30 N. Y. 497, 502; *Low v. Payne*, 4 N. Y. 247. The entries put in by the plaintiff are not described. The precise relation between them and the entries offered by the defendant do not appear. The case, therefore, affords no opportunity for a discussion of the limita-

tions, if any, upon the right of a party to the use of his books of account after they have been adopted as proof by his opponent. It does not appear that the books were used as evidence for any purpose except to rebut the inference sought to be drawn by the plaintiff from the items selected by him; and, as the case is drawn, it must be assumed that the items relied on by the defendant legitimately tended to rebut such inference. But, as the only use claimed for the books by the defendant was to rebut the inference sought to be drawn by the plaintiff, it is immaterial whether the items relied on by the defendant had such tendency, or whether they were competent for that purpose or not. "The delivery of money without other evidence of the contract between the parties raises no presumption of law that it was intended to be a loan, rather than the payment of a debt or a gift." *Coburn v. Storer*, 67 N. H. 86, 87, 36 Atl. 607; *Fall v. Haines*, 65 N. H. 118, 23 Atl. 79. As the inference sought to be drawn from the admission of the receipt of money, contained in the books of the deceased, could not properly be drawn, it is immaterial whether the evidence admitted solely to rebut that inference was competent or not. Since the only effect the evidence adopted could have had was to defeat an inference which could not have been drawn if the evidence had been excluded, the plaintiff could not have been harmed by its admission.

Subject to exception, the defendant was permitted to prove that at the time when the plaintiff claimed the deceased, then living and solvent, was indebted to him in a large sum, the plaintiff told a witness that he was unable to pay a note on which the plaintiff was principal and the witness surety. "Evidence is any matter of fact, the effect, tendency, or design of which is to produce in the mind a persuasion, affirmative or disaffirmative, of the existence of some other matter of fact." *Cook v. New Durham*, 64 N. H. 419, 420, 13 Atl. 650; *Cole v. Boardman*, 63 N. H. 580, 581, 4 Atl. 572; *Cohn v. Saidel*, 71 N. H. 558, 568, 53 Atl. 800; 1 Wig. Ev. 28. Evidence having any tendency, however slight, to prove a particular fact, is competent to be submitted to the jury to show that fact. *Curtis v. Car Works*, 73 N. H. 516, 63 Atl. 400; *Eaton v. Welton*, 32 N. H. 352. The evidence objected to tended to show that the plaintiff was in need of money at a time when, according to his present claim, the deceased, Smith, had in his possession a considerable sum in cash belonging to him. The plaintiff's failure, in this situation, to demand or attempt to collect his debt of a responsible debtor for a considerable time, and until after the death of his alleged debtor, is a circumstance which has some logical tendency to discredit his present claim. Failure to make claim when occasion therefore exists has some tendency to prove the invalidity or nonexistence of the claim. *Stone v. Tupper*, 58 Vt. 409, 412, 5 Atl. 387; *Strong*

v. Slicer, 35 Vt. 40, 43. Such failure to act may constitute "an admission by conduct" adverse to the present claim. 1 Wig. Ev. §§ 267(b), 284. As the evidence was relevant, its admission was not error of law, even if it might properly have been excluded as too remote. *Pritchard v. Austin*, 69 N. H. 367, 369, 46 Atl. 188.

The testimony of the bank cashier to the payment of money by Smith upon an obligation of Smith and Page was competent. Whether the payment was available in defense would depend upon other evidence. The bond for the deed of the land conveyed by deed by Smith and Page was a part of the transaction opened by the plaintiff by the introduction of the deed and his claim to the consideration received by Smith. It was a statement under the hand and seal of the plaintiff. No objection to its competency appears, nor is it perceived in what way its admission could have prejudiced the plaintiff. If payment was made according to the terms of the bond, Smith received the money at an earlier date than the plaintiff has charged him with it. At the most, the bond, if immaterial, was not prejudicial.

Exceptions overruled.

YOUNG, J., not having been present at the argument, took no part in the decision. The others concurred.

(75 N. J. L. 64)

In re ELECTION OF DIRECTORS OF BROOKLYN BASEBALL CLUB.

(Supreme Court of New Jersey. June 10, 1907.)

CORPORATIONS—DIRECTORS—ELIGIBILITY—RE-ELECTION.

It requires a willful refusal to file the report of the election of directors within 30 days after any annual election to make the directors so failing to file the same ineligible to re-election at the next succeeding annual meeting.

(Syllabus by the Court.)

Petition to establish the election of the petitioners as directors of the Brooklyn Baseball Club. Petition dismissed.

Argued February term, 1907, before FORT, HENDRICKSON, and PITNEY, JJ.

Northrop & Griffiths, for the petitioners. Vredenburg & Wall, for the respondents.

FORT, J. We think the prayer of the petitioners in this case should be denied. The respondents were elected directors of the Brooklyn Baseball Club at the annual meeting held on November 12, 1906. They received 1,275 votes and the petitioners received 209 votes. The capital stock of the company is divided into 2,500 shares. There are five directors. The by-laws fix the second Monday in November as the date for the annual meeting. The company was organized December 11, 1899. The only meetings at which directors were elected since the or-

ganization were those of February 12, 1902, March 21, 1905, and November 12, 1908. The last stated meeting was the only one at which directors have been elected upon the day fixed by the by-laws of the company. No report of the meeting of March 21, 1905, was made and filed within 30 days after such meeting and election, as required by statute. It appears, however, that the directors ordered such report to be made and directed the secretary to attend to it. The report was drawn by the counsel of the company, and signed by the president and delivered to the secretary to file, but, for some reason, it was never filed. The secretary died July 27, 1905. None of the directors were aware of the fact that the report had not been filed until October, 1905, whereupon it was immediately done.

The statute relied upon by the petitioners is section 43 of chapter 124, p. 313, of the Laws of 1900, which, in part, reads as follows: "Every domestic corporation and every foreign corporation doing business within the State, shall file in the office of the Secretary of State within thirty days after the first election of directors and officers, and annually thereafter, within thirty days after the time appointed for holding the annual election of directors, a report authenticated by signatures of the president, and one other officer, or by any two directors of the company, stating, * * * if such report be not so made and filed, all of the directors of any such domestic corporation who shall wilfully refuse to comply with the provisions hereof and who shall be in office during the default shall at the time appointed for the next election, and for a period of one year thereafter, be thereby rendered ineligible for election or appointment to any office in the company as director or otherwise." P. L. 1900, p. 313.

On the facts in evidence in this case the only question for determination here is one of fact, namely, was the failure to file the report of the election of directors on March 21, 1905, willful refusal to so do on the part of the respondents? We do not think the facts proven justify such an inference.

The petition is dismissed, but without costs.

(73 N. J. Eq. 220)

ARNOLD et al. v. CITY OF ORANGE et al.
(Court of Chancery of New Jersey. May 25, 1907.)

1. DEDICATION—NECESSITY FOR ACCEPTANCE.

A mere dedication without acceptance is insufficient to charge the dedicated land with a public use and with public authority.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Dedication, §§ 64, 65.]

2. SAME—ACCEPTANCE—ACTS NOT AMOUNTING TO ACCEPTANCE.

The erection of a street light by a private corporation within the limits of a street dedicated to a village, the maintenance of which was paid for by the village, was not sufficient to show an acceptance by the village of the street dedicated.

3. SAME—OFFICIAL ACTS.

The construction of a public sewer by proper municipal authority at the expense of the municipality in a dedicated street connected with the municipality's general system of sewers was an acceptance of the dedication of the street through which the sewer was constructed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Dedication, § 75.]

4. SAME.

An agreement by a village with a city granting the latter the right to lay water pipes through certain of the village streets for a valuable consideration, to which was attached a map showing the location and boundaries of a dedicated street included among those in which the pipes were to be laid, was an express recognition of the public character of the dedicated street, and sufficient to show an acceptance of the dedication.

5. SAME — EFFECT OF STATUTORY REQUIREMENTS ON COMMON-LAW METHODS.

The fact that a village charter prescribes for the acceptance of a dedicated street by an ordinance especially devised, drawn, and adopted does not exclude the common-law methods of acceptance.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Dedication, § 64.]

Bill for an injunction by Frank Arnold and others against the city of Orange and others. Bill dismissed.

Albert C. Wall and Smith & Dugan, for complainants. William A. Lord, for defendants.

HOWELL, V. C. This suit is brought to restrain the city of Orange from laying water pipes through a strip of land lying in the village of South Orange, called Clark street, the title to a portion of which, to the middle of the strip, is claimed to be owned by the complainants. The water pipes in question are parcel of the water supply system of the city of Orange, but, in order to reach that municipality, it was deemed necessary to construct the line through the village of South Orange. Permission was granted for this purpose by the village to the city and the work was begun. The permission given by the village to the city included a right to lay the pipe line through the so-called Clark street. The complainants, conceiving that this so-called street was a private roadway, and that the village had no authority to grant permission to use it for any purpose, bring this suit to restrain the city and its contractor from infringing upon their private rights by the construction aforesaid.

The city claims that Clark street is a public highway, and as such is subject to the legislative permission contained in the statutes under which it is laying its pipe line. Indeed, it was admitted on the argument that in 1870, two years before the organization of the present South Orange village government, the land now lying within the boundaries of Clark street was dedicated to public uses as a public highway by an agreement between Haskell and Page, under whom the complainants derive their title;

and it appeared by the testimony of the surveyor who did it that the street was actually laid out on the ground in the year 1871. I think there is no question but that there was a dedication as is claimed by the city; but a mere dedication without acceptance is insufficient to charge the dedicated land with a public use and with public liability. Mr. Justice Lippincott in *N. Y. & L. B. R. R. Co. v. South Amboy*, 57 N. J. Law, 252, 80 Atl. 628, says: "Whilst the fact of dedication may be clear as against the owner or those claiming under him, yet there must exist on the part of the public a ratification or acceptance evidenced by some authorized formal municipal act or a public user. The public acquired no rights, nor is it subject to any burdens by reason of the dedication, unless it be by some formal act of acceptance or by unequivocal public user." *Trustees v. Hoboken*, 83 N. J. Law, 13, 97 Am. Dec. 696; *Holmes v. Jersey City*, 12 N. J. Eq. 299; *Booraem v. N. H. C. R. Co.*, 12 N. J. Eq. 465.

The city claims that the village did exercise unequivocal municipal authority by formal municipal acts over the property in question to a sufficient extent to warrant the finding of an acceptance; in short, that there was an acceptance of the dedication. It appears that a private corporation erected a street light within the limits of the street, the maintenance of which was paid for by the village. This, however, under the opinion of Vice Chancellor Emery in *Robertson v. Meyer*, 59 N. J. Eq. 370, 45 Atl. 983, would not be sufficient to justify the conclusion of an acceptance. Neither do I think that the failure of the village to tax the land as private property is any evidence of acceptance, because it may well be, as was said by the complainants' counsel on the argument, that the valuation of the abutting land for purposes of taxation included the value of the land within the lines of the so-called street; nor is the somewhat limited user by the public standing alone a sufficient fact from which to infer an acceptance which would bind the municipality. Its public use resembles very much the use of Henry street in South Amboy described in Mr. Justice Lippincott's opinion above referred to, which was thought by the Supreme Court to be insufficient evidence of an acceptance.

But it appears that in the year 1902 the village, in the exercise of its municipal power, constructed a sewer through the so-called street, which extended from West Turrell avenue northerly to the Orange city line, and in front of the lands of the complainants, which was paid for by the village, and was laid in connection with similar sewers in other streets in pursuance of a general plan for the drainage of the village, and that a majority of the owners of property along the so-called Clark street have connected their properties with the sewer, and that sewage therefrom is now being discharg-

ed into it. The ordinance under which this work was done is in part as follows:

"An ordinance to construct pipe sewers in certain of the streets and highways of the village of South Orange in the county of Essex, to be connected with the joint trunk or outlet sewer.

"Section 1. That there shall be constructed and laid public sewers in the village of South Orange in accordance with the maps, profiles, plans and specifications submitted by Alexander Potter, which plans have been heretofore adopted and were filed in the office of the village clerk on the 30th day of July, 1902, such sewers to be of the dimensions and in the streets and highways between the points following."

Then follows a list of the streets to be sewerred, including "Clark street from West Turrell avenue to Montrose avenue 8 and 10 inch."

This action appears to me to be a most complete and efficient acceptance of the dedication of the lands in question, and, while it may possibly be argued that this holding may not affect the rights of the village of South Orange in other litigations because it is not a party to this suit, it can be made the foundation of a decree which shall be decisive of the rights of the parties now before the court. It is useless to speculate in regard to the position that the village might have taken if the complainant had made it a party to this suit. It might, and I think probably would, have admitted that the act in question was an acceptance of the dedication.

The question as to what particular municipal action will be sufficient to evince an acceptance of a dedication has not often been decided in our state. I think, however, that so important a municipal act as the construction of a public sewer by proper municipal authority at the expense of the municipality in a dedicated street connected with the municipality's general system of sewers must be held to be an acceptance of the dedication of the street through which it is constructed. In *People's Traction Co. v. Atlantic City*, 71 N. J. Law, 134, 57 Atl. 972, it was claimed that Atlantic City had no right to grant permission to a street railway to lay its tracks and maintain its overhead construction in certain streets within its boundaries, because the streets were not dedicated and accepted streets. Mr. Justice Garretson, speaking for the Supreme Court, says: "We think the evidence shows that the streets were dedicated by the filing of maps and sales of lots upon them, and were accepted by the city by resolution accepting them, and also by the passage of this very ordinance in which provision is made for their improvement by paving." If the paving of a dedicated street as a condition of permission to a street railway company to use the street for its purposes is sufficient evidence of an acceptance, then certainly the paving

of the street directly by the city would be still stronger evidence; and I fail to see any distinction in the character of the municipal use between the paving of a street and the construction of a sewer in it. If one would be an acceptance, the other would be likewise. The particular subject-matter was decided by the New York Court of Appeals in *Re Hunter*, 163 N. Y. 542, 57 N. E. 735. There Hunter in his lifetime dedicated Rawson street. The tender of the dedication was open for many years, and was not accepted by the city. On May 16, 1898, upwards of 20 years after the dedication had been tendered, the city passed an ordinance providing for the construction of a sewer through certain streets, and, among others, along the center of Rawson street; the particular phrases in the ordinance relating to that street being "along the center of Rawson street," "from center line of Rawson street," "thence southerly along Rawson street," "the continuation of Rawson street," "for that portion in Rawson street and its northerly continuation." In relation to this state of facts Judge Vann says: "We think the ordinance was an acceptance of the street, and that upon its approval by the mayor two days after its passage Rawson street became a public highway, even if it had not become so before. We do not pass upon the effect of the first map prepared and filed by Mr. Hunter, his numerous conveyances of land with reference to it, the action of the city authorities in naming the street and constructing a cross walk in it, the public user, the change in 1875, and the acquiescence of all concerned therein. We place our decision upon the tender of dedication by Mr. Hunter in his lifetime, continued without interruption by the present owner for years after his death, and the acceptance of that tender when still in full force by the ordinance of May 16, 1898. Without reference to the earlier history of the street, we think this tender and acceptance were sufficient of themselves, independent of any other fact, to make Rawson street a lawful and irrevocable highway." To the same effect is *Philadelphia v. Thomas*, 152 Pa. 494, 25 Atl. 873. There the court said: "The proper city authorities entered upon the land dedicated to the public use as aforesaid, constructed the sewer therein, and filed the liens. Those unequivocal acts were clearly an acceptance of the dedication and an unqualified recognition of Reed street as an open highway of the city. They were just as effectual and conclusive as if an ordinance to open had been passed and damages had been assessed and paid. While the city was not bound to accept the dedication and forthwith take charge of the street as a regularly opened highway, it had an undoubted right to do so whenever in the judgment of

councils the public interests would be thereby promoted. The action that was taken necessarily implied an acceptance of the dedication. It was not susceptible of any other construction." See, also, *People v. Loehfelm*, 102 N. Y. 1, 5 N. E. 783.

If there could be any doubt about the efficiency of the acceptance of the dedication by the construction of the sewer, I think the question is set at rest by the agreement between the city and village of July 2, 1906, by which the village gave to the city permission to lay its water pipes through the village streets. This agreement recites a request made by the city for consent to the laying of a water pipe line through certain streets in the village according to a plan therewith submitted. It grants the consent and provides in detail for the manner in which the work shall be done. Attached thereto is a map which shows the location and boundaries of Clark street, the line of the water pipes in front of the land of the complainants therein, and on that side of the street nearest to their premises the whole length of Clark street from West Turrell avenue northward to the Orange City line. The agreement provided that the city shall pay to the village the sum of \$1,500 for the privilege of using the streets and highways delineated on the map for the construction of its pipe line. We must assume that this agreement was made upon due consideration by the properly constituted municipal authorities in accordance with the statute (Laws 1906, p. 512, c. 239), and that the same is a binding agreement on both corporations. It contemplates a single consent to the laying of an uninterrupted line of water pipes through undoubted public places for a valuable money consideration. In my opinion it is an express recognition of the public character of Clark street and irrefutable evidence of an acceptance of the dedication. *People's Traction Company v. Atlantic City*, supra. The village claims that, under its charter (Laws 1872, p. 1227, c. 527, §§ 43, 44), this street cannot be foisted upon it except by an ordinance specially devised, drawn, and adopted for the acceptance of the dedication. It is indeed true that these sections provided for acceptance of dedication in a particular manner, but I find nothing in them which excludes the common-law methods. If, however, the common-law methods are excluded, the Atlantic City and Hunter Cases above cited would be authority for holding that the ordinance for the construction of the sewer, and the municipal permission to lay the water pipe would meet the requirements of the above-mentioned sections of the charter. See the motion to reargue the Hunter Case in 164 N. Y. 365, 58 N. E. 288.

I will therefore advise a decree dismissing the bill.

(72 N. J. Eq. 725)

**PATERSON GENERAL HOSPITAL ASS'N
v. BLAUVELT et al.**(Court of Chancery of New Jersey. April 6,
1907.)**1. WILLS — LEGACIES — PROPERTY SUBJECT TO
PAYMENT.**

Where a testator follows bequests of pecuniary legacies with a general residuary clause, the legacies are charged upon the entire residuary estate, real and personal, and remain so charged until paid; the lien upon the realty being not contingent upon the insufficiency of the personalty at the testator's death or at the final accounting, and it being immaterial that the legacies fail of payment out of the personalty because it has been wasted, embezzled, misappropriated, or destroyed.

2. SAME — ENFORCEMENT — LACHES.

A legatee was not barred by laches in 1906 from suing to enforce its lien upon the residuary realty, where testatrix died May 6, 1892, and January 5, 1899, the legatee obtained a decree requiring the executor to pay the legacy and he refused to pay it on the ground he had no assets in his possession.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, § 2133.]

**3. EXECUTORS — LEGACIES — PRESUMPTION OF
PAYMENT.**

A presumption of the payment of a legacy does not arise until after 20 years from the accrual of the right to it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 22, Executors and Administrators, § 1861.]

Bill by the Paterson General Hospital Association against Jacob H. Blauvelt, executor, John Clough, and others. Defendant Clough demurs to the bill. Decree overruling the demurrer advised.

Hannah Grundy died on the 6th day of May, 1892. By her will, which was duly probated in the orphans' court of Passaic county, she bequeathed general pecuniary legacies aggregating \$12,400, and then gave, devised, and bequeathed all the rest, residue, and remainder of her estate, real and personal, wheresoever situate, or of whatsoever the same might consist, to her cousin John Clough, and appointed Jacob H. Blauvelt sole executor. Among those to whom pecuniary legacies were bequeathed was the complainant, whose legacy was \$4,000. The will was admitted to probate, and letters testamentary were issued to Blauvelt, the executor. The testatrix died possessed of personal property and real estate; the inventory of the personal property amounting to \$15,414.85. On the 31st day of December, 1896, the executor, by his final account duly allowed by the orphans' court of Passaic county, showed that he had paid all of the legacies bequeathed in the said will, except the sum of \$1,850 to the complainant, \$360 to another legatee, and \$100 to another; and the said account also showed that the executor had a balance in his hands of the personal estate amounting to \$2,638.51. After this time the executor made a payment to the complainant of \$200, leaving a balance still due to it of \$1,650. On the 19th of December, 1898, the complainant began proceedings in the orphans' court aforesaid against

the executor, which resulted, on the 5th of January, 1899, in a decree that the executor pay to the complainant, upon its tendering a proper refunding bond, the sum above mentioned remaining due upon its legacy. Whereupon it tendered a proper refunding bond, and the said executor refused to pay, stating that he had no assets of the estate in his possession.

The bill charges that the executor, at the time of filing the final account on the 31st day of December, 1896, had wasted the estate of Hannah Grundy, and had misappropriated the same; that he was and is now insolvent and of no financial responsibility whatever; and that the complainant has exhausted all means at its command to obtain the balance due upon its legacy. The bill also charges that at various dates from the 15th of June, 1895, to the 29th of June, 1906, the residuary legatee, John Clough, conveyed certain portions of the real estate and agreed to convey certain other portions thereof to various persons. The bill charges that the legacy of the complainant is a charge upon the real estate of the decedent, and prays that the same may be so decreed, and that the defendants be decreed to pay the amount due thereon, or that so much of the real estate as may be necessary may be sold to raise and pay the same. The executor, the residuary devisee, and each of the parties to whom the real estate was conveyed by the residuary devisee, and the other legatees who have not received payment in full, are made defendants.

John Clough, the residuary devisee, files the demurrer. His grounds may be briefly summarized as follows: First. That the complainant is in laches in attempting, at this late date, to charge the real estate of the defendant acquired as residuary devisee. Second. That there was sufficient personal estate at the time of the death of the testatrix to pay all of the legacies, together with the costs of administration. Hence there is no charge upon the real estate acquired by the defendant under the will. Third. That under the will there was no intention to charge the real estate acquired by the demurrant under the residuary clause thereof. Fourth. That if the complainant ever had a lien, its delay in enforcing the same has resulted in its losing it. Fifth. That the complainant has not, on the face of his bill, justified his laches.

Robert Williams and Gustav A. Hunziker, for complainant. George P. Rust and Thos. P. Costello, for defendant John Clough.

GARRISON, V. C. (after stating the facts.) There is no doubt that, where a testator bequeaths pecuniary legacies and follows this with a general residuary clause, the legacies are charged upon the entire residuary estate, real as well as personal. This matter was set at rest in this state by the decision of the

Court of Errors and Appeals in the case of *Corwine v. Corwine*, 24 N. J. Eq. 579 (1874). The rule, as there stated, was adopted from *Hawkins on the Construction of Wills*, and is in the following language (page 583): "It has been said that a testator generally intends the legacies given by his will to be a charge on his residuary real estate, as well as on his personal estate, but (in the absence of an express charge) they are held to be so only when the residuary real and personal * * * estate are given together; * * * it being a rule of construction that, if legacies are given generally, and the residue of the real and personal estate is afterwards given in one mass, the legacies are a charge on the residuary real as well as the personal estate." In the case of *Johnson v. Poulson*, 32 N. J. Eq. 390 (Court of Errors, 1880), the rule in *Corwine v. Corwine* is explained, and is shown to apply only to those cases in which there is no evidence of contrary intention appearing in the will; that is to say, a will giving legacies generally, and following that with a residuary clause blending all of the property, real and personal, therein, will be construed as charging the legacies on the blended mass of real and personal property left by the testator. But if there is anything in the will which shows a contrary intent, then the charge does not necessarily result from a residuary clause of the character mentioned. In the case at bar there is nothing in the will to take it out of the plain rule laid down in *Corwine v. Corwine*, and so frequently applied since that time. *Brown v. Brown*, 31 N. J. Eq. 422 (Runyon, Ch., 1879); *Miller v. Sanford*, 31 N. J. Eq. 427 (Runyon, Ch., 1879); *Adams v. Beideman*, 33 N. J. Eq. 77 (Runyon, Ch., 1880); *Cook v. Lanning*, 40 N. J. Eq. 369, 3 Atl. 132 (Runyon, Ch., 1885); *Langstroth v. Golding*, 41 N. J. Eq. 49, 3 Atl. 151 (Runyon, Ch., 1886); *American Dramatic Fund Ass'n v. Lett*, 42 N. J. Eq. 43, 6 Atl. 280 (Runyon, Ch., 1886); *Turner v. Gibb*, 48 N. J. Eq. 526, 22 Atl. 580 (Green, V. C., 1891); *Congregational Church v. Benedict*, 59 N. J. Eq. 136, 44 Atl. 878 (Stevens, V. C., 1899, affirmed 62 N. J. Eq. 812, 44 Atl. 1117); *Horton v. Howell* (N. J. Ch.) 56 Atl. 702 (Stevens, V. C., 1903).

Since it is the rule that the personal estate of a decedent is the primary fund for the payment of debts and legacies, the question arises, in applying the doctrine of *Corwine v. Corwine*, whether there is any charge upon the residuary real estate if there is sufficient personal property to pay the debts and legacies. There is no doubt whatever that, as between the residuary devisee and a legatee, the legatee can be compelled by the devisee to proceed to obtain his legacy from the personal estate before resorting to the real estate. The question, however, still remains, whether, if the legatee does proceed to obtain payment first from the personal estate and fails, although there was at the time of the death of the testator or of the final account-

ing ample personal estate to pay debts and legacies, the lien upon the real estate exists, or whether such lien only arises in the event that there was not sufficient personal property applicable to the payment of legacies. Concisely stated, I think the question is whether, under the doctrine being considered, the proper holding is that there is a lien or charge upon the residuary real estate, or that there is such a lien or charge only if there is not sufficient personal estate at the time of the death of the testator or final accounting to pay the legacies. It seems to me plain that if the first suggestion is adopted as a correct statement of the rule, then the lien or charge must remain until paid; and it is utterly immaterial whether there was sufficient personal property at the time of the death of the testator or of the final accounting—the only importance of that question being that such personal property must be resorted to by the legatee before enforcing his charge upon the real estate.

On the other hand, if the latter statement of the rule is the correct one, then, if there was sufficient personal property at the death or at the final accounting, there is no charge. This proceeds upon the reasoning that the testator only intended to charge his real estate if he had not sufficient personal property to pay the legacies. I am of opinion that, under the reasoning and precedents, a will of the kind here under consideration charges the legacies upon the land, and that they remain a charge until paid. I do not think that the proper rule is that the so-called charge or lien is a contingent one, which only arises in the event that there was insufficient personal property at the time of the testator's death or at the final accounting. The leading case upon this subject is *Greville v. Browne*, 7 H. L. Cas. 690 (1859). In that case there was a pecuniary legacy, a general residuary clause, and another person than the residuary devisee was the executor. Lord Chancellor Campbell, at page 696, said: "For nearly a century and a half this rule has been laid down and acted upon, that, if there is a general gift of legacies, and then the testator gives the rest and residue of his property, real and personal, the legacies are to come out of the realty. It is considered that the whole is one mass, that part of that mass is represented by legacies, and that what is afterwards given is given minus what has been before given, and therefore given subject to the prior gift." He further quotes with approval the language of Vice Chancellor Page-Wood, who said, "I feel that I should be only introducing a useless and mischievous distinction if I held the legacy not to be a charge; the principle of the decision being in truth the same in the case of legacies as in that of debts." Lord Cranworth, at page 699, said: "The distinction that is suggested between real and personal property is an artificial part of the case;" and Lord Kingsdown, at page 705,

after holding that "the rest" must be construed to mean that which remains after what has previously been given is withdrawn," proceeds to say: "The distinction which is relied upon * * * is, I think, a distinction which is founded, not upon general principles, or upon the ordinary sense of mankind, but entirely upon the technical rules of the English law."

It must be recalled that by reason of the feudal system, and the inability to transfer lands by will, there grew up an entirely arbitrary distinction with respect to property. As has just been pointed out by the judges above quoted, there is no real distinction in the mind of the layman between one kind of his property and another kind. He has property. He desires to dispose of it by will. To the lay mind it does not occur that any distinction will be applied; and hence, when he gives some of the property in the form of money bequests, and what is left of his property in a mass to another, he undoubtedly means that all of his property shall first be used (after payment of his debts) to pay the legacies he has given, and that only what is left shall go to the one who is to have the residuum. It is an entirely artificial thing that the personal property is held to be the primary fund for the payment of debts and legacies; and, while it is perfectly true that it is so held, I think it entirely improper to extend this doctrine so as to hold that if, for any reason, the personal property is diverted from and does not reach the legatee, he thereby loses his legacy, in a case where the testator left ample property to pay the named pecuniary legacies. It will be observed that in the leading case just cited there is no suggestion that the charge upon the realty arises in the event of a deficiency of personal property. The court, as has been demonstrated, wiped out any distinction in such cases between the two classes of property, and held squarely and without qualification that the legacies were a charge upon the realty. This case was cited in our leading case of *Corwine v. Corwine*, supra, and at page 584 of 24 N. J. Eq. thereof, is shown to be the basis of the modern formulation of the doctrine.

The difficulty which now confronts us has arisen in my view because the courts, in stating the undoubted rule that the personal property is the primary fund for the payment of legacies, have failed to clearly show that this relates merely to priority or precedence in the marshaling of assets, and does not affect the existence or continuance of the lien. Because the residuary devisee has the undoubted right to have the personal property of the decedent, after the payment of his debts and administration expenses, applied to the satisfaction of pecuniary legacies, the courts have often unqualifiedly stated that, under the doctrine being dealt with, the legacies are a charge on the land, if there be an insufficiency of personal es-

tate. This is undoubtedly the rule, but it is not the whole rule, and as thus stated leads to the incorrect inference to which I have alluded. If from this statement of the principle it is inferred that there is only a charge upon the real estate in the event of there being an insufficiency of personal estate, then such inference is unwarranted, and the principle is not properly applied. In my view, as between the legatee and "the estate," the latter is charged as a whole, irrespective of any distinction as to different kinds of property, and remains charged until the legacy is paid. In the matter of marshaling of assets, or of determining the rights as between the residuary devisee and the legatee, the latter undoubtedly can be compelled to exhaust his remedy against the personal property before enforcing the lien which he has upon the real estate. Many of the cases above cited as following *Corwine v. Corwine* refer in the way in which I have above indicated to the necessity of there being an insufficiency of personal assets before the doctrine contended for will be applied. But *Greville v. Browne*, the leading authority above cited, does not, as heretofore shown, refer to the necessity of any such insufficiency to create the lien, and the following cases in our own courts have stated the doctrine without any such qualification: *American Dramatic Fund Ass'n v. Lett*, 42 N. J. 44, 6 Atl. 290; *Stevens v. Flower*, 46 N. J. Eq. 340, 19 Atl. 777 (McGill, Ch., 1890); *First Baptist Church v. Syms*, 51 N. J. Eq. 363, 28 Atl. 461 (McGill, Ch., 1898); *Carter v. Gray*, 58 N. J. Eq. 411, 43 Atl. 711 (Grey, V. C., 1899); *Vernon v. Mabbett* (N. J. Ch.) 58 Atl. 298 (Grey, V. C., 1904); *Haberman v. Kaufer* (N. J. Ch.) 61 Atl. 976 (Grey, V. C., 1905). See, also, *Wyckoff v. Wyckoff*, 48 N. J. Eq. 113, 21 Atl. 287 (Pitney, V. C., 1881). While the Vice Chancellor in that case dealt only with the doctrine which concerned land devised to a person who is directed to pay a legacy, and held that in such case the deficiency of personal assets was not considered, he cites authorities which show that the same ruling is made in cases where the charge is upon a residuary estate, and is not confined to cases where the land is devised with a specific direction to pay. In *Greville v. Browne*, one of the authorities cited by the Vice Chancellor, and which I have heretofore alluded to, Lord Cranworth, in commenting upon an argument and an inference from the case of *Awbrey v. Middleton*, points out that the circumstance that the legacies were directed to be paid by the executor and that the gift of the general residue was to the executor did not control the decision, but that the decision proceeded upon the general principle that the residue was charged with the legacy, and therefore the legacy must be paid without regard to whether it came from personal property or real estate.

If, then, I am correct in my understanding

of the principle, this will, as above stated, create a lien or charge upon the real estate, and the authorities all hold that under such circumstances nothing but payment to the legatee extinguishes the lien. *Quick v. Quick*, 1 N. J. Eq. 4 (Vroom, Ch., 1830); *Terhune v. Colton*, 10 N. J. Eq. 21 (Williamson, Ch., 1834); *Grode v. Van Valen*, 25 N. J. Eq. 97 (Runyon, Ch., 1874). See, also, collection of cases in other jurisdictions, *Am Dig.* vol. 49, col. 3254, § 2122. Even in cases where the charge was upon the real estate, "if the personal property should prove insufficient to pay," the Irish courts have held that the lien existed in cases where the executor embezzled sufficient personal property to have paid the legacies; although in the English Court of Chancery, under similar circumstances, there is a different holding. In *re Massey*, 14 Ir. Ch. Rep. 355 (1863); *McCarthy v. McCartie*, Ir. Rep. vol. 1, p. 86 (1897); *Richardson v. Morton*, L. R., 13 Eq. 123 (1871). In the case of *Sims v. Sims*, 10 N. J. Eq. 158, at page 161 (Williamson, Ch., 1854), there is a dictum that if the executor embezzles the money of the estate, the legatee loses, and the land is released. It will be found in analyzing that case, first, that the Chancellor held that under the will therein considered there was no charge upon the real estate, so that what he had to say concerning the effect of the embezzlement of the executor in a case where there was a charge was dictum; and, secondly, that the authorities which he cites for that dictum are those in which land charged with the payment of legacies was once resorted to and the money raised upon it and paid to the executor for the legatee, and the misconduct or embezzlement of the executor was then attributable to the legatee and not to the devisee whose land had once suffered the burden. Undoubtedly the cases hold that if there is a charge, and the amount of the charge is obtained from the land, that land shall not again be subjected to the same charge. But I do not think that this in any way militates against the principle that, if the land is subject to the charge and has not borne it, it is not exempt therefrom, because the executor did have funds in his hands arising from the personal estate which should have been devoted to paying the legacy.

In the case at bar there was sufficient personal property left by the testatrix, if properly and honestly administered upon, to have paid the legacies in question. This money was wasted, misappropriated, or embezzled by the executor. The legatee (the complainant) has pursued the executor, and has, it pleads, exhausted all the remedies at its command to obtain payment of its legacy, and has failed to secure such payment, and cannot secure it because the executor is insolvent and there is no personal property of the decedent now in existence to be applied to this legacy. In the case of *Horton v. Howell* (N.

J. Ch.) 53 Atl. 702 (1903), Vice Chancellor Stevens holds that, as between the residuary devisee and the legatee, the net amount shown to be in the hands of the executor from his administration of the personal property is all that the devisee can require as applicable to the legacy. In the course of his reasoning it will be found that he holds that the intention of the testator must be held to be to prefer the legatee as against the residuary devisee; and he points out that extraordinary expenses of litigation carried on by the executor are not chargeable as against the legatee in relief of the land devised to the residuary devisee, because the testator could not contemplate that any such expenses should reduce the amount payable to the legatee upon his legacy. By way of reasoning I think it may fairly be said in the case in hand that the testatrix could not contemplate that an embezzlement of her personal property by her executor should result in a loss to the legatee while there was property, whether real or personal, coming to the residuary devisee. In my view, the whole matter is settled by the holding—which I find to be the correct one—that, under the language of this will, the legacies were charged upon the property of the testatrix, and that until they are paid they remain a charge, and therefore it is immaterial whether they fail of payment out of the personal property because it was wasted, embezzled, misappropriated, or destroyed by an act of God. If we suppose a case in which ample personal property in the shape of money was left in a bank which failed, or was left in some form which was destructible, and that it was, without negligence or fault and by an act of God, destroyed, we are then to consider whether the testator intended that the legatee should lose and the residuary devisee should be exempt from loss under such circumstances. I fail to see how it can be reasonable to hold that the testator had any such intention. He names his beneficiaries and the amounts he desires them to receive, and the rest of his property, without artificial distinction between the kinds, he leaves to another. I think the only reasonable conclusion is that those to whom he has given pecuniary legacies have a charge upon all the property, and that until they are paid such charge remains.

This decision disposes also of the contention of the defendant that there was laches. It would be equally ineffectual in my view, if the objection came from those who acquired title from the residuary devisee. *Grode v. Van Valen*, *supra*. But undoubtedly, on behalf of the residuary devisee himself (who is the only demurrant here), there is no basis for a contention that the complainant is barred by laches from enforcing its lien upon the residuary realty. A presumption of payment of a legacy does not arise until after the expiration of 20 years from the time of accrual of the right to it. *Cole-*

man's Ex'rs v. Howell (N. J. Ch.) 16 Atl. 202 (Bird, V. C., 1888); Congregational Church v. Benedict, at page 140 of 59 N. J. Eq., page 880 of 44 Atl.

I will advise a decree overruling the demurrer, with costs.

(75 N. J. L. 187)

STATE v. CASTLE et al.

(Supreme Court of New Jersey. June 10, 1907.)

1. GRAND JURY—TERM OF SERVICE—STATUTORY PROVISIONS.

Under the act of 1903 (P. L. p. 341), in counties where a new grand jury is authorized, grand jurors summoned to attend at the opening of the court are to serve until the new grand jury appear.

2. SAME—ORDER TO SUMMON NEW JURORS—FILING—NECESSITY.

The order of the court, directing the sheriff to summon a new grand jury pursuant to the act of 1903 (P. L. p. 341), need not be filed with the clerk.

3. INDICTMENT—FORM OF ALLEGATION—NUMERALS.

An indictment which designates a house by its street number need not set forth that number in words at length. It is an arbitrary symbol and should be set forth in accordance with the fact.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Indictment and Information, §§ 207, 208.]

4. MUNICIPAL CORPORATIONS—POLICE COMMISSIONERS—NEGLECT OF DUTY.

An indictment which charges police commissioners holding office under the act of 1885 (Gen. St. p. 1551) with failure to inquire into the neglect and omission of police officers under their control to suppress houses of ill-fame and gaming houses, and to discipline and punish such of the officers as were guilty of neglect of duty, is valid.

5. INDICTMENT—JOINDER OF PARTIES.

Police commissioners may be jointly indicted for neglect of their public duty as such.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Indictment and Information, §§ 327-332.]

6. SAME—MULTIFARIOUSNESS.

An indictment of police commissioners holding office under the act of 1885 (Gen. St. p. 1551) for failure to inquire into the neglect and omission of police officers under their control to suppress houses of ill-fame, and gaming houses, and to discipline and punish such of the officers as were guilty of neglect of duty, is not multifarious because it specifies many such houses.

(Syllabus by the Court.)

Motion by Frederick Castle and others to quash an indictment. Motion denied.

Argued February term, 1907, before GARRISON, SWAYZE, and TRENCHARD, JJ.

Henry Young, for the State. Francis Child and Louis Hood, for defendants.

SWAYZE, J. The defendants move to quash an indictment found at the Essex oyer and terminer and removed to this court by certiorari.

The indictment contains two counts. The first charges: That the three defendants were members of the board of police commissioners of the city of Newark. To that board was in-

trusted the government, control, and management of the police department and police force of the city and the direction and control of all police matters therein. That the defendants were charged with the duty of using and exercising all proper, reasonable, and effective means, and all means within their power, for preserving public peace and insuring good order and for suppressing all houses of ill-fame and prostitution and gaming or betting houses therein, and for enforcing the laws of this state relating thereto. That the board of police commissioners and the defendants as members thereof had under their control and management the police force, and were vested with full and adequate power and authority for the proper and efficient enforcement of said duty. That houses of ill-fame and prostitution, and gaming or betting houses were kept at places specified by street and number—all of which defendants knew. That the defendants neglected and omitted to use and exercise, and cause to be used and exercised, all proper, reasonable, and effective means and all means within their power as members of the board of police commissioners for the suppression and prevention of the keeping and maintenance of said houses, and neglected and omitted to enforce the laws of the state in respect thereto, and suffered and permitted the houses to be kept and maintained without interference and without proper, reasonable, or effective endeavor on their part, and without using all means within their power for the suppression and prevention of the keeping and maintenance of said houses, and for the enforcement of the laws in respect thereto.

The second count charges the defendants with the duty of directing and controlling the members of the police force under their command and direction and of inquiring into the manner of performance of duty by each and every member of the police force and of punishing violations or neglects of duty by members of the force. It charges knowledge of the existence of the houses of ill-fame and gaming houses on the part of the defendants, and the officers and members of the police force, neglect to suppress the houses and to enforce the laws, and that they suffered and permitted the places to be kept and maintained without interference on the part of the police force; that the defendants neglected to inquire into the keeping and maintenance of the houses, and the neglect and omission of the police force to suppress and prevent the keeping and maintenance thereof.

The first reason urged in support of the defendants' motion to quash is that the grand jury by which it was found was not a legal grand jury. This objection is founded on the act of 1903 (P. L. p. 341). The act, after providing that the sheriff shall cause to come before the court of oyer and terminer at the time and place of holding the court 24 men to serve as grand jurors, enacts that in counties with a population exceeding 250,000 the

sheriffs shall cause to come before the court six weeks thereafter 24 men to serve as grand jurors in the place and stead of the grand jurors summoned to attend at the opening of the court, and when the grand jurors so summoned shall appear for service the court shall discharge those summoned to attend at the opening of the court. The court is, however, authorized by order to direct the sheriff to refrain from summoning the new grand jury, in which case the general (evidently meaning grand) jurors summoned to attend at the opening of court shall continue to serve until the end of the term unless sooner discharged.

The caption of the indictment is not before us, but in the printed book there appears what seems to be an extract from the minutes, not certified in any way, which sets forth the names of the grand jurors who appeared at the opening of the September term, 1906. Whether the indictment was found by this grand jury or not is not shown by the return to the certiorari nor is it to be inferred from anything in the printed case.

If the fact be as stated in counsel's brief, we think it is not a valid objection. The evident intent of the act is that the grand jury summoned for the opening of the term shall serve until a new grand jury appears. It is not suggested that a new grand jury actually appeared. The statute expressly authorizes the court by order to direct the sheriff to refrain from summoning new grand jurors, and we must assume that such order was made unless it appears to the contrary. The clerk returns that no such order is on file, but the statute does not require it to be filed, nor even to be in writing. We see no reason why a mere verbal order to the sheriff will not suffice, and, if the use of the words "by order direct" imply something more, the written order may well be given to the sheriff and not filed with the clerk.

An objection urged against the form of the indictment is that the street numbers of the houses of ill-fame and gaming houses are designated in the indictment by Arabic numerals and not written out in words at length. We recognize the general rule contended for and have no desire to relax its force; but it is not applicable to this case. The street numbers of houses in our cities do not indicate the numerical order of the houses, but are mere arbitrary symbols which have indeed a convenient relation to numerical order, but nothing more. A house numbered 2 is probably in our American cities never next to a house numbered 1, and the house next to number 1 may be numbered 5 or 7 or 1a or 1½. In many cities, as in Philadelphia, the house number may be a composite indicating the number of the block and the position of the house in the block. What the rule is in Newark we are not advised. It is, however, safe to say that it would attract attention by its novelty if the number

of the house instead of being in Arabic numerals were written out in words. Strict accuracy would require that in pronouncing the number of a house we should say, to take a concrete illustration, two-one and not twenty-one. Such a method is not uncommon in dealing with numbers that are in fact arbitrary symbols. The pleader seems to have shown care and accuracy in setting these symbols forth in accordance with the fact and not attempting to translate them into words.

The other objections go to the substance of the indictment. The first is that the board of police commissioners was a mere administrative body, not vested with criminal jurisdiction, not authorized to issue criminal process, or to sanction or authorize the raiding of houses of ill-fame or gambling houses.

This objection overlooks the gravamen of the charge. The gist of the first count is the willfully suffering and permitting the specified houses to be kept and maintained without interference on the defendant's part, and without proper, reasonable, or effective endeavor, and without using all means in their power for the suppression and prevention thereof. The gist of the second count is the failure to inquire into the neglect and omission on the part of the police officers to suppress the public nuisances set forth in the indictment, and to discipline and punish such of the officers as were guilty of neglect of duty.

If either count is good, the motion to quash must fail, *State v. Norton*, 23 N. J. Law, 83, 48; *State v. Startup*, 39 N. J. Law, 423, 429.

Without deciding whether it is the duty of the police commissioners to use and exercise all proper, reasonable, and effective means, and all means within their power for suppressing houses of ill-fame, and enforcing the laws of the state relating thereto, as set forth in the first count, but without intimating any doubt as to the validity of that count, it is sufficient for the decision of this motion to examine the second count.

The statute, creating the board of police commissioners, intrusts them with the government, control, and management of the police department, and the direction and control of police matters. They are given full power and right to suspend and to expel or discharge any person employed or appointed in or under the department, provided good cause is shown after an investigation by the board.

Whatever may be the powers of the police as to the suppression of houses of ill-fame, we think that if the police force of a city willfully permits such houses to be kept without interference, as this indictment charges, it is at least the duty of the police commissioners, charged by statute as they are with the discipline of the force, to investigate the conduct of the police under their control, and that, if the police commissioners with

the knowledge which the indictment charges they had, willfully neglect to inquire into the conduct of the police force in permitting such a public nuisance, they are themselves guilty of neglect of a duty imposed upon them by law, and are indictable therefor.

The next objection is that the defendants are jointly indicted when the neglect of each is necessarily a separate offense. This is not the fact. The neglect charged is of the public duty of the defendants as police commissioners. That duty is a joint duty, which cannot be exercised by any one of them alone, and the neglect is likewise joint. Each defendant must indeed concur in the neglect, but the result is a joint result. An early precedent of a joint indictment for nonfeasance is given in 2 Chitty, Criminal Law, *587.

No doubt seems to have been felt by Lord Mansfield that in a proper case a joint indictment might be found against two justices for improperly refusing to grant a license to an inn. *Railroad v. Young & Pitts*, 1 Burr. 556. In *People v. Meakim et al.*, 133 N. Y. 214, 30 N. E. 828, the Court of Appeals of New York sustained a joint indictment against three excise commissioners for neglecting for an unreasonable time to decide a complaint of the sale of liquor on election day. In a very recent case in this state, directors of a street railway company were jointly indicted for involuntary manslaughter. The duties of the defendants were diverse. Some were concerned only with the operation of the road, and some with the scheme or system under which the operation was to take place. Had the objection now urged to this indictment been sound, it would have disposed of the indictment in that case. The point was not even raised, and the case came on for trial upon the merits before three of the justices of this court, who delivered separate charges to the jury. Neither alluded to any difficulty in the way of holding the defendants jointly liable for negligence. *State v. Young* (N. J. Sup.) 58 Atl. 471. We think there is no substance in the present objection.

As to the objections that the indictment is ambiguous, indefinite, and vague, and bad for multifariousness, it is enough to say that there is a single definite charge of neglect of duty in failing to investigate the conduct of the police force under the control of the defendants. The averments as to the existence of numerous houses of ill-fame amount only to specifications of numerous instances of neglect, but the crime is single. It may well be that there would be no criminal neglect, if there was but one house of ill-fame in the city. It may be necessary to prove the existence of many in order to establish the neglect. A similar view has been taken in a recent case in New York. *People v. Herlihy*, 73 N. Y. Supp. 236, 66 App. Div. 534, affirmed in the opinion 170 N. Y. 584, 63 N. E. 1120.

The motion to quash is denied.

(75 N. J. L. 26)

WRIGHT et al. v. BOARD OF EXCISE OF CITY OF ELIZABETH.

(Supreme Court of New Jersey. June 10, 1907.)

INTOXICATING LIQUORS—ISSUE OF LICENSE—NEW PLACE.

The words "any new place," as used in the act of March 8, 1905, regulating the sale of liquors (P. L. p. 42), means a place for which a license has not previously been granted upon a direct application. The mere transference of a license to a place leaves it still a "new place" for the purposes of this act.

(Syllabus by the Court.)

Certiorari by George W. Wright and others against the board of excise of the city of Elizabeth to review the granting of a license by such board. License set aside.

Argued February term, 1907, before GARRISON, SWAYZE, and TRENCHARD, JJ.

Edward Q. Keasbey, for prosecutor. James C. Connolly, for defendant.

GARRISON, J. This certiorari brings up a license to keep an inn and tavern at 201 Spring street, Elizabeth, granted by the board of excise of that city. The validity of the license is contested upon the ground that 201 Spring street is within 200 feet of a church edifice. The writ is prosecuted officially on behalf of this church.

When this question was brought before us on a previous occasion by private prosecutors, the testimony adduced by them failed to satisfy us as to the applicability of chapter 21, p. 42, of the Laws of 1905, for reasons that are stated in the opinion filed in that case. *George v. Board of Excise of Elizabeth* (Sup.) 63 Atl. 870.

In the present case the testimony entirely establishes the claim of the church represented by the prosecutors to be regarded as a church within the meaning of the statute just cited. The only question that has seriously arrested our attention is whether in view of the fact that 201 Spring street was a licensed inn and tavern at the time the present license was applied for and granted it can be said to be "a new place" in the sense in which that term is employed in the statute. Our conclusion, however, is that it is a new place within the contemplation of that act. The license that was passed upon in the prior case was one that had been granted for a different locality, and was merely transferred to 201 Spring street. Hence the application upon which the present license was granted was the first application for a license for this place, and was the first opportunity afforded the public and the present prosecutor to test the question raised by this writ. In view of the obvious purpose of the statute, these considerations rather than the mere existence of a licensed house should determine the meaning to be given to the words of the act.

The license brought up by this writ is set aside.

(72 N. J. E. 537)

LONGLEY v. SPERRY et al.

(Court of Chancery of New Jersey. May 15, 1907.)

1. CHATTEL MORTGAGES—PRIOR INCUMBRANCE—NOTICE.

Plaintiff and B. purchased a livery stable in common, executing a chattel mortgage to the seller to secure their several notes for a part of the price, each being an indorser for the other. Plaintiff paid his note, but while the other was outstanding B. applied to S. for a loan, stating to his attorney that he (B.) individually owned the property, "the interest of another having been paid off," without mentioning the name of such other, except for a chattel mortgage to the original vendor to secure \$500, which was paid with the money borrowed. S. in an affidavit testified that he believed B. individually owned the chattels; "he having been informed by B. that the claims formerly held by plaintiff had been paid off." *Held* sufficient to charge S. with notice of plaintiff's interest in the property.

2. SAME—ASSIGNMENT OF MORTGAGE—NOTICE.

Plaintiff and B. having purchased a livery business, mortgaged the property to secure their several notes given for part of the price, on which each was indorser for the other. Plaintiff paid his note, and thereafter B., having wrongfully obtained possession of the mortgage, borrowed more money from S., giving a chattel mortgage on the property with which he paid his note to a bank which had discounted it, and also executing an assignment of the vendor's original mortgage to S. B. then applied to plaintiff, offering to purchase his interest, producing to him the original chattel mortgage with the seals torn off, and the note stamped "paid" by the bank, whereupon plaintiff sold his interest to B., taking a chattel mortgage for a part of the price without knowledge of the assignment. *Held*, that the assignment of the mortgage without the transfer of the unpaid note secured thereby conferred no rights on the assignee as against plaintiff.

3. SAME.

The fact that the note and mortgage were presented by B. to plaintiff, the one with the seal torn off, and the other marked "Paid" two months before its maturity, was insufficient to put plaintiff on inquiry, or excite suspicion that the note and mortgage had been stolen.

4. SAME—CANCELLATION OF RECORD.

P. L. 1902, p. 489, § 8, providing that chattel mortgages duly recorded shall be valid against creditors of mortgagors and against subsequent purchasers, and mortgagees from the time of recording until the mortgages are canceled of record, was ineffective to validate, as against a subsequent mortgagee in good faith, a prior mortgage which had been in fact paid but which was not canceled of record.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Chattel Mortgages, §§ 508, 509.]

5. ACKNOWLEDGMENT—CHATTEL MORTGAGES—FORM.

P. L. 1902, p. 488, § 6, relating to chattel mortgages, provides that no chattel mortgage shall be recorded until its execution shall be first acknowledged or proved and certified in the manner required by the act respecting conveyances which (P. L. 1898, p. 678, § 22) provides that the officer having first made known the contents of the instrument to the party making the acknowledgment and being satisfied that such party is the grantor, etc., shall make a certificate on, under, or annexed to the deed or instrument. *Held* that, where the certificate of acknowledgment to certain chattel mortgage assignments did not state that the contents of the assignments had been made known to the party acknowledging the execution

thereof, the acknowledgments were fatally defective.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Acknowledgment, § 192.]

6. CHATTEL MORTGAGES—ASSIGNMENTS—RECORD.

The record of chattel mortgage assignments not properly acknowledged, and, therefore, not entitled to record, did not operate as constructive notice to a subsequent mortgagee.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Chattel Mortgages, §§ 246-252.]

7. SUBROGATION—PERSONS AGAINST WHOM IT MAY BE ENFORCED—PAYMENT—FURTHER SECURITY.

The rule that a chattel mortgage may be kept alive notwithstanding payment in order to secure another creditor of the mortgagor as against subsequent incumbrancers or purchasers is inapplicable where the attempt to keep the mortgage alive has been made by only one of the mortgagors having only a third interest in the mortgaged chattels for the purpose of defrauding his co-owner.

8. SAME.

Where an assignee of a mortgage permitted the note which it was given to secure to come into the hands of the mortgagor with evidence on its face that it had been paid and did not secure possession of the mortgage itself, which the mortgagor thereafter used to induce the belief on the part of his partner and subsequent mortgagee that the note had been paid, such assignee was not entitled to claim that the mortgage should be kept alive to secure money which he loaned to take up the note secured by the mortgage.

9. PARTNERSHIP—ASSETS—CHATTEL MORTGAGES—EXECUTION BY ONE PARTNER—EFFECT.

Where one of the members of a firm engaged in operating a livery stable mortgaged the entire assets of the firm to raise money which he converted to his own use, such mortgage was only effective to create a lien on the mortgaging partner's interest in the firm after an accounting.

10. CHATTEL MORTGAGES—RECORD—NOTICE.

Where a chattel mortgage was properly executed, acknowledged, and recorded, it operated as notice to a subsequent mortgagee under the express provisions of P. L. 1898, p. 690, § 53.

Bill by William J. Longley against William M. Sperry and another. Decree for complainant.

B. O. Austin, for complainant. W. D. Wolfskiel, for defendant Sperry.

PITNEY, Advisory Master. The contest in this cause is over a sum of money in the hands of the court, which is the proceeds of the sale, by consent of the parties and the order of the court, of certain chattels constituting a livery stable plant known as "the Golf Stables," situate at Cranford, N. J. The question involved is which of two innocent parties—Longley and Sperry—shall suffer by the manifest fraud of a third party.

Both parties claim under chattel mortgages, and the question is one of priority, depending upon the effect of certain facts and circumstances in the cause. The facts are as follows: In the last days of July, 1905, one James Z. Smith was the owner in possession of the chattels in question, and all parties claim through him. On the 29th day of Ju-

ly, 1905, he conveyed the stable and contents and the lease of the realty to the complainant, Longley, and to one William E. Brock (who is the fraud doer in the case), jointly, for the sum of \$3,000. Of this sum \$2,000 was paid in cash, \$1,500 being paid by Longley and \$500 by Brock, and for the balance of \$1,000 they delivered to Smith their several promissory notes for \$500 each—one made by Longley, indorsed by Brock, payable 6 months after date, and one made by Brock, indorsed by Longley, payable 12 months after date. Mr. Austin, a lawyer practicing at Cranford, seems to have attended to this matter professionally, and he swears that he promptly lodged the mortgage for record, and it so appears, and that it was duly returned to him from the office of the register, and that he mailed it immediately to Mr. Smith at Cranford. Mr. Smith swears that immediately after the sale, and while Brock was in possession managing the business for himself and Longley, his (Smith's) mail continued to be delivered at the stable. The fair inference from all the evidence, and this is Mr. Smith's theory, is that this mortgage was delivered from the post office to the livery stable, and there taken and kept by Brock. It is certain that it never came to the hands of Mr. Smith, and was next seen in the hands of Brock under circumstances presently to be stated. Mr. Longley left the management of the business at the livery stable mainly, if not entirely, to Brock; but the bill and letter heads of the concern were printed, and the bills made out, in the name of William E. Brock & Company. Mr. Longley paid his note at maturity, which made him the owner of two-thirds interest in the plant. Mr. Smith procured the note of Brock, with Smith's indorsement, in addition to that of Longley, to be discounted at the Cranford Bank.

Some time shortly before the 1st of June, 1906 (two months before maturity of Brock's note), Brock applied to the defendant Sperry (who was engaged in business in New York City, but seems to have lived and been acquainted in Cranford) for a loan of \$2,250 to be secured by a chattel mortgage on the stable. Sperry seems from his carefully prepared *ex parte* affidavit (received in evidence by consent without cross-examination) to have been satisfied to loan that amount, and for the purpose of carrying the affair through employed his regular New York attorney, Mr. John Hall Jones, with an office at 320 Broadway. Sperry learned from Brock that Smith held a chattel mortgage on the premises to secure \$500, and instructed Jones to procure an assignment of that mortgage. Jones thereupon communicated by telephone with Smith, and arranged with him for a meeting on June 4th at Jones' office. On that day Sperry, Smith, and Brock met in Jones' office and it then appeared and was stated that the original mortgage could not be produced, and that the \$500 note of Brock was held by the Cranford Bank, Sperry thereupon drew

his check for \$525.33—the amount of the note with interest—to the order of the bank; and another check for \$1,724.67 (the balance of the \$2,250 to be loaned) to the order of Brock, and delivered the same to a Mr. Nolan, apparently an attorney, but who was called in the case assistant to Mr. Jones, and whom I will call his clerk, with instructions that the same were to be delivered upon receiving from Mr. Smith an assignment of his mortgage, and upon the execution by Brock of a chattel mortgage to Sperry. Mr. Jones caused to be prepared and executed by Smith an assignment of Smith's mortgage, in which it is erroneously described as a mortgage dated August 1, 1905, and made by Brock alone, without stating the name of the mortgagee, and that assignment was executed on the same 4th day of June before Jones as a notary, and recorded that same afternoon. On the same afternoon—according to Sperry's theory of the facts—Nolan, Brock, and Smith proceeded to the bank at Cranford, and there Nolan handed the \$525.33 check to the proper officer of the bank, who produced Brock's note, indorsed by Longley and Smith, accepted the check, stamped the note paid, and handed it to Brock, the maker, and thereupon Smith delivered his assignment to Nolan, who caused the same to be recorded promptly.

The error in the description in Smith's assignment being detected—just when does not directly appear—a new assignment was prepared in Jones' office, executed, dated, and recorded on the 5th day of June, wherein the mortgage was properly described, both as to date and the names of the mortgagors, Longley and Brock. On the same 4th day of June Brock executed a chattel mortgage, prepared by Jones, to secure the whole sum of \$2,250 to which is annexed an affidavit made by Brock, the mortgagor, and not by Sperry, the mortgagee, stating that the true consideration was a loan of \$2,250, and that mortgage was acknowledged on the same day before Mr. Jones as a notary public, and was recorded on the same day, and the check of Sperry for \$1,724.67 was duly delivered to Mr. Brock, and paid on that day by the bank. Mr. Jones, on being informed that the original note of Brock had been handed to Brock and kept by him, required and received from Brock a substituted note for \$500 to the order of Sperry and due on August 1, 1906, with interest from August 1, 1905. Jones also prepared and required Brock to sign a statement under date of June 6, 1906, that he (Brock) had destroyed the \$500-note, and also the chattel mortgage given to secure it.

The foregoing facts are abstracted from the several affidavits of Sperry, Jones, Smith, and Nolan, carefully prepared for use in contesting a motion by complainant for interim restrain against Sperry pending suit, and admitted in evidence by consent without cross-examination. In this condition of affairs on the 9th day of June Brock proposed to Longley, who resided in Elizabeth, to pur-

chase out his (Longley's) interest in the stable, and in that connection produced and showed to him the chattel mortgage given by the two to Smith, duly canceled by tearing off the seal, and the promissory note made by Brock and indorsed by Longley, duly stamped "paid" by the bank. The chattel mortgage did not bear any evidence of having been satisfied of record. A week later, on the 16th day of June, Longley and Brock concluded the contract of purchase and sale. Longley gave Brock a bill of sale, and Brock gave Longley his note at one year for \$2,328.04 and a chattel mortgage covering the stable and having annexed an affidavit by Longley describing the note and stating that the note was executed and delivered for property purchased. The note and mortgage were dated back to June 1st in order to render it more easy to settle the partnership accounts between them. Mr. Longley testified, and is not contradicted therein, that he had no notice of any facts or circumstances which could lead him to suspect, and he did not in fact suspect, that the Smith mortgage and note were paid by anybody but Brock, or that the mortgage had been assigned to anybody by Smith, or that Brock had executed any other mortgage to any other person. On the other hand, Mr. Sperry swears that he had no notice that Longley had any interest in the business or in the stable. But not only was he a customer of the stable, whose billheads were printed "William E. Brock & Company," but his affidavit before referred to contains a clause which is significant. It is as follows: "Throughout this transaction deponent verily believed that said Brock was the individual owner of the chattels described in said mortgage, and that the same were free and clear from all incumbrances, except the lien of \$500 held by said Smith, and had no information to the contrary until after the 18th day of June, 1906; deponent having been informed by said Brock that a claim formerly held by said Longley had been paid off. Deponent acted in entire good faith throughout the entire transaction, desiring to help said Brock, and making the loan as an accommodation to him." The witness here undoubtedly refers to the circumstance that shortly after Longley sold to Brock the latter in turn sold to Grau and absconded with some of the chattels conveyed. Sperry's information from Brock as to the state of the title of the goods was obtained in connection with the negotiation for his loan to Brock. Moreover, the ex parte affidavit of Jones, the attorney of Sperry, states that on the 1st day of June Sperry brought Brock to him and gave him instructions to prepare the necessary papers for a loan upon the Golf Stables. The affidavit then proceeds: "Deponent asked said Brock if he was the individual owner of the goods and chattels in said Golf Stables, and whether there was any incumbrance upon them. Said Brock replied that he was the owner thereof, as the interest of another party therein had

been paid off, without mentioning the name of such other party; and that there was a chattel mortgage upon said property held by James Z. Smith to secure the payment of \$500." Then the affidavit proceeds to state the negotiations with Smith.

Here I find distinct notice to Sperry that Longley had previously had an interest in the property, and direct notice to his attorney employed by him to transact the business that some other party did have an interest, but that he had been paid off. On this point of previous notice to Sperry of Longley's interest there is another little piece of evidence furnished by the exhibits on the part of Sperry which was not noticed by counsel in argument, and which is not consonant with the order of events which I have previously given. Two checks, as we have seen, were drawn by Sperry, both dated June 4, 1906, on the Cranford National Bank; one for \$1,724.67, in favor of Brock, and one for \$535.53, in favor of the bank. Now the theory of Sperry's counsel is that the check to the order of the bank was presented and accepted by the bank, and the promissory note for \$500 delivered over to Brock on June 4th, and that the mistake in the description of the mortgage found in the first assignment was not discovered until the next day (June 5th) when a new assignment was prepared. Now the chattel mortgage from Brock to Sperry was filed for record on June 4th at 29 minutes after 3 in the afternoon, and the first assignment from Smith to Sperry was lodged for record on the same day at 28 minutes after 3. Now the larger check to Brock's order was stamped paid by the bank June 4, 1906. Hence we may fairly infer from all the depositions that the check to Brock was not delivered to him until the chattel mortgage was lodged for record, so that he had time, after the recording of the mortgage, to get from Elizabeth to Cranford before the bank closed for business. And if Brock could get to the bank, so could the clerk Nolan. But the smaller check given to pay the note in the bank is stamped as having been paid on June 5th, a day later. Now the clerk, Nolan, falls in his affidavit to state or give the date or hour for any of these transactions. He simply says that he carried out his instructions from Mr. Jones as to the giving of the check to the bank in payment of Brock's note, and neglected to get possession of the note itself. Jones swears that on June 4th an appointment was made to close the transactions at the Cranford bank on the afternoon of that day, but he says that on the 5th of June he sent Nolan over to the register's office at Elizabeth to verify the description of the assignment in the mortgage, and Nolan found the description incorrect; that he (Jones) then prepared another assignment, and procured the execution of it by Smith and its record.

A careful examination of these carefully prepared affidavits on the part of Sperry fail to state, except by inference, just when it

was discovered that the description in the first assignment by Smith to Sperry of the Longley-Brock mortgage was erroneous. Now if we ask why the smaller check given to the bank directly was not stamped paid at the same time that the larger check was so stamped, we find the answer in the circumstance that Nolan discovered the error when he went to the clerk's office to lodge the papers for record and embraced that opportunity to examine the record of the missing mortgage. And this he would naturally do, for he was aware undoubtedly of the nonproduction of the older mortgage by Smith when he attempted to assign it to Sperry. And then having discovered this error, he declined to use the smaller check until a new assignment was prepared and executed. This being done on the morning of the 5th of June, that second assignment was executed and recorded and the Brock note paid and stamped accordingly. It is well to note in this connection that the stamp used by the bank in marking notes and checks paid is changed every morning, and it seems quite impossible to account for the smaller check bearing the stamp of June 5th while the larger check bears the stamp of June 4th on the supposition that they were both paid on the same day. Here, then, is evidence tending to show that the clerk Nolan discovered that the mortgage which was the subject of the assignment was executed by Longley, and that it contained the clause describing the notes accurately, adding "which notes were given for a part of the purchase price for said goods and chattels," and the same expression occurs in the affidavit of Mr. Smith in that mortgage; and that this information was probably received by Nolan at the moment of the delivery of the chattel mortgage and the larger check to Brock. This was in ample time for him to have halted the transaction, either by withholding the check from Brock, or stopping its payment at the bank.

For all these reasons I come to the conclusion that Sperry had notice of such facts and circumstances as clearly to put him on inquiry as to Longley's interest in these chattels, and the case must be considered on that basis. But Sperry, in his affidavit prepared for use on the motion for injunction, states that he first commenced foreclosure proceedings on the \$500 mortgage, and shortly after also proceeded under the mortgage direct from Brock to him, and that shortly after that, ascertaining that the mortgage given by Brock was fatally defective, he had abandoned proceedings under that and had fallen back on his assignment of the smaller mortgage. But it is proper to say that in his answer he claims under both instruments.

We come now to the situation of the complainant, Longley, and inquire whether he is chargeable with notice that the older mortgage had been assigned to anybody. And in the first place it was brought to him

by his co-mortgagor, Brock, with the seals torn off, and with the note which it was given to secure stamped paid by the bank. Now it seems to me that such production of the mortgage and the note was the very best evidence that the whole had been actually paid and discharged. The case might have been different if the note had not been produced stamped "paid" by the bank. In this respect the case is in marked contrast with the famous case of *Harrison v. Johnson*, 18 N. J. Eq. 420, s. c. on appeal *Harrison v. New Jersey Railroad & Transportation Company*, 19 N. J. Eq. 488, where the mortgage was produced without the bond which it secured, or any proof of its payment, and under circumstances which the court thought put the party relying upon its cancellation upon inquiry. The rule is there stated with great clearness, and acted upon, that, if the debt is paid the mortgage is gone as a lien. In the case on appeal, at page 500 of 19 N. J. Eq., Chief Justice Beasley uses this language: "For it is clear, I think, that the exhibition of the mortgage did not show that the debt secured by it was paid. On the contrary, it evinced that there was a bond outstanding which was the legitimate evidence of such indebtedness. The mortgage is the mere adjunct of the bond, which is the obligation manifesting the debt, and which, wherever it may reside, draws its adjunct to it. It is common knowledge that when the bond is assigned it carries in equity the mortgage security with it, and the consequence is that the mortgage is often in one hand and the equitable right in the other."

It follows in this case that the assignment of the mortgage without the transfer of the note unpaid with it amounted to nothing. Nor can I perceive that the fact that the note and mortgage were presented by Brock to Longley, the one with the seals torn off and the other marked paid, two months before their maturity, ought to have put Longley on any inquiry or excitable suspicion that they had been stolen. My reason is that the exhibition of these papers was accompanied by a proposition to buy Longley out, and Longley may well have supposed that Brock had prepared himself to deal with him by first paying the note on which Longley was endorser. And here it may be well to mention that if anybody was in fault, in permitting Brock to be in possession of the mortgage it was Smith, for, as we have seen, he knew that his mail was being handled by Brock, and yet it never occurred to him that Brock might have been tempted to get possession of the mortgage. And Sperry, taking title from Smith, not only was put on inquiry as to the actual possession of the mortgage, but he took it, so to speak, subject to whatever negligence Smith had been guilty of up to the date of the assignment. But, be all that as it may, there can be no doubt that Sperry, through his attorney, is responsible for the note

coming to the hands of Brock, who was thereby enabled to practice the fraud.

But counsel for Sperry rely on the eighth section of the chattel mortgage act of 1902 (P. L. 1902, p. 489), which provides that chattel mortgages duly recorded shall be valid against the creditors of the mortgagors and against subsequent purchasers and mortgagees from the time of the recording thereof until the same be canceled of record. That section is a repetition of section 9 of the chattel mortgage act of 1885 (P. L. 1885, p. 319; Gen. St. p. 2114), and the object of its insertion in the original act, as is well known, was to change the old law which provided that chattel mortgages must be filed and refiled, or in some way renewed, every year. Besides it is quite impossible to suppose that the Legislature meant to validate a mortgage that had been actually paid. And this view is strengthened when we observe that the language used is "creditors, subsequent purchasers, and mortgagees," omitting the words "in good faith," which are found in section 4 of the revision and the corresponding section in the original statute. That this is the correct exposition of this section of the statute was held in *Roe v. Meding*, 58 N. J. Eq. 350, at page 358, near the bottom, 30 Atl. 587, at page 590. But the counsel for the defendant relies upon the fact that there was an assignment of the mortgage on record before Longley dealt with Brock on the strength of his possession of these securities and that Longley is chargeable with notice of that assignment.

The complainant's counsel makes two answers to this. In the first place, that the possession under the circumstances of those securities, especially the note, was a dispensation to Longley of any duty on his part to examine the records. He knew that his own note, secured by the mortgage, was paid. His co-mortgagor brings him the other note stamped paid, accompanied with the mortgage, and the question is, why should he look further on the records? I am unable to understand on what principle he could be called upon to inquire any farther. And on this subject much of what was said by Knapp, J., in *Heyder v. Excelsior Building & Loan Association*, speaking for the Court of Errors and Appeals (42 N. J. Eq. 408, at page 407, 8 Atl. 310, at page 311, 59 Am. Rep. 49), applies. The opinion of Advisory Master Williams in that case and the opinion of Wilson, Master, in *Harrison v. Johnson*, *supra*, contain all the authorities up to that date. The other answer made by counsel for Longley to the argument of the counsel for Sperry, based on the assignment, is this: That neither of those assignments as recorded were entitled to record because not acknowledged according to the laws of New Jersey, in that the certificates of acknowledgment do not contain the statement that the contents were made known to the party acknowledging the execution, and hence their record is not

constructive notice. Their examination verifies that contention, and it remains to be determined what effect must be given to it. The chattel mortgage revision of 1902 in its sixth section provides that no chattel mortgage shall be recorded until its execution "shall be first acknowledged or proved, and such acknowledgment or proof certified thereon in the manner prescribed by the act respecting conveyances." That "act respecting conveyances" is found in Pamph. Laws 1898, p. 670 et seq., and the twenty-first section provides what deeds and instruments may be acknowledged and recorded, among which are "chattel mortgages, assignments, releases, and discharges thereof." The twenty-second section provides how these instruments shall be acknowledged and the acknowledgment certified. After enumerating certain officers to take acknowledgments, it proceeds as follows: "Such officer having first made known the contents thereof to such party making such acknowledgment, and being also satisfied that such party is the grantor in such deed or instrument, of all which the officer shall make his certificate on, under or annexed to said deed or instrument." The certificates here in question fall in both of these respects. Then the fifty-third section provides "that any deed, etc., which shall have been duly executed, acknowledged or proved and certified as aforesaid, and shall have been duly recorded, etc., such record shall be notice to all subsequent judgment creditors, purchasers and mortgagees of the execution of said deed or instrument and the contents thereof." The original act providing for the assignment of mortgages of real estate (Gen. St. p. 2108, § 81) provided that, where a mortgage of lands is assigned and the assignment recorded, such record shall be notice to all persons concerned that said mortgage is so assigned; and further that if the assignment is not recorded, payments made to the assignor in good faith and without notice of the assignment and releases of mortgaged premises shall be valid in the absence of actual notice. It will be observed that the language above quoted from sections 53 and 54 of that act respecting conveyances (1898) do not, strictly speaking, apply to the case in hand, and, further, the chattel mortgage act of 1902, respecting chattel mortgages, contains no clauses such as I have quoted relating to assignments of land mortgages.

But granting that the sections from the act respecting conveyances are broad enough to apply to the present case, we are then met with the old question whether an instrument, deed, mortgage, or contract, not properly proved or acknowledged, but nevertheless recorded, is constructive notice binding on a party who has no actual notice, because he thinks it not worth while to examine the public record. My examination of that subject leads me to the conclusion that the great weight of authority and reason is that such

record is not constructive notice. I shall not take time or space to cite the authorities. They are largely gone into by Mr. Wade in his treatise on the law of notice, and in the various treatises on mortgages. Jones on Chattel Mortgages, §§ 247-248. In the American notes to *Le Neve v. Le Neve*, 2 White & Tudor's Leading Cases in Equity (4th Am. Ed., from 4th London Ed.) p. 208, the doctrine is thus stated: "So a purchaser need not take notice of an instrument which does not appear to have been proved or acknowledged in accordance with the statute"—citing a large number of cases.

Counsel for Sperry falls back upon the well-settled rule that a mortgage that has been paid may be kept alive, notwithstanding such payment, to secure another creditor of the mortgagor, or may be appropriated to other purposes than that for which it was originally executed and kept alive as against subsequent parties, incumbrancers, or purchasers. The doctrine is a familiar one, but has no application here, where the attempt was made to keep it alive by only one of the mortgagors, and that one having only a one-third interest in the chattels mortgaged, and that one-third interest subject to the superior lien of his co-mortgagor and co-owner for any balance due to him on a settlement of the partnership affairs. Further, in order to uphold the mortgage under such circumstances the parties to the novation or new delivery of the mortgage must be careful not to do or omit anything which may lead a subsequent purchaser or incumbrancer to the just belief that the mortgage has been discharged. Here the parties to the attempted assignment of the mortgage permitted the leading document, the promissory note which it was given to secure, to come to hands of the mortgagor with evidence on its face that it had been paid, and, not only that, but did not secure possession of the mortgage itself. Upon this, the most important part of the case, I conclude that Sperry's case falls, and that he can claim no relief under the old mortgage.

We come now to the larger mortgage from Brock to Sperry, given to secure the whole \$2,250. The joint ownership of the property having been established beyond all peradventure, the question is, what effect has that mortgage, or what effect could it have had, if it had been properly and lawfully executed? The answer is plain that, as in favor of any person having notice of the joint ownership and quasi partnership, its only effect was to convey to the mortgagee the equitable interest which Brock had in the chattels covered by it after the affairs of the partnership were wound up and the actual amount coming to Brock ascertained. In other words, Sperry obtained the right, and no more, to have the partnership wound up in an orderly manner and to receive the part coming to Brock. Longley had the superior right, as a partner, to enforce his general lien upon the partnership assets to secure anything that

might be due from Sperry to the partnership upon a winding up. But counsel for Sperry puts himself upon the proposition that each partner has the power to sell and dispose of the partnership property. It is familiar law that the power of one partner over the property of the partnership is that of an agent, and is confined to the scope of the partnership business. It would be absurd to hold that one partner in the business of keeping a livery stable would have the implied right, from the mere fact that he was keeping a livery stable, to sell out the whole plant and give a good title to it without the knowledge and consent of his partner, and the same consideration applies to the mortgaging of it. The general rule is stated with approximate accuracy by Vice Chancellor Reed in *Carr v. Hertz*, 54 N. J. Eq. 127, at page 131, 33 Atl. 194, at page 196, a case cited by counsel for Sperry in his argument. What was said by the learned Vice Chancellor must be read in connection with the facts of the case, which was an attack upon certain mortgages given by one partner to creditors of the firm for the purpose of preferring such creditors against other creditors of the firm, and those mortgages were set aside by the Vice Chancellor, and his decree was affirmed (*Hertz v. Carr*, at page 700 of 54 N. J. Eq., page 1117 of 37 Atl.).

Turning to the present case, it does not necessarily appear that it was a part of the business of Longley and Brock to buy and sell horses as dealers. But, presumably, had Brock sold a horse and carriage apparently in the ordinary course of business, he would have passed a good title. That, however, is quite a different matter from executing a chattel mortgage on the whole, and appropriating the proceeds to his own use. This point taken by counsel for Sperry in my judgment completely fails.

His next point is that, although there is what in law amounts to no affidavit at all annexed to the mortgage, still, as it was properly acknowledged and recorded, the complainant being merely a subsequent purchaser of Sperry's one-third interest and not a creditor, the mortgage is not invalid as against him, because he has had constructive notice of it through the public record. There is undoubtedly a decided difference in the standing of creditors and subsequent purchasers under the statute here in question, as was pointed out in the opinion in this court in *Roe v. Meding*, 53 N. J. Eq. 350, 33 Atl. 394, and the cases there cited; and counsel relies on the case of *Bolce v. Conover*, 54 N. J. Eq. 531, 35 Atl. 402. But that was not a case where the prior mortgage was attacked for want of any affidavit made according to the statute, or that the affidavit which was properly made by one of the mortgagees was absolutely untrue, but the attack was made on the ground that the affidavit was misleading, and the consideration therein stated was false in that it treated a mere indorsement by

the mortgagee as an indebtedness constituting part of the consideration, and that the remainder of the consideration was a debt due by one of the mortgagors only. For that reason it was held to be an improper and unlawful attempt to prefer creditors and fraudulent and void as to creditors. But as to Mrs. Bolce it was held good, because her mortgage, though subsequent in execution, was given by the same mortgagors, and she had full notice of the prior mortgage, and was therefore not a "bona fide purchaser," but must content herself with taking whatever interest the mortgagors had when they executed their mortgage. The notice to Mrs. Bolce of the prior mortgage was an actual notice; hence the question still remains whether the record in this case became, in the absence of any actual notice to Longley, constructive notice which binds him. The mortgage to Sperry was properly acknowledged; the certificate declares that the contents were made known to Brock, etc. In fact the mortgage was a New Jersey form with a New Jersey form of certificate. Hence it was entitled to record, and is not within the category of the two assignments of the older mortgage, whose acknowledgments were defective, and it only remains to inquire whether, under our statute, it is constructive notice. I have already cited a part of the twenty-first section of the act respecting conveyances of 1808, which shows that chattel mortgages are entitled to be recorded. By the fifty-third section, if properly acknowledged and recorded, all such "instruments shall be thereafter notice to all subsequent judgment creditors, purchasers, and mortgagees of the execution of said deed or instrument and of the contents thereof." This statute is peremptory, and in effect declares that the record of the Sperry mortgage was notice to Longley of the existence of the mortgage and its contents.

Counsel for Longley, having his attention called to this aspect of the case, argues that in the case of *Bolce v. Conover*, supra, Mrs. Bolce had actual notice of the former mortgage, and he attempts to distinguish between actual notice and the constructive notice resulting from registry. The language of the act as to the effect of registry is explicit, "shall be notice," and I am unable to distinguish between actual notice and constructive notice due to the statute. No authority was produced by counsel to sustain his argument in that respect, and in my judgment to sustain the distinction as claimed would have the effect of destroying the whole of the registry act in the matter of notice.

The result, then, to which I have come is this: That Longley's mortgage is the first lien on the two-thirds interest in the chattels, and also that Longley has a partner's lien on the other one-third for any amount which, upon taking the account, it may be found that Brock has reduced his proportionate share in the property, if any, by over-

draft. The evidence does not show how the amount for which Longley sold his interest to Brock was arrived at, and probably the absence of Brock from the state will render the taking of the account very difficult, and perhaps the books have not been kept in such a manner as to render it possible under any circumstances.

Be that as it may, unless the parties can agree upon a partition of the funds upon a basis of two-thirds to one-third, or some other basis, an account must be taken. I will settle the decree upon notice. The question of costs is reserved.

(73 N. J. E. 321)

SPEAR v. LOCUST WOOD CEMETERY CO. et al.

(Court of Chancery of New Jersey. April 22, 1907.)

1. EXEMPTIONS—CEMETERY LANDS—SALE ON FORECLOSURE.

Act April 8, 1875, § 8 (Revision, p. 102; Gen. St. p. 350, § 8), exempts from sale under execution the cemetery lands and property of any association formed pursuant to that act or otherwise incorporated. Complainant, through his attorney in fact, sold land to a cemetery association with full knowledge that it was for use as a cemetery. *Held*, that he was precluded under the statute from foreclosing the purchase-money mortgage on the land.

2. SAME—STATUTES—REPEAL.

Act March 14, 1851, § 10 (P. L. 1851, p. 257), exempted the lands of cemetery associations formed thereunder from sale under execution. Act April 8, 1875 (Revision, p. 1396), repealed the act of 1851. Act March 14, 1879 (P. L. 1879, p. 318; Gen. St. p. 360, § 56), amended section 10 of the repealed act of 1851. *Held*, that the act of 1879 does not repeal the act of 1875.

3. SAME—LAND COVERED BY MORTGAGE.

Act April 8, 1875, § 8 (Revision, p. 102; Gen. St. p. 350, § 8), exempting from sale under execution the cemetery lands and property of cemetery associations, applies only to land of the association actually brought into use as a cemetery, though Act May 9, 1889 (P. L. 1889, p. 418; Gen. St. p. 356, § 40), authorizes the holding of 125 acres for cemetery purposes.

4. SEQUESTRATION—ENFORCING DECREE OF FORECLOSURE—INCOME FROM CEMETERY LANDS.

Act March 21, 1881 (P. L. 1881, p. 158; Gen. St. p. 353, § 15), provides that the rents, etc., of land held by a cemetery association may be taken and sequestered and applied to the payment of judgments against the association, and the court of chancery may appoint a receiver to take and apply the rents, etc., for that purpose. *Held* that, where the lands of a cemetery association not used as a cemetery are sold to satisfy a mortgage on the entire tract owned by the association, and the proceeds are insufficient to satisfy the amount due, a receiver may be appointed to take possession of the cemetery tract reserved from sale, and sequester the income for application to the amount remaining due under the decree of foreclosure.

Suit by Charles C. Spear against the Locust Wood Cemetery Company and others to foreclose a purchase-money mortgage. Decree rendered.

The bill seeks to foreclose a purchase-money mortgage made November 17, 1902, by the

Locust Wood Cemetery Company to complainant. The defense is made by the provisions of section 8 of the cemetery act of 1875 (Revision, p. 102; Gen. St. p. 350, § 8) that the cemetery lands covered by the mortgage cannot be sold to satisfy the mortgage debt.

French & Richards, for complainant. John F. Harned, for defendants.

LEAMING, V. C. Defendant Locust Wood Cemetery Company was incorporated April 29, 1902, under the general corporation act. The object for which the corporation was formed is defined in its certificate of incorporation as "to maintain cemetery or cemeteries." November 17, 1902, complainant conveyed to defendant Locust Wood Cemetery Company the tract of land now in question, and at the same time that company executed to complainant a purchase-money mortgage on the land conveyed to secure the payment of a bond given by the company for a part of the purchase price. Defendant Locust Wood Cemetery Company brought into use as a cemetery a portion of the mortgaged premises and operated as a cemetery company until November 17, 1904, when 125 acres of the mortgaged premises, including the part in use as a cemetery, was conveyed by it to defendant Locust Wood Cemetery Association, the latter corporation having been formed under the cemetery act of 1875 (Revision, p. 100; Gen. St. p. 349) for the purpose of taking over that portion of the land. The present foreclosure of the mortgage is resisted as to the 125 acres conveyed to the latter company under the claim that the statute exempts the land from sale.

Section 8 of the act of April 8, 1875 (Revision, p. 102; Gen. St. p. 350, § 8), exempts from sale under execution "the cemetery lands and property" of any association formed pursuant to that act, "or otherwise incorporated." This section is substantially the same as section 10 of the act of March 14, 1851 (P. L. 1851, p. 257). As is suggested in *Rosedale Cemetery Association v. Linden Township* (N. J. Sup. 63 Atl. 904, the purpose of this legislation is the protection and preservation of the places where the dead are buried.

The contention is made on behalf of complainant that the present mortgage, as a purchase-money mortgage, will be protected from the operation of the section. This contention cannot prevail. If complainant could be said to occupy the position of one who had taken a mortgage on lands not devoted to use as a cemetery, I entertain no doubt that the subsequent dedication of the land to cemetery purposes, without the consent of the mortgagee, could not, under our Constitution, operate to impair the mortgage security. But it is impossible to give to complainant the benefit of that status. The evidence disclosed that the cemetery company tentatively arranged with complainant's attorney in fact for the purchase of this land for use as a cemetery sev-

eral months prior to the sale, and that company was permitted by complainant's attorney in fact (who afterwards conveyed the land for complainant) to take possession and lay out a portion of the land into cemetery lots as early as August, 1902, and during that time the attorney in fact referred to was a member of the cemetery company. It is entirely clear that the sale of the land was made by complainant, through the attorney in fact, to the cemetery company, with full knowledge that it was for use as a cemetery, and the mortgage must be regarded as having been accepted by complainant with a full knowledge of and acquiescence in the proposed use of the land. Under these circumstances the rights of the mortgagee cannot properly be considered as free from the burden imposed by the statute.

The contention is also made that the provisions of section 8, above referred to, are superseded by an act of March 14, 1879 (P. L. 1879, p. 318; Gen. St. p. 360, § 56). The act of 1879 is a supplement to the act of 1851, above referred to, and amends section 10 of that act. The act of 1851 was repealed in 1875. The curious legislation thus presented is an amendment of a repealed statute. In the consideration of this statute in *Newark v. Mount Pleasant Cemetery Company*, 58 N. J. Law, 168, 173, 33 Atl. 896, the Court of Appeals finds no legislative intent to apply its provisions to cemetery corporations other than those incorporated under the act of 1851.

Having reached the conclusion that section 8 of the act of 1875 operates to exempt "the cemetery lands and property" of defendants from sale under a decree of foreclosure of the mortgage held by complainant, it becomes necessary to determine whether all the land covered by the mortgage is so exempt, and, if not, what part thereof.

The evidence discloses that but a small portion of the land covered by the mortgage has been brought into use as a cemetery. About 100 burial lots have been sold, and about 30 interments have been made. The contention is made that as the act of May 9, 1889 (P. L. 1889, p. 418; Gen. St. p. 356, § 40), authorizes 125 acres to be held for cemetery purposes, and, as that exact acreage was accordingly conveyed to the Locust Wood Cemetery Association, the entire 125 acres will be exempted from sale. This contention cannot be maintained. The exempting section (section 8) defines as exempt from taxation and also from sale under execution "the cemetery lands and property" of the association. I think that the only reasonable construction of the language used is that the land intended by the Legislature to be exempted from taxation and from sale under execution is the land actually brought into use for cemetery purposes. With no limitation at that time existing upon the quantity of land which a cemetery company could own, the legislative intent to exempt from taxation and

from sale all lands which cemetery companies might acquire cannot be reasonably assumed from the language used. The natural significance of the words "cemetery lands," as well as the manifest purpose of the legislation, indicates an intention to extend the exemptions only to lands actually used for cemetery purposes. This view of the legislative purpose led the Supreme Court, in *Rosedale Cemetery Association v. Linden Township*, supra, to construe the word "property," as used in this section, as inapplicable to personal property.

The view here taken renders necessary the ascertainment by exact boundaries of the lands which shall not be subject to the decree of sale. For that purpose a master will be appointed whose duty it will be to ascertain and report the boundaries of the land which is in use for burial purposes. Upon the confirmation of that report a decree will be made for the sale of the remainder of the land in satisfaction of the amount due on the mortgage held by complainant. If the proceeds of sale are not sufficient to satisfy the amount due, a receiver may be appointed pursuant to the act of March 21, 1881 (P. L. 1881, p. 158; Gen. St. p. 353, § 18), to take possession of the cemetery tract reserved from sale, and sequester the income for application to the amount remaining due under the decree of foreclosure.

(75 N. J. L. 106)

**McLAUGHLIN v. MAYOR AND COUNCIL
OF CITY OF BAYONNE.**

(Supreme Court of New Jersey. June 10, 1907.)

MUNICIPAL CORPORATIONS—BUILDING CONTRACTS—CONSTRUCTION—LIABILITY FOR EXTRAS.

The plaintiff brought suit to recover of a city municipality the balance due on a contract for plumbing, gas fitting, etc., in a new police station house, and also for a bill of charges for extra work outside of the specifications. The payment of the extras was resisted on the ground that they were not ordered as required by the provisions of the contract. There was a clause in that writing which prohibited any extra work being done without a resolution of the city council, and an express agreement in writing between the parties as to the cost to be added to the contract price for the same. A further provision in the instrument under the heading of "Subcontractor Notice" was that, should the owner at any time desire any variation of the work or any additional work executed, the same might be proceeded with after the architect or owners should order the same, in writing, stating, when possible, the price to be paid therefor. At the trial the court directed a verdict for the extras, if the evidence showed the architect's order in writing for the extra work without a resolution of the city being first passed authorizing the same. *Held*, on review, that the latter proviso applied to subcontractors only, and that the proviso first named was binding upon the contracting parties here, and that unless plaintiff would remit from the verdict the amount of the extras it must be set aside and a new trial granted.

(Syllabus by the Court.)

Action by John T. McLaughlin against the mayor and council of the city of Bayonne. Verdict for plaintiff. Rule to show cause made absolute on conditions.

Argued February term, 1907, before FORT, PITNEY, and HENDRICKSON, JJ.

Elmer W. Demarest, for the rule. William D. Edwards, opposed.

HENDRICKSON, J. The plaintiff obtained a verdict in the above cause at the Hudson circuit for \$1,713.39. Of this amount \$1,405.59 was admitted to be due the plaintiff for the balance due him, with interest, under a contract with the city for plumbing, gas fitting, and heating in the police station house lately erected in said city. The balance of the verdict (\$307.80) represents a charge for certain extras incurred by variations and additions to the work provided by the specifications; the payment of which is resisted by the city on the ground that no legal liability for such payment exists, and that none was shown at the trial. The plaintiff claims that the items for extra work were incurred in accordance with the provisions of the contract. It is therein provided that such alterations or additions may be made, should the city through its committee during the progress of the work so desire; the contract price to be added to or subtracted from according to changes made with the proviso added "that no extra work shall be had or done without a resolution of said city and an express agreement in writing between the parties hereto as to the cost to be added to the price of this contract because of such extra work." There was a further clause in the contract under the heading "Subcontractor Notice," which reads as follows: "Should the owner at any time desire any variation of the work as planned and specified, or should the owners desire any additional work executed, the same shall be proceeded with, after the architect or owners shall order it in writing, and stating when possible the price to be paid therefor."

The case shows, and it is admitted, that the extra work was not authorized by a resolution of the mayor and council of the city, but that it was ordered by the architect in writing. When the learned trial judge came to deal with the case in his charge, he instructed the jury that, as to the legal question raised whether any recovery can be had without such a resolution or whether under a later clause in the contract the plaintiff is entitled to rely upon the mere writing of the architect, he had resolved that question for the present in favor of the plaintiff, and directed the jury that, if they found the orders were given by the architect in writing and that the work was done properly and the charges for those items were either fixed by the writing or were reasonable charges, they should find those amounts in favor of the plaintiff in addition to the balance of the contract price.

We think there was error in this construction of the contract in question. Our view is that the provision first named applied to this contract, and that the other provisions apply to subcontractors only, declaring their obligation to the contractor and to the owner. And by fair intendment we think the phrase in the subcontractor notice, "should the owners desire any additional work executed," imports that the desire of the owners in this case should be evidenced by a resolution of council as provided in the main portion of the contract.

But the plaintiff contends also that the verdict should be sustained on the ground of ratification; that, as the evidence shows that the city council by paying the bill of the architect for his 5 per cent. commission, the cost of the work which included the item of extras, this amounts to a ratification of the extra work, or at least was evidence from which a jury could infer ratification. Without expressing any opinion upon the merits of this question, it is proper to say that it is not now before us for the reason that the trial judge expressly charged the jury to the contrary of this contention, and we cannot sustain the verdict on a legal theory directly opposed to the judge's instructions, for that would deprive the city of its right of review.

The result is that the rule to show cause must be made absolute, unless the plaintiff will consent to remit \$307.80 from the amount of the verdict. If the plaintiff will so remit, the rule will be discharged. In any event the city is entitled to costs upon this rule.

(78 N. J. Eq. 228)

ARMSTRONG v. FISHER et al.

(Court of Chancery of New Jersey. May 25, 1907.)

MORTGAGES — FORECLOSURE — COSTS — SEARCHING TITLE.

Under P. L. 1906, p. 269, providing that a purchaser of real estate at foreclosure sale, etc., shall be relieved from his bid if before delivery of the deed he satisfy the court of the existence of any substantial defect in or cloud on the title which would render the title unmarketable, or of the existence of any lien or incumbrance thereon, unless a reasonable description of the estate or interest to be sold and of the defects in the title and liens or incumbrances thereon, with the approximate amount thereof, be inserted in the notices and advertisements of sale and in the conditions of sale, expenses incurred in procuring searches showing the state of a title since the date of a mortgage were necessary for the proper foreclosure thereof, and taxable under rule 113a in favor of the party foreclosing the mortgage, though expenses incurred in searching the title anterior to the date of the mortgage were not taxable.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 85, Mortgages, § 1662.]

Bill by Roland D. Armstrong against Agnes Fisher and others. Heard on bill, answer, replication, and proofs. Decree for defendants in part.

Condict, Condict & Boardman, for complainant. Tennant & Haight, for defendant.

GARRISON, V. C. It is not necessary to advert to the issues raised and decided in this suit. The only question to be determined is one of costs. The suit is one to foreclose a mortgage held by the complainant, and the solicitor of the complainant caused, not only the customary searches to be made from the date of the mortgage, but also searched the title anterior to the date of the mortgage for the purpose of disclosing any defects in or liens or incumbrances thereon. His purpose in doing this was so that he could insert in the notice of sale and in the conditions thereof a reasonable description of the defects in the title and the liens or incumbrances thereon, so that the purchaser at the sale could not be relieved of his bid on account of the existence of such defects, liens, or incumbrances. The insertion in the notice of sale, and in the conditions thereof, of the existence of the defects in the title and of the liens and incumbrances thereon has the effect of preventing the purchaser from obtaining relief from his bid by force of the statute (P. L. 1906, p. 269).

The solicitor of the complainant requested me to certify, in pursuance of rule 113a, that in my opinion the certificates of search presented by him were necessary for the proper foreclosure of his mortgage, upon which certificate he could obtain the taxation of the same in his costs. I will certify that the expense incurred in procuring searches showing the state of the title since the date of the mortgage were necessary for the proper foreclosure thereof, and, therefore, under rule 113a and the statute (P. L. 1902, p. 540) are properly taxable in favor of the complainant. I cannot certify that the expenses incurred for searching the title anterior to the date of the mortgage are taxable.

The complainant contends that these search fees should be included, because they were rendered necessary by the statute above referred to (P. L. 1906, p. 269). I do not concur in this view. In my view, that statute does not cast any duty upon the complainant, or upon any of the parties in the suit, but does extend to each of them a privilege. Before the enactment of this suit a purchaser at a judicial sale in New Jersey took such title as the proceedings showed, and could not claim to be relieved because of the existence of prior incumbrances or of defects in the title. The effect of this statute is to prevent the bidder or purchaser from being relieved, if the defects in the title and the liens and incumbrances thereon are brought to his notice before the sale.

In my view, therefore, any one who desires to bring these things to the notice of the intending purchasers may do so, but it is not the duty of any one to do so. A mortgage may be foreclosed, and the equity of redemption disposed of, and the title which a sale under the mortgage is capable of conveying be conveyed, without necessarily searching back of the date of the mortgage. If it be to

the interest of the complainant to have the sale under such conditions that the purchaser cannot be relieved of his bid because of defects, etc., then the complainant may serve his own interest by searching for defects, liens, and incumbrances, and may cause notice of the same to be given. In like manner, in my view, any of the other parties may avail themselves of the privilege extended by this statute.

I conclude, therefore, that costs for such searching may not be taxed in favor of any party without legislative sanction; and I do not find any present legislation sanctioning the same.

(75 N. J. L. 75)

SHAFFER v. LEHIGH VALLEY R. CO. OF NEW JERSEY.

(Supreme Court of New Jersey. June 17, 1907.)

RAILROADS—ACCIDENT AT CROSSING—OPEN GATES.

While open gates are an invitation to cross, they do not excuse a traveler approaching a railway crossing from looking or listening, or both, where either would be effective.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, § 1072.]

(Syllabus by the Court.)

Action by Oscar W. Shafer against the Lehigh Valley Railroad Company. Verdict for plaintiff. Rule to show cause discharged, unless plaintiff remits portion of damages recovered.

Argued February term, 1907, before FORT, HENDRICKSON, and PITNEY, JJ.

H. B. Herr and Smith & Gray, for the rule. William C. Gebhard, opposed.

FORT, J. In this case but two questions are argued on the brief as grounds for a new trial; the first being the refusal of the court to nonsuit. We think that this refusal was right.

At the point where the plaintiff was injured there were seven tracks at grade. On either side of the roadway there were gates. Those gates were operated by a man in the tower. The plaintiff was a baker, and on the morning in question was crossing the tracks in his baker wagon, and as he approached the tracks the gates were up. Three of the tracks at the side of the railway from which the plaintiff approached were sidings. The two tracks on the opposite side of the roadway were the main tracks. Upon the sidings there were standing cars to obstruct the view of the plaintiff from the direction from which the train that hit him came. The train was going rapidly, concededly at the rate of 35 to 40 miles an hour, probably faster. There were also distracting dangers at the crossing at the time the plaintiff was going over, consisting of a drill engine switching or handling cars but a short distance away and which the plaintiff was observing. Open gates are an invitation to

cross. Although they do not excuse a failure on the part of the traveler either to look or listen, yet open gates under such circumstances are clearly evidence of the negligence of the agents of the defendant company, and, whether the plaintiff exercised reasonable care and prudence, or that care and prudence which was required of him under the circumstances surrounding him, was a question for the jury. So, in any view, the court rightly refused to nonsuit.

The other ground urged for a new trial is the suggestion that the damages were excessive. The verdict was for \$18,000. We think the damages were excessive. The plaintiff was seriously injured undoubtedly, but whether the serious character of the injury, which still exists, is to obtain for all the life of the plaintiff, is not clear. The earning capacity of the plaintiff was much more than capitalized by the verdict.

This disposition will be made of this case: The rule to show cause will be discharged, unless the plaintiff will consent to remit all damages recovered in excess of \$10,000, and, upon the further condition that, if the plaintiff does not consent to thus remit and to this reduction, the defendant may have a new trial upon the condition that it concede liability in the case and consent to go to trial upon the question of the quantum of damages only.

(75 N. J. L. 172)

STONE v. NEW JERSEY & H. R. RY. & FERRY CO.

(Supreme Court of New Jersey. June 10, 1907.)

INSURANCE—MUTUAL ASSESSMENT COMPANY—INSOLVENCY—SET-OFF OF MEMBER.

A member of an insolvent mutual assessment insurance company cannot set off a debt due him for a loss under a policy against assessments due from him to the company to pay losses, even though the company is a foreign corporation, and the suit to recover the assessments is brought by a foreign receiver.

(Syllabus by the Court.)

Action by Theodore W. Stone, receiver, against the New Jersey & Hudson River Railway & Ferry Company. Motion to strike out notice of set-off granted.

Argued February term, 1907, before GARRISON, SWAYZE, and TRENCHARD, JJ.

Linton Satterthwait, for the motion. Edmund W. Wakelee and Wendell J. Wright, opposed.

SWAYZE, J. The plaintiff is a receiver of a mutual assessment insurance company of Pennsylvania, appointed by a court of that state. The action is brought to recover assessments upon a policy of insurance. The defendant seeks to set off a sum due to it for losses covered by the policy. The question raised by the motion is whether there is a right of set-off.

The right of set-off as against the receiver of an insolvent corporation does not rest upon the statute of set-off, but upon the provision of the corporation act authorizing the receiver to settle debts due the company upon such terms as he shall deem just and beneficial to the corporation, and in case of mutual dealings to allow just set-offs. *Receiver v. Paterson Gaslight Co.*, 28 N. J. Law, 283.

Whether the allowance of such a set-off as is here claimed is just or not depends upon the contractual relations between the insolvent company and the defendant. The contract is found in the defendant's applications and in the policies issued thereon, all of which are in the same terms. By the applications the defendant applies for membership and insurance. By the policies, it is entitled to share in dividends declared by the directors of the insolvent association, and, in case the fixed premium rate charged by the association is insufficient to pay losses, becomes liable to pay a pro rata additional sum to make up the deficiency, not exceeding 5 per centum of its gross traffic receipts.

Under such a contract the relation of the defendant to the association is twofold: It is assured thereby, and hence a possible creditor; it is a member of the association, and hence a quasi partner in the enterprise. The present suit is to enforce the liability of the defendant in the character of member. The set-off is a claim in its character of creditor. The injustice of allowing one member of a mutual insurance company upon the assessment plan to escape liability to contribute to the common fund, and thereby obtain an advantage over his fellow members, all of whom embarked in the same enterprise presumably on equal terms, and of allowing one creditor of an insolvent company to be preferred over other creditors merely by reason of his liability to contribute toward the payment of the losses of all, is manifest. The authorities seem quite unanimous against allowing a set-off in such a case. One of the early cases is *Hillier v. Alleghany Mutual Insurance Co.*, 3 Pa. 470, 45 Am. Dec. 656. This was followed in *Lawrence v. Nelson*, 21 N. Y. 158. Although the precise question has never been decided in this state, a somewhat similar question was presented to Chancellor Runyon (*Vanatta v. New Jersey Mutual Life Insurance Co.*, 31 N. J. Eq. 15, 23) with the same result. The New York and Pennsylvania cases above cited have been relied on as authority by the Court of Errors and Appeals. *Hannon v. Williams*, 34 N. J. Eq. 255, 38 Am. Rep. 378. This was a case where a depositor in a savings bank was refused a set-off of her deposit against her indebtedness. Although her indebtedness to the bank was upon bond and mortgage, this fact was not relied on. The set-off was refused upon the ground that the depositors in a savings bank had a com-

mon interest in a common fund to which all looked for profit or for indemnity. The case of a mutual assessment insurance company presents an even stronger case against the allowance of a set-off, for the reason that the members are under a contract liability to contribute to the payment of losses, and, unlike depositors in a savings bank, cannot escape with the loss of what they have already paid. Their position is quite like that of stockholders of a corporation whose stock is not fully paid. As to stockholders, it is well settled that there is no right of set-off in such cases. *Ex parte Grissell*, L. R. 1 Ch. 528, 35 L. J. Eq. 752; *Sawyer v. Hoag*, 17 Wall. (U. S.) 610, 21 L. Ed. 731; *Williams v. Traphagen*, 38 N. J. Eq. 57.

It is urged, however, that the present plaintiff is a foreign receiver, and the defendant a New Jersey corporation. We are unable to see why these facts should be allowed to give the New Jersey creditor an advantage over other creditors. We do not allow a foreign receiver to exercise his powers in our jurisdiction to the disadvantage of creditors resident here; but, subject to this restraint, comity requires that he should be acknowledged and aided. *Hurd v. Elizabeth*, 41 N. J. Law, 1. Where it is necessary our courts will appoint an ancillary receiver, but the assets will be so administered that creditors in this state and in the foreign jurisdiction shall fare alike. *Irwin v. Granite State Provident Association*, 56 N. J. Eq. 244, 38 Atl. 680. Such equality of treatment cannot be secured in this case if the set-off is allowed.

The motion to strike out is granted, with costs.

(75 N. J. L. 40)

CHRISTIE et al. v. BOARD OF CHOSEN
FREEHOLDERS OF BERGEN
COUNTY et al.

(Supreme Court of New Jersey. June 17,
1907.)

1. COUNTIES — BUILDINGS — BONDS — MANDAMUS.

Where a county building committee has been appointed by the chosen freeholders of any county, pursuant to the act of 1901, as amended by the act of 1902 (P. L. 1901, p. 79; P. L. 1902, p. 42), and such committee has incurred obligations for lands or building construction, it is lawful for the chosen freeholders to raise the necessary funds to cover such expense by the issuance of bonds as provided by statute, and in default a mandamus will issue so directing.

2. SAME — ERECTION OF COUNTY JAIL.

Under the act of 1901, the building committee, when appointed, have the authority to erect a county jail.

3. SAME — CHANGE OF BUILDING SITE.

The provisions of the act of 1903 (P. L. 1903, p. 47) do not apply to a change of site for the location of county buildings at the county seat, but only to a change of the county, town, or seat itself.

(Syllabus by the Court.)

Application on the relation of Walter Christie and others to the board of chosen

freeholders of the county of Bergen and others. On rule to show cause. Peremptory writ ordered.

Argued February term, 1907, before FORT, HENDRICKSON, and PITNEY, JJ.

Wendell J. Wright and Edmund W. Wakelee, for relators. Luther A. Campbell and Peter W. Stagg, for respondents.

FORT, J. This is an application for a mandamus to compel the issuance by the respondents of county bonds to meet the cost of the purchase of lands and the erection of public buildings for the county of Bergen. The freeholders of that county heretofore appointed a committee for the purpose of erecting public buildings in such county, under the act of 1901, as amended by the act of 1902 (P. L. 1901, p. 79; P. L. 1902, p. 42). These proceedings were questioned and affirmed in this court and in the Court of Errors and Appeals. *Gulnac v. Freeholders* (N. J. Err. & App.) 64 Atl. 998. The constitutionality of this act was sustained by the Court of Appeals. *Dickinson v. Hudson Co. Freeholders*, 71 N. J. Law, 589, 60 Atl. 220. The building commission appointed pursuant to statute have entered upon the discharge of their duties, and have incurred expenses in securing the site and employing experts and for the services of a consulting engineer, and the like, amounting to several hundred dollars, and they have also made requisition upon the board of freeholders for funds for the purchase of a site which they have selected for the erection of the county buildings within the town of Hackensack, which is the county seat. The board of freeholders, by a vote of 6 to 18, have refused to issue bonds in accordance with the statute, to provide the necessary funds to meet the requirements of the appointed building committee. This proceeding is to test the right of the county commission to require the freeholders to issue the bonds and to provide the necessary funds.

No technical points are made by counsel, but the broad claim is made by the respondents that the matter of furnishing the funds requisite for the county building which the county building commission proposes to construct is discretionary with the board of freeholders, and that, if they refuse to furnish the funds, no buildings can be erected. We think otherwise. After the statutory proceedings have been taken for the selection of the county commission, and the commission has been appointed, the power of the chosen freeholders under the statute is ended, and all duties then devolve upon the county commission. They are given power to acquire by purchase or condemnation lands suitable for the erection of the necessary buildings, to be used for the courts and county officers, and for the transaction of the public business of the county and to furnish the same ready for occupancy and use by such courts and public officers. Title is to

be taken in the name of the freeholders. Among other things, they are authorized to employ architects and to execute all necessary contracts and agreements in the name of the freeholders, and to incur "any proper and necessary expense in carrying out the provisions of this act," and, by the fourth section of the act of 1901, as amended by the act of 1902, that it shall be lawful for the board of chosen freeholders of such county to issue and sell the bonds of such county corporation for the purpose of raising the money to pay the cost of lands and buildings and furnishing the same, according to the provisions of this act, to an aggregate amount not exceeding $1\frac{1}{2}$ per centum of the total assessed value of the real and personal property in such county. The bonds are to run for 40 years and to be sold for not less than par, and it is made the duty of the chosen freeholders to establish a sinking fund to meet the bonds at maturity, and also to enter in the county tax levy a sum sufficient to pay the interest on the bonds.

It is argued that the words "it shall be lawful," in the fourth section of the act, are words of discretion, and not mandatory upon the board of freeholders as to the issuance of bonds. This view does not commend itself to our judgment when the history of the statute is considered. The act provides for a scheme for the erection of county buildings, and authorizes the commission, when appointed pursuant to the statute, to do the things in relation thereto above enumerated. To meet these obligations, in order to justify the board of freeholders in doing it, the statute provides that "it shall be lawful" for the board to issue and sell bonds. Of course, but for this there would be no power in the board of freeholders to issue the bonds. The statute gives the unquestioned power to the county commissioners to incur obligations in the name of the county of the character mentioned above. To meet these, it is the duty of the freeholders to provide the funds, and the statute points out the method in which it shall be lawful for them to do so. There is no discretion in the board of freeholders with respect to this matter. The duty is cast upon them to provide the funds to meet the engagements which the statute authorizes the commission to incur. Any other construction of this act would lead to this anomaly: That the county commission could incur expenses which there would be no way to pay, unless the duty upon the board of freeholders to meet the obligations thus incurred was a mandatory one.

Another point was made. It is conceded that the money in this case is desired to purchase land in the town of Hackensack, which is the county seat of Bergen county, at a different location, in that town, from that upon which the present county buildings are situated. The record shows the reason for the taking of this course by the commission in a full and satisfactory report found there-

in. The contention is that this is a change of location of the county buildings within the provisions of the act of 1903 authorizing the change of the location of the county buildings for the use of the courts and public officers of the county, and acquiring lands, etc. (P. L. 1903, p. 47), and that this change of location must be voted upon by the people in order to justify the expenditure therefor. We do not so construe the act of 1903. We think that act is limited in its operation and effect to the selection of a new location for county buildings, and by that is meant a change of the county seat from one town to another in the county, and that it does not relate to the purchase of a different piece of land within the territory of the municipality which is now designated by law as the county seat of any county in this state.

It is also suggested that the act of 1901, as amended by the act of 1902, does not cover the erection of a county jail, as it is suggested the relators intend to do in this case. We think that it does cover any county buildings to be used for county purposes, and a jail is within this description.

It is stipulated in this case that the assessed valuation of the property of Bergen county for the year 1906 was \$60,600,000, and that the \$50,000 asked for by the county building committee, and refused by the board of freeholders, is for the purpose of paying preliminary expenses and acquiring land upon which to erect two separate buildings, one for a county courthouse and public offices, and the other for a jail, and that the amount thus required is within the amount legally authorized by statute to be appropriated for that purpose.

In this case, in view of the agreement of counsel at the hearing that all the facts are before us that could be shown, if there were an alternative writ issued in the first instance, and that, if the court thought a writ should go, that a peremptory writ of mandamus should be issued, an order will be made that a peremptory writ of mandamus issue to the board of freeholders, directing them to issue bonds pursuant to statute.

(75 N. J. L. 70)

WENDEL v. BOARD OF EDUCATION OF CITY OF HOBOKEN.

(Supreme Court of New Jersey. June 17, 1907.)

1. EMINENT DOMAIN—DELEGATION OF POWER—SCHOOLS AND SCHOOL DISTRICTS—BOARD OF EDUCATION—POWERS.

The members of the board of education of the city of Hoboken as in office at the time of the approval of the general school act of 1903 (P. L. 1903, p. 5) became a body corporate under that act, and were given the power, conferred by that act, to condemn lands for public school purposes. Their successors, elected as they were, prior to the adoption by the people of either the provisions of section 38 or 39 of that act, have the like powers.

2. STATUTES—SPECIAL LEGISLATION.

The conference of such powers upon existing boards of education, in cities not adopting either section 38 or 39 of said act (P. L. 1903,

p. 17), is not special legislation as to cities, and hence is not in conflict with our state Constitution.

(Syllabus by the Court.)

Certiorari by John G. Wendel against the board of education of the city of Hoboken to review an order appointing condemnation commissioners. Affirmed.

Argued February term, 1907, before FORT, HENDRICKSON, and PITNEY, JJ.

Collins & Corbin, for prosecutor. James F. Minturn, for defendant.

FORT, J. This writ brings up an order of a justice of the Supreme Court appointing commissioners to condemn land for a public school building in the city of Hoboken. The order of the justice is challenged upon the ground that there is no power in the school board of that city to condemn lands for the reason that the powers to condemn given to school boards by the general school law of October 19, 1903, does not extend to the school board of the city of Hoboken, nor to any school board not created in accordance with sections 38 or 39 of the general school act of 1903 (P. L. 1903, p. 17).

We take a different view of the law applicable to this case. By section 45 of the general school act of 1903 the board of education in any city school district is declared to be a body corporate by the name of the board of education of the city in which it is, and is authorized to have an official seal. By section 47 of that act said board is authorized in and by its corporate name * * * to take and condemn land and other property for school purposes in the manner provided by law regulating the ascertainment and payment of compensation for property condemned or taken for public use. This confers upon such a board the power to take proceedings for condemnation provided by the general condemnation act (P. L. 1900, p. 79). By section 246 of the general school law all provisions of this act and all acts and parts of acts, general, special, and local, so far as they are inconsistent with the provisions of this act, are hereby repealed. By section 40 of the school act of 1903 it is provided as follows: "In any city school district, until the organization of a board of education in such school district, as provided in sections 38 or 39 of this act, the administration and conduct of the public school, and the management and control of the public school property therein, shall remain in and shall be exercised by any board of education or other body heretofore having control of the public schools therein. Said board of education or other body shall be hereafter deemed to be incorporated under the provisions of section 45 of this act, and shall have all powers and be charged with all the duties conferred or imposed upon the board of education as provided in this article." The section goes on to provide that members of any board of education or other

body shall be elected or appointed at the same time and in the same manner, and shall serve for the same terms as members of such board of education or other body have been heretofore elected, selected, or appointed. We think the general purpose of this statute from which these citations have been made, was to create in every city the then existing board of education as a corporation with all the powers of the act of 1903. All boards of education of all cities of the state were brought under the act of 1903, and their proceedings and powers were solely such as that act conferred, after the date of its approval. Sections 38 and 39 provided for a definite method of selection of board of education in cities adopting either of those sections, and if neither of said sections shall be adopted, then all cities are, as to the powers of boards of education, under a general statute which is uniform as to all.

It was suggested on the argument that if the school act of 1903 should be held to confer powers of condemnation upon all city boards, whether they were appointed under sections 38 or 39 of the act or not, that it was an unconstitutional statute, because special. We are unable to take this view. Neither section 38 nor 39 is operative in any city of this state, unless they shall be adopted by vote of the people after being submitted in accordance with the provisions of the act. These two sections are open to all cities, and any city may adopt either the one or the other of them, but no city is required to adopt either of them. This act merely takes the machinery existing in cities for the government of their educational system, and leaves such machinery as it is, but provides a uniform method for the management and control of all the cities of the state by the board or body as created or organized in such cities at the time of its approval.

We think the board of education of the city of Hoboken, as constituted at the time of the adoption of the act of 1903 and at the time of the making of the order brought up in this case, was a legal body, and that the act of 1903 gave it power of condemnation, and that the order of the justice of the Supreme Court appointing the commissioners should therefore be affirmed.

(72 N. J. Eq. 745)

BABBITT v. FIDELITY TRUST CO. et al.
(Court of Chancery of New Jersey. May 17, 1907.)

1. TRUSTS — CONSTRUCTION — PURPOSES OF TRUST.

A trust declaration and assignment, by which C. transferred all his property to a trustee, provided that the trustee should pay the interest on outstanding notes, bonds, mortgages, etc., given or indorsed by C., and from time to time reduce and cancel the same, and hold and retain without action, and without collecting interest thereon, all notes and securities given by C., or by his son, daughter, and son-in-law, until the death of C., and then to cancel them. *Held*, that a mortgage by the son-in-law, a bond of the daughter, and notes

of the son, indorsed by C., were to be canceled at his death, and the trustee should be credited with the sum expended in the payment of the same.

2. SAME.

Under this trust declaration and assignment, where a note was not made before the making of the declaration of trust, and was not a renewal of any note or notes existing at the time of the execution of the trust, the trustee was not warranted in paying it from the estate.

3. SAME—MANAGEMENT OF TRUST PROPERTY—SALE—EXPENDITURES—IN GENERAL—COMMISSIONS.

Where real estate was transferred to a trustee to hold or convey the same as he thought best, items paid real estate agents and others as commissions on sales of real estate, which were shown to be reasonable commissions for the services rendered, were properly charged against the trust estate.

4. SAME—ATTORNEYS' FEES.

Where a party transferred all his property to a trustee, it was proper for the trustee to pay for the services of the lawyers engaged in making the transfers and the declaration of trust and in giving advice concerning the proper way to accomplish the object of the settlor.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 47, Trusts, § 334.]

5. SAME—RIGHT OF CESTUI QUE TRUST AS AGAINST TRUSTEE — PERSONAL LIABILITY OF TRUSTEE.

A settlor at the time of making a declaration of trust owned and transferred to a trustee shares of stock in an insurance company. The execution of a scheme whereby the trustee attempted to obtain a majority of the stock of the insurance company was prevented by the court, and the stock of the insurance company depreciated in value so that the stock of the trust estate sold after the defeat of the scheme brought much less than that sold before. *Held*, that it could not be said that the trustee should have known that the necessary result of the proposed scheme would be to depress the price of the stock of the insurance company; and he should not be surcharged with the difference between the selling price of the stock before the defeat of the scheme and the lower price at which it subsequently sold.

6. SAME.

Where a person transferred all his property to a trustee to hold as a trust fund, it was a general trust, and if the trustee held stock which came to him from the settlor, and which were not securities he was authorized by law to hold, he should be surcharged with the difference between the market value of the stock at the time he should have sold it, and the lower price at which it subsequently sold.

7. SAME—INVESTMENTS—IN GENERAL.

Where a declaration of trust declared that the trustee hold the property transferred in trust for the following uses and purposes, "to hold or convey the same as in his judgment may be deemed advisable, and to collect the principal of securities and reinvest the same from time to time," the trustee was to exercise his discretion only in doing authorized things, and could not hold securities transferred to him which he was not by law authorized to hold.

8. SAME—COMPENSATION OF TRUSTEE—COMMISSIONS.

Where a trustee's conduct was not willfully wrong, and he has not confused accounts, or unwarrantably used trust moneys, and has large resources, so that the making of unauthorized investments could not prejudice the interest of the cestui que trust, the fact that he was subject to surcharge in certain respects is insufficient to defeat his right to commissions.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 47, Trusts, § 460.]

9. SAME — COMPENSATION OF TRUSTEE — AMOUNT.

Where a trustee was held to a strict accountability, had charge of a large estate of a most varied character, was required to exercise due diligence in the calling in of all unauthorized investments, and had duties and responsibilities not incident to the care of an ordinary trust estate, 4 per cent. upon the principal was a proper allowance for his compensation.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 47, Trusts, §§ 455-459.]

10. SAME — OBJECTIONS TO ACCOUNT — COSTS AND EXPENSES.

Where a suit is instituted and prosecuted in good faith to secure a construction of a declaration and assignment of trust, allowance may be made, including costs and counsel fees, to be paid out of the estate.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 47, Trusts, § 324.]

Suit by Anna D. Babbitt against the Fidelity Trust Company and others. Conclusions by court.

See 63 Atl. 18.

On the 19th day of July, 1898, Charles G. Campbell, by appropriate instruments, transferred all of his property of every description to the Fidelity Trust Company of Newark, as trustee. The latter, on that date, executed a declaration of trust with respect to the said property. In said instrument it "declares that it holds the property, real and personal, this day conveyed to it by Charles G. Campbell in trust for the following uses and purposes: (1) To hold and possess or dispose of and convey the same by proper instruments of conveyance, as in its judgment may be deemed advisable, and to collect the principal of securities and reinvest the same from time to time. (2) To collect the income from the personal property, and the rents, issues and profits from the real property." By other provisions it undertakes to attend to the taxes and repairs upon the real estate, to the payment of interest on outstanding notes and other obligations, and to their reduction and cancellation, and to pay the proper expenses arising in the execution of the trust. The net income is to be paid monthly, in certain stated amounts, to the settlor, his sisters, his son, Charles B. Campbell, his daughter, Anna D. Graham (since intermarried with Babbitt), and the father of a deceased daughter's children. Upon the death of Charles G. Campbell, certain sums are to be paid to his sisters, and the balance is to be divided among his heirs at law according to the intestate laws of this state; the personal property according to the statute of distributions, and the real property according to the statute of descent. There are other provisions which will be stated as occasion requires it.

Charles G. Campbell died on the 29th day of May, 1905, and left, him surviving, his daughter, the complainant; Charles B. Campbell, a son; and Robert C. Denny, Walter B. Denny, and Julia Denny, children of Jennie B. Denny, deceased, who was the daughter of Charles G. Campbell and the wife of

Edward B. Denny. The bill in this case is filed by Anna D. Babbitt. She obtained loans from certain nonresidents, and made certain assignments of her interest in the estate of her father to secure the same. The bill in this case was framed not only to secure an accounting from the Fidelity Trust Company, the trustee, but also sought to litigate certain questions between the complainant and those to whom she had executed the assignments. These latter, being then represented by nonresident executors, filed a plea to the bill, and the issue raised was disposed of by this court adversely to the complainant. The report will be found in 63 Atl. 18 (Garrison, V. C., 1906). The suit thereupon proceeded as one of accounting between trustee and cestui que trust. All of the other beneficiaries under the declaration of trust, or their assignees, are parties to this suit. The trustee, in addition to filing an answer and account, also filed a cross-bill, praying, among other things, for a construction of certain portions of the declaration of trust, and for directions concerning its duty under certain provisions thereof. The complainant filed exceptions to numerous items of the trustee's account. Issues were properly joined and are to be herein disposed of.

Henry H. Fryling and Chandler Riker, for complainant. S. W. Beldon, for defendant Fidelity Trust Company. Edw. D. Duffield and J. J. Burke, for defendant Chas. B. Campbell. G. R. Dutton, for defendant Florence Joel.

GARRISON, V. C. (after stating the facts). The property which Charles G. Campbell had, and which on the 19th day of July, 1898, he turned over to the Fidelity Trust Company as trustee, was of varied character and of large value. It consisted of real estate, mortgages, bonds, stocks of companies, furniture, pictures, bric-a-brac, money in bank, and other characters of personal property such as an active business man of large means would possess. The face value exceeded the actual value by many thousands of dollars, because among the property turned over were interests in real estate which could not be realized upon, and in some instances the real estate could not be located; and, also, among the property, were bonds and stocks of various companies, which latter were defunct, or, if in existence, the stock of which had no value. The realized value exceeded \$400,000, with some items still undisposed of in the trustee's hands. The account of the trustee is a very long one, and shows total receipts, principal and interest, of over \$700,000; among the numerous items of disbursement being advancements made to the various parties to this suit on account of their distributive shares. A number of the questions raised under the exceptions were disposed of at the hearing by consents or arrangements between the parties, and only need to be stated without

discussion. Others of the exceptions may be grouped, and so much of the trust deed as requires construction for the purpose of determining the rights of the parties need not be discussed separately, but will be dealt with in connection with the subject-matter which it concerns.

1. The first exception concerns a series of promissory notes, all excepting two of which were made by Charles B. Campbell, the son of Charles G. Campbell (or by firms of which Charles B. Campbell was a member) and indorsed by Charles G. Campbell; the money going to Charles B. Campbell. After the making of the deed of trust, these notes were renewed, and such renewed notes were paid by the trustee. The two notes not coming within the above statement are one made by Denny Bros. and indorsed by Charles G. Campbell, and one made by Campbell & Osborne and indorsed by Charles G. Campbell, and paid to the Merchants' National Bank. The point of the exception is that, under the declaration of trust, the trustee, if it paid such notes, must hold them and charge the amount thereof against the distributive share of the maker of the note. This, of course, depends upon the proper construction of the declaration of trust. This instrument has two claims which concern this matter of obligations of Charles G. Campbell existing at its date, the fourth and the tenth clauses. The fourth clause is as follows: "(4) To pay the interest on outstanding notes, bonds, mortgages, etc., given or indorsed by the said Charles G. Campbell, and to provide from time to time for the reduction and cancellation of the same, as may be deemed advisable, provided it be done, so far as possible, without interfering with the execution and performance of the trusts hereinafter set forth." The tenth clause is as follows: "(10) To hold and retain, without action and without collecting interest thereon, all notes and securities given to Charles G. Campbell by Charles B. Campbell, Anna D. Graham and Edward B. Denny, and now held by assignment by Fidelity Trust Company until the death of the said Charles G. Campbell, and then to cancel and deliver them without charge to the said Charles B. Campbell, Anna D. Graham and Edward B. Denny, their respective heirs, executors and administrators."

At the time of the making of the declaration of trust, there was held by the settlor and delivered to the trustee a mortgage of E. B. Denny, the settlor's son-in-law, for \$2,100, and notes of his for \$8,710. At the same time there was held by the settlor and delivered to the trustee company a bond of Anna D. Graham, the complainant, for \$20,976.51. Under the provision of the tenth clause, these two obligations were canceled at the time of the death of Charles G. Campbell, and the amounts thereof thus became gifts by the settlor to each of the persons named. There were no notes or other securities of Charles B. Campbell held by the set-

tlor and transferred to the trustee; but there were between \$16,000 and \$17,000 worth of notes of Charles B. Campbell, indorsed by Charles G. Campbell, outstanding in the hands of those who had discounted them.

It is evident that it was with these notes in mind that the fourth clause was inserted. The exceptant contends that the proper meaning to be ascribed to this fourth clause is that the trustee is to reduce the notes, if it deems advisable, and if, by reduction, they are finally paid off, the trustee is to hold the paid-off note, and charge it, after the death of Charles G. Campbell, against the distributive share of the maker of the note. I do not think that this is the correct construction of this clause, or that it was the meaning of the settlor. I think it clear that this settlor, who was disposing of all of his property, and had clearly in mind that which he wished to do with it, desired to treat his son Charles, his daughter Anna, and his deceased daughter's husband and her children with similar bounty. At the time of the making of the instrument he had advanced money to his son-in-law, and to his daughter, and had obligated himself upon the notes of his son. I think it entirely clear that by these two clauses he intended that, where he had actually made advances and held an obligation therefor, such obligation was to be retained by the trustee without action, and was, at the distribution of the estate, to be canceled and delivered to the obligor; and, similarly, he intended that the obligation which he had undertaken for his son by indorsing his notes should be met by the trustee from time to time, and, when met, the note should be canceled. I cannot conceive of any meaning to be given to the word "canceled," in the fourth clause, excepting the well-known one "to render null and void." This works out the scheme of equity which I think was in the mind of the settlor. I hold, therefore, that, when this estate is to be distributed, the trustee is to be credited with the payments of the notes of Charles B. Campbell, indorsed by Charles G. Campbell. This holding also applies to the notes of Mrs. Babbitt, the complainant, which were indorsed by her father and paid by the trustee; and also to the note of Denny Bros., which was the title under which Edward B. Denny traded. These notes were in existence at the time of the making of the declaration of trust, and were renewed and subsequently paid by the trustee, and therefore come within the language of the fourth clause. The only remaining note to be dealt with is that which was in the Merchants' National Bank. This note was made by Campbell & Osborne and indorsed by Charles G. Campbell. There is no evidence that this note was a renewal of any note or notes existing at the time of the making of the declaration of trust. I cannot find any warrant or authority for the trustee paying this note out of the estate. If it has paid the

same, it must either be surcharged with it, or must, as between the parties hereto, charge the same against the distributive share of Charles B. Campbell.

2. The next exception relates to items in the account of commissions on principal retained by the trustee. Undoubtedly the trustee can only retain such commissions on principal as are fixed by this court, and the matter of this exception will be dealt with in adjusting the matter of commissions.

3. The next exception relates to the investment in the gold notes of the Public Service Corporation. The amount involved is \$99,750, and the point of the exceptant was that the investment was not one authorized by law. By consents made at the time of the final hearing this matter was satisfactorily adjusted; the trustee agreeing to charge itself with whatever the proper sum was in respect to this item.

4. The next exception relates to the payment on account of the distributive share of Charles B. Campbell in advance of payments of any of the other distributees, and merely requires adjustment of interest items.

5. The next exception relates mainly to items paid to real estate agents and others as commissions on the sales of real estate. These were shown to be proper commissions for the services rendered, and I think it entirely proper to charge them as the trustee has. Any effect which the rendering of these services by others should have upon the amount to be allowed to the trustee will be taken into account in fixing its compensation. The items in this exception which are not covered by the above statements are for lawyers' services, and only one item is questioned; the other one being conceded to be correct at the hearing. The questioned item has to do with services at the time of the making of the declaration of trust. I think it clear, since Charles G. Campbell was transferring everything he owned to the trustee, that it is a proper item for the trustee to pay for the services of the lawyers engaged in making the transfers and the declaration of trust, and in giving advice concerning the proper way to accomplish the object of the settlor. I therefore allow this item.

6. The matter of interest on net bank balances was adjusted at the trial, and was set off against the right of the trustee to charge interest on advances to the distributees.

7. The only remaining question under the exceptions relates to the conduct of the trustee concerning shares of stock of the Prudential Insurance Company. The par value of this stock is \$50, and much confusion resulted at the trial because the custom is to sell two shares at one time and call the same "a full share"; that is, the custom is to deal with this stock as if the par were 100, and deliver two shares to make what is termed "one full share." To avoid confusion I have dealt with the stock as it actually was, namely, each share at a par of 50. At

the time of the making of the declaration of trust, the settlor owned and transferred to the trustee 167.27 shares of such stock. This was disposed of by the trustee at the following rate per share of \$50 each: February 23, 1899, 60 shares at \$360; February 6, 1900, 13 shares at \$350; August 20, 1901, 20 shares at \$375; December 7, 1903, 30 shares at \$200; December 23, 1903, 25 shares at \$195; January 25, 1904, 19.27 shares at \$200. It will be observed that the first three sales averaged about \$360 a share, and that these took place prior to the year 1903. The sales made after that date do not average quite \$200 per share. The proofs show that down to about November, 1902, the stock of the Prudential Insurance Company was readily salable at about the average figure shown above, namely, \$360 per share, and that since that date the latter average has been about the obtained price, namely, \$200 per share. At about the date in 1902 just mentioned, the Fidelity Trust Company and the Prudential Insurance Company endeavored to carry out a scheme by which each should own a majority of the stock of the other, and by this means the existing management in each company could perpetuate its control. In execution of this scheme, the Fidelity Company offered the stockholders of the Prudential Insurance Company \$300 per share for one-half of their holdings. It succeeded in purchasing two shares over one-half of the capital stock of the Prudential Insurance Company. This court (*Robotham v. Prudential Insurance Company* [Stevenson, V. C., 1903] 64 N. J. Eq. 673, 53 Atl. 842) prevented the execution of this scheme, and the Fidelity Trust Company parted with sufficient of the stock to reduce its holdings below a majority.

The exceptant charges that the trustee, the Fidelity Trust Company, should have known that the scheme it embarked in with respect to the Prudential stock would depress the price or value of that stock, and therefore it should be surcharged, on the stock held in this trust, with the difference between the selling price of the stock before it entered upon the execution of the scheme and the lower price at which the stock subsequently sold. Applying to the trustee the rule of care to which it was subject, I cannot say that I find that it should have known that the necessary result of the proposed scheme would be to depress the price of the stock of the Prudential Insurance Company. The scheme was undoubtedly conceived with the purpose of perpetuating the management of those then in the control of each of these companies; but, as appears by the facts stated in the cited case, each was solvent and possessed of large assets and of a great and valuable business, and the business of each was growing and not diminishing, and I do not think it fair to infer that a reasonable man should have believed that perpetuating the then management would lessen the value of the stock of either of the companies. Whatever

the result may have shown the fact to be, I do not believe that at the time the scheme was proposed and was attempted to be carried out there was any thought in the minds of the parties that it would decrease the value, in the market, of the stock of the companies concerned. The very fact that the parties engaged wished to retain control and invested large sums of money for that purpose shows that they thought that each institution was a valuable one and would so continue. I do not, therefore, concur in the point made by the exceptant that, under the rule concerning the care with which a trustee is chargeable under such circumstances, this trustee is to be surcharged in this respect.

I do find, however, that the trustee is to be surcharged with the difference between the fair market value of this stock down to 1903, and the price at which it was sold in 1903 and 1904, for the reason about to be given. The trust in this case was of a unique character. It was a transfer by a living person of all of his property of every kind and description, including even his household goods and his money in bank. It was, in the broadest sense of the word, a general trust. Under such circumstances, I think it the duty of the trustee, so soon as it could do so in the exercise of reasonable diligence and good judgment, to convert the securities which came to it from the settlor into cash and invest the same in securities authorized by law. It is admitted by all of the counsel in the case that there is no statute law involved, excepting to the extent that the statute points out the investments in which trustees are authorized to place trust moneys; and it is conceded that the stock of the Prudential Insurance Company is not one of those so authorized. The general principle deducible from the cases and textbooks is well stated in the seventeenth volume of *American & English Encyclopedia of Law*, p. 454, as follows: "While a fiduciary may, as a rule, in the exercise of his discretion, retain such investments as are proper for the fiduciaries to hold, all others he must call in, and invest the proceeds in an authorized manner." *Perry on Trusts*, §§ 460, 461, 465; *Ashhurst v. Potter* (Ct. of Errors, 1878) 29 N. J. Eq. 625.

The trustee in the case at bar seeks to escape the responsibility involved in the application of this principle. In the brief of counsel for the trustee, its position is thus stated: "The rule contended for has undoubted existence, but is not of universal application. It is applicable to trusteeships where the subject of the trust has come to the trustee as a general estate, or an aliquot portion of an estate, but is not applicable where it comes as certain and specific property, unless there be a direction to convert." It therefore insists: First, that this was a trust of a specific thing, and that it was entitled to hold that thing, chargeable only with the exercise of

reasonable discretion; second, that by the declaration of trust it was given discretion with respect to investments, and therefore is not chargeable for anything excepting negligence. As I have before said, I do not concur at all in the view that this is a trust of a specific thing, or that this is a case to which the authorities relating to duties of trustees under trusts of specific things can be applied. It is true, of course, that a specific thing, or rather a great number of specific things, were by this settlor turned over to this trustee; but the real transaction was a turning over by the settlor of everything that he possessed to the trustee for it to handle and manage under its obligation as trustee, subject to the responsibilities thereof. I shall not stop to cite or analyze the various cases in which the subject-matter of the trust was held to be specific, but will content myself with saying that in each case, as I have read them, it was clear that the settlor intended that the identical thing transferred should be held by the trustee. There is not the slightest evidence in this case of the settlor's intention that this trustee should hold any specific thing, and it is quite clear, I think, from the circumstances, that there could have been no such intention. Among other property transferred to the trustee were household furniture, pictures, bric-a-brac, and money in banks. Certainly it was not intended that these several species of property were to be held in specie by the trustee. Similarly, there is nothing to show that any of the transferred property was to be so held. The intention clearly shown was to hand over all of the property owned by the settlor to the trustee for the latter to deal with as trustee, and under such circumstances the law is clear that the trustee can only escape responsibility by converting the unauthorized securities thus transferred to it into authorized securities so soon as it conveniently and reasonably may do so.

In the case in hand, it is clearly shown that it could have sold the Prudential stock during the years 1898, 1899, 1900, 1901, and 1902 at at least \$860 per share. The income from this stock was very small, being 10 per cent. upon \$50 par, and therefore about 1½ per cent. on the market value of the stock. There was therefore no reason, properly viewed by the trustee, to induce it to hold an unauthorized security, paying so little, at a time when the market for its sale was open, and a large price could have been obtained for it, and that price could have been invested in authorized securities to yield a rate of interest at least three times greater than that received from the then investment. With respect to the argument that by the terms of the declaration of trust the trustee was so vested with discretion that it is not chargeable for maintaining unauthorized investments, it is necessary to refer to the language of the instrument. The material part thereof is that in which the trustee dis-

clares that it holds the property, real and personal, in trust for the following uses and purposes: "To hold and possess or dispose of and convey the same by proper instruments of conveyance, as in its judgment may be deemed advisable, and to collect the principal of securities and reinvest the same from time to time." From this clause the respective parties draw diametrically opposing meanings. The complainant insists that the meaning of this clause is that the trustee has enjoined upon it the absolute duty of collecting the principal of securities; in other words, it draws from this clause the inference that the settlor intended to direct the trustee to collect the principal of securities, and therefore it has not only the duty cast upon it by law, but also the positive injunction of the settlor with respect thereto. The trustee, on the other hand, lays great stress upon the presence of the words "as in its judgment may be deemed advisable," and argues that they relate not only to the first part of the sentence concerning conveyances, but also to the last part of the sentence. It therefore repudiates the idea that it was directed to collect the principal of securities, and contends that the whole matter was left to its discretion, and it can only be chargeable if negligent. The trustee further argues that stocks are not "securities," and therefore, even if it is required to collect the principal of securities, this would not relate to stocks generally. I do not find it necessary to determine whether this clause should be construed so as to positively require the trustee, by force of its terms, to convert the securities, including the stocks, into money, and reinvest the same in authorized securities, because I think the result of a fair reading of this clause in any legitimate way is not to vest in the trustee any greater or other discretion than it vested in trustees generally. Differently stated, I think that this clause confides the property to the trustee to be dealt with as its judgment deems advisable, subject to those rules which govern trustees; that its discretion, in other words, was not to do unauthorized things, but to exercise its judgment concerning what authorized things it would do.

I do not find from the authorities that it is the rule to exempt trustees without a clear and unequivocal statement of intention to that effect made by the maker of the trust in the instrument creating or evidencing it. *Ward v. Kitchen* (Runyon, Oh., 1878) 30 N. J. Eq. 31; *McCullough v. McCullough* (McGill, Ch., 1888) 44 N. J. Eq. 313, 14 Atl. 123; *Halsted v. Meeker's Ex'rs* (Zabriskie, Ch., 1866) 18 N. J. Eq. 136; *King v. Talbot*, 40 N. Y. 90; *Adair v. Brimmer*, 74 N. Y. 539; *Clark v. Beers*, 23 Atl. 717, 61 Conn. 87; *Spratt v. Wilson*, 19 Ont. 23; *Kimball v. Redding*, 81 N. H. 352, 64 Am. Dec. 333. In the case of *Tuttle v. Gilmore* (Ct. of Errors, 1883) 36 N. J. Eq. 617, the clause limiting the liability of the trustee provided that he should

not be liable or responsible for any other cause, matter, or thing except his own willful and intentional breaches of the trusts therein expressed and contained. The present chancellor, in writing the opinion of the court, said: "It is a breach of trust for the trustee to speculate with trust funds for his own gain, but it is no less a breach of trust to make unauthorized investments * * *. To do so knowingly is a willful and intentional breach of trust. In my judgment, it is a willful and intentional breach of trust within the meaning of this clause to knowingly do any act hazarding trust funds, in violation of a duty imposed on a trustee. That this construction may leave but little force to the clause is no reason why it should not be adopted." It will thus be seen that it is settled in this state that a clause restricting the responsibility of the trustee in terms much broader and more comprehensive than in the case at bar was held not to exonerate the trustee. In the same case, the court holds that "a strict rule of construction should be applied as against the claim of restriction." I therefore conclude that this trustee is chargeable with the difference between the price at which the 74.27 shares were sold in 1903 and 1904, namely, about \$200 per share, and \$360 per share, which I find to be the price at which it could have been sold at any time within five years after the date of the execution of the declaration of trust.

8. The remaining question relates to the matter of compensation to the trustee. While it was urged by the complainant in her brief that there should not be any allowance of commissions to this trustee, I can perceive no legitimate ground for withholding the same. It is true that in certain respects this trustee is found by the court to be subject to surcharge; but its conduct has not been willfully wrong, nor has it confused accounts, unwarrantably used trust moneys, or done any of the things which have been held to disentitle trustees to compensation. It is, of course, true that a general rule of law applies alike to those possessed of small means as well as those possessed of large; but it is equally true that where a trustee is possessed of very large resources, as this trustee is, and therefore nothing that it has done could possibly jeopardize the interests of the cestui que trust, and the latter would in every event receive all that the court found due to them, a different situation exists than if a trustee of meager resources should make unauthorized investments, and thereby jeopardize the interests of the cestui que trust, and make it possible that they would lose what ought to come to them. I see no reason for treating this trustee in any other than the normal way in fixing its compensation. The discretion of this court in this class of cases as to the amount to be allowed is unfettered by statute, and the compensation should be based on the nature and amount of the services rendered and the risk incurred by the trustee.

tee. *Van Houten v. Van Houten* (Ct. of Errors, 1889) 45 N. J. Eq. 796, 18 Atl. 842.

Holding this trustee, as I do, to a strict accountability, I think that its allowance should be commensurate with such responsibility. If the contention of the trustee was found to be sound, and it was only chargeable for negligence, and would be held to have done its duty if it merely retained the securities and collected the income, then I think a small allowance would compensate it fully for its responsibility. I am only speaking of an allowance upon principle, because, under the terms of a declaration of trust, it was to receive 5 per cent. upon the income, and it has already, under such clause, taken its commissions on income. But I think that where a trustee has a very large estate, such as this one was, of a most varied character, handed over to it, and is required by the rule, applied to it by the court, to exercise due diligence in the calling in of all unauthorized investments and the duty of investing in authorized securities, it should be paid a proper sum to compensate it for this labor and the responsibility and risk involved. In view of the rule which I apply to this trustee, I do not think that 4 per cent. upon the amount of principal is too large a sum for the time, labor, responsibility, and risk involved. It had the estate in its charge from 1898 to date, and, in addition to the ordinary duties in an ordinary trust, there were unique duties imposed upon this trustee, because, as has been before stated, many of the apparent securities turned over were worthless, and that fact could only be ascertained after patient investigation and much trouble, and in each instance it had to take the risk of its conduct. And, with respect to the valuable property, it performed its duties well; the surcharge resulting from a misconception of duty, and not from a willful disregard thereof. In the *Van Houten Case*, cited above, the Court of Errors set the figure as $3\frac{1}{2}$ per cent. I think the additional $\frac{1}{2}$ per cent. allowed by me in this case fairly represents the additional services and risk involved.

Application is made by the various counsel for costs, including counsel fees, to be paid out of the estate. This seems to be of the class of cases in which, under the practice and as a matter of authority, allowances should be made. *Trustees v. Greenough*, 105 U. S. 527, 26 L. Ed. 1157.

The matter of the amounts may be settled upon the settling of the decree, which will be done upon notice.

TABER v. TABER.

(Court of Chancery of New Jersey. October 8, 1904.)

1. DIVORCE—DEFENSES—CONDONATION.

Condonation is the forgiveness of the offense followed in fact by a reconciliation, in which the wife is reinstated to such conjugal

cohabitation as may be adapted to the circumstances of the parties.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Divorce, §§ 169–187.]

2. SAME—EVIDENCE.

In an action for a divorce, evidence examined, and held not to show condonation by the wife of the husband's adultery.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Divorce, § 451.]

Bill for a divorce by Laura Taber against Frank Taber. Decree for complainant.

Griggs & Harding, for complainant. Coult, Howell & Ten Eyck, for defendant.

STEVENS, V. C. This is a suit for divorce on the ground of adultery. The parties were married on March 31, 1897, by Rev. Dr. Owens, pastor of the East Side Presbyterian Church of Paterson. They continued to live together until the fall of 1902. After one or two temporary separations of a few weeks duration, during that fall, they finally separated on December 31, 1902. This suit was commenced in June, 1903.

The evidence relied upon to support the complainant's case consists of defendant's admissions, and the alleged presence of gonorrhea and syphilis, symptoms of which are said to have appeared shortly after the act confessed was committed. There is no evidence tending to show guilt outside of these. The defendant says that, while he admitted committing adultery with a prostitute in New York City, he, in fact, did nothing more than accompany her to her room; and he explains the presence of the disease that he admits he had by saying that it was not gonorrhea or syphilis, but a disease whose symptoms resembled gonorrhea and which he had had twice before in his childhood. The defendant's evidence was given with so much apparent sincerity that it necessarily produced a favorable impression. It is perfectly apparent that he was devotedly attached to his wife and child; that he sincerely repented of the wrong done them, by what he himself admits to have been a very disgraceful occurrence; and that he made extraordinary efforts to bring about his wife's return. Whether it would not have been better for the wife to have remained at his home, under the conditions to which they both appear to have assented, I shall not undertake to say. I have merely to decide the legal question.

After a careful consideration of the case, I am forced to the conclusion that the weight of the evidence is that defendant did commit adultery. The defendant owned a farm in the neighborhood of Ridgewood, which he himself cultivated. In the summer he and his wife were accustomed to take boarders. He appears to have become dissatisfied with this mode of life, and in the winter of 1901–1902 procured employment in New York as a salesman. He gave up this employment on March 29 or 30, 1902. The day before he left he says that, being tired, he stopped

at a music hall on Twenty-Third street, New York, and there became engaged in conversation with a young woman who sat next to him and who invited him to accompany her to her room, not far distant. To state the disgusting details is unnecessary. He went to the room with her, and after being there a very short time broke away without having had intercourse. His statement puts him in the attitude of one who, overcome with shame at his situation, had neither the ability nor inclination to indulge his passion. About two weeks after this time appeared a disease whose symptoms, it is admitted, were, in all respects, similar to those of gonorrhea, and he was actually treated by his physician, Dr. Vroom, for gonorrhea. In the following August and September there appeared some of the symptoms of syphilis, and he was actually treated by two physicians, Drs. Doty and Demund, independently, for that malady. Whether he had this latter disease in mild form is left doubtful by the evidence.

Without discussing the evidence at length, I shall briefly state why I think the defendant's account of the matter is improbable. He made a confession of adultery, not only to his wife, but to Rev. Dr. Owens, Mrs. Taber's pastor, who was called into a family consultation on the subject. Dr. Owens says: "I can only say that he admitted that he had been guilty of adultery, and that he had become infected by such conduct, and, consequently, he was under medical treatment." Still more explicit is the defendant's own account of what he told Dr. Owens. He testifies: "I said that I knew I had wronged my wife very dreadfully; that I had done so under great temptation, and was very sorry the moment it was over." The confession was not made without reflection, and in a moment of surprise. Six months had elapsed since the offense, and his malady, known to his wife as early as April, had become the subject of anxious consideration by her family. It was made at a time when the defendant was doing everything in his power to regain his wife, who had then left him, and was under a pressing necessity of telling the simple truth, if that which he now states were the truth. The occurrence as he now relates it was less disgraceful than that which he confessed to. If true as related, he would have stood forth as one who had been tempted and who had at the last moment resisted temptation and overcome it. Men under the stress of an impending calamity not infrequently seek to avert it by falsehood. It is, however, difficult to imagine that any man, in his senses, would resort to a falsehood which would involve him in misfortune, rather than tell the truth which would, at least, tend to free him from it, and which would, in any event, give him a legal right to the society of his wife and child.

There is another circumstance which must be adverted to. His confession was coupled with the mention of a friend of his by the name of Scott. This is his wife's version of the conversation on that point: "I said, 'Tell me truly, were you anywhere with your brother Ed. Taber?' He said 'No.' I said, 'Were you anywhere with Raymond Scott?' He didn't say anything. He merely burst out crying, and then said, 'I have been untrue to you.'" The defendant's version of this conversation is: "Then she tried to lay the blame for my going wrong on two other parties. I told her it was not the case in one instance, and in the other I didn't give any answer at all." The wife testifies that on March 29th Scott met him in the city. After most of the evidence had been put in, I stated that it would be proper to call Scott, and an adjournment was had which afforded an ample opportunity either to produce him or take his testimony on commission. No satisfactory explanation of why he was not examined has been given. The defendant does not say in his testimony that Scott accompanied him to the music hall, nor, on the other hand, can I find that he says, in so many words, that he went alone. In addition to the evidence of confessions is the presence of venereal disease. The defendant denies having had it. His suggestion now is that what he had was simple urethritis—the same disease that he had when a boy. It is a very singular coincidence that this disease should have broken out two weeks after the visit to the music hall. It is rather remarkable, too, that not only three of the doctors whom he consulted should have treated him for either gonorrhea or for syphilis, but that the defendant himself should have thought or feared, as he evidently did think or fear, that the disease was of a venereal character.

The defendant's counsel, in his argument, chiefly relied upon condonation. The pertinent facts are these: The presence of the disease gave rise to suspicion as early as April or May. He denied improper relations with any one. In June, the disease continuing, and the complainant becoming more uneasy, she left his room. At the end of August he made the confession. His wife did not leave his house until the end of September. She remained away until October 11th. On that day, at a family meeting, Rev. Dr. Owens having been called in consultation, she decided to return, but only on condition. The condition was, in the words of Dr. Owens, that he would not ask that his wife should come back and be a wife to him, but simply that she would remain in the house. She left him again, about October 20th, on a visit to her sister in Paterson. On November 12th, the defendant's sister was to be married at Patchogue, Long Island, where his mother lived. The complainant consented to go to the wedding, and it was arranged between them that they should spend the winter at

his mother's house at Patchogue, but still on the above-mentioned condition. At the last moment, however, Mrs. Taber refused to go there, because, as she says, he had, the day before, insisted that she should share his room; that she was doing him a great injustice in thinking that he then had any disease. She remained in Paterson until December 3d. During the interval between the wedding on November 12th and December 3d the defendant gave up farming and hired a flat in Brooklyn, where, his wife refusing to return to him, he began to keep house with his mother. During that interval two important letters were written, one by defendant to complainant, suggesting that he might, because of the separation, commit suicide, and the other by defendant's brother Edward, a New York attorney, to Irving Dey, a brother of complainant, threatening that, if complainant did not return, a disclosure of certain disgraceful conduct on the part of complainant's father might be made. The complainant says that she was so far operated on by these two letters and by her destitute condition that she resolved to return. Defendant says that she gave as her reason for returning that he had sent her, with an imploring letter, the child's winter coat. On her way to his Brooklyn residence she stopped at the home of defendant's brother-in-law, Dr. Northrop, a practicing physician. Dr. Northrop says, and in this all parties agree, that she expressly stipulated for two conditions. One was that if he ever had anything to do with any other women she would leave him, and the other was that they should sleep in different rooms. She remained at her husband's flat from December 3d to December 31st, and then left him. Her reason was, as she says, that he kept asking her to resume marital relations, and that her situation became unendurable.

Do these facts show condonation? In *Bernstein v. Bernstein*, Pro. Div. (1893) 302, it is said: "Condonation is a conclusion of fact, not of law, * * * and means the complete forgiveness and blotting out of the conjugal offense, followed by cohabitation." In an earlier case (*Dance v. Dance*, 1 Hagg. Ec. 794) Lord Stowell had used language very pertinent to the case in hand. "The parties had separate beds. * * * They never, as far as appears, bedded together afterwards, and therefore what has been said of condonation is quite of the question. There must be something of a matrimonial intercourse presumed in order to found it. It does not rest merely on the wife's not withdrawing herself. But the court does not hold condonation so strictly against the wife from whom it looks for a long-suffering and patience, not to be expected nor tolerated in the husband." In *Goeger v. Goeger*, 59 N. J. Eq. 15, 45 Atl. 349, V. O. Emery used the following language: "Forgiveness of the offense, whether it be evidenced by words or acts, is not necessarily legal condonation, which requires the forgive-

ness to be followed in fact by a reconciliation, in which the wife is reinstated to such conjugal cohabitation or connubial intercourse as may be adapted to the circumstances of the parties." It has been often held that remaining in the same house after knowledge of the offense does not constitute condonation. *Westmeath v. Westmeath*, 2 Hagg. Ec. Supp. 1, 118; *Jacobs v. Tobelman*, 36 La. Ann. 842; *Harnett v. Harnett*, 59 Iowa, 401, 13 N. W. 408.

These expositions of the meaning of condonation show clearly that it is something more than forgiveness, in the sense of ceasing to harbor resentment. It is not only a blotting out of the offense from the mind and heart of the person forgiving, but a restoration of the offender to his former position. If the wife says: "I will cease to entertain feelings of resentment against you for the wrong you have done me. I will go back and be your housekeeper, but I will not maintain wifely relations with you"—it is manifest that the condonation is not complete. Great stress was laid by counsel upon a letter written by the complainant to Charles Taber on the day she finally left her husband's home. She says: "Every one supposed that wifely relations were not to be thought of, at least for the present;" and further on: "If your brother had acted like a man about things, instead of making such numerous propositions or any proposition at all, for the present at least, yes at all—for I was the one propositions should have come from—it would have changed things." This letter, fairly interpreted, seems to me to militate against counsel's position. It shows very plainly, first, that there were to have been no wifely relations for the present; and, secondly, and this is the important point, that the complainant had reserved to herself, and to herself alone, the decision whether there should be any in the future. It is this explicit reservation on her part which precludes the idea of condonation. It might perhaps be open to argument whether it must be shown that there has been an actual resumption of sexual intercourse; whether the condonation might not be complete where, the parties being apart, there was forgiveness coupled with an agreement to live together again and to resume sexual intercourse when, for example, the family physician should pronounce all danger of infection over, and where the parties actually came together again in pursuance of such an agreement. No such question is to be dealt with here, and I express no opinion about it. There was no agreement for the resumption of intercourse, present or future. On the contrary, the agreement was that there should be no "wifely relations, at least for the present," and that whether there would be in the future would rest entirely with the wife.

I think the decree must be in favor of complainant.

VAN HOUTEN v. HALL et al.

(Court of Chancery of New Jersey. Oct. 20, 1906.)

APPEAL—TRANSFER TO APPELLATE COURT—PROCEEDINGS IN TRIAL COURT—JURISDICTION.

The Court of Chancery entering a final decree of distribution in a suit construing a will and determining the rights of beneficiaries thereunder has no jurisdiction pending an appeal from a part of the decree to permit, on the petition of appellants, the enforcement of the other part of the decree, but an application therefor should be made to the Court of Errors and Appeals, which has jurisdiction of the subject-matter of the suit.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, § 2210.]

Bill by Rachel Van Houten against Joseph C. Hall and others for distribution of the residue of the estate of Rachel Van Houten, deceased. From a decree of the Court of Chancery (64 Atl. 460) ordering distribution, certain of the parties appeal. Heard on petition to permit enforcement of a portion of the decree. Petition denied.

Preston Stevenson, for petitioner. Robert Williams, for respondents.

BERGEN, V. C. From the final decree of this court ordering the distribution of a legacy under the will of Rachel Van Houten to be made per stirpes, and not per capita, between the devisee of the child of her deceased son and the children of her daughter, the children have appealed. The appellants now petition this court to permit the enforcement of the decree in their favor to a substantial extent, consenting that the devisee of the child of the son may participate in such distribution, but only to the extent she will be entitled should the appellants succeed in the Court of Appeals. In support of their petition the petitioners argue that, in any event, they will be entitled to at least what has been decreed to them by this court, and that, in carrying out the decree, the status will not be changed to the prejudice of the appellees. I can find no precedent permitting such a partial execution of a decree in a cause removed to, and now within, the jurisdiction of the Appellate Court by the act of the party asking its partial enforcement in this court. The purpose of the proceeding in which the decree appealed from was made was to determine the rights of numerous parties to a fund, the distribution of which requires the construction of a last will and testament. What view the appellate court may adopt it would not be proper for me now to anticipate, for it might reach a conclusion, not only different from the views expressed in support of this decree, but also at variance with the claims of the appellants.

In addition to what I have stated, I am of the opinion that during the pendency of this appeal this court ought not to partially execute it in behalf of one who, by his own act, has removed the proceedings to another

jurisdiction; for, if the right to enforce this decree is not effected by the appeal, it would apply to the whole decree as well as to a part of it, and to execute the entire decree would manifestly destroy the subject of the appeal. *Penna. R. R. Co. v. Nat. Docks Ry. Co.*, 54 N. J. Eq. 647, 35 Atl. 433. That these petitioners are in great need of the money, the receipt of which they have postponed to a future time by their own appeal, is no reason why this court, if it has the power, should partially execute the decree in favor of those who complained of it. If the executors or trustees choose to act upon the decree made in this court, and to pay out part of the sum to the present applicants, on the ground that they will be entitled to at least that much on any decree which would be made in the Court of Appeals, they can do so taking that risk. The present application should be made to the Court of Appeals, which now has jurisdiction of the subject-matter, for any order that this court might make would itself be subject to appeal, thus creating a confusion that ought to be avoided, and I must decline to make any order for a partial distribution, except with the consent of all the parties interested in the fund.

(75 N. J. L. 32)

HART v. DENISE et al.

(Supreme Court of New Jersey. June 10, 1907.)

TRIAL—COMPROMISE—VERDICT.

In an action for services rendered, where the court instructed the jury that they could fix under the evidence what they thought was fair and right, that the plaintiff was allowed less than he sought, and more than the defendant claimed he should have received, was insufficient to show that the verdict was by way of compromise.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 740.]

Action by John Hart against Lewis A. Denise and others. Verdict for plaintiff. Rule to show cause discharged.

Argued February term, 1907, before FORT, HENDRICKSON, and PITNEY, JJ.

John Sykes, for the rule. Barton B. Hutchinson, opposed.

FORT, J. This cause was tried at the Mercer circuit before the court and a jury, with a verdict for the plaintiff. The action was for compensation for services rendered to Louisa A. David, deceased, in her lifetime, by Martha Hart, as nurse and attendant. The plaintiff was the assignee of the claim of Martha Hart.

The proofs seem to show services, and the amount of the verdict was much less than the amount of the plaintiff's alleged claim. The record does not show any exceptions to evidence or to the charge, and but a single ground is relied upon in the brief of the counsel for the applicant for this rule, namely: "(7) The damages awarded by the verdict are not based on any sound reasoning or up-

on the evidence in the case, but were fixed by the jury by way of compromise between the plaintiff and defendant." There is nothing before the court in the record to sustain this specification. The court expressly told the jury that the suit was for the value of services, and that they could fix under the evidence what they thought was fair and right. They did not allow the plaintiff all his claim. They evidently thought it excessive, and, under the proof, they had a right to so find. There was no ground for saying that the verdict was a compromise verdict other than the fact that the plaintiff was allowed less than he sought and more than the defendant claimed he should receive.

The rule to show cause is discharged.

(72 N. J. Eq. 324)

KELSEY et al. v. DILKS et al.

(Court of Chancery of New Jersey. May 8, 1907.)

EQUITY—PETITION TO OPEN DECREE—WHEN MAY BE MADE.

A petition to open a final decree for error apparent in the record must be brought within the time allowed for an appeal or writ of error, where the complainant has been under no disability during that period.

Petition by Orlando Kelsey and another against Sarah Dilks and others to open a final decree.

See 63 Atl. 1118.

T. J. Middleton & J. J. Crandall, for petitioners. J. Boyd Avis, for defendants.

LEAMING, V. C. I am unable to extend to petitioner the relief which she seeks. The petition is to open a final decree, which was enrolled more than three years ago. Petitions of this nature have in this jurisdiction largely superseded bills of review, and the simplicity of the procedure goes far to recommend it. *Kerans v. Kerans* (N. J. Ch.) 62 Atl. 305; *White v. Smith* (N. J. Ch.) 65 Atl. 1017. But the principles which control the court in granting or withholding relief appear to remain unchanged. I am unable to find any authority to justify a departure from these well-established principles. It has been uniformly held in England and in the American states that a bill of review for error apparent in the record must be brought within the time allowed for an appeal or writ of error in all cases where the complainant has been under no disability during that period. *Story's Eq. Pl.* § 410; *Daniel's Ch. Pl. & Pr.* § 1580, and note; 3 *Enc. Pl. & Pr.* p. 583; *Fletcher's Eq. Pl. & Pr.* § 932; 1 *Foster's Fed. Pr.* § 354. No reason suggests itself for a departure from this rule where the relief is sought by petition, instead of by bill of review.

In the case at bar the relief sought is based wholly upon matters of record. No newly discovered evidence is claimed. It is claimed that the court erred in excluding certain evidence, and that the pleadings do not justify

the decree entered. These are matters touching which the law defines the period of three years for review by appeal, and that period has been uniformly adopted as a period beyond which a bill of review cannot be entertained, except for newly discovered evidence, or in cases of disability.

I am obliged to discharge the order to show cause, and dismiss the petition, for the reasons stated.

(76 N. J. L. 224)

OSBORN v. GURTNER et al.

(Supreme Court of New Jersey. June 10, 1907.)

APPEAL—REVIEW—OBJECTIONS NOT RAISED BELOW.

On appeal from the district court this court will not consider an alleged error not in any way brought to the attention of the trial judge, and not shown, in the state of the case, to have been in any way raised before him.

[Ed. Note.—For cases in point, see *Cent. Dig.* vol. 2, Appeal and Error, §§ 1141-1160.]

(Syllabus by the Court.)

Appeal from District Court of City of Newark.

Action by Ellen N. Osborn, executrix, against Theophile E. Gurtner and Selma B. Gurtner. Judgment for plaintiff, and defendants appeal. Affirmed.

Argued February term, 1907, before GARRISON, SWAYZE, and TRENCHARD, JJ.

George H. Peirce, for appellants. Phillip J. Schotland, for appellee.

TRENCHARD, J. This is an appeal from a judgment of the second district court of the city of Newark. The action was for rent of premises No. 482 Broad Street, Newark, N. J., alleged to be due to the plaintiffs from the defendants. The cause was tried before the judge without a jury, and a judgment for plaintiff rendered.

The only reason urged for reversal is the refusal of the trial judge to render a judgment for the defendants. An examination of the state of the case shows that the motion for judgment for the defendants specified no grounds for the allowance of such motion, and therefore raised no legal question for the determination of the trial court. *Garretson v. Appleton*, 58 N. J. Law, 386, 37 Atl. 150; *Hopwood v. Atha & Illingsworth Co.*, 68 N. J. Law, 707, 54 Atl. 435; *Zelliff v. North Jersey Street Railway Co.*, 69 N. J. Law, 541, 55 Atl. 96. On appeal from the district court this court will not consider an alleged error not in any way brought to the attention of the trial judge, and not shown, in the state of the case, to have been in any way raised before him. *O'Donnell v. Weller*, 72 N. J. Law, 142, 59 Atl. 1053; *Hanson v. Pennsylvania Railroad Company*, 72 N. J. Law, 407, 60 Atl. 1101; *Frisby v. Thomas Jefferson Council* (N. J. Sup.) 64 Atl. 1053.

The result is that the judgment below should be affirmed.

(72 N. J. Eq. 506)

GILLEN v. HADLEY et al.

(Court of Chancery of New Jersey. May 15, 1907.)

1. EQUITY—JURISDICTION—RETENTION OF JURISDICTION ACQUIRED — ALTERNATIVE RELIEF.

A complaint in a Court of Chancery by cestui que trust under a will alleged that defendants as trustees under the will had received money and property belonging to the estate and had never accounted therefor, and asked that they make a discovery of all property which had come into their possession as trustees and that they be required to file an account showing all their transactions and a schedule of all property in their possession. Subsequently to filing of the bill, but prior to the service of subpoena on defendant trustees, they filed with the Prerogative Court an account purporting to show all their transactions, as such trustees, to several items of which exceptions were then pending, and these facts were pleaded to the action in chancery. It did not appear that any of the parties knew of the proceedings of the others prior to the service of the subpoena on defendants. *Held*, that the jurisdiction of the Chancery Court had been properly invoked, and that the court would maintain jurisdiction, since it had first taken it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Equity, §§ 103–118.]

2. WILLS—ACTIONS TO CONSTRUCT—STATUTORY PROVISIONS.

In an action in chancery, if a question arises as to the validity of a devise in a will, and the reading of the clause in question does not settle the matter, the court may hold the bill until an action at law is brought to establish the title, or it may refer the question to a court of law for an opinion thereon, as provided by Chancery Act 1902, § 79 (P. L. 1902, p. 537).

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, §§ 1665–1670.]

3. EQUITY—JURISDICTION—GROUNDS.

A bill in chancery by a cestui que trust under the will of a testator alleged that temporary annuities given by the will had ceased by the death and the attaining of majority of the beneficiaries thereof, and that all of the temporary purposes for which the trustees were directed by will to hold certain real estate had ceased and been determined, and that a certain devise in trust was void, because the ultimate disposition of the residue violated the rule against perpetuities, and that complainant was entitled to the same as an heir of testator; and in addition to a general prayer the bill asked that the executors give a full account of the estate and make discovery of their transactions as such, and as to what sums of money had been realized from the sale of real estate, and asked that the portion of the will attempting to create a perpetuity be declared null and void, and that the oratrix receive her share of the estate of the decedent. *Held*, that the bill made a case within the jurisdiction of the court independent of the title to the real estate.

Action by Jane Elizabeth Gillen against Mary Eliza Hadley and others. Plea and demurrer to the complaint overruled.

This is the second suit in this court between these parties. It was commenced by bill filed on the 7th day of September, 1906. The complainant is one of the children of Henry P. Simmons, late of the city of Passaic, and one of the cestui que trusts under his will. The defendant Mary Eliza Hadley and her husband, Jacob F. Hadley, William

Nelson, and Collin R. Wise are the executors named in said will. Mrs. Hadley is one of the children of said testator, and she and her husband are named as the trustees under said will. Their duties and powers as such are distinct from their duties as executors. The will of Mr. Simmons was dealt with by the Court of Errors and Appeals in *Simmons v. Hadley*, 63 N. J. Law, 227, 43 Atl. 661. Subsequently Mr. Nelson, the active executor, prepared and procured to be passed by the Prerogative Court an elaborate joint account of the dealings of the executors, which account was subsequently repudiated by Mrs. Hadley, as executrix, in a bill filed by her against Nelson, which resulted in this court adversely to Nelson, and to a setting aside and readjustment of the account, as between the executors, up to that date. The complainant herein was a party to that suit, and co-operated with her sister, Mrs. Hadley, in attacking the accounting in the Prerogative Court. Henrietta Simmons, the plaintiff in *Simmons v. Hadley*, supra, is one of the defendants herein. Mrs. Howe, the fourth daughter of the testator and one of the beneficiaries under his will, died before the filing of the present bill, leaving no children, and testate of a will in favor of her husband, who, however, had predeceased her.

Sherrerd Depue, for complainant. Edwin C. Adams, for defendants.

PITNEY, Advisory Master (after stating the facts). This is a suit by a cestui que trust against a trustee. The trust was created by a will, and the trustees have been in possession of the estate, real and personal, eight or more years before bill filed. The subject of the trust is, at present, both real and personal estate. The will gave and devised all of the testator's property, with certain exceptions, to the trustees in trust for the purposes of his will with power of sale. That gift in trust and the objects and purposes of the trust are set forth in the tenth paragraph of his will and 13 subdivisions of it. They are stated sufficiently for present purposes in *Simmons v. Hadley*, supra. The fifth paragraph of the bill alleges that Mrs. Hadley and her husband have, as trustees, from time to time, collected and received moneys and other property belonging to the estate, the exact amount of which is unknown to the complainant, and have never accounted to the complainant or to any court respecting the same. The third paragraph of the prayer is that Mrs. Hadley and her husband may make discovery of all money, property, books, and papers of every description which have come into their possession or the possession of either of them, as trustees under the will, etc., and that said trustees may be required to file an account in this court, showing all their transactions as such trustees, and what sum or sums of money have been received by them belonging to said estate, together with

a list or schedule of all the real estate or personal property now in their possession or claimed by them as trustees under said will. After demurring to all the bill except the fifth paragraph of the statement of the bill and the third paragraph of the prayer, above recited, the defendants Mrs. Hadley and her husband pleaded to the statement and prayer last mentioned, "that on the 13th day of September, 1906, they filed with the Prerogative Court an account showing all their transactions as such trustees, what sum or sums of money had been received by them belonging to the said estate, and what payments from such moneys had been made by them in fulfilling their trust as trustees under the said will; that the register of said Prerogative Court duly audited and stated the said account, and that legal notice of the proposed settlement of said account was given, as appears by affidavits filed in said Prerogative Court; that one Henrietta Simmons, one of the defendants in this suit, filed exceptions to four items in said account, and that the Ordinary, by an order made on the 16th day of October, 1906, referred said exceptions to a master of this court to take proofs thereon and report his conclusions to said Prerogative Court, and said exceptions have not yet been finally disposed of." By comparing the plea with the prayer it will be observed that the plea is not so broad as is the prayer, which is based on other allegations in the will besides that in the fifth clause.

It is further to be observed that the bill was filed in this court seven days before the account was filed in the Prerogative Court, and that the proceedings set up in the plea as being taken in the Prerogative Court upon the exceptions were taken on the 16th day of October, while the service of the subpoena upon Mrs. Hadley and her husband was acknowledged by their solicitor as of the 28th day of September previous thereto. There is nothing in the papers to show that the complainant had notice at the time of the filing of her bill that the defendants were preparing their account for the Prerogative Court; nor, on the other hand, to show that the defendants, when they filed their account, knew of the filing of the bill. It thus appears that the complainant had invoked, in a proper manner, the jurisdiction of this court to take cognizance of this accounting before the defendants had actually filed their account in the Prerogative Court. The jurisdiction of this court is undoubted, and the general rule is that if it first takes jurisdiction it will maintain it to the exclusion of the regular probate courts. On the other hand, this court will not withdraw an accounting already pending, and thereby interfere with the jurisdiction of either of the other courts after they have once entertained it, except for special reasons. But for special and sufficient reasons this court will arrest a proceeding in the Prerogative Court or the Orphans' Court in a given case, and assume

exclusive jurisdiction. In the present case I find reasons in the circumstances set forth in the bill for the conclusion that it is altogether better that the whole subject should be dealt with in this court, and I will therefore advise that the plea be overruled without prejudice to the defendant to set up the same matter by their answer. The complainant is clearly entitled to that part of the prayer for discovery which is not covered by the plea. There is no prayer in the bill for an injunction restraining proceedings in the Prerogative Court, and no restraint of that character has been applied for.

We come now to the demurrer. For present purposes the statement of the contents of the will found in the report of *Simmons v. Hadley*, supra, is sufficient. The bill alleges that the temporary annuities given by the will to the daughter, Mrs. Howe, and to the grand-daughter, Miss Gillen, mentioned in the opinion in *Simmons v. Hadley*, supra, have ceased by the death of Mrs. Howe and the arrival at the age of 21 years by Miss Gillen, and that all the temporary purposes for which the trustees were directed by the will to hold real estate has ceased and been determined. It was upon the continued existence of these temporary purposes that the case of *Simmons v. Hadley*, supra, was decided in favor of the defendant by the Court of Errors and Appeals, and the bill alleges that the original defect in the devise revives, and that the devise is void because the ultimate disposition of the residue violates the rule against perpetuities in that it extends the ultimate division of the property to a period more than 21 years beyond the life of a person in being, and that the complainant, as an heir at law of her father and of her sister, Mrs. Howe, is entitled to the same; and it prays, in addition to the general prayer for answer without oath, that the four executors may give a full account of the estate, and make discovery of all their transactions as executors and what sums of money have been realized from the proceeds of the estate or from the proceeds of the sale of any of the real estate. This prayer is not covered by the plea. The fourth prayer is "that so much of the will as creates or attempts to create a trust under the tenth paragraph of the will [in which the offensive provision is contained] may be declared to be null and void and as of no effect as a testamentary gift, bequest, or devise of the property therein referred to; and that your oratrix may receive her share of said real and personal estate of decedent." The fifth prayer is that the defendants Hadley may be restrained from making any farther sales of real estate under the power given to them, or from giving any deed for the purpose of confirming such sales and for other relief. To this part of the bill the defendants demur generally for want of equity.

The ground of demurrer is thus stated in the written argument of the defendants:

"An heir at law who claims a mere legal estate in real property, when there is no trust, is not allowed to come into a court of equity for the mere purpose of obtaining a mere construction of the provisions of the will." And in anticipation of the claim on the part of the complainant that the trustees have already converted a part of the real estate into money the brief contains this further point: "Upon the principles of equitable conversion the proceeds of the sale of real estate by the trustees are to be regarded as real and not personal property for the purposes of this bill." The theory of the counsel for the defendants seems to be that complainant must first establish at law their title to the property, and cannot use this court directly or indirectly for that purpose. But the leading case which they cite—*Bowers v. Smith*, 10 Paige (N. Y.) 193—contains this clear statement by Chancellor Walworth on the part of the court: "So, also, if the real estate of the testator is devised to a trustee upon distinct and independent trusts, some of which trusts are valid and others invalid, there is a resulting trust in favor of the heir at law as to so much of the property as is not legally and effectually disposed of by the will, where the interest of each is not turned into a legal estate by the provisions of the revised statutes. The cestui que trust in such cases, also, may file a bill in this court to have his rights as cestui que trust settled and ascertained, and to have the trusts of the will carried into effect so far as they are valid and effectual. And, where there is a mixed trust of real and personal estate, it frequently becomes necessary for the court to settle questions as to the validity and effect of contingent limitations in a will to persons who are not in esse in order to make a final decree in the suit, and to give the proper instructions and directions to the executors and trustees in relation to the execution of their trust—citing authorities. But I am not aware of any case in which an heir at law of a testator, or a devisee, who claims a mere legal estate in the real property, where there was no trust, has been allowed to come into a court of equity for the mere purpose of obtaining a judicial construction of the provisions of the will." And that definition or delineation of the jurisdiction of the court covers this very case.

The question is whether the complainant has an adequate remedy at law. The bill is not filed avowedly for the construction of the will. Its object is to prevent further dealing by these trustees, with the real estate in question and a recovery from them of the estate now in their hands. The necessity for preventing further sales and recovering what has already been sold is the ground of the action so far as demurred to. The case of *Torrey v. Torrey*, 55 N. J. Eq. 410, 36 Atl. 1084, was the case of a woman who filed a bill against her own children, claiming that by the true construction of

her husband's will she was the absolute owner in fee simple of all his property, including certain lands, and asking the court to make a decree to that effect against her own children, infants, and the court refused. *Fahy v. Fahy*, 58 N. J. Eq. 210, 42 Atl. 726, is precisely the same case as *Torrey v. Torrey*, supra. *Palmer v. Sinnickson*, 59 N. J. Eq. 530, 46 Atl. 517, was a bill in form to quiet title, but lacked all the elements of jurisdiction for that purpose. The complainants desired the opinion of the court in the construction of a will for the purpose of establishing their title to a sum of money lying in a bank. The demurrer was naturally and necessarily sustained. In *Hoagland v. Cooper*, 65 N. J. Eq. 407, 56 Atl. 705, the chancellor, in an elaborate opinion, goes over the whole ground. There were in that case several specific questions submitted involving the construction of several parts of the will. He says: "The Court of Chancery, when called upon to exercise its judicial functions in determining whether the relief sought by a suitor should be granted, and when the question whether such relief should be granted involves the construction of a will, has undoubted power, and its duty is to construe the will. The peculiar jurisdiction of this court over trusts and over those charged with trusts frequently requires it, upon the instance of such trustees or those interested, to give directions for the conduct of such trustees in the administration of the trust, and when the trust is created by will, incidentally, the exercise of this jurisdiction to direct involves the construction of the will. Mr. Pomeroy, indeed, declares that the doctrine in harmony with principle and sustained by the weight of authority in this country is that the special equitable jurisdiction to construe wills is a mere incident of the general jurisdiction over trusts, and that a court of equity will never entertain a suit brought solely for the purpose of interpreting the provisions of a will without any further relief." The learned Chancellor then cites all the New Jersey authorities. As examples of the proper exercise of the power, he cites *Benham v. Hendrickson*, 32 N. J. Eq. 441, and *Dusenberry v. Johnson*, 59 N. J. Eq. 336, 45 Atl. 103. The Chancellor then sought in the case before him for ground for the exercise of jurisdiction by the court, and found one such matter, and examined carefully and construed the will as to it, and finally decided against the complainant, who was a substituted administrator, and held that the relief ought not to be granted because it would be inequitable to do so. He then proceeds, in the latter part of his opinion, to deal with a request made of the court in that cause to declare its opinion as to the effect of the will upon the real estate of the testator, of which the testator died seised. This he declined to do, and added: "In the absence of some specific equitable relief which this court can give, it

would be impertinent for it to express an opinion which would not be binding upon a court of law in an action of ejectment and which could not be enforced by any decree of the court." There was in that case no relief asked for as to the real estate as to the title to which under the will the bill asked the opinion of the court. A still more recent case, decided in 1906, is *Goetz v. Sickie* (N. J. Ch.) 63 Atl. 1116, decided by Chancellor Magle. There the bill was filed by the executors, who took the real estate in trust, and under the directions of the will they were collecting rents of a house and paying them to the widow and two daughters, and the bill stated that those daughters were claiming that the executors had no right to hold the property and collect the rents, contending that the devise in question was wholly void because in contravention of the rule against perpetuities. The prayer was for a decree that the trusts may be performed and carried into execution, and that all necessary directions may be given for that purpose, and a prayer for further relief. The children and all persons living and having an interest under the will were made parties. The jurisdiction was put upon the ground that the trustees were entitled to the direction of the court. The Chancellor held, with reluctance, that he had no authority to grant such a decree, saying that it was plain that what complainants sought is not a direction as to the performance of their duties as trustees, but to discover whether they are in fact trustees and therefore charged with any duties as such, from which it follows that they were seeking to induce the court to decide the question of the title to land, and dismissed the bill.

The difference between that case and this is that here a devisee, who is also an heir at law, is seeking not only the proceeds of sale of the land already made by the trustees to which she is not entitled if there was a valid devise of the land to the trustees, but also to prevent a further execution of the power of sale. And if the complainant's contention that the devise is void for the reason stated, then it is eminently proper that the bill should be retained and the relief granted. Turning to the bill itself, we find that it states and charges distinctly that the devise is void, and gives the language in the will which it alleges creates the perpetuity. Now it is possible that the bare reading of that clause in connection with the well-settled rules of law would leave the matter not open to doubt, and the court may find itself unembarrassed by any question in that respect. In short, there may be no question to solve. But, if the court finds itself embarrassed, there remain two modes for the relief thereof. In the first place, the court may do as it does in cases where the title to land is questioned in a suit for partition. It may hold the bill until an action at law is brought to establish the title; or, in the sec-

ond place, it may refer the question to a court of law for an opinion thereon under the seventy-ninth section of the chancery act of 1902. (P. L. 1902, p. 537).

Upon the whole case, then, considering that the bill makes a case clearly within the jurisdiction of the court, quite independent of the title of the real estate, and that it is possible that the court will not be embarrassed with any doubt as to title when it comes to the hearing of the cause, and, further, that this is an action by the cestui que trust against the trustee, and that, if, in the course of it, any embarrassment does arise out of a doubt as to the title to land set up by the complainant, the court will find no difficulty in procuring that doubt to be settled by a court of law, I am of the opinion that the demurrer should be overruled, and will so advise.

(72 N. J. Eq. 740)

TUITE et al. v. TUIITE.

(Court of Chancery of New Jersey. April 11, 1907.)

1. TRUSTS—EXPRESS TRUSTS—EVIDENCE—SUFFICIENCY.

Evidence held insufficient to justify a finding that defendant purchased certain real estate in her own name under an agreement to hold the same in trust for herself and complainants, her minor children.

2. PARTNERSHIP—FORMATION—EVIDENCE.

Defendant, on the death of her husband, continued his junk business, with the assistance of three of her six minor children, the eldest of whom was a girl of 16 and the youngest only a month old. She collected all the money, paid all the bills, and employed such help as was necessary, and from the profits purchased certain real estate in controversy. Held, insufficient to establish a partnership between defendant and her children, under which they were entitled to an equal share in the profits, while defendant was alone responsible for losses.

3. PARENT AND CHILD—CONTRACTS—CONSIDERATION.

The mother being entitled to the earnings of the children during minority, there was no consideration for such an agreement of partnership if one was made.

4. ADMINISTRATOR'S EXECUTRIX DE SON TORT—ACCOUNTING.

Where, after the death of defendant's husband, she assumed control of his estate without any administration being declared thereon, she was chargeable with the value of the property derived from her husband, less all payments made by her with which a lawful administrator might have been credited, under the express provisions of Gen. St. vol. 2, p. 1426, § 3.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 22, Executors and Administrators, §§ 2591, 2592.]

Bill by Peter J. Tuite and others against Mary J. Tuite, to decree a trust of certain lands held by defendant for the benefit of complainants. Decree for defendant.

This is a bill filed by Della, Peter, Ellen, and Ann Tuite against Mary J. Tuite. Mary J. Tuite is the mother of the four complainants. The father was Michael J. Tuite. He died on the 9th of February, 1885, in-

testate, leaving at that time the widow aforesaid and six children, one of whom, Sarah, at the time of her father's death was 14 years of age, died on the 22d of January, 1888, and another of whom, Michael, was born in January of 1885, and died in December of the same year.

The bill charges that at the time of the death of Michael J. Tulte he was engaged, in the junk business in Jersey City, which, at that time was worth about \$3,000; that no letters of administration were taken out, but Della, the eldest child, and Peter, the next eldest, took charge of the business, and with the assistance of Sarah until her death conducted the same; that the business was profitable, and the income therefrom was invested in real estate in Hudson county, with the understanding and agreement that such real estate should be the joint property of the complainants and the widow Mary J. Tulte, but that for the purpose of convenience the title to all of such property should be and was taken in the name of Mary J. Tulte, she to collect the rents and income, and after paying the taxes and other expenses to divide the balance among the complainants and herself in equal proportions.

It is charged that Mary J. Tulte agreed to hold the property in trust for the complainants and herself in equal shares; and it is prayed that she be decreed to be trustee, and that each of the complainants is entitled to a one-fifth part of the real estate, and to a one-fifth part of all the rents, issues, and profits thereof, less the expenses and disbursements in connection therewith.

The answer denies any agreement or arrangement concerning the said property, and denies that the defendant is a trustee for the complainants, and avers that all the property now standing in the name of Mary J. Tulte is her own unqualifiedly, and that the complainants have no interest or estate whatsoever therein.

James P. Northrop and Tumulty & Cutley, for complainants. Black & Drayton, for defendant.

GARRISON, V. C. (after statement of issues). Michael J. Tulte married the defendant in the year 1868. He engaged in several businesses thereafter until 1877, in each of which he was unsuccessful, owing to his habits with respect to drinking. In 1877 he started in the junk business in a very modest way. He still continued to drink, and frequently became incapacitated therefrom, during which periods he transacted no business. His wife always was an active aid to him in his business. They managed to lay by a little money, and in October of 1883 two lots of land, costing less than \$400, were purchased in the name of the wife. This property was undoubtedly hers, and the charges in the bill concerning it utterly failed of proof.

Michael J. Tulte was ill for a considerable

time before his death, and at the time of his death on the 9th of February, 1885, did not leave much property. He had no real estate. Whatever he had was the accumulated junk in the lower part of the house in which they lived, and the horses and wagons used in the junk business. There is considerable dispute between the witnesses for the respective parties as to the amount and value of this property, but it is obvious that it was not great. I am inclined to the opinion that \$1,000 is an ample but not accurate estimate of the value of all the property that he left.

No administration was taken out upon his estate. At the time of his death the children were respectively aged as follows: Della sixteen, Sarah fourteen, Peter twelve, Ellen eight, Ann three years, and Michael one month.

The junk business was continued; the widow taking out the license required by law in her own name. Men were hired to go out on the wagons, and were given money with which to buy junk, which was then brought to the house where the parties lived, was there sorted, if it required sorting, as the rags and other material of that character did, and was then sold to dealers in the different classes of material.

Della both before and after her father's death engaged in sorting the rags. Sarah for a time sorted, but almost immediately after her father's death ceased doing this and engaged in work about the house. Peter went out on one of the wagons with the men and helped the best he could. The others were too young to do anything.

The girls were sent to school, some of them for short periods, and others for considerable periods, and two of them at least were fairly well educated, that is, Ellen and Ann. All of the children lived at home with the mother, and she paid all of their expenses of maintenance and education. The business was under the direct management and control of the mother, and what moneys she received therefrom she invested in the real estate described in the bill.

I do not find any evidence to support the charge of the bill that there was any agreement or understanding between the mother and the children that she was trustee for them with respect to the real estate purchased by her in her own name from the profits of the business. I think it would waste time to either analyze the evidence or cite authorities for what, to me, is so plain a situation.

I therefore conclude that the complainants are not entitled to relief on the case made by the bill.

The testimony of the complainants, while it did not refer to or concern in any way any agreement with the mother by which she was to act as trustee for them, did seek to show that there was a general partnership agreement between the mother and all six of

the children, and that by the terms of the said partnership agreement the business was to be carried on and the profits were to be divided equally among all of the partners. They seek to show that this agreement was first entered into immediately after the father's death in 1895, at which time the eldest child was 16 years old, and the youngest one month.

The law with respect to the proof of partnerships *inter sese* will be found in *Hallenback v. Rogers*, 57 N. J. Eq. 199, 40 Atl. 576 (Grey, V. C., 1898), affirmed 58 N. J. Eq. 580, 43 Atl. 1098. But the facts in the case at bar do not, in my judgment, make it necessary to devote much time to the consideration of such principles. I utterly failed to find any credible evidence upon which any finding of a partnership could rest. It passes belief that a mother would enter into a partnership with her own children (the eldest of whom, a girl, was 16 years, and the youngest of whom was one month old), and would agree that each should have an equal share of the profits, while she, so far as they allege, was alone responsible for all the losses.

Furthermore, there was no possible consideration for such an agreement. The mother was entitled to the earnings of her children during their minority. *Campbell v. Campbell*, 11 N. J. Eq. 268 (Williamson, Ch., 1856); *Osborn v. Allen*, 26 N. J. Law, 388 (Sup. Ct. 1857); *Furman v. Van Sise*, 56 N. Y. 435, 15 Am. Rep. 441 (1874). And if they worked for her under her direction and control, they but did their duty to her, and there is therefore no possibility of importing any consideration into any such agreement as they allege was made. Upon the theory, therefore, that there was a partnership between the complainants and the defendant, I find that complainants could not succeed, even if they amended their bill by appropriate allegations to charge such an agreement.

It is proven that there was no administration taken out upon the estate of Michael J. Tuite, and that whatever personal property he possessed at the time of his death was taken possession of by his widow, the defendant. The children, of course, were entitled to two-thirds of the value of such property after the debts and administration expenses of the decedent were paid. Undoubtedly the defendant is accountable for the children's share of the property which she thus possessed herself of at that time. It may be that, if she used the money derived from this property for their support, such expenses will be allowed to her. *Pyatt v. Pyatt*, 46 N. J. Eq. 285, 18 Atl. 1048 (Ct. Er. 1889).

Under our statute (title "Executors and Administrators," Gen. St. vol. 2, p. 1426, § 3) she is chargeable with the value of all such property, less all payments made by which a lawful administrator might have been credited with under the laws of this state.

She was not proceeded against in this case

as an executrix *de son tort*, and no personal representative of the decedent is a party hereto, and the frame of the bill is not such as to raise the proper issues and secure appropriate relief from her as such. Since the estate is very small, and considerable expense has been incurred by the proceedings in this present suit, and much testimony has been taken which will be available in such an accounting, if one is to be had, I have determined to permit the complainants, if they so desire, to move to amend their bill so as to seek an accounting from this defendant for the property of Michael J. Tuite which came into her hands at the time of his death, making a representative of his estate a party, if they shall be so advised. As to this see 1 *Daniell's Ch. Pr. & Pl.* *p. 319; *Flagler v. Blunt*, 32 N. J. Eq. 521 (Runyon, Ch., 1880); *Jenkins v. Freyer*, 4 Paige, Ch. (N. Y.) 47.

If the complainants do not move to amend their bill within 10 days after the date of the filing hereof, then I will advise a final decree dismissing this bill, with costs.

BOOTH et al. v. YENNEY et al.

(Court of Chancery of New Jersey. May 17, 1907.)

VENDOR AND PURCHASER—BONA FIDE PURCHASERS—EVIDENCE—SUFFICIENCY.

In an action for specific performance, where the uncontradicted testimony of other witnesses as to admissions established the rights of plaintiff as against a defaulting defendant who had purchased the property in question, and her own testimony, if competent after defaulting, showed that she knew of the controversy between plaintiff and the principal defendant and that there was an agreement between them for the purchase of the property, though she understood that plaintiff had forfeited her right, the defaulting defendant was not an innocent purchaser.

Action by Lena Booth and another against Ebenezer Yenney and others. Decree for specific performance.

Douglass & Douglass, for complainants. Lewis T. Stevens and Curtis T. Baker, for defendants.

LEAMING, V. C. (orally). My mind is entirely at rest in this matter. As I view the case I see no possible discretion for me to exercise at this time. The clear preponderance of the evidence is for the complainants. I have no disposition to doubt the veracity of Mr. Yenney, or to doubt his absolute sincerity in all that he has testified to; but, in view of the fact that four credible witnesses have testified to facts directly the reverse from those claimed by Mr. Yenney, I have no possible right or justification to doubt the truth of their statements. I can see how it may be possible for Mr. Yenney to have said or thought that he said all that he has testified to, and for him to sincerely believe that he said the things exactly in the manner in which he has testified to them,

and I am inclined to accept all that he says as an honest statement of his belief of what transpired, for I believe him to be an honest man; but at the same time I cannot help believing that the witnesses on the other side have been equally sincere, and that they actually understood the transaction to be as they have testified it to have been. It is not possible for me to believe that four of them in number have come here and deliberately perjured themselves. Mr. Yenney may have had in his own mind at the time this transaction occurred a certain condition of facts with which he was entirely familiar and may well have thought that his statements fully disclosed those facts, whereas, the parties with whom he was dealing may have understood him in exactly the manner in which they have testified, not fully knowing the facts which Mr. Yenney may have had in mind. Misunderstandings not infrequently occur that way. I entertain no manner of doubt, however, that the complainant in the case understood at the time and fully believed that Mr. Yenney was to purchase this property for her at the lowest possible price at which he could get it, and that he was to receive his commission from the other side; and while Mr. Yenney may not have intended to justify her in that belief, I am perfectly satisfied, from the amount of corroborative evidence there is, that she was entirely justified in accepting that as the agreement which she made, and I see no way under the proofs to escape this conclusion. With these four witnesses all corroborating each other to that effect it leaves practically no discretion in the court as to what it must decide. My decision, therefore, will be for the complainants.

Touching the defendant who has defaulted—the person to whom a portion of the property has since been sold—while her testimony was vague, to say the very least, yet my understanding of it was that at the time she made the agreement with Mr. Yenney she knew that there had been some difficulty about these lots, and that Mrs. Booth had had an agreement to purchase them from Mr. Yenney, and, as she understood it, had forfeited her rights. That, of course, was sufficient to put her upon notice, and operates to deny to her the rights of an innocent purchaser. If her testimony were eliminated, the testimony given by the other witnesses as to the admissions made by her, which admissions she did not undertake to deny, would be sufficient to establish the rights of the complainants as against her as a defaulting defendant. In fact, I doubt the competency of her testimony as a witness called by the defense to put in issue that fact, inasmuch as she was a defaulting defendant and it was simply a question of proof to be made by the complainant as against the defaulting defendant to establish a prima facie case against her; but, as I stated, according to her own testimony, she bought

with notice. I will therefore advise a decree of specific performance in favor of the complainants. The details of the decree may be arranged by counsel.

(78 N. J. E. 22)

WOOSTER v. CRANE & CO.

(Court of Chancery of New Jersey. May 31, 1907.)

1. ASSIGNMENTS — CONTRACT TO PUBLISH BOOKS—PERSONAL NATURE.

Contracts to publish schoolbooks between the author and a New Jersey corporation, providing that they should extend during the continuance of the copyrights and of any renewals thereof, and that the publisher was to keep an account of the sales and render the same every six months and pay to the author a certain percentage of the sales, were not assignable, without the consent of the author, to an Arizona corporation, though the personnel of the latter corporation was the same as that of the former, with the exception of the local stockholder and director whom the statute of New Jersey requires to live in that state.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 4, Assignments, §§ 11, 28, 30, 31, 40.]

2. SAME—CONTRACT NOT ASSIGNABLE BY ITS TERMS.

Contracts to publish schoolbooks between the author and a corporation engaged in the publication of books, its successors and assigns, providing that the corporation should have the exclusive right to publish the books, that the corporation, its representatives and assigns, should in good faith keep their agreement therein contained, and that it should publish the books and pay the publisher a stated percentage of the receipts as royalties, were not, by their terms, assignable.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 4, Assignments, §§ 11, 28, 30, 31, 40.]

Bill by Lizzie E. Wooster against Crane & Co. to rescind certain contracts entered into between complainant and the defendant and for an accounting and other relief. Decree advised rescinding the contracts.

Frank P. McDermott and William R. Spooner, for complainant. O. D. McConnell and Mr. Quinton, for defendant.

PITNEY, Advisory Master. The object of this bill is to rescind certain contracts entered into in the early part of the year 1900, between the complainant, Miss Wooster, the author of certain schoolbooks, and the defendant, Crane & Co., a corporation of New Jersey, a publishing and printing company of Topeka, Kan.; and, also, for an accounting between the parties, and for other relief. The ground on which the rescission is asked is threefold: First, that the contracts themselves were ultra vires the corporation, because not within the scope of its powers, as stated in its articles of association. Second, because the corporation has itself, of its own motion, been dissolved strictly in accordance with our statute providing for dissolution, and thereby became incapable of fulfilling the contracts, which by their terms and their nature were continuous, and extended over the life of the copyright of the complainant

in the schoolbooks of which she was the authoress. The defense denies that the publishing of schoolbooks was not within the scope of its articles of incorporation. I have not found it necessary to consider that point. As to the second point made by complainant, defendant admits that it was, in the year 1905, duly dissolved by proper and sufficient proceedings under our statute for that purpose; but it avers that the same stockholders who owned and controlled the stock in the New Jersey corporation were, at or about the date of its dissolution, organized into a corporation bearing the same name under the laws of Arizona, and all its property, plant, and contracts, including those between the complainant and the defendant, were assigned and transferred to the new company, which thereby succeeded to all the rights of the old company under the contracts with the complainant, and which is ready and willing to carry out and perform the same. The complainant sets up a third cause for rescission in an alleged nonperformance by the defendant of its part of the contracts, in failing to print and publish a part of the works therein mentioned, as by its contract it had undertaken to do. To this part of the complainant's case the defendant sets up that the nonperformance by the defendant was due to nonperformance by the complainant in failure to furnish copy for the printer, and it alleges in its answer that this question was litigated between the parties in a suit in the Kansas courts, brought by the present complainant against the present defendant, in 1902, in which the same grounds the complainant takes herein for rescission (with the exception of that of the dissolution of the defendant) were taken, and put in issue, and decided against the complainant, and an accounting between the parties was had up to April 15, 1903, and a judgment rendered in favor of the defendant against the complainant for \$1,252.

Turning, now, to the second ground of complainant's relief for rescission, based on the dissolution of the defendant, we find that the fifty-third section of the corporation act of 1902, which is a re-enactment of the previous statute (Gen. St. p. 918, § 59), provides that, when corporations are dissolved by any means, they are continued bodies corporate for the purpose of prosecuting and defending suits and of enabling them to settle and close their affairs, to dispose of and convey their property, and to divide their capital, "but not for the purpose of continuing the business for which they were established." The defendant herein is a New Jersey corporation, and jurisdiction was obtained over it as such by service in that state, and this suit was prosecuted under that section of the act. The power, then, of the defendant, to assign these contracts to the Arizona corporation, is undoubted; but the question is whether from the nature of the contracts themselves the defendant could empower the new

corporation to take its place in the contracts against the will and without the consent of the complainant, the other party to the contract. That question depends upon the character of the contracts themselves. Mr. Pollock, in his work on Contracts, says, at page 411: "Rights arising out of a contract cannot be transferred if they are coupled with liabilities, or if they involve a relation of personal confidence, such as that the party whose agreement conferred those rights must have intended them to be exercised only by him in whom he actually confided." And he cites the case of "a partner who has no power to force a new partner on the other members of the firm without their consent. All he can give to an assignee is a right to receive what may be due to the assignor on a balance of the partnership accounts." These are familiar and fundamental principles, and, independent of the question of personal character, qualification, etc., of the proposed substituted contractor, there intervenes the qualification mentioned by Mr. Pollock, namely, the question of liability, where the question of financial responsibility alone is involved. Thus, if A. agrees to deliver to B. at a certain point a certain quantity of any commodity at a certain price at stated times in the future, and to take B.'s promissory note at three months for the price, manifestly B. cannot assign that contract to C. and compel A. to take C.'s promissory note instead of B.'s, for which he had contracted.

Now, if we turn to the contracts here in question, we find that they provide for the publication of certain schoolbooks by the defendant on certain terms, among which is that the contracts extend during the life of the copyright not yet expired and of any renewal thereof, and that the defendant is to keep an account of the sales and render such account every six months during that period, and to pay the complainant a certain percentage of the sales every six months. Here then comes in directly the question of pecuniary responsibility. The defendant, by its answer, sets up that the personnel of the new company (with the exception of the local stockholder and director, which, by our statute, it is obliged to keep in New Jersey) is precisely the same as that of the present defendant, and that the new company is performing the contracts in all respects and is able and willing to continue to perform them, and it asserts that condition as a complete answer to the cases cited by the complainant; but does that condition cover the question of pecuniary responsibility? The complainant contracted with a corporation organized under the laws of the state of New Jersey, whose solvency and pecuniary responsibility is protected and maintained by all the safeguards found in our statute for that purpose, and she is entitled, both at law and in equity, to the benefit of the continuation of those safeguards. We are not shown what the pro-

visions in that respect are as found in the Arizona statute; but it is significant that the defendant, in its answer, gives as a reason for its dissolution and reorganization in Arizona, among other things, that the laws of Arizona do not require that one of the directors should reside within Arizona, nor are corporations organized there required to make annual reports to the extent required in this state, and it avers that it is more convenient and less expensive to carry on business under an Arizona corporation than under a New Jersey corporation.

Another consideration comes in here. Complainant is entitled, under her contracts with this defendant, to have, in a measure, the protection of the courts of New Jersey, and she may have and probably has, more confidence in those courts, to say nothing of a greater convenience in access than in the courts of Arizona. It cannot, of course, be, and was not contended, that the Arizona corporation was the same legal entity as the New Jersey corporation. The mere fact that the ultimate property rights rest in the same stockholders cannot for present purposes make the legal entity identical.

The authorities on this, the main question, are uniform and clear. *Stevens v. Benning* (1855) 1 K. and John. 168, and on appeal 6 De G., M. & G. 223, 24 L. J. Chy. 153, 1 Jur. N. S. 74, where the opinion of Vice Chancellor Wood in the lower court is given. That was the case of the publication of Forsyth on the Law of Composition with Creditors, and the language used by Vice Chancellor Wood in determining the case is important. I will not repeat it here. The effort of the counsel for the assignee in that case was to show that the result of the original contract was to assign the copyright of the book, and it was hardly contended that, if it was not so assigned, the assignment by the original publisher to the assignee gave the latter any legal standing. Another case is *Humble v. Hunter* (1848) 12 Adol. & E. Q. B. 310. That was an action by the owner of a vessel on a charter party which was signed on behalf of the owner and plaintiff by her son, calling himself "the owner"; and it was held that she could not recover because the son had represented himself as the owner. Lord Denman, in delivering judgment, said: "You have a right to the benefit you contemplate from the character and credit and substance of the party with whom you contract." *Stevens v. Benning*, supra, was followed and adhered to by Fry, J., in *Hole v. Bradbury* (1879) 12 Ch. Div. 886. Coming to the United States, we find the very important case of *Arkansas Smelting Company v. Beldon Company*, 127 U. S. 379, 8 Sup. Ct. 1308, 32 L. Ed. 246, which was argued with great ability and fullness and complete examination of the authorities on the side which corresponds to that of the defendant here. In that case the Beldon Company had agreed to sell and

deliver to a firm of Billings & Eilers, at their smelting works in Leadville, Colo., 10,000 tons of lead ore from its mines, delivered at the rate of 50 tons a day, with a clause: "All ore so delivered shall at once upon delivery become the property of the party of the second part [Billings & Eilers]." Then there was a provision for ascertaining by assay of samples the value of the ore so delivered and the price to be fixed after the sampling by the price of lead in New York. Billings & Eilers dissolved, and their smelting works, where delivery was to be made, and their contract, was assigned and conveyed to the plaintiff. Beldon & Co. thereafter refused to deliver ore to the assignee, whereupon the plaintiff brought suit. Defendants demurred, the demurrer was sustained, and the plaintiffs brought a writ of error. No one appeared for defendant at the hearing in the Supreme Court, and the judgment below was sustained, in an opinion by Mr. Justice Gray, on the ground that the original vendors of the ore were not obliged to take the successors of Billings & Eilers as their debtors, although they had succeeded to the very same smelting works and business which Billings & Eilers originally carried on. One of the cases cited by Mr. Justice Gray is *Winchester v. Howard*, 97 Mass. 303, 93 Am. Dec. 93. There the owner of a pair of oxen put them in the hands of an agent for sale. The agent sold them to a purchaser upon the representation that the oxen belonged to him, and they were delivered to the purchaser. When he ascertained that they belonged to another party, he refused to complete the contract. The court held he was justified therein, and after citing the language of Lord Denman, above quoted, the court proceeds: "There may be good reasons why one should be unwilling to buy a pair of oxen that had been owned or used or were trained by a particular person, or why he should be unwilling to have any dealings with that person." Another important case is *Boston Ice Company v. Potter* (1877) 123 Mass. 28, 25 Am. Rep. 9. The headnote is this: "A., who had bought ice of B., ceased to take it on account of dissatisfaction with B., and contracted for ice with C. Subsequently B. bought C.'s business and delivered ice to A., without notifying him of his purchase until after the delivery and consumption of the ice. Held, that B. could not maintain an action for the price of the ice against A." The time during which the plaintiff had supplied ice to defendant was a whole year. In delivering judgment, Endicott, J., said: "A party has a right to select and determine with whom he will contract, and cannot have another person thrust upon him without his consent." The opinion contains quite a full citation of authorities. In *Randall v. Chubb*, 46 Mich. 311, 9 N. W. 429, 41 Am. Rep. 165, and *Lewis v. Sheldon*, 103 Mich. 102, 61 N. W. 269, a lessee of a farm on

shares attempted to assign the lease and failed. There evidently the lessor relied on the personal quality and character of the lessee on shares. In *Lansden v. McCarthy*, 45 Mo. 106, a coachmaker, who had a secret partner unknown to the other party, contracted to furnish McCarthy a carriage for use for the term of five years at a given price per year, payable in advance. At the end of three years, the coachmaker assigned the contract to his secret partner. It was held that McCarthy was not obliged to continue the contract with the assignee. In other words, he was not obliged to pay a stranger in advance for the use of the carriage, nor was he obliged to deal with the stranger in any way.

It seems to me that these principles, thus illustrated by adjudged cases, are conclusive in favor of the complainant, and I must advise a decree rescinding the contract, unless another point made by the defendant has some substance, viz., that the contracts in question by their terms are made assignable. One contract, dated the 19th day of February, 1900, is expressed to be between Lizzie E. Wooster and Crane & Co. and their successors and assigns, a corporation, Shawnee county, state of Kansas. Then, after recitals in this clause, "therefore this agreement witnesseth that the said Lizzie E. Wooster, having full power to make this grant, hereby agrees that the said Crane & Co. have the exclusive right to publish and print the said books or any revised edition thereof during the full term of copyright thereof and during the full term or terms of any renewals of said copyright." Then Miss Wooster agrees to defend the copyright and to bear the cost of illustration and metal plates, and Crane & Co. have the right to sell editions or duplicate plates in foreign countries; and the contract proceeds: "The above agreements are made with the understanding that the said Crane & Co. and their representatives and assigns shall in substantial good faith keep and perform their agreement hereinafter contained." Then follows the covenants on the part of Crane & Co. that they will publish the books and pay Miss Wooster 10 per cent. of the cash receipts as royalties, and will render semiannual statements. The next agreement is that of the 15th of March, 1900, in which the parties are described as in the previous contract, and then, after a recital of the books, Miss Wooster agrees that Crane & Co. shall have the exclusive right to publish and print the said books or any revised edition thereof during the full term of the copyright thereof, and during the full term and terms of any and all renewals of said copyright. Then, like the previously recited agreement, there is a clause that these agreements are made with the understanding that Crane & Co. and their legal representatives and assigns shall keep and perform that agreement. Then comes the contract by Crane &

Co. to publish and pay royalties, etc. Upon careful consideration, I am unable to give to the presence of the word "assigns," as above quoted, the force the defendant claims for it. I am unable to construe it as a contract on the part of Miss Wooster to deal with anybody to whom Crane & Co. may assign that contract, and to accept such assignee as paymaster. It will be observed that, wherever there is a covenant on the part of Crane & Co. to do anything on its part, the weight of the covenant is placed entirely upon Crane & Co. Upon the whole, I am of the opinion that the only effect of the word "assigns" is to give the right which Crane & Co. have without that word, viz., that their assignee would take whatever interest they had in the contract up to the time of the assignment, precisely as in the case of one partner selling out his interest in the partnership. The result is that I think that the complainant is entitled to a decree of rescission.

It is unnecessary at this time to inquire how far the new corporation, Crane & Co., which is not a party to this suit, is bound by this decree. I have so far assumed that such new corporation has a legal existence, but such existence was earnestly denied by complainant. The defendant, by its answer, and as a part of its defense, alleged its legal existence, and hence the burthen was on the defendant to prove it by competent evidence. The case is not one where the mere fact that it is acting as such is sufficient. The *de facto* doctrine does not apply. In support of this burthen, the defendant introduced a properly attested copy of articles of association of the stockholders of the defendant corporation (excepting the New Jersey director) on file in a public office in Arizona, but did not offer any proof of the laws of Arizona entitling such filing or declaring that the result thereof was to create a corporation. Seasonable objection was taken to the document without such proof. I have grave doubts whether the proof thus made was sufficient to establish the legal existence of the new corporation. Of course, every corporation owes its existence to statutory law. But I do not find it necessary to determine this question here. The result is the same, whatever may be the proper view of the question.

The other prayer of the bill is for an accounting. The accounting is prayed for only from the month of April, 1903. The defendant has annexed to its answer what it affirms is an account of the profits and royalties due to Miss Wooster since that time, amounting to \$1,203.28, up to October 1, 1906; the answer having been filed on the 23d of October, 1906. Complainant complains that the account is not complete. As the complainant is entitled to have the account brought down to date, and as the matter must go before a master, an opportunity will there be given to except to the account and have it thoroughly examined. The important question is as to that

part of the answer which sets up that, in a litigation between the parties in a Kansas court, the defendant here obtained a decree against the complainant for the sum of \$1,252.39, besides costs, and it claims the right to apply all royalties due to the complainant under the contract between them to the payment of that judgment. At the hearing the defendant attempted to sustain that decree by what purported to be a copy of certain enrolled proceedings in the Kansas court. The complainant's counsel objected to the certification of that document for certain reasons not necessary now to be stated. I have examined the certificate, and the objections made, and come to the conclusion that I ought not to rely upon it or admit it in evidence, and I at once notified the parties that they might correct that defect, or at least apply for leave for that purpose. The result is that the reference to the master should preserve leave to the defendant to make proper proof of the judgment before the master.

It may be well to add that, as I have stated above, the complainant relied as one ground upon which she based her prayer for rescission that defendant had failed to perform its contract by printing and publishing two volumes of her reader. The defendant set up that by this litigation before mentioned that very question had been involved and passed upon by the court, and that it had been decided that the complainant, and not the defendant, was at fault that the last volumes were not printed. A large amount of evidence was gone into on both sides on this question, but I have not considered it, since I found the point of change of party to the contract a clear ground for rescission.

The answer and the evidence disclose other matters in litigation between the parties, both in the state and the federal courts, which show that it is highly improbable that it is practicable for them to maintain to each other those relations which should exist between author and publisher.

(73 N. J. L. 73)

HANKS v. WORKMASTER.

(Supreme Court of New Jersey. June 17, 1907.)

LANDLORD AND TENANT — TENANCY FROM MONTH TO MONTH—NOTICE TO TERMINATE.

In the case of a tenancy from month to month, the requirement of a notice to terminate the tenancy is mutual. Neither the landlord or the tenant can terminate such a tenancy except upon proper notice.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Landlord and Tenant, § 396.]

(Syllabus by the Court.)

Appeal from District Court of Jersey City. Action by Henry Hanks against Helen Workmaster. Judgment for plaintiff. Defendant appeals. Affirmed.

Argued February term, 1907, before FORT, HENDRICKSON, and PITNEY, JJ.

Merritt Lane, for appellant. William B. Gillmore, for appellee.

FORT, J. This is a suit for one month's rent for the month of July, 1906, for the premises No. 15 Henry street, Jersey City. The district court found in favor of the plaintiff, and gave judgment accordingly. The facts, as returned certified by the judge, are as follows: "The action was to recover the sum of \$27.50, for one month's rent, July, 1906, of premises No. 15 Henry street, Jersey City, \$27, and one light of glass in same premises, 50 cents. The plaintiff testified that he was the owner of the premises, and through his agent, Percy Gaddis, in April, 1906, the house was rented to defendant; and after May 1st he told defendant he would thereafter act as his own agent, and that he collected the rent for June, 1906, and defendant then said nothing about moving. About the middle of June he received word that defendant would move, and he sent word if she moved he would hold her for the rent. The defendant did move about July 1, 1906, and plaintiff, on going to the premises, found same vacant. Plaintiff testified defendant gave him no notice she was going to leave, nor did she give him the keys. The keys were left at Gaddis, the agent's office. Plaintiff testified that Gaddis was authorized to rent and did rent for one year to defendant. A bill 'to let' was put up, and the premises rented to a new party in August, 1906. On the part of the defendant, the evidence was: She rented for one month, and remained from one month to another month, paying May and June, 1906, rent. See Exhibits D1 and D2. She decided to move about June 17, 1906, and sent her son to tell plaintiff defendant would move, and did move June 22, 1906. The keys were sent June 20, 1906, to the agent, Gaddis, by defendant's daughter, who said, 'All right'; and a bill 'to let' was then put upon the house. I ruled that on defendant's own testimony she was a monthly tenant, and the landlord entitled to a full month's notice of her intention to move; and, not having received this, defendant was entitled to recover the rent for July, 1906, and gave judgment therefor, viz., the sum of \$27, and which was entered accordingly against defendant and in favor of plaintiff."

Under this state of the case, we think the defendant was a tenant from month to month, and that the trial court, accepting her evidence as true, rightly so found; that, being a tenant by the month, the requirement of notice for the purpose of terminating the tenancy was mutual, and that neither the landlord nor the tenant could terminate the tenancy except upon notice. Such notice must be one corresponding with the beginning and ending of the tenancy. It is conceded in this case that notice of the intent to vacate was not given until the 17th of June, and that it was the purpose of the tenant to vacate July 1st. This was not the legal notice, and the

plaintiff was entitled to recover the rent, and there was no error in the judgment. *Steffens v. Earl*, 40 N. J. Law, 134, 29 Am. Rep. 214; *Taylor on L. & T.*, § 474; *Archibald on L. & T.*, § 87.

The judgment of the district court is affirmed.

(218 Pa. 39)

In re WALLACE'S ESTATE.

Appeal of BRITTAIN.

(Supreme Court of Pennsylvania. April 29, 1907.)

ADOPTION—DEED OR DECLARATION.

An indenture of apprenticeship provided that it was the intent of the party of the first part to place, and of the second part to receive, the apprentice as an adopted child of the party of the second part, to be maintained and treated with like care as if he were the child of such party. Held not to constitute the child an adopted son and heir of the master.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Adoption, §§ 12-14.]

Appeal from Orphans' Court, Monroe County.

In the matter of the estate of William Wallace. From a decree dismissing exceptions to the auditor's report, A. R. Brittain, ancillary administrator, appeals. Affirmed.

Argued before FELL, BROWN, MESTREZAT, ELKIN, and STEWART, JJ.

John G. Johnson, Edward R. Loud, and Henry J. Kotz, for appellant. A. Mitchell Palmer and John B. Williams, for appellee.

FELL, J. The question in this case is whether Charles Brandies, whose administrator is appellant, was the adopted son of William Wallace. It appears from the findings of the auditor, approved by the court, that in 1861 William Wallace received from the American Female Guardian Society of New York and took to his home in Stroudsburg, Pa., two orphans, a brother and sister, Charles Brandies and Emily Brandies, aged 8 and 10 years. Both children were afterwards known by the name of Wallace. Neither Mr. Wallace nor his wife wanted the boy, but the society refused to have him separated from his sister. He lived in the home of Mr. Wallace a short time, when he went to the home of Mrs. Huntsman, in the same town. He attended school irregularly, and was about Mr. Wallace's place of business, but performing no services for him, until he became 18 years of age, when he went to Michigan to live with Mr. Wallace's brother. He remained there four or five years, when he returned to Stroudsburg, and for a few months acted as a clerk in Mr. Wallace's store. He went back to Michigan in 1876, and died there in 1905. After his return to Michigan, he maintained no relation of business or friendship with Mr. Wallace or his family. His conduct had at all times been unsatisfactory to Mr. Wallace, who never expressed an intention to give him the right of an heir.

The girl was a member of Mr. Wallace's family until her marriage, and thereafter their relations were friendly and confidential. Mr. Wallace expressed his intention to make her his heir, and in 1902 presented a petition for her adoption as his daughter, which was proceeded with regularly to final decree. He died intestate in 1903.

If there was an adoption of Charles Brandies, it was effected by the agreement under which he was received from the American Female Guardian Society. The important parts of this agreement, following the recital that Charles Brandies had been surrendered by his parents to the society, and that William Wallace had applied to the managers "to put out and place the said child with him by adoption and as an apprentice, until said child shall arrive at the age of twenty-one years," are: "That the parties of the first part * * * do put, place and bind out the said Charles Brandies as an apprentice unto the party of the second part to dwell with and serve him from the day of the date of these presents until the said apprentice shall attain the full age of twenty-one years. During all of which time the said apprentice shall serve * * * and shall honestly, orderly and obediently in all things demean and behave himself towards his said employer and all others. And the party of the second part doth covenant and agree * * * to provide and allow unto the said apprentice * * * meat, drink, apparel, and other things necessary and fit for the apprentice, * * * and shall cause the said apprentice to be taught and instructed, * * * and shall give to the said apprentice at the expiration of the said term of service a new bible, one hundred dollars in money, * * * and shall cause said apprentice to attend public worship, * * * and shall not allow the said apprentice to be absent from the service of his said master without express leave or suffer him to haunt ale houses, taverns, * * * but will exert his authority to cause and procure the said apprentice to behave himself in all things, as a faithful apprentice ought to do, during the term aforesaid." It is further provided: "That if the said apprentice or indenturing committee shall at any time within three months * * * become dissatisfied with his situation or employment, or the party of the second part shall at any time within that period become dissatisfied with the apprentice," the indenture shall be canceled. Thus far it is an indenture of apprenticeship in the ordinary form. The clause of the agreement upon which the appellant's claim is based is as follows: "Although the present instrument binds the above-named child, strictly as an apprentice, it is, nevertheless, the true intention of the parties of the first part to place, and of the party of the second part to receive, said apprentice as an adopted child, to reside in the family of the party of

the second part, and to be maintained, clothed, educated and treated as far as practicable, with like care and kindness as if he were in fact the child of the said party of the second part."

If the fullest meaning of which this clause is susceptible consistent with the before clearly expressed intention of the parties be given it, it refers only to the treatment of the apprentice during the term of apprenticeship. He is to be received as an adopted child would be received, to reside in the master's family, and to be maintained and treated "with like care and kindness as if he were in fact the child of the party of the second part." The relation established was to end when the apprentice became of age. There is not the slightest suggestion of an intention to confer upon him any right of inheritance.

The decree of the court confirming the report of the auditor is affirmed, at the cost of the appellant.

(217 Pa. 386)

TOWNSEND et al. v. BOYD.

(Supreme Court of Pennsylvania. April 1, 1907.)

1. LANDLORD AND TENANT—ESTOPPEL TO DENY LANDLORD'S TITLE.

Where one comes into possession of land under a title of record proclaimed to be adverse to the landlord, and continues in such possession for over 60 years undisturbed by anybody, the rule that a tenant is estopped from denying the landlord's title does not apply.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Landlord and Tenant, §§ 199-209.]

2. SAME—ADVERSE POSSESSION.

A lease of land for 2,000 years was entered into in 1682, and in all deeds and wills executed for 145 years the land was described as the residue of the term of the 2,000-year lease. In 1823 allotments in a partition suit were made to the allottees in fee, and for 60 years all of the conveyances were in fee, and there was a continuous adverse possession against all the world. *Held*, that a sale in foreclosure of a mortgage given after that time by one in possession would pass a title in fee good as against a purchaser at a sheriff's sale of the unexpired term of the lease.

3. SAME—PRESUMPTION OF GRANT.

Where an unchallenged title to land has been enjoyed for a great many years, the court, as against a lease of the land for 2,000 years, created in 1682, will presume whatever grant may be necessary to quiet title.

4. MORTGAGES—FORECLOSURE—DEFENSES.

A mortgagor cannot set up as a defense to a mortgage that he had no title to the premises.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 35, Mortgages, § 1210; vol. 19, Estoppel, § 65.]

Appeal from Court of Common Pleas, Delaware County.

Action by Joseph B. Townsend, Jr., and others, against Matthew M. Boyd. Judgment for plaintiffs, and defendant appeals. Affirmed.

At the trial the defendant presented the following points:

"(6) The defendant, having acquired title to the leasehold by a sheriff's sale, is entitled to retain possession in this proceeding, and the verdict should be in his favor. Answer: That is refused. We cannot say to you the verdict should be in favor of the defendant. It will be for you to say under all the circumstances.

"(7) The mortgage of the plaintiffs being unrecorded in law and being a mere pledge of the land, with no transfer of possession to the mortgagee, is void, as against existing creditors, and, it appearing by the uncontradicted evidence that the defendant was an existing creditor, said mortgage is fraudulent and void, as to him, and the defendant is entitled to your verdict. Answer: That is refused. The questions are for you under the instructions of the court. We cannot say, or do not say, to you who is entitled to the verdict."

The court charged, in part, as follows:

"That if, from the evidence in the case, you find that there was a grant which has been lost from this old lessor in 1682 or his heirs, to the predecessors in title of Matthew Boyd, then your verdict should be for the plaintiff.

"Now, as bearing upon the question of whether or not there was such a (lost) grant, we call your attention to the testimony bearing upon that question:—First, this was a leasehold, a tenancy. It was made in 1682 for 2,000 years. The consideration was, as you have been told, a peppercorn and so many shillings—five shillings. I believe it is for each 100 acres of land. Now you will say what bearing that has upon the question of presumption. There was a letting, a lease of 500 acres of land in the township of Upper Chichester to a son for 2,000 years, yielding and paying yearly during the said term unto William Withers, his heirs and assigns, one peppercorn at or upon the feast of St. Michael, the archangel, if the same be lawfully demanded. It was not to be paid outright, but it was to be paid if it should be demanded by the lessor, and also paying and discharging the aforesaid chief or quit rent of a shilling yearly as aforesaid; one shilling for each 100 acres. So you see the consideration of the old lease for 2,000 years, which was to a son, was, if the lessor should demand it, he should pay a peppercorn, and in addition one shilling for each 100 acres of land. You will say what bearing a lease for 2,000 years, for a nominal consideration, has upon the question whether or not, when in 1823 the owner of this land began to convey it in fee simple—whether it is reasonable to suppose that there was a grant to them, and that it had been lost.

"When he (Erasmus Morton) died, the husband of one of his children, Thomas Marshall, came into court, in the (should be orphans' court) court of common pleas of Delaware county in 1823 and filed a petition to have this property of Erasmus Morton parted

and divided. In that petition he set out that this land was real estate, and that Erasmus Morton died seised of it in fee, that is, had divided it—made a partition of it, as the lawyers say; and one of the heirs of Erasmus Morton was awarded a tract, I think of about 44 or 45 acres, part of the land in dispute, out of the Erasmus Morton estate. It was awarded to one of the sons, Aaron Morton, and this court made a decree that he should take and hold that property—it was awarded to him—and that was in effect awarding the title to him absolutely.

"This tract was conveyed to Aaron Morton and Aaron Morton died. I think he died in Delaware. I am not sure. But before he died he made this will, in which he willed a portion of this land, real estate. He says: 'I order and direct that all my real and personal estate be sold by my executor either at public or private sale, within one year after my decease, &c., and I further authorize him to convey said real estate to Matthew Boyd at the price of \$4,400, say \$1,400 in cash,'—and appointed John Larkin as his executor. So that this heir of Erasmus Morton, Aaron, made his will on which he recognized this property as real estate, and directed his executors to convey it to Matthew Boyd at a fixed price. John Larkin made a deed in 1858—Morton died in 1857—in which he conveyed this tract of land, 44 acres, in fee, absolute title, to the person named in the will, Matthew Boyd.

"Now, the plaintiffs ask you to say as to this tract which is included in the lands in dispute—ask you to say from this deed of 2000 years—this deed of 2,000 years to a son for a peppercorn which he should pay if it was demanded and a shilling for every 100 acres, and from the fact that from 1831 down to 1892, when this land was mortgaged, all the owners of it conveyed it in fee simple, or, if they died before conveying, willed it, and that it was sold by those in power under their wills and conveyed by the various assurances in fee simple, they ask you to find from that that there was a grant to them which has either been lost or mislaid. In other words, they ask you to presume to find that there was such a grant, and, if you do find there was such a grant, then the plaintiffs are entitled to your verdict.

"We also say to you that, if the plaintiffs have for 21 years and upwards—for more than 21 years before the bringing of this suit—or those under whom they claim, did enter upon this land in hostility to the owner, and did for over fifty years, as it is in this case, occupy it adversely, hostilely, exclusively as their own, then this plaintiff is entitled to your verdict.

"Now if Matthew Boyd entered under the will of John Boyd in part and the deed from his brother as to one tract and the John Larkin deed upon the other, if he entered upon that property hostilely, adversely, claiming to own it in fee simple, and has continued

to do that for twenty-one years and upward, then this plaintiff is entitled to recover, and in support of that proposition as to the character of his holding—because we say to you that if this entry was hostile, open, adverse possession, exclusive of the lessors, and it continued for upwards of fifty years, we say to you, that that gave Matthew Boyd a complete title to the land, he had a right to mortgage it and the plaintiffs are entitled to recover."

Verdict and judgment for plaintiffs. Defendant appealed.

Argued before MITCHELL, C. J., and FELL, MESTREZAT, POTTER, and STEWART, JJ.

William B. Broomall and W. Roger Fronefield, for appellant. Frank P. Prichard, George T. Butler, and John G. Johnson, for appellees.

POTTER, J. On November 16, 1892, Matthew Boyd gave a mortgage to Joseph B. Townsend, to secure the sum of \$13,000 upon a tract of 152 acres and a fraction, situate in Upper Chichester township, Delaware county. On March 30, 1894, a writ of scire facias was issued under this mortgage in the court of common pleas of Delaware county, judgment entered for want of an affidavit of defense, and the mortgaged premises sold under a levary facias to the executors of the mortgagee, and a sheriff's deed made to them. Notice was given and proceedings instituted by the purchasers to obtain possession of the mortgaged premises; but Matthew M. Boyd, a son of the mortgagor, who was then in possession, made affidavit that he did not hold under Matthew Boyd, defendant in the judgment on the mortgage, but in his own right; and he gave his recognizance to appear at court to plead to a declaration in ejectment, etc. The present action was the proceeding in court, which was in effect an ejectment, with the mortgagees and purchasers at the sheriff's sale as plaintiffs, and the claimant as defendant.

Upon the trial the plaintiffs offered in evidence the record of partition proceedings in the estate of Erasmus Morton, deceased, commenced October 29, 1823, whereby a lot of ground, including part of the premises here in dispute, was awarded to Aaron Morton. This was followed by other conveyances, all treating the title as a fee simple, which finally assumed to vest it as such in Matthew Boyd, on March 25, 1838. The remaining portion of the premises in dispute was traced from the record of partition proceedings in the estate of Nehemiah Broomall, deceased, begun on November 28, 1831, down through a chain, always treating the title as a fee, and assuming to vest it as such in Matthew Boyd, on March 21, 1865. Plaintiff offered in evidence the record of the mortgage of Matthew Boyd to Joseph B. Townsend, dated November 16, 1892, for \$13,000, which was the basis of the proceedings out of which

this controversy arises, together with the record of the foreclosure suit and judgment and the sheriff's deed to plaintiffs. Plaintiffs then called as a witness John M. Boyd, a son of Matthew Boyd, who testified that his father had resided on the mortgaged premises for a period of 56 or 57 years, and during all that time witness never heard of any one claiming to have an interest in the farm except his father; never heard it was leased until 1896 or 1897. His father paid the taxes on the farm, and he never heard of any one else paying them. No one else resided on the farm except his father. Plaintiffs also offered the triennial assessments of the property from 1866 to 1896, which were admitted under exception. Their admission is the subject of the first assignment of error, but they are neither set out in the assignment nor printed in the paper book. Plaintiffs also offered two satisfied mortgages, given by Matthew Boyd, which were admitted in evidence, subject to exception. The admission of these mortgages is the subject of the second assignment, but they are not set out.

In none of the papers offered in evidence by plaintiffs was there any reference to a lease, and in all of them the estate allotted, conveyed, or mortgaged was assumed to be a fee. Defendant offered in evidence a lease, dated September 5, 1681, from William Penn to William Withers for 500 acres of ground, and a release of same dated September 6, 1681, reserving a quit rent of one shilling for every 100 acres; also, a discharge of accrued rent, dated July 6, 1681; also, a lease for the same tract of 500 acres from William Withers, to Thomas Withers, dated January 22, 1682, for a term of 2,000 years at an annual rental of "one pepper corne at or upon the feast of St. Michael the Archangell, if the same be lawfully demanded, and also paying and discharging the aforesaid chiefe or quit rent of one shilling yearly." This was followed by various conveyances, wills, and mortgages of this tract and portions of it, in most of which the grant was for the rest of the term of 2,000 years under the above lease. This chain of title to the leasehold estate extended down to the titles of Erasmus Morton and Nehemiah Broomall; but, when their estates were partitioned in 1823 and 1831, it was assumed in the proceedings that each owned a fee in the land.

Defendant, also, showed that Matthew Boyd, Jr., the defendant here, and Martha J. Boyd, during the pendency of the foreclosure proceedings, entered judgments against Matthew Boyd and issued executions under which the sheriff of Delaware county levied upon the residue of the term of 2,000 years given under the lease of William Withers to Thomas Withers, and sold and conveyed the same to the defendant. Defendant then called one of his counsel, who was a conveyancer, who testified that he had examined the title to the land in controversy, and that it

was all included in the 500 acres covered by the Withers lease. Under this testimony the court refused to give binding instructions for either plaintiffs or defendant, and submitted to the jury three questions: (1) Whether the property here in question was within the tract of land leased in 1682 by William Withers to Thomas Withers; (2) whether there had been a grant or extinguishment of the landlord's interest in favor of the predecessors in title, of Matthew Boyd; (3) whether there had been such adverse, hostile, and exclusive possession as to bar the setting up of the landlord's title by the defendant. The jury found for the plaintiffs, in a general verdict, and there is nothing upon the record to show upon which of the questions submitted the verdict was based.

The title of Matthew Boyd, the mortgagor, to the mortgaged premises was, as we have seen, traced directly back to two proceedings in partition, in the orphans' court of Delaware county; one in the estate of Erasmus Morton in 1823, and the other in the estate of Nehemiah Broomall in 1831. It was averred in the petitions for the inquests in these proceedings that each intestate died "seised in his demeane as of fee" of the land described, and the estates dealt with are throughout treated as freehold estates, and referred to as real estate, and as that alone. The deed made by the administrators of Nehemiah Broomall to Robert Boyd, in pursuance of the sale under the partition proceedings, expressly undertakes to convey the fee. Aaron Morton, who took by allotment, and Robert Boyd, who took by deed, under the respective partitions, took "fee-simple estates," or else they took nothing. The unexpired term of the Withers lease was personal property, and not susceptible of partition. The partition proceedings show no reference to any lease, and there was no apparent intention to deal in any way with a lease, and, if there had been any such purpose, there was no jurisdiction in the orphans' court to make partition of personality.

A leasehold interest is not real estate, but merely a chattel real, which is personal property. *Dalzell v. Lynch*, 4 Watts & S. 255; *Williams v. Downing*, 18 Pa. 60; *Kile v. Glebner*, 114 Pa. 381, 7 Atl. 154; *Sterling v. Com.*, 2 Grant, Cas. 162; *Wells v. Becker*, 24 Pa. Super. Ct. 174. In *Bismark B. & L. Ass'n v. Bolster*, 92 Pa. 123, Mr. Justice Trunkay said (page 129): "A long term of years of very great value is not such an interest in land as is subject to the lien of a judgment, it is a chattel, subject to seizure and sale by a constable on an execution issued by a justice of the peace." In *Brown v. Beecher*, 120 Pa. 590, 603, 15 Atl. 608, Mr. Justice Clark said: "But although the writing of February 8, 1882, is a lease, it conveyed to Marsh an interest in the land, a chattel interest, however, the lease was a chattel real, but none the less a chattel."

If these predecessors of Matthew Boyd

took estates in fee under the partition proceedings, then he also possessed the fee; but, even if the partitions were void, the holdings of the parties were adverse to the rights of any one claiming under the lease. During a period of over 60 years, all the wills, deeds, and mortgages in the chain of title assumed to pass the fee and made no reference to any leasehold interest. For over 30 years prior to giving the mortgage Matthew Boyd was in sole and undisputed possession of the entire tract, paying taxes thereon, and exercising all the rights of an owner. This was shown by the record evidence and by the testimony of the witness John M. Boyd, his son. We can find no evidence that Matthew Boyd, or any predecessor in title since the partition proceedings, ever acknowledged the title of another to the land; but, on the contrary, they all actually claimed the title in fee simple in themselves. The general principle that a tenant is estopped from denying his landlord's title is, of course, unquestioned; but in the present case Matthew Boyd, and his predecessors in title, took possession under a proceeding of record, in which the title was openly and avowedly claimed as a fee simple, and in absolute defiance of the claim of any one in opposition thereto, and there is not a trace of any claim being made by any one as landlord during a period of more than 60 years. The parties who took possession under the partition proceedings were fully justified in supposing that they were taking possession in fee. "Where one enters without knowledge of the tenancy, and irrespective of it, in the assertion of a title on its face adverse to the lessor, though derived, as here, from the tenant, his possession will be hostile, if unequivocal acts and declarations manifest an intention to hold in despite of all others. * * * Of the facts that have been recognized as indicative of hostile intent, none are perhaps more decisive than the exhibition of a paper title, independent of that residing in the original owner, by color of which the party justifies his entry." *Dikeman v. Parrish*, 6 Pa. 210, 225, 47 Am. Dec. 455. We can see no evidence to sustain the claim that the relation of landlord and tenant ever existed between Matthew Boyd and the representatives of the lessor in the ancient lease, which is here invoked to defeat his claim to a freehold estate. The defendant got more than he was entitled to, when the question of adverse possession was submitted to the jury. Under all the testimony, the court below might well have held the evidence of adverse possession to be conclusive.

Equally persuasive are the circumstances in raising a presumption of a grant or extinguishment of the landlord's reversion prior to the partition proceedings in 1823 and 1831. After a great lapse of time and a series of circumstances disclosing the enjoyment of an unchallenged title during such

period, the courts will presume whatever grant may be necessary to quiet the title. It is not sufficient for a stranger to rest upon an ancient outstanding title. In *Jackson v. Hudson*, 3 Johns. (N. Y.) 375, Chancellor Kent said: "If a defendant sets up an outstanding title existing in a stranger, it must be a present subsisting title. It must be one that is living and operating. Otherwise the presumption will be that it has become extinguished." This language was cited with approval by Chief Justice Gibson, in *Hasting v. Wagner*, 7 Watts & S. 215, where he said: "These presumptions conduce to repose, and there is a growing tendency to encourage them, not only here, but elsewhere. In *Jackson v. Hudson*, 3 Johns. (N. Y.) 375, the Supreme Court of New York were of opinion that to constitute a defense in ejectment an outstanding title in a third person must be a present and operative one, else it will be presumed to have been extinguished only by a conveyance, and to whom? Not to the defendant, who does not pretend to claim under it, but to the plaintiff, who has claimed the tract for 30 years and acted as the owner of it." The same chief justice, in *Taylor v. Dougherty*, 1 Watts & S. 324, said, in referring to the case then before him: "We have the expenditure of money, not a single contested act of ownership, but in acts repeated and persisted in for more than 30 years, as regards the ownership of the warrant, and without any adverse claim to it whatever. On every principle of authority and reason, this was sufficient, not only to be left to the jury, but, in the absence of conflicting evidence, to command a verdict. The execution of a deed is presumed from possession in conformity to it for 30 years; and why the entire existence of a deed should not be presumed from acts of ownership for the same period, which are equivalent to possession, it would not be easy to determine." Many other cases to the same effect might be cited in support of this principle, such as *Carter v. Tinicum Fishing Co.*, 77 Pa. 310; *Brown v. Day*, 78 Pa. 129; *Wallace v. Presbyterian Church*, 111 Pa. 164, 2 Atl. 347; *Fletcher v. Fuller*, 120 U. S. 534, 7 Sup. Ct. 667, 30 L. Ed. 759; *United States v. Chavez*, 175 U. S. 509, 20 Sup. Ct. 159, 44 L. Ed. 255. In the present case, under all these authorities, the evidence was, in our judgment, amply sufficient to sustain the presumption of a grant.

But, in any aspect of the case, the mortgagor cannot set up, as a defense to the mortgage, that he had no title to the premises. *Penna. Company v. Beaumont*, 190 Pa. 101, 42 Atl. 522; *Faucett v. Harris*, 185 Pa. 164, 39 Atl. 842. When the defendant here purchased the interest of Matthew Boyd in the unexpired lease to Thomas Withers, he became the owner of only such interest and rights as the judgment debtor possessed. The defendant had full notice from the record that his father was in possession under

a chain of title which purported to vest in him a fee-simple estate, and he was also aware that his father had held himself out as the owner of the fee by mortgaging it as such, not only to the present mortgagee, but to others. The mortgage under which claim of title is made by the present plaintiffs was on record years before the defendant concocted his scheme and obtained his judgments and made his purchase at sheriff's sale. As he is a son of Matthew Boyd, he was presumably familiar with the fact of his father's long and exclusive possession of the land in controversy. We see no reason for allowing to the defendant any higher rights than those possessed by his father. If the father should be estopped from setting up his want of title against his own mortgage, why should not the son, who claims through the father, be also estopped?

The evidence of title upon the part of plaintiffs was in accordance with the abstract filed. Possession under that title was also shown. If plaintiffs' evidence had stood alone, it would have been sufficient. The alleged title under the prior lease was set up by the defendant, and the claim of possession adverse to the lease was made, and the presumption of a grant in extinguishment of the lease was set up in rebuttal of defendant's case. We do not see that this constituted any variance.

The assignments of error are all dismissed, and the judgment is affirmed.

(117 Pa. 535)

FIREMEN'S RELIEF ASS'N v. CITY OF SCRANTON.

(Supreme Court of Pennsylvania. April 22, 1907.)

1. MUNICIPAL CORPORATIONS—DISPOSITION OF FUNDS—POWERS.

Act June 28, 1895 (P. L. 408), imposes a tax on the business of foreign fire insurance companies, one-half of the amount to be paid by the state to the treasurers of the several cities in proportion to the tax derived from each. *Held* that, as the act did not appropriate the fund to any particular purpose, a city may use it in its discretion for any lawful purpose.

2. SAME—APPROPRIATION—EFFECT—REVOCA-TION.

An ordinance of a city appropriating money received from the state under Act June 28, 1895 (P. L. 408), appropriating one-half of the amount received from the tax on premiums paid by foreign insurance companies to cities to a firemen's relief association, does not create any vested right in the fund in the association before its actual payment, but such gift is subject to revocation.

Appeal from Court of Common Pleas, Lackawanna County.

Action by the Fireman's Relief Association against the city of Scranton. Judgment for plaintiff on demurrer, and defendant appeals. Reversed.

The following is the opinion of Newcomb, J., in the court below: "This action is as-

sumpsit. The defendant has demurred to a statement disclosing the following facts:

"(1) By the act of June 28, 1895 (P. L. 408), a tax was imposed upon the business done in this state by foreign fire insurance companies, of which one-half the net amount was directed to be paid over by the state to the treasurers of the several cities and boroughs in proportion to the amount of tax derived from each as shown by the annual reports of the insurance commissioner.

"(2) By ordinance approved March 17, 1898, entitled 'An ordinance to provide for the annual transfer of a certain fund received from the state treasury as revenue from the foreign insurance companies agreeably to an act of assembly approved June 28, 1895, to the Scranton Firemen's Relief Association,' it was enacted:

"Section 1. Be it ordained, etc., that all such sums of money as may be received by the city treasurer in accordance with the act of assembly, approved June 28, 1895, be, and is hereby declared to be received for the benefit of the Scranton Firemen's Relief Association.

"Sec. 2. That the city treasurer is hereby directed to enter such sum on the receipt thereof, under a special account and to report the said amount annually to the city clerk, who is hereby directed to issue warrants therefor in favor of the treasurer of the Scranton Firemen's Relief Association immediately after the receipt thereof and on report to him of the city treasurer.'

"(3) June 6, 1898, the Scranton Firemen's Relief Association was incorporated by decree of this court. Its articles of association bear date of April 1, 1898, and it nowhere affirmatively appears that it had any actual existence prior to that date, and therefore when the ordinance was passed. Its purpose, as stated in the charter, is 'to provide for the maintenance of a society for beneficial or protective purposes to the members from funds collected therein.' Its qualification for membership is not defined by the charter, but section 3 of the by-laws provides that 'the requisite qualifications for membership are that the beneficiary shall be or have been an active member of the fire department of the city of Scranton, and a citizen of the commonwealth of Pennsylvania.'

"(4) By section 2 of its by-laws the object of the association is stated to be 'the accumulation of a fund from the annual dues of its members, legacies, bequests, gifts and other sources for the purpose of relieving firemen who may be disabled through accident while in the performance of their duties as active firemen of the city of Scranton, and in case of death for the benefit of a member's widow, orphans or estate.'

"(5) At the time the ordinance was passed, and until 1901, Scranton was a city of the third class, but whether its fire department was a voluntary or paid organization does not appear.

"(6) In pursuance of the ordinance the receipts from the tax in question for the years 1896 to 1899, inclusive, were paid over by the city to the plaintiff. After that date the treasurer refused to make report of the fund to the clerk, and pending mandamus proceedings to compel him to do so the ordinance was repealed by another, approved October 24, 1903. The fund in dispute, therefore, is the amount of receipts from the tax for the years 1900 to 1902, inclusive, still in the city treasury, as follows:

For the year 1900.....	\$2,579 37
For the year 1901.....	3,023 67
For the year 1902.....	3,245 72

Total \$8,848 76

which the plaintiff claims, with interest on the several sums from the date when they respectively came to the hands of the city treasurer. These dates, however, do not definitely appear.

"The demurrer was argued upon the assumption that the plaintiff corporation had an associate existence under its present name prior to the passage of the ordinance under which its claim is made. While it is doubtful practice to supply such fact in that way, we will in this instance assume it as counsel have done, and suggest that the statement be amended in that particular by agreement."

Argued before FELL, BROWN, MESTREZAT, POTTER, and STEWART, JJ.

David J. Davis, City Sol., and H. R. Van Deusen, Asst. City Sol., for appellant. A. A. Vosburg and Charles W. Dawson, for appellee.

POTTER, J. This is an appeal from a judgment entered in favor of plaintiff upon a demurrer filed by defendant to the statement of claim. When the ordinance involved in the present case was under consideration by this court in *Com. v. Barker*, 211 Pa. 610, 61 Atl. 253, we held that it was a valid and sufficient appropriation of the fund in question for the current year of its passage. Beyond that it was not then necessary to go. But now we are called upon to decide whether or not it may be regarded as a valid appropriation for future years. We can see no sound reason for exempting this appropriation from the estimate of probable expenditures for each fiscal year which, in accordance with the requirements of article 6, § 10, of the act of May 23, 1889 (P. L. 277), is to be made up and presented to councils before the commencement of the year to be covered by the annual appropriations. The fund for distribution comes from the state under the act of June 28, 1895 (P. L. 406), section 2 of which provides as follows: "On and after the first day of January, one thousand eight hundred and ninety-six, and annually thereafter, there shall be paid by the State Treasurer to the treasurers of the several cities and boroughs within the commonwealth, one-half of the net amount received from the two per

centum tax paid upon premiums by foreign insurance companies. The amount to be paid to each of the treasurers of the several cities and boroughs, shall be based upon the return of said two per centum tax upon premiums received from foreign insurance companies doing business within the said cities and boroughs as shown by the insurance commissioner's report. Warrants for the above purposes shall be drawn by the auditor general, payable to the treasurers of the several cities and boroughs in accordance with this act whenever there are sufficient funds in the state treasury to pay the same." We do not find in the statute any direction, or any intimation to any municipality receiving this fund, that it is to be appropriated for the benefit of any private corporation, association, or individual. It is to be paid into the treasuries of the several municipalities, without distinction as to its use, from any other fund therein. It may be used in the discretion of the local authorities for any lawful purpose. No good reason is apparent why the disposition of this fund should not be subject to the restrictions which apply to the disbursement of all public moneys. Certainly there is nothing in the act of assembly to indicate that the plaintiff had any right to it, and its claim thereto must rest upon the action of councils through the ordinance in question. Circumstances might arise in which this fund would be needed for the discharge of the current expenses of the city. If so, it is certainly subject to the disposal of councils. We feel impelled to construe the payment as one requiring the support of an annual appropriation made after consideration by councils of the estimate of the probable receipts and expenditures for the fiscal year.

There is no foundation for the contention that the ordinance created in the plaintiff association a vested right in the fund. It was at most merely an executory gift, subject to revocation, as long as the transfer had not actually been made. As was pointed out in *Com. v. Barker*, 211 Pa. 610, 61 Atl. 253, the mere fact that the plaintiff association was a volunteer fire company did not make it ineligible for the discharge of the municipal function of protecting the city from fire. But there is a serious question as to the right of the municipality to appropriate public funds to the support of an association over which it has no control or supervision.

It appears from the history of the case that the city of Scranton became a city of the second class in April, 1901, prior to which time its fire department had been a volunteer department. It further appears that the department is now a paid or permanent department, and that, when it became so, the volunteer department vacated the fire houses which were owned by the city, and sold to the city all furniture, fixtures, etc., not required by the association in furnishing their club-house, and all connection with or control

over the association by the city was severed. On the organization of a paid fire department the city by ordinance established a pension fund for the benefit of her firemen, under the act of 1901, and appropriated to it the funds in the hands of the city treasurer received under the act of 1895. Prior to the organization of the paid fire department every member of the volunteer force was a member of the Firemen's Relief Association, and entitled to receive benefits. No dues were assessed against him as an individual, but each company was assessed pro rata according to the number of members, which assessment was paid from the treasury of the different volunteer fire companies. The purpose of the plaintiff corporation, as stated in its charter, was "to provide for the maintenance of a society for beneficial or protective purposes to the members from funds collected therein." The qualifications for membership were not fixed by the charter. The by-laws provided that the requisite qualifications for membership are that the beneficiary shall be or have been an active member of the fire department of the city of Scranton and a citizen of the commonwealth of Pennsylvania. There does not appear to have been any provision in either charter or by-laws giving the city any voice in or control over the management of the association. The by-laws, of course, could be amended at any time by the action of the members, and the "beneficial or protective purposes" of the association extended to others than firemen or ex-firemen. The funds appropriated by the city could, therefore, be used for purposes other than the relief of firemen or ex-firemen, and for the benefit of persons to whom the city owed no duty other than such as was due to every citizen.

The words of Chief Justice Lowrie in *Phila. Ass'n v. Wood*, 39 Pa. 73, with reference to a similar association, are equally applicable here. He said: "This is an association for charitable purposes it is true; but still it is strictly a private corporation. No public officer has any official knowledge of its existence, or of its members, organization, or acts. It renders no account of its proceedings or of its funds. It is a close corporation, fixing its own terms of membership, and changing its organization but not its object, as it pleases." There is a plain distinction in this respect between membership in a voluntary association such as this, and that of a paid fire department, organized and controlled by the city authorities. In the latter case the membership, the discipline, and the management are subject to the regulation of the city. The benefits can be confined to those who have actually rendered service to the city. It is this feature only which distinguishes the payment of such a benefit from the bestowal of a gift or gratuity, which is prohibited by section 7, art. 9, of the Constitution.

The case of *Firemen's Fund v. Roome*, 93

N. Y. 313, 45 Am. Rep. 217, relied upon by the court below, and by appellee, seems to be in direct conflict with our own case of *Phila. Ass'n v. Wood*, 39 Pa. 73. It was furthermore distinguished, and limited in its scope by the New York Court of Appeals, in the later case of *Fox v. Humane Society*, 165 N. Y. 517, 59 N. E. 353, 51 L. R. A. 681, 80 Am. St. Rep. 767. But, upon the ground that the ordinance did not constitute a valid appropriation for anything more than the current year, and that it was merely an executory gift, subject to revocation at any time prior to the actual transfer, the judgment entered upon the demurrer is reversed.

(217 Pa. 631)

In re MULHOLLAND.

Appeal of WOODRUFF et al., Registration Com'rs.

(Supreme Court of Pennsylvania. Nov. 2, 1906.)

1. ELECTIONS—REVIEW—FINDINGS OF FACT.

On certiorari from a decision under the election laws, the court cannot review the finding of fact, but will inspect the whole record as to the regularity of the proceedings to determine whether the court exceeded its jurisdiction.

2. SAME—REGISTRATION—POWERS OF COURT.

A petition to the court of common pleas averred that petitioner had naturalization papers, but had mislaid them and could not find them to present to the board of registration; that thereafter he appeared before the board and produced proofs of his qualifications, including a certified copy of his naturalization papers, but the board refused to register him, because they had not been produced on one of the registration days. The court ordered his name to be added. He had presented no petition to the commissioners alleging error in the act of the registrar, as authorized by Act Feb. 17, 1906 (P. L. 49), nor did he show that he was prevented from registering by illness or unavoidable absence. *Held*, that the court of common pleas had no jurisdiction, and its proceedings will be quashed.

Mitchell, C. J., dissenting.

Appeal from Court of Common Pleas, Philadelphia County.

In the matter of William Mulholland. From an order adding his name to the registry list, Clinton Rogers Woodruff and others, registration commissioners, appeal. Reversed.

Argued before MITCHELL, C. J., and FELL, MESIREZAT, POTTER and STEWART, JJ.

Thos. Raeburn White, for appellants.

POTTER, J. On November 2, 1906, William Mulholland filed a petition in the court of common pleas No. 2, for the county of Philadelphia, in which he averred that he was a qualified naturalized voter of the twentieth division, nineteenth ward, of the city of Philadelphia; that he had in his possession naturalization papers, but had mislaid them, and did not find them in time to present them to the board of registrars; that on October 19, 1906, he appeared in

person before the commissioners of registration and produced all proofs of his qualifications as an elector, including a certified copy of his naturalization papers, but they refused to register him as a qualified elector of his division, assigning as their reason that he should have produced naturalization papers on one of the three registering days. He prayed the court to grant him an appeal from the decision of the commissioners, and to make such order as they might deem just and right under the circumstances. The court allowed the appeal and on November 21, 1906. Indorsed on the petition, "Name to be added," evidently meaning to order that the name of the petitioner should be added to the registry list. By certiorari the board of registration commissioners for the city of Philadelphia have brought the record before us for review. As to our jurisdiction in the matter, it is settled that "the judicial authority of this court extends to the review and corrections of all proceedings of all inferior courts, except where such review is expressly excluded by statute, in accordance with the Constitution." *Gosline v. Place*, 32 Pa. 520. After considering the prior decisions, Justice Woodward said, in *Chase v. Miller*, 41 Pa. 403: "Such, then, in general, is the jurisdiction of this court to correct all manner of errors of inferior judicial tribunals; and that is not to be taken away, except by express terms or irresistible implication." In a recent case, also arising under the election laws, Chief Justice Mitchell said: "The case having been brought to this court by certiorari, the first question is our jurisdiction. The proceeding being entirely statutory and without appeal, we cannot review the findings of fact or the merits of the case, but under the general supervisory powers of the court on certiorari we are entitled to inspect the whole record with regard to the regularity and propriety of the proceedings to ascertain whether the court below exceeded its jurisdiction or its proper legal discretion." *Independence Party Nomination*, 206 Pa. 108, 57 Atl. 344.

Turning to the law governing the present case, we find that the act of February 17, 1906 (P. L. 49), entitled "An act to provide for the personal registration of electors in cities of the first and second classes of this commonwealth, to make such registration a condition of the right to vote in such cities, and to provide penalties for the violation of its provisions," provides (section 8) for the appointment for each of said cities of a board of registration commissioners, consisting of four members, who shall (section 5) each year appoint four registrars for each election district of the city. The registrars of each division are required (section 6) to meet at the polling place thereof on the ninth Tuesday, seventh Tuesday and fourth Saturday preceding the November election, and the fourth Saturday preced-

ing every municipal election, and remain in open session from 7 a. m. to 10 p. m. of each registration day, to receive applications from persons claiming to be entitled to be registered as voters. Every person claiming the right to vote is required (section 7) to appear before the registrars in the district in which he lives prior to every general election, and make answer to certain prescribed questions. All persons claiming the right to vote by reason of naturalization must (section 9) produce the proper naturalization papers, or a certified copy thereof, before they shall be registered. No person may be registered (section 8) unless at least three of the registrars determine that he possesses or will possess before the next ensuing election the qualifications of an elector as provided in the Constitution and laws of this commonwealth, and only such persons (section 17) as shall be registered are permitted to vote at any general, special, or municipal election. If any citizen (section 15) objects to the action of the registrars in accepting or rejecting any claim for registration, he may file his petition with the commissioners, setting forth the ground of his complaint, and the commissioners, after hearing, may amend the registry of voters in accordance with their decision. An appeal lies from the decision of the commissioners to the court of common pleas, but must be made not later than five days preceding an election. A qualified elector (section 15) who was too ill to appear at the polling place on any of the registration days, or was unavoidably absent from the county on those days, may petition the commissioners at any time up to two weeks before the general election, setting forth the facts and praying that his name may be added to the register. Any person dissatisfied with the decision of the commissioners on such petition may appeal to the court of common pleas as in other cases. But, except in these two instances, no provision for an appeal appears in the act.

In the present case the petitioner had not been rejected by the registrars. He does not even aver that he ever appeared before them on any one of the registration days, and he expressly admits that he did not produce to them his naturalization papers, or a certified copy thereof, as he was required to do as a prerequisite to registration. He presented no petition to the commissioners alleging error in the action of the registrars, nor does he allege that he was prevented from registering by illness, or unavoidable absence from the county. Under these circumstances the commissioners had no power under the act to order his name to be added to the register, nor is there any right given to the court of common pleas to entertain an appeal from their refusal to make such an order. The record shows an entire absence of jurisdictional facts upon which the action of the court of common pleas could have been based. Its

proceedings are unauthorized by any of the provisions of the act of assembly.

The order of the court below is therefore reversed and set aside, and the proceedings upon the petition for an appeal from the decision of the commissioners of registration are quashed.

MITCHELL, C. J., dissents.

(218 Pa. 24)

**CHESTER CITY v. UNION RY. CO. OF
CHESTER et al.**

(Supreme Court of Pennsylvania. April 29, 1907.)

**1. STREET RAILROADS—RIGHT TO USE STREET
—CONDITION OF GRANT.**

A city gave by ordinance a street railway company the right to use a particular street, reserving the right to grant to any other railway company rights in the same street. The mayor required the railway company in consideration of the ordinance, to agree to arbitrate any dispute with another company to which the right to the street might be granted. *Held*, the company could not allege that the agreement for arbitration, not being a part of the ordinance, was not binding on it.

2. SAME—FORFEITURE OF FRANCHISE.

Where an ordinance giving a street railway company the right to use a street contained no clause of forfeiture, an agreement of the company with the mayor, at the time of signing the ordinance, to arbitrate any difficulty with another street railway company seeking to use the street, did not give the city the right to forfeit the franchise because its arbitrator was unable to agree with the second arbitrator in the choice of a third.

3. SAME—USE OF STREET.

Where a city gave a railway company by ordinance permission to use a street in question, with a provision therein reserving the right to another company to use the same street, the city cannot maintain a bill in equity to compel the first company to permit the second company to use the street; the party aggrieved in such case being the second company.

Appeal from Court of Common Pleas, Delaware County.

Bill by the city of Chester against the Union Railway Company of Chester, Pa., and the Chester Traction Company. Decree for plaintiff, and defendants appeal. Reversed.

Argued before MITCHELL, C. J., and FELL, MESTREZAT, POTTER, and ELKIN, JJ.

W. B. Broomall, for appellants. A. A. Cochran, for appellee.

MITCHELL, C. J. The city of Chester, in 1893, by ordinance granted to the Union Railway Company, appellant, the right to construct and operate its railway on certain streets named. The ordinance contained conditions, none of which have any relevancy to this controversy, except the following: "The councils of the city of Chester reserve the right to grant permission to any other railroad company to run over the tracks of the said Union Railway Company on * * * Edgmont avenue from Fifteenth street to the city line, upon the company to whom

this right shall be granted making an amicable arrangement with the Union Railway Company for the running of cars over its tracks between the points named." When this ordinance was presented to the mayor, he declined to approve and sign it until the appellant had agreed "that if at any time permission shall be granted by the said city of Chester to any other railway company, or if such permission shall be asked of the said city by any other railway company to run over the tracks of the party of the first part on * * * Edgmont avenue, from Fifteenth street to the city line, * * * and the said party of the first part and the said other railway company shall fail to agree upon the terms upon which the said other railway company shall be allowed to use the tracks of the party of the first part, then and in such case the terms and conditions of such use shall be determined in the following manner, to wit: The party of the first part shall appoint one person, and the other railway company asking the said permission shall appoint another person, and these two persons so appointed shall select a third person, and the majority of the said three persons so selected shall prescribe the terms and conditions upon which the said other railway company shall occupy and use the said tracks of the said party of the first part, and such terms shall be obligatory upon the said party of the first part; and in case either party refuse or neglect within a reasonable time to appoint, the other party shall have the right to appoint in its place." A formal agreement in these terms was executed by the appellant company and the mayor and city clerk, and on the same day the ordinance was signed by the mayor and became effective. By various ordinances between 1894 and 1902, the city of Chester granted to the Media, Middletown, etc., Railway Company the right to lay tracks on certain streets, including finally Edgmont avenue, with the right to use appellant's tracks thereon. This was the origin of the present controversy.

The appellant claimed that the agreement for arbitration, not being part of the ordinance, was not binding on it, and that, even if it were, the agreement of submission was revocable. Neither claim can be sustained. Whether the mayor of the city had any authority to impose conditions of consent additional to those called for in the ordinance itself is a question that does not arise. The appellant agreed to them. The city was not under any obligation to grant the use of its streets at all, and did so only by virtue of the ordinance. The ordinance became valid by the mayor's approval, and his approval was in consideration of the agreement for arbitration. That agreement was, therefore, part of the consideration for the city's consent, and binding on the appellant.

Nor can the appellant's claim of the right to revoke the agreement of arbitration be

sustained. While such agreements are in general unfortunately under the ancient precedents held revocable, yet, where they are part of the condition of the municipal consent, the corporation takes the consent cum onere, and cannot thereafter revoke or repudiate any part of the condition. *Plymouth Township v. Chestnut Hill, etc., Ry. Co.*, 188 Pa. 181, 32 Atl. 19. But, on the other hand, the ordinance of March, 1904, was far beyond the city's authority. There was no clause of forfeiture in the original ordinance of consent, and even if the agreement of arbitration could possibly be considered as containing such implied power, there was no breach by the appellant. Even express powers of forfeiture must be strictly followed. What the agreement stipulated for was the appointment of an arbitrator by each party, and on refusal by either the right of the other to appoint for both. The appellant did not refuse. On the contrary, it appointed an arbitrator who met the arbitrator appointed by the Media & Middletown Company, but failed to come to an agreement with him as to the third, and thereupon the Media & Middletown arbitrator assumed to appoint another, and an award was made by the tribunal as thus constituted. This action was entirely unauthorized, and the award a nullity. The appellant appointed an arbitrator, and thus prima facie complied with its agreement. If appellant or its arbitrator was acting in bad faith, and his failure to agree on a third arbitrator was a mere device to escape substantial compliance with the agreement, that fact should have been judicially established by a bill or other proceeding. It could not be assumed by the adverse party and action taken on that assumption. The award was a nullity, and the ordinance of March 22, 1904, based on it, was void for want of authority to declare a forfeiture.

But another fatal objection to the present proceeding is that the city of Chester on its own showing is not a party aggrieved. In consenting to the occupation of its streets by the appellant, it reserved the right "to grant permission to any other railroad company to run over the tracks of the said Union Railroad Company on Edgmont Avenue," etc. Under that reservation it has given permission to the Media & Middletown Railway, and, if such permission has been regularly and properly granted, the franchise to that company is complete and valid and enforceable, without reference to appellant's consent or action. The right of the city to grant permission to the second company was not in any way dependent on the "amicable arrangement" between the two companies. Such a construction would make the validity of the city's permission to the second company dependent on the appellant's willingness to come to such amicable arrangement, and thus put it in appellant's power to defeat the city's reserved right. The agree-

ment for arbitration by the two companies, therefore, was no part of the franchise which the city reserved the right to grant. It was only a mode provided for adjusting conflicting rights in the future, a mode to be pursued in the first instance because it was so agreed, but not exclusive of a mode to be ascertained and enforced by a court of equity, if, as heretofore said, the action of appellant or its arbitrator was in bad faith for the real purpose of defeating an apparent compliance. But the party aggrieved in such case, and therefore the party to ask for remedy, is the grantee of the second franchise which is thus interfered with. The city has exercised its reserved right and has no further legal interest in the matter.

The Media & Middletown railway is not a party to this action, and its rights cannot be adjudicated in it.

The decree is reversed, and the bill dismissed; each party to pay half the costs.

(217 Pa. 539)

KAUFMAN v. PITTSBURG & C. S. R. CO.
et al.

(Supreme Court of Pennsylvania. April 22, 1907.)

1. RAILROADS—POWER TO LEASE.

Where a railroad company is incorporated under the general railroad act of April 4, 1868 (P. L. 62), and acquires additional powers under the special act of February 21, 1872 (P. L. 142), enabling it to own and operate coal mines, and by special act of April 5, 1873 (P. L. 546), to construct and operate inclined planes, it may lease its railroad to a railway company organized under special act of May 25, 1871 (P. L. 1170), with general powers.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, § 404.]

2. SAME.

Where a railroad company has under its charter power to construct a railroad for another company to operate, and also to operate a railroad for its own use, it can lease the railroad which it operates for its own use for a term of years.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, § 404.]

3. SAME—CONDITIONS.

The general railroad acts April 23, 1861 (P. L. 410), and February 17, 1870 (P. L. 31), requiring the railroads of a lessor and lessee to be connected, do not apply to act May 25, 1871 (P. L. 1170), conferring on certain corporations chartered by the Legislature express power to merge, consolidate, or unite with any other company.

Bill by Sibilla Kaufman against the Pittsburgh & Castle Shannon Railroad Company and others. From a decree dismissing the bill, plaintiff appeals. Affirmed.

The following is the opinion of Macfarlane, J., in the court below:

"(1) The Pittsburgh & Castle Shannon Railroad Company, hereinafter called the 'railroad company,' is a corporation organized under the general railroad act of April 4, 1868 (P. L. 62), and having by the special act of February 21, 1872 (P. L. 142), the right to own real estate and mine coal therefrom,

and by the special act of April 5, 1873 (P. L. 546), the right to construct an incline plane. The plaintiff was in August, 1905, and still is the owner of 50 shares of stock of the said company.

"(2) The Pittsburgh Railways Company, hereinafter referred to as the 'railways company,' was incorporated by a special act of assembly May 25, 1871 (P. L. 1170), under the name of the 'Surety Contract Company,' subsequently changed to the present name, and its principal business is that of operating traction lines and passenger railways in the county of Allegheny.

"(3) The Pittsburgh Coal Company, herein after referred to as the 'coal company,' is a corporation under the laws of the state of New Jersey, having its principal office in the city of Pittsburgh, Allegheny county, and is engaged extensively in the mining and selling of coal in the said and adjacent counties; and it is the owner of 7,756 shares of the stock of the Pittsburgh & Castle Shannon Railroad Company, out of a total of 9,628 shares.

"(4) The board of directors of the railroad company, 10 in number, is with one exception composed of officers and directors of the coal company, and the railroad company has been for several years controlled and managed by the coal company.

"(5) The executive officers of the railroad company, its superintendent, engineer, and accounting officers, were officers in a similar capacity of the coal company, which charged the railroad company for their services a reasonable amount, and the operating expenses of the railroad company were, in this respect, much less than they would have been if independently officered.

"(6) The railroad operated by the railroad company extends from Arlington Station, Scott township, Allegheny county, to a point on Bailey avenue in the Thirty-Second Ward in the city of Pittsburgh, and then by an incline plane with the road running from Bailey avenue to Carson street in the city of Pittsburgh. It also owns and operates coal mines in Scott township. Prior to January 1, 1893, the railroad ran by a horseshoe curve track north of Washington avenue, in the Thirty-Second Ward, in the city of Pittsburgh, via a coal tunnel and coal incline to Carson street in the Thirtieth Ward, Pittsburgh, where there was and is now located a coalyard of the railroad company. About the last-mentioned date the company constructed a shorter and more direct line diverging from the former route at a point near Washington avenue, in Montooth borough, and by incline planes reaching Carson street at a point adjoining the coalyard. Upon the completion of the new short line the horseshoe curve track, coal tunnel, etc., were used solely for the transportation of coal from the mines of the company to the yard, and were not used for the transportation of freight and passengers, except on several

occasions prior to the year 1900 passengers were so transported on account of accidents to the incline planes on the shorter route, which from January, 1893, was used exclusively for passengers and freight and became the main line of the railroad. The horseshoe curve portions of the track were used in connection with the coalyard as a part of the terminal facilities of the railroad company in its mining and shipping of coal.

"(7) On July 13, 1904, the railroad company leased to the coal company, at \$30 a month, for the term of three years from July 1, 1904, a lot which had been used as a dump for refuse, and the coal company erected thereon a laboratory for its use and the use of the railroad company.

"(8) For some time prior to any negotiations for the lease in this case the coal company had erected telephone wires, at its expense, along the right of way of the railroad, and this line was used by the coal company and the railroad company without charge to the latter.

"(9) The coal company has, and has had, no agreement or understanding with the railroad company for the use of the horseshoe curve portion of the tracks, and has not, at any time, used these tracks or any part thereof, and it does not own, control, or operate in any way any mines or other property on or near the line of the railroad company.

"(10) The railroad company was in August, 1905, and had been for several years previous, insolvent. Its coal property was valuable, and was capable of being operated with profit, but the railroad had for a long time been operated at a loss of more than \$3,000 a month, which was almost an offset to the earnings of the coal business of the company.

"(11) During the months of July and August, 1905, the railroad company began negotiations with one Baxmyer for the lease of the railroad, and a meeting of the stockholders of the railroad company was called on August 16, 1905, for the purpose of considering a proposition for the leasing or selling of certain of its property, and there was then presented to the stockholders a resolution authorizing the execution of a lease, and it was then stated that the proposed lessee was the railways company, and that the proposed lease was in pursuance of a resolution of the board of directors, made on July 21, 1905. Objections were made by some of the stockholders, including the plaintiff, and a verbal offer was made to take a lease at the rent of \$20,000 per annum. The meeting adjourned to August 17th, at which time William Kaufman, acting on behalf of a principal whose name he refused to disclose, but with whom the plaintiff had no privity, but who was, some time after the execution of the lease, disclosed to be Robert C. Hall, a broker and promoter, of the city of Pittsburgh, offered in writing that he, Kaufman, would, on or before August 24th, bid at

least \$17,500 for the lease in the same form as that submitted, and as evidence of his good faith he deposited three bonds of \$1,000 each. The meeting was adjourned to August 24th, at which time Kaufman did bid \$17,500 per annum for the lease for a term of 99 years, and for a further term of 99 years at \$20,000 per annum. This bid was in writing. The said bid was not submitted for the consideration of the stockholders, for the reason that the identity of the principal was not disclosed, although demanded, and it appeared on the bid that there was no corporation competent to take the lease; and it was known by the directors and by the plaintiff and most of the stockholders present that the railways company was ready and willing to execute the lease, and that it was a strong corporation, of a good credit, and capable of carrying out the terms of the lease.

"(12) The action of the coal company as a majority stockholder, and of the officers of the railroad company, in voting for the lease and in subsequently executing it, was prudent and in good judgment and was advantageous to all of the stockholders, and the refusal of the Kaufman bid was in good faith and in the exercise of good judgment. It developed upon the trial of this case that Mr. Hall had no connection with or control over any corporation capable of taking a lease, and his purpose in desiring to acquire the lease was simply as a speculation.

"(13) At the last-mentioned meeting an election was had upon the proposed lease. The coal company cast its stock in favor of the resolution, and out of a total of 9,628 shares 8,153 shares were cast in favor of 66 against the resolution, the affirmative vote being composed of the stock of the coal company and its officers, directors, and employes, with the exception of 350 shares, and of the 66 shares, 50 were owned by the plaintiff and 16 by E. F. Hays.

"(14) Neither the coal company nor any of its officers nor any of its subsidiary companies or their officers have received or will receive any pecuniary or other benefit or advantage in consideration of voting its stock in favor of the lease, except such benefits and advantages as accrue equally to all of the stockholders of the railroad company.

"(15) The lease dated August 25, 1905, was executed for the railroad company by its president on the morning of August 25th, and by its secretary in the evening of that day, and was executed by the railways company on August 26th; and as early as 12:25 p. m. August 25th, notice was served upon the railways company by plaintiff, requiring the defendant not to execute the lease or to pay out any money on account thereof. This bill was filed on August 30th and served the same day. The railways company entered into possession, and since that time has been operating the portion of the railroad leased to it.

"(16) On or before September 1, 1905, the railroad of the defendant railroad company

did not connect with nor intersect any other railroad nor physically with the road or railway of any street railway company, and the railways company did not own, control, lease, or operate a railroad physically connected with that of the railroad company. The railways company's tracks are situated, with reference to the railroad company's tracks, at a number of points, as follows: At Carson street within 60 feet, at which point passengers have been for several years transferred between the respective companies under the terms in an agreement; on Bailey avenue, within 4 or 5 feet; near Arlington avenue the railways' tracks cross the railroad above grade; the Washington avenue line parallels the railroad for more than a quarter of a mile, at a distance from 20 to 60 feet; at another point the lines are 150 feet apart, and the intervening land is leased by the railways company; from Arlington to Castle Shannon the lines parallel for about half a mile, at a distance from 25 to 200 feet; and in Castle Shannon a spur of the railroad extends to within 10 feet of the railways' tracks. At all but one of these points the transshipment of passengers from one road to the other is easy and convenient.

"Conclusions of Law.

"(1) There being no fraud or undue advantage, the lease is not void on that ground.

"(2) The lessor has not violated any duty to the commonwealth.

"(3) The lessee has the right to take the lease.

"(4) The lessor has the right to make the lease.

"(5) It is not necessary under the charter of the lessee that the lines be mechanically connected, and it is sufficient that they are in proximity so as to afford convenient transfer of passengers.

"(6) The bill should be dismissed, at the costs of the plaintiff."

Argued before MITCHELL, C. J., and BROWN, ELKIN, and STEWART, JJ.

Wm. Kaufman and E. F. Hays, for appellant. David A. Reed and Charles M. Johnston, for appellees.

ELKIN, J. The answer to the third proposition contained in appellant's statement of the question involved will control all the material questions raised by this appeal. Does the charter of the defendant railway company authorize it to take the lease, the execution of which is sought to be enjoined by appellant, and, if so, will the lease be held valid for that reason, even though the charter of the railroad company did not in express terms confer the power to enter into such a contract?

The defendant railroad company is a corporation organized under the general railroad act of April 4, 1868 (P. L. 62); and by the special act of February 21, 1872 (P.

L. 142), it is given the power to purchase and own real estate and mine coal therefrom. Under the act of April 5, 1873 (P. L. 546), it has the right to construct an incline plane. The learned court below has found as a fact that said railroad company was in August, 1905, and had been for several years prior thereto, insolvent. Its coal property was valuable, and was capable of being operated with profit, but the railroad had for a long period of time been operated at a loss of more than \$3,000 per month. The railroad company, being desirous of relieving itself from the operation of the road, opened negotiations for the purpose of making a lease of the same for a term of years. Several meetings were held for the purpose of considering a proposition looking to a leasing of the railroad, and on August 24, 1905, the final meeting of the stockholders of the railroad company was held, at which 8,153 shares were voted in favor of the lease and 66 against it. The appellant voted 50 shares out of the total of 66 against the resolution. The learned court below has found as a fact that the lease was an advantageous one for the stockholders of the railroad company to make, and that there was no fraud or collusion in the transaction. Indeed, we do not understand that the learned counsel for appellant raises any such question on this appeal, but relies entirely on the legal proposition above stated.

The Pittsburgh Railways Company derives all of its powers under the special act approved May 25, 1871 (P. L. 1170). This company is one of seven or eight corporations chartered by the Legislatures of 1870 and 1871 which have been granted very broad and comprehensive powers. It is clearly within the power of this company to engage in the transportation of passengers and freight by land or water for it is so expressly written in the act creating it. In section 2 it is given the power "to build, construct, maintain or manage any work or works, public or private, which may tend or be designed to improve, increase, facilitate or develop trade, travel or the transportation or conveyance of freight, live stock, passengers and any other traffic, by land or water." In section 4 it is given the power to purchase, make, use, and maintain any works or improvements connected or intended to be connected with the works of said company, and to merge or consolidate or unite with said company the improvements, property, and franchises of any other company. It will be observed that this company is given the express power to merge, consolidate, or unite with its works or business the improvements property or franchises of any other company. It also has the power to purchase, make, use and maintain any works or improvements of another company connecting or intended to be connected with the business of said company. When these general powers are considered in connection with the power to build, construct, maintain, or manage any work or works, public or private, intended to im-

prove, increase, facilitate, or develop trade, travel, or the transportation or conveyance of freight, passengers, and other traffic by land or water, conferred by section 2, there can be no doubt that the railways company had the power to enter into a contract of lease with the railroad company, under the terms of which it is to use and maintain the property of the railroad company for a term of years at a fixed annual rental agreed upon. It cannot be seriously questioned that the railways company under its charter has the power to build a railroad for another corporation to operate, nor can it be doubted that it has the power to build and operate a railroad for its own use, and it necessarily follows that, if it can construct a railroad for another company to operate and can operate a railroad for itself, it can lease a railroad for its own use for a term of years. The power to purchase outright certainly includes the power to lease and operate for a definite term. The greater includes the lesser power.

It may be objected that the Legislature was improvident in conferring upon this and the several other companies created by the special acts during the legislative sessions of 1870 and 1871 such omnibus powers; but this is a legislative, and not a judicial, question. In *International Navigation Company v. Commonwealth*, 104 Pa. 38, *Hespenheide's Appeal*, 4 Penny. 71, and *Carothers v. Philadelphia Company*, 118 Pa. 468, 12 Atl. 314, it was held that the rights and franchises granted by these special acts were a valid exercise of the legislative power. In the last case cited it was distinctly held that the power conferred was sufficiently comprehensive to authorize that particular company to engage in the production, distribution, and supply of natural gas for fuel.

It seems to be conceded in the argument of the learned counsel for appellant that the railways company has the general power to engage in the transportation of freight or passengers; but it is earnestly contended that the provisions of the acts of 1861 (P. L. 410) and 1870 (P. L. 31), requiring the railroads of a lessor and lessee to be "connected," should apply, and that the lines of the defendant railways company and railroad company do not have a physical connection, and for this reason the lease must fail. In this connection it should be observed that the words "connected or intended to be connected," in the act of 1871 which created the defendant railways company, are of much wider significance in the matter of acquiring connecting lines than are the provisions of the general railroad acts referred to. The question involved in this case has nothing to do with the rights or limitations of railroad companies under the general acts of 1861 and 1870. The defendant railways company, in so far as these general powers are involved, looks to the act of its incorporation, and is not controlled by the acts referred to. Even under the railroad acts of 1861 and 1870, it has

been held that the roads of the lessor and lessee need not be so connected that the same cars shall pass from one road to the other without interruption, but only that they shall be so connected that a convenient interchange of passengers and freight is possible. *Philadelphia & Erie Railroad Company v. Catawissa R. R. Co.*, 53 Pa. 20; *Hampe v. Pittsburgh & Birmingham Traction Company*, 165 Pa. 468, 30 Atl. 931. However, it is unnecessary to discuss the question whether the lines of the two companies were so connected as to meet the requirements of the acts of 1861 and 1870, because the rights of the lessor and lessee in this case are controlled by the act of 1871, under which the lessee company was incorporated.

It is now urged, however, that, even conceding that the railways company had the power to take the lease in question, the railroad company did not have the power to make it. This does not now seem to be an open question in this state, as it has been expressly held by this court that the power to take, expressly conferred upon the railways company, implies the power in the lessor company to make the lease. *Pinkerton v. Pennsylvania Traction Company*, 193 Pa. 229, 44 Atl. 284. In that case the present Chief Justice, speaking for the court, said: "Nor is there any weight in the objection that the passenger railway company had no power to lease its road. The power to take a lease is expressly given to the motor company, and the corresponding power in the passenger railway company, as owners, to give a lease, is necessarily implied. Without it, the grant in the act would be nugatory." To the same effect are the cases in other jurisdictions. In *re Prospect Park & Coney Island Railroad Company*, 67 N. Y. 371; *N. Y. & N. E. R. R. Co. v. N. Y., N. H. & H. R. R. Co.*, 52 Conn. 274; *Hunting v. Hartford Street Railway Company*, 73 Conn. 179, 46 Atl. 824. From the rule stated in these cases it clearly appears that the railways company, under its act of incorporation, having the power to enter into the lease with the railroad company, and there being no limitation on the power of the railroad company to enter into the lease, and therefore no violation of any statutory requirement, it had an implied power to make the lease in question.

Decree affirmed.

(115 Pa. 56)

BARDSLEY v. GILL & CO.

(Supreme Court of Pennsylvania. April 29, 1907.)

1. EVIDENCE—EXPERT TESTIMONY.

Where a witness testifies to a long experience with different oils, he is competent to testify that a room in which oil was kept was not properly ventilated, and to state what precautions should have been taken to insure safety to the employes.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 2343, 2344, 2347.]

2. CUSTOMS—EVIDENCE.

Where witnesses testified as to the method of dealing with oil for fuel purposes in the establishments in which they were employed, though none of them could testify as to the general custom, the jury could say from the consideration of such evidence what the general custom was.

3. MASTER AND SERVANT—INJURY TO SERVANT.

In an action by a wife to recover for the death of her husband, caused by alleged negligence of defendant employer in storing fuel oil, evidence held to sustain an inference that deceased did as he was expected by his employer to do in entering the oil room with an open light.

Mitchell, C. J., dissenting.

Appeal from Court of Common Pleas, Philadelphia County.

Action by Martha Bardsley against Gill & Co. Judgment for plaintiff, and defendants appeal. Affirmed.

Argued before MITCHELL, C. J., and FELL, MESTREZAT, POTTER, and STEWART, JJ.

W. W. Smithers, for appellants. Henry J. Rebman, Glenn C. Mead, and James Gay Gordon, for appellee.

POTTER, J. The plaintiff in this case seeks to recover damages for the death of her husband, who was killed in an explosion at the defendants' factory on November 27, 1901. Richard Bardsley, the husband, was employed by the defendants as a night engineer, performing, among other duties, that of caring for an oil pump which drew fuel oil from a room in which it was stored, in the cellar of the factory, to the furnace room where it was used as fuel for melting glass. On the night of the explosion the flow of oil from the tank became in some way obstructed. The matter was reported to Bardsley, the engineer, and he went to the oil room to ascertain the source of the trouble. A few moments later the explosion occurred, and the night watchman found Bardsley staggering about in the oil room, where he soon fell dead. The fireman, who came in a little later, testified that he found Bardsley's body lying over a box or barrel, with his head facing away from the oil tank. His clothing was scorched. McCormick, who was a companion of Bardsley, was also injured by the explosion, and could give no clear version of the accident beyond the mere fact that it happened. While he would not state positively that Bardsley was carrying a light when the accident happened, yet he thought so. There was positive evidence that there was no fixed light in the room where the explosion occurred. In the daytime some light was afforded by a small door or shutter, which could be opened; but even this was usually closed. There was evidence that defendants supplied their employes with candles or lamps to use about their work. There were three tanks in the oil room, one of which apparently was never used. The larger of the two remaining tanks had a capacity

of about 2,800 gallons of fuel oil. It was sunk in the floor, and in its top there was a manhole through which passed an oil pipe and two steam pipes. The tank contained a steam coil used for heating the oil when it became sluggish in cold weather. There was evidence that the general nature of fuel oil is to give off explosive gases at any temperature, and that heating the oil increases the volume of gas produced. The negligence charged was, in substance, failure to provide safe conditions for the employes to work in and about the oil room. Specifically, defendants were charged, among other things, with improper construction, arrangement, and equipment of the tank and oil room, in these respects: (a) No covering provided for the manhole of the tank; (b) lack of usual and customary devices to indicate quantity of oil in tank; (c) lack of usual and customary devices to indicate temperature of oil as affected by the steam pipes used for heating the oil; (d) lack of adequate means of ventilation for carrying off gases. In addition, they were charged with failure to supply Bardsley with a safety lamp, and with violation of duty in not notifying him of the dangerous condition of the room. Evidence tending to sustain these charges was offered by plaintiff. The defendants offered no testimony, and asked for binding instructions at the close of the evidence for the plaintiff. The trial judge refused the request and submitted the facts and inferences to be drawn therefrom to the jury in a very careful and discriminating charge.

The first group of assignments, as arranged by counsel for appellant, complains of the admission of evidence as to what other employes did, and as to what instructions they received, and as to the condition of the plant, at other times. Some latitude must be allowed in such cases as this, where much of the evidence was unattainable, by reason of the explosion. The particular duty of the employer in any given case is to be ascertained from the nature of the employment, and the location and condition of the premises, and the particular facts of the case. It was proper that the jury should be informed as to the methods pursued by the defendants in handling this dangerous kind of fuel. "A higher degree of care and vigilance is required in dealing with a dangerous agency than in the ordinary affairs of life or business." *Koelsch v. Phila. Co.*, 152 Pa. 355, 25 Atl. 522, 18 L. R. A. 759, 34 Am. St. Rep. 653.

In the second group of assignments complaint is made of the admission of the testimony of the witness Chesshire. He was offered as an expert on the subject of fuel oil, and his knowledge and long experience with oil would seem to qualify him admirably. He testified, in substance, that fuel oil is a by-product of a crude oil that is produced in the manufacture of other oils. Fuel oils are black and very oily, having a Beaume gravity of 29 to 35, with a fire test from 175

degrees to 300 degrees F. It is the general nature of these oils to give off gases, at all temperatures; but, if heated, the volume is increased. These gases are explosive only when brought in contact with an open flame. In answer to a hypothetical question, he stated that defendants' method of storing the oil was not the customary method. It is usually stored in tanks in the open air with ventilating shafts, and the amount and temperature of oil is determined by gauges. The witness stated that he knew of some 30 or 40 industrial institutions using fuel oil. He was of the opinion that the room, under the evidence as set forth in the hypothetical question, was not properly ventilated; that the manholes should have had lids with vent pipes leading to the open air; that there should have been at least two windows, always open, with a flue to the outer air; that there should have been an oil gauge outside of the oil room, and there should have been a fixed electric light with a vapor-proof globe; and that open lights should have been forbidden. We think this evidence was entirely relevant, and very much to the point, as tending to show the ordinary usage and proper method in dealing with oil, for fuel purposes, as contrasted with the method used by defendants.

This answer applies also to the third group of assignments, in which complaint is made of the admission of evidence as to the methods employed in other establishments. To show those methods, employes of certain glass firms were called. These men knew nothing of general customs, but testified as to the methods employed in their particular establishments. In all of these the tanks were ventilated by vent pipes or hoods connected with the outer air, with tight coverings over the manholes. One testified that at his establishment there was a glass gauge to determine the quantity of oil, without going into the room. The other two witnesses stated that their tanks were apart from the main factory buildings. These methods were in direct contrast to that pursued by defendants. It is true that no single instance is sufficient to prove a custom but custom is certainly made up of an aggregation of different instances. It was a question of fact for the jury to say what the general custom was, after the evidence of the methods in use in various concerns was before them. The question was as to the usual and proper method of storing oil, and rendering it reasonably safe to the employes, when used as fuel, whether in glass factories, or in other factories did not matter. It was the storage and care of this class of fuel oil which was under consideration. There was evidence that the explosive gases emitted from fuel oil rendered it a more or less dangerous commodity under any conditions, so dangerous that the proper practice was to store it apart, and in a separate place; but, if this was not done, defendants were at least bound

to take such ordinary and reasonable precautions as were in customary use in other factories using oil for fuel.

We see no merit in the fourth group of assignments, in which error is alleged in the general charge of the court. The question of ventilation, to carry off dangerous gases, was most important as bearing upon the measure of duty required of the employer, and was properly put before the jury. So, also, was the fact that, under the evidence, the gases would explode only when brought into contact with flame, and it therefore became a question for the jury whether failure to furnish illumination for the oil room other than that from the open flame of a lamp or candle, was negligence. The same thing is true of the failure to provide a tight manhole cover to the tank, to confine the explosive gases, and prevent them from spreading into the room. Without burdening the opinion with further details, it is sufficient to say that we think the evidence, which was uncontradicted, was sufficient to justify the jury in reaching the conclusion that the defendants were negligent in failing to provide the ordinary and well-known facilities in common use in storing fuel oil, for the protection of the workmen engaged upon the premises, in the performance of their duties; and that the jury were justified in drawing the inference that, as a consequence of the neglect, the explosion followed. The evidence was circumstantial, it is true, but that is sufficient in such cases to sustain the burden of proof. The inference of negligence upon the part of the employer is not confined to direct evidence alone. *Hughes v. Fayette Mfg. Co.*, 214 Pa. 282, 63 Atl. 692. The facts proven were that fuel oil generates explosive gases at all times, but especially when heated; that in this case the fuel oil was heated; that the open manhole in the oil tank permitted the gas to permeate the room; that contact with flame would explode the gas; that there was no permanent light of any kind in the oil room; that lamps and candles were used habitually by the employes in entering the room, and were provided for that purpose; that the witness who accompanied the deceased into the room stated that he thought Bardsley had a light, but, owing to his own injuries received at the time, he could not be positive. From these proven facts, we think the jury were entitled to draw the inference that Bardsley did what he was expected by his employers in case of need to do—that is, he entered the oil room with an open light—and that this light, coming in contact with the gas, caused the explosion. The inference that the accident happened in this way was certainly reasonable and natural.

We do not regard the evidence of alleged contributory negligence upon the part of Bardsley as sufficient to justify a binding in-

struction to the jury to find for the defendants. This was also a question for the jury, and the rights of the defendants in this respect were carefully and sufficiently guarded by the trial judge in his charge. The jury were instructed that, if Bardsley was negligent in the slightest degree, in any matter contributing to the accident, there could be no recovery. The defendants did not see fit to offer any testimony, but if, as is argued, Bardsley took a light with him into the oil room, he was only making use of that which had been provided for him, for that very purpose, by his employers. "Servants may assume that all instrumentalities are fit and suitable for the use to which the master applies them, and that they are properly adjusted to each other." *Shearman & Redfield on Negligence*, § 217. As was said in *Durst v. Steel Co.*, 173 Pa. 162, 33 Atl. 1102: "The master owes certain duties to the employe, and among these is to furnish a reasonably safe place to work, and to notify the employe of any latent danger of which the employer has knowledge, or with reasonable care would know. These duties cannot be avoided." Of course, if Bardsley had known that the oil room was filled with gas or fumes from the oil, and had then gone in with an open lamp, or lighted a match, he would have assumed the risk; but there is no evidence of that. He had the right to rely upon the intelligence and faithfulness of his employers in providing reasonably safe methods of storing the oil, and he cannot be charged with contributory negligence because he made use of the facilities supplied to him for that purpose in his work. We do not see that the defendants have any just cause for complaint as to the admission of evidence, or as to the manner in which this case was submitted to the jury.

The assignments of error are overruled, and the judgment is affirmed.

MITCHELL, C. J. (dissenting). I do not think any negligence on the part of defendants in the arrangement and equipment of the oil room was shown; but, even assuming that enough evidence was given to take that question to the jury, there was no evidence at all that it caused the explosion. As to the cause, the verdict was a mere guess by the jury. What little evidence there was pointed to an open light as the immediate cause; but, if it was negligence, in the defendants not to supply safety lamps to their employes on the rare occasions when they might have to enter the oil room at night, then it was equally negligent in the deceased to go with an open light into the room, where he knew there was some trouble. The explosion, if that was the cause of it, and no other theory is as plausible, was as much the result of the deceased's own negligence as of anything else.

(217 Pa. 263)

ANDERSON et al. v. LOWER MERION TOWNSHIP.

(Supreme Court of Pennsylvania. April 1, 1907.)

1. MUNICIPAL CORPORATIONS—SEWERAGE SYSTEMS.

The Legislature may confer authority on municipalities for the creation and maintenance of a sewerage system.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, §§ 725, 1309.]

2. SAME—SEWER DISTRICTS—CREATION.

Act Feb. 23, 1905 (P. L. 22), providing for charging the cost of construction of sewers in townships of the first class against properties benefited, authorizing township commissioners to create sewer districts, apportioning the cost, and prescribing the manner in which the costs will be assessed, is not unconstitutional, in so far as it gives townships of the first class the power to divide the township into sewer districts and provide for alternative methods of assessment on properties benefited.

3. SAME—ASSESSMENTS.

Under Act Feb. 23, 1905 (P. L. 22), relating to construction of sewers and drains, township authorities may apply the foot-front rule to densely populated sewer districts, and assess the costs, where the properties are of a rural character, according to the benefits.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, §§ 1109, 1118.]

4. SAME—APPOINTMENT OF VIEWERS.

Act Feb. 23, 1905 (P. L. 22), providing for the construction of sewers and drains, is not unconstitutional because authorizing the township commissioners. Instead of the courts, to appoint the viewers to ascertain the benefits of the sewer improvements.

5. SAME—TAXATION—UNIFORMITY—SPECIAL ASSESSMENTS.

Act Feb. 23, 1905 (P. L. 22), providing for the creation of sewer districts, is not in violation of Const. art. 9, § 1, providing that all taxation shall be uniform, inasmuch as this section refers only to taxes of a general nature, and does not apply to local improvements.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, § 1003.]

6. MUNICIPAL CORPORATIONS—SEWER DISTRICTS.

Act Feb. 23, 1905 (P. L. 22), providing for the construction of sewer districts, does not exceed the general powers of taxation conferred on the Legislature.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, § 1003.]

7. CONSTITUTIONAL LAW—RETROACTIVE STATUTES.

Act Feb. 23, 1905 (P. L. 22), providing for the creation of sewer districts, is not unconstitutional because retroactive as to a township which has already paid for a sewer improvement.

8. MUNICIPAL CORPORATIONS—SEWER DISTRICTS—CONSTITUTIONAL LAW.

Act Feb. 23, 1905 (P. L. 22), providing for the creation of a sewer district, is unconstitutional in so far as it authorizes the assessment of benefits where a sewer passed through private lands.

Appeal from Court of Common Pleas, Montgomery County.

Bills by Joseph W. Anderson and others against the board of township commissioners of Lower Merion township. Decrees for defendant, and plaintiffs appeal. Affirmed.

The lower court (Swartz, P. J., and Weand, J.) filed the following adjudication:

"Lower Merion is a township of the first class. The board of township commissioners constructed sewers in certain sections of the township. Assessments for benefits were made under the act of February 23, 1905, against properties situate in said sections or districts to collect the cost of the construction of the service sewers. The several bills in equity were filed by property owners to restrain the collection of the assessments made against their properties. It is contended that the assessments are illegal because the proceedings under which they were made are based upon an act of assembly that is in conflict with the Constitution of the state; secondly, that the sewers constructed were paid for by loans created under a vote of the electors of the township and by an ordinance of the commissioners, and that such action was conclusive against any further assessment to pay for the construction of the sewers; and, thirdly, that the methods of assessment invoked are illegal, and cannot be enforced even if the properties are liable to assessment.

"In our findings and conclusions we have not separated the cases. Bills Nos. 8, 9, and 16 relate to properties located within the limits of the third sewer district. Bill No. 11 relates to properties located either in the first district or in the second district. In districts 1 and 2 the assessments are made in proportion to the frontage of each property abutting on a sewer, while in district 3 the assessment against each property is determined by viewers appointed by the board of township commissioners. Where the findings and conclusions did not relate to all the bills, there is no difficulty in referring them to the proper bill when we keep in mind the two distinct methods of assessments; the one the foot-front rule, and the other assessment by viewers appointed by the township commissioners.

"Findings of Facts.

"(1) Lower Merion is a township of the first class, and became such in the year 1900.

"(2) On April 16, 1902, the board of township commissioners passed an ordinance to establish and maintain a system of sewers, culverts, pipes, and drainage to dispose of domestic drainage and sewage in said township. A system of sewers was designated on plans and maps and was subsequently constructed. The work was completed prior to February 23, 1905, but within six months of said date. The action of the township commissioners was in pursuance of the authority conferred upon them by the act of the General Assembly, approved May 24, 1901 (P. L. 294).

"(3) The township commissioners ascertained that the cost of the sewer system would amount to more than 2 per centum of the last preceding assessed valuation of taxable

property in said township. They resolved to submit to the electors the question whether an indebtedness of \$250,000 should be incurred 'for the purpose of paying the cost of constructing a system of sewers and drainage in said township as heretofore planned and adopted, including the pumping engines and necessary appurtenances.' A majority of the votes polled in the whole township was in favor of incurring the said indebtedness. After this vote of the electors, the township commissioners on May 20, 1903, accepted the bids of the contractors for the construction of a portion of the system of sewers. Bonds were issued for the purpose of securing the loan of \$250,000, and these were negotiated, and the money was realized by the township commissioners.

"(4) On June 17, 1903, the board of township commissioners appropriated \$250,000, or so much thereof as may be necessary, to the committee on health and drainage for the purpose of constructing a system of sewers for said township in accordance with an ordinance passed and approved April 16, 1902.

"(5) It was ascertained that the loan of \$250,000 was insufficient to pay for the projected sewer system, and on June 1, 1904, the board of township commissioners passed an ordinance authorizing an additional loan of \$200,000 to complete the sewer system. Bonds to this amount were also negotiated, and on July 20, 1904, the board of township commissioners, by ordinance, appropriated \$140,000 out of said second loan, to the committee on health and drainage, for the purpose of sewer construction.

"(6) The entire cost of the sewer system, including pumping stations, receiving tanks, and discharge pipes, was \$424,741.75. All of this sum was paid or provided for from the proceeds of the two loans aforesaid. This sewer system so constructed and paid for is the identical system now in use. The assessments in controversy are for benefits, and the commissioners demand from the property owners the payment of over \$300,000 of the said expenditure of \$424,000.

"(7) By ordinance of the board of township commissioners, property owners abutting on said sewers could be required to connect with and use the sewers of the township. In pursuance of said ordinance the owners of property abutting on the said sewers were notified to connect their respective buildings with said sewers. Failure to observe the order subjected the property owner to certain penalties. The board of township commissioners also established a rate of annual charges for all persons who connected with the sewers. These annual sewer charges will produce an amount somewhat in excess of the cost of operating and maintaining the sewer system. This action on the part of the township commissioners, requiring connections and annual rentals, was all taken prior to the passage of the act of February 23, 1905 (P.

L. 22), and the action was taken by authority of the act of May 24, 1901 (P. L. 294).

"(8) The ordinance providing for the issuing of the bonds also states that 'an annual tax is hereby levied upon the taxable property within the township of Lower Merion as the same shall appear by the assessment and valuation thereof,' for the payment of the interest and the principal of said bonds as they shall mature. These taxes were so levied on June 24, 1903, and June 1, 1904, to cover a period of 29 years, during which time the bonds were to be liquidated.

"(9) The sewer system so constructed under the act of May 24, 1901 (P. L. 294), passed in part over private lands; the said act having given the authority for such construction. The act also provided a method of assessing the damages for land occupied where the lines of sewers were not located on public roads: The court of common pleas was to appoint the jury. Several juries were appointed by said court to assess the damages for injury to private property. The complainant for the estate of Wistar Morris (Bill No. 16) had a jury appointed, and the jury in that case awarded damages in the sum of \$1,500. The report was filed on February 6, 1905; that is, before the passage of the act of February 23, 1905. The township commissioners took an appeal from the award.

"(10) The money to pay for the entire system of sewers was in the hands of the township commissioners as early as July 20, 1904, when the last appropriation was made to the committee on health and drainage. The annual rates for the use of the sewers were established apparently as early as December 2, 1903. The construction of the sewer system was completed, the money for its cost was paid or provided for, and its operation was assured by the enforced connections and the rentals for its maintenance. This was the condition of affairs for some time prior to February 23, 1905, although less than six months intervened between the completion of the system and the date just named.

"(11) On March 1, 1905, an ordinance was passed by the township commissioners in pursuance of the act of the General Assembly of February 23, 1905. According to this ordinance, there is no change in the sewer system in the slightest degree, either in construction or operation; but liability of the property owners for the costs of construction is changed. Under the new ordinance the cost of the service sewers, \$300,000, is to be paid by the property owners benefited, while under the original proceedings the entire cost was placed on all the landowners within the township. The sewer system embraces about 5,300 acres of ground. By the new ordinance this territory is divided into three sewer districts. No. 1 contains 900 acres, upon which 1,086 houses are erected. No. 2 contains 900 acres, and about 247

houses. No. 8 contains 3,500 acres, and about 150 houses. In sewer districts Nos. 1 and 2 the ordinance provides for the assessment according to the foot-frontage rule. The assessment, however, is only for the cost of the construction of service sewers; that is, the large sewers when used as service sewers are computed at the cost of eight-inch branch sewers. No charge is made for main sewers not used as service sewers, and no charge is made for the costs of the pumping stations. The assessment basis in No. 1 is \$141,682, while the whole cost of the sewer system chargeable to this district is nearly \$224,000. The assessment basis for No. 2 district is \$60,582, while the cost of the whole system in this district is over \$64,000. In No. 1 district the difference between the assessment basis and the actual cost of the system is very marked, because the pumping stations, tanks, and discharge pipes constitute a large part of the whole cost, while in sewer district No. 2 there are no expenses of this character. The sewage is carried off by gravity alone. In sewer district No. 3 the ordinance provides for an assessment according to benefits; these benefits to be determined by viewers appointed by the board of township commissioners. The assessment basis is \$127,755; the whole cost \$136,752.

"(12) In sewer district No. 2 the lines of pipes follow the streets, and do not pass over private land. With a few exceptions, this is also true of sewer district No. 1. The only deviation from the streets for any extended distance occurs where a line of pipes runs through lands of Joshua L. Bailey. There is, however, no assessment for this line over private ground. Mr. Bailey is assessed for the sewer line on Lancaster avenue, and also for the line on Church street or Linwood avenue, and his property abuts on these streets. The same is true where a line of pipes passes over a section of the Haverford College grounds. The college is not assessed for this through pipe line, but is assessed for the line along Railroad avenue, upon which the college grounds abut. In sewer district No. 3 the pipe lines run over private property at numerous points. In many cases where the line runs through a private tract that property also abuts on a sewer line on a street. In some cases, however, a pipe line passes through a property where that property does not have a sewer line on a street or on any boundary line of the property. Properties, whether in the one situation or the other, were assessed for benefits by viewers appointed by the board of township commissioners.

"(13) The properties assessed by the foot-front rule in sewer districts 1 and 2 are urban, and not rural. The only property used for farming purposes that is assessed in No. 2 is the Lodge tract. This tract has a frontage of 610 feet on Bala avenue, a fine wide street. The property is urban, notwithstanding its present use. The neigh-

boring properties to the east and west and on the opposite side of the avenue are urban. The villages of Bala and Cynwyd form this sewer district. There are no farm lands in district No. 1 abutting on any sewer line. The villages of Rosemont, Bryn Mawr, Haverford, and Ardmore constitute this sewer district, and there are no intervening rural lands between the end of one of these villages and the beginning of the next. The whole territory in districts Nos. 1 and 2 is devoted to or is ripe for residential purposes, although some of the owners may be unwilling to sell presently. Where the streets and roads are not lined with built up houses and stores, the lands are devoted to fine residential homes, ornamented with trees and shrubbery, and enjoy all the comforts of city homes, so far as water pipes, street lights, police and fire protection, and fine streets are concerned. These houses are occupied very largely by business and professional men engaged daily in the city of Philadelphia.

"(14) In assessing for benefits in sewer districts Nos. 1 and 2, the entire cost of the sewer service in each district was divided by the whole number of feet of sewer frontage in the district, and the quotient was taken as the benefit per foot to each property owner whose land abutted on the sewer system. By this computation each foot of frontage was charged a benefit of 90 cents. Apparently the computation in each district produced the same quotient of 90 cents. The natural surface of the various streets is somewhat irregular. There was diversity in the conformation of the ground, and upon some streets or lines the sewer trench at sections was more than 30 feet deep, while on other streets or lines the depth was less than 3 feet. At Thompson street the trench in parts had a depth of 32 feet, while at Wyoming avenue the depth was only 3.6 feet. In district No. 2 the trench on Bala avenue at some points had a depth of over 18 feet, while on some of the other streets the depth did not exceed 4 or 5 feet. Necessarily the sewer cost on different streets was very disproportionate, even where the size of the pipes is the same. One street has a natural grade in the right direction for a sewer; another must be built through a wrong slope by deep excavation. 'A ratio cost made up of the average of these is not an accurate measure of any one of them.' *Witman v. City of Reading*, 169 Pa. 375, 32 Atl. 92.

"(15) Certificates have been presented from the clerks of the townships of the first class throughout the commonwealth, and according to these certificates there is no township of the first class other than Lower Merion, in which a system of sewers or drains was finally completed within six months of February 23, 1905. The certificates to that effect were offered in evidence from 20 townships of the first class.

"(16) The following plaintiffs are owners of properties traversed by sewers or pipe

lines. We find this fact from the evidence and maps before us, but cannot vouch for the absolute correctness of our finding, as the evidence was not specially directed to this inquiry: The Girard Trust Company, trustees of the estate of Wistar Morris, deceased; Bryn Mawr Hotel Company, Charles E. Mather, Eulalie W. Leslie, I. Layton Register, Mary P. Ashbridge, Rebecca E. Ashbridge, and Lida H. Ashbridge, tenants in common. Some of the complainants' properties may abut on private roads having sewers. If so, then in some of these cases their properties may not abut upon any public highway occupied by a sewer line.

"Conclusions of Law.

"(1) Under the facts as found by us, the properties in sewer districts 1 and 2 are of such a character and situation that the foot-front rule of assessment is fairly applicable to them.

"(2) To charge each property according to the average cost per foot frontage in the whole sewer district is not allowable where the cost of construction of one branch or line, as in the case before us, is entirely disproportionate with the cost of another branch or line. As this was the method used by the commissioners in applying the foot-front rule, it follows that the assessments in districts Nos. 1 and 2 are incorrect. Some properties are charged too much, while others are not charged enough.

"(3) The assessment of benefits by viewers appointed by the board of commissioners, against properties abutting on a public street or highway, is not in violation of any provision of the Constitution of the state, where the benefits are assessed for service sewers located on such highways.

"(4) The assessment of benefits against properties by viewers appointed by the board of township commissioners, where a sewer line passes over private property, is illegal. Such assessment must be made by a jury appointed by the court, as the assessment involves damages arising under the exercise of the right of eminent domain. The viewers appointed by the board of commissioners did more than assess benefits. They declare: 'Where said sewer extends through private property, we have given due consideration to the question of possible damage to such property caused by the construction of the sewer and have weighed carefully the advantages and disadvantages thereof.'

"(5) The Legislature has the power and authority to impose a tax or municipal assessment for sewer benefits special to the property in townships of the first class, although the improvement for which the tax is assessed was made before the law was enacted which gives the right to assess the tax.

"(6) The act of February 23, 1905, is not unconstitutional as to its retroactive feature, even if it be a fact that this feature will not apply to any sewer system fully completed

other than the one in the township of Lower Merion.

"(7) The act of February 23, 1905, is applicable to the sewer construction in Lower Merion township, although the work was completed and paid for before the passage of the said act of 1905. The provisions of the act, to the extent that they were used or applied in the assessment of benefits, are not unconstitutional, but the foot-front rule was not properly applied, and the viewers appointed by the commissioners had no authority under the act to make the assessments as they were made in those cases, where the sewer lines passed over private lands. The act does not confer upon the viewers appointed by the commissioners the right to assess damages where the land is taken under the right of eminent domain.

"(8) We conclude that the following decrees and orders should be made in the several proceedings: And now, after due consideration, it is ordered; adjudged and decreed that the bill filed by Joseph W. Anderson and others, being No. 9, June term, 1905, be dismissed, at the cost of the plaintiffs. It is ordered, adjudged, and decreed that the defendant commissioners be enjoined from proceeding in any manner whatever for the collection of any assessments set out in the proceedings against any of the properties of the plaintiffs in bill No. 8, June term, 1905, where the sewer line passes over or traverses the private lands of any plaintiff, and the liens filed against such properties are hereby declared null and void and are stricken from the record. The defendant is directed to pay the costs of the proceedings under this bill. It is ordered, adjudged, and decreed that the assessments made against the properties of plaintiffs in bill No. 11, June term, 1905, were made upon an improper basis of assessment, and each plaintiff is allowed to show in any proceeding to collect the assessment that his property is charged more by the commissioners' mode of assessment than its proper share for the sewer in front of it. The defendant is directed to pay the costs of the proceedings under this bill. It is ordered, adjudged, and decreed that the defendant commissioners be enjoined from proceeding in any manner whatsoever for the collection of the assessment set out in the bill of the Girard Trust Company, trustees of the estate of Wistar Morris, deceased, bill No. 16, June term, 1905, and the lien filed against the property of said estate is hereby declared null and void, and is stricken from the record, and the defendant is directed to pay the costs in this proceeding. On exceptions, the court entered the following final decree: And now, October 29, 1906, the request for additional findings is refused, the exceptions filed in each case are dismissed, and it is now ordered, adjudged, and decreed, after due consideration and deliberation, that the assessments made against the properties of the plaintiffs in bill No. 11, June

term, 1905, were made upon an improper basis, and each plaintiff must be allowed to show in any proceeding on the lien or other proceeding to collect the assessment that his property is charged more by the commissioners' mode of assessment than its proper share for the cost of the construction of the sewer in front of it. The costs to be paid by the defendant."

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, and STEWART, JJ.

Wm. Righter Fisher, John G. Johnson, Montgomery Evans, Townsend, Elliott & Townsend, Louis M. Childs, Wanger & Knipe, George Vaux, Jr., W. W. Montgomery, and George S. Graham, for appellants. Rowland Evans and James Alcorn, for appellee.

MESTREZAT, J. These several cases were heard at the same time and decided by the court below in one opinion, and we will dispose of them in the same way. The questions raised on the record have been so satisfactorily considered and determined by the trial court that we rest our decision upon its conclusion. The questions have all been substantially passed upon by this court, as will appear by the authorities cited in the opinion of the court below. It would serve no good purpose to discuss the questions at length which have been adjudicated in those cases.

The many assignments of error filed by the property owners raise substantially the one question—the constitutionality of the act of February 23, 1905 (P. L. 22), and of the ordinance enacted under its authority by the board of township commissioners of Lower Merion township. In many respects wherein the constitutionality of the act is attacked, it is almost identical in language with that part of the act of May 23, 1889 (P. L. 277), relating to sewer construction and assessments in cities of the third class, which has been considered and sustained by this court, as numerous cases will disclose. Townships of the first class were created by the act of April 28, 1899 (P. L. 104), and this court sustained the authority of the Legislature in making the classification. *Commonwealth v. Blackley*, 198 Pa. 372, 47 Atl. 1104. The General Assembly may legislate upon any municipal function relating to that class of townships, and it will not offend the constitutional prohibition against special or local legislation. *Reeves v. Traction Co.*, 152 Pa. 153, 25 Atl. 516; *Commonwealth v. Guthrie*, 203 Pa. 209, 52 Atl. 254. The act of 1905, which is attacked in these proceedings, deals with a subject proper for municipal regulation, and is therefore within the legislative province. There are, it is true, some features of the act of 1905 which cannot be sustained, as pointed out in the opinion of the court below; but they are not so interwoven with the balance of the act that they render the whole statute unconstitutional and void. The third clause of section 7 (page 106) of the act of April 28, 1899, con-

ferred upon the board of commissioners the authority to establish a system of sewers and drainage and to require connection to be made with such sewers, and also made provision for the construction, maintenance, and repair of the sewers in whole or any part by an equitable assessment upon the properties benefited, in such manner as might be prescribed by ordinance. The act of May 24, 1901 (P. L. 294), amendatory of this clause of section 7 of the former act, omitted the provision authorizing the cost of the sewer to be charged on the property benefited, but conferred power on the township to enter on private lands for the construction of sewers. The act of February 23, 1905, restores the power of the townships to assess the cost of the sewer on the properties benefited. Legislation, therefore, bearing upon townships of the first class, has conferred upon such townships the power and authority of other municipalities in regard to the construction and maintenance of sewers, as well as providing for the expenses necessarily incurred for the purpose. As suggested above, the creation and maintenance of a sewer system for a municipality is clearly a municipal function, and hence the Legislature may confer authority for the purpose on a class of municipalities without impinging the Constitution.

As we have said, the act under consideration is very similar to former legislation on the same subject enacted for cities of the third class. We have ruled that it is within the province of the Legislature to authorize the division of the territory of a municipality into sewer districts and provide for alternative methods of assessment. See *Oil City v. Oil City Boiler Works*, 152 Pa. 348, 25 Atl. 549. We think it quite clear that there is a necessity for such division in townships of the first class, much more than in boroughs and in cities. Part of the township may be sparsely settled and needing no system of sewers, while other parts of it may be densely populated, as much so as a borough or city, and needing a system of sewers and drainage. If the Legislature can confer authority upon the councils of boroughs and cities to make such divisions, it is quite apparent, we think, that it can confer a like authority upon the commissioners of a first-class township. In the cases before us, the court has found that the whole territory in sewer districts Nos. 1 and 2 is devoted to or is ripe for residential purposes, and that the inhabitants enjoy all the comforts of city homes. The properties in these districts were held to be subject to the foot-front rule of assessment. On the other hand, the court found that sewer district No. 3 was rural and not thickly populated, and held that it was proper to assess the property in that district according to the benefits derived. The court, therefore, in both instances, followed the well-established rule announced by this court that the foot-front rule is applicable to prop-

erty situated in a city or other densely populated community, and that the rural properties must be assessed according to the benefits derived from the improvement.

The property owners also contend that the Legislature could not authorize the commissioners to appoint viewers to ascertain the benefits accruing from the improvement, but the appointment of such viewers must be made by the court. This provision of the act of 1905, however, is sustained by *Commonwealth v. Woods*, 44 Pa. 113, as well as by later decisions of this court. In the *Woods Case*, the court held an act of assembly to be constitutional which authorized the councils of Pittsburgh to construct sewers in the streets, and to appoint three viewers to levy and assess the cost upon the property benefited and to make report thereof to the city councils, and provided that the assessment, when approved by the councils, should be a lien on the property assessed. An appropriate ordinance was passed to carry out the provisions of the act of assembly. In delivering the opinion in that case, Mr. Justice Read, quoting from *Gault's Appeal*, 33 Pa. 94, says (page 100): "States and cities cannot exist without taxation. The time, the mode, and the manner of taxation are committed altogether and exclusively to the legislative discretion." The decisions in that case and in *Oil City v. Oil City Boiler Works*, 152 Pa. 348, 25 Atl. 549, and *Winter v. City of Reading*, 15 Wkly. Notes Cas. 329, also meet the objection of the property owners that the act should have provided for an appeal from the assessment made by the board of viewers.

It is contended by the property owners that the act offends against article 9, § 1, of the Constitution, which provides that all taxation must "be uniform upon the same class of subjects, within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws." That contention, however, is without merit, for the reason that we have held time and again that this section of the Constitution has no application to assessments for local improvements. In the many decisions on the subject, it has uniformly been ruled that this section refers only to such taxes as are of a general nature, and does not apply to such as are levied for local improvements. It is also suggested that the act exceeds the general powers of taxation conferred upon the Legislature, and its effect is to confiscate private property, in violation of the restrictions of the Declaration of Rights. But this position finds nothing to sustain it in the numerous cases of this court cited by counsel for that purpose. None of those cases decide that the Legislature does not have the power to authorize a municipality to construct a necessary sewer system and impose the cost upon the abutting property owners according to the benefits derived from the improvement. That is the extent of the authori-

ty conferred by the act of 1905 on the board of commissioners of townships of the first class. It is strictly within the rule established by our decisions, which requires the assessment to be made on the basis that the benefits are local and essentially peculiar to the property assessed, and that the limit of the benefits is the limit of the taxing power.

It has been suggested, although there is no argument in support of it in the printed brief, that the statute as applied to Lower Merion township is retroactive, and that, as the township had paid for the improvement, the Legislature could not authorize the commissioners to collect the cost of the sewer off the owners of the property benefited by the improvement. The learned court below has fully answered this contention in the opinion filed. In *City of Chester v. Black*, 132 Pa. 568, 571, 19 Atl. 276, 6 L. R. A. 802, it is said: "The principle has been repeatedly recognized in this state that, where the Legislature has antecedent power to authorize a tax, it can cure, by retroactive law, an irregularity or want of authority in levying it, though thereby a right of action which had been vested in an individual should be divested. * * * The constitutionality of this kind of legislation is not open to objection." In *Magee v. Commonwealth*, 46 Pa. 358, it was held that an act of assembly was constitutional which authorized the city councils of Pittsburgh to grade and pave the streets and to collect the cost and expense from the owners of lots abutting thereon, by an equal assessment upon the front foot of each owner, and providing for the appointment of appraisers to value and appraise the paving, the cost of which had been paid or assumed by the city. In that case one of the points for instruction submitted by the defendant, and which this court held was rightly refused, was the following: "That if the jury believe that the city of Pittsburgh has paid for the paving for which this suit is brought, and that said payments were made from moneys collected by general taxation, and that the property to be subject to the lien here was assessed and taxed for said purpose, and that the amount so assessed was paid, the plaintiff cannot recover." In *re Beechwood Avenue*, 194 Pa. 86, 45 Atl. 127, was an appeal by a property owner from the order of the court below confirming a report of viewers appointed to assess damages for improving Beechwood avenue, in the city of Pittsburgh. One of the exceptions to the report of viewers, filed by appellant and overruled by the court, is as follows: "The cost of said improvement has been provided for by city bonds payable by taxpayers generally, and the present assessment amounts to double taxation, and is unjust, inequitable, and illegal." In sustaining the position of the court below, Mr. Chief Justice Sterret said (page 91 of 194 Pa., page 129 of 45 Atl.): "It is a grave error to assume that the cost of the improvement should

be paid out of the proceeds of the loan created by the city for the purpose of enabling it to meet deficiencies that will arise in cases where property fronting on improvements of the same kind will be but slightly benefited, relatively, and the city will be obliged to pay nearly all, or at least a very considerable part, of the costs and expenses of such improvements. In providing the fund referred to, it was never intended by the city to relieve from assessments for 'special benefits' any property fronting on her newly improved streets, avenues, or boulevards that may be actually benefited specially, that is, benefited over and above the general benefit accruing to it in common with other property in the vicinity of such improvements." Here the complaining property owners are in error in thinking that the sewer system constructed by the township is a general public improvement, and that therefore they should not be required to contribute for the benefits they have received from the improvement. The township was divided into sewer districts, and the improvements were in those districts, and hence were local to that part of the territory embraced in the whole township. Those districts were the territory accommodated by the improvement, and, being local, may be paid for by the abutting property owners.

The learned court below was clearly right in refusing to sustain the legislation in so far as it authorizes the assessment of benefits where the sewer had passed through private lands. In such cases the land is taken, injured, or destroyed by virtue of the power of eminent domain, and in the assessment of damages the owner cannot be deprived of his constitutional right to demand a trial by jury. We fail to see that the act of 1905 deprives the complaining landowners of any constitutional right. Taxation is a legitimate burden imposed upon the property owner, and he must submit to it when he is not discriminated against in behalf of others similarly situated. If the property owners of townships of the first class believe that the method adopted by the act of 1905 for meeting the expenses incurred in constructing and maintaining sewer systems imposes unjust or unequal taxation, their relief must come from the legislative, and not the judicial, department of the government.

The assignments of error in each of the four appeals are overruled, and the decree in each case is affirmed.

(218 Pa. 100)

LOUCHHEIM et al. v. CITY OF PHILADELPHIA et al.

(Supreme Court of Pennsylvania. May 6, 1907.)

MUNICIPAL CORPORATIONS—CONTRACTS—LET-
TING TO LOWEST BIDDER.

The municipal authorities have no power to enter into private negotiation with a successful bidder for a city contract, whereby the

terms of the competitive bids are so modified that the successful bidder becomes in fact the lowest bidder, in view of Act May 23, 1874 (P. L. 230), providing that all work and materials required by the city shall be given to the lowest responsible bidder.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, §§ 861, 862.]

Appeal from Court of Common Pleas, Philadelphia County.

Action by Jerome H. Louchheim and Walter C. Louchheim against the city of Philadelphia and others. From a decree dissolving a special injunction, plaintiffs appeal. Reversed.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

M. Hampton Todd and Samuel K. Louchheim, for appellants. Ernest Lowengrund, James Alcorn, Asst. City Sol., and John L. Kinsey, City Sol., for appellees.

ELKIN, J. The appellants seek to restrain the appellees by injunction from executing and delivering a contract for filter materials and collectors for the Torresdale filters to the firm of Norcross & Edmunds. While the appeal raises several questions of a collateral nature, on which we express no opinion, the decisive question involved is one of law and within narrow limits. In 1905 the then director of public works advertised for bids for the furnishing of filtering materials and collectors for the Torresdale filters, and on September 6th of that year bids were received from seven different bidders. They were opened by the director in the presence of the bidders, and scheduled according to the usual method of the department. It was determined that the three lowest bidders, calculated upon the estimate of the materials to be furnished, were as follows: Pepper & Bowle, \$310,996.05; Jerome H. Louchheim, \$328,194.48; Norcross & Edmunds, \$336,589.42. In the formal notice to bidders it was suggested that bids by letter, or on detached sheets not forming part of the printed proposal and specifications, would not be considered formal, and that incomplete, conditional, or obscure proposals could be rejected. The evident purpose of the notice was to put all bidders on an equality so that open and honest competition should obtain in the awarding of the contract. On December 9, 1905, Pepper & Bowle, with the consent of the city, withdrew their bid, and were no longer considered competitors. All of the other bidders, with the exception of Norcross & Edmunds and Louchheim, had their respective certified checks returned to them and retired from the competition. Louchheim was the lowest bidder, and, as the testimony shows, frequently requested the director to take action on the bids submitted, and award the contract. The director who had advertised for and received the bids resigned on March 6, 1906, and his successor in office then took up the question of award-

ing the contract. After some negotiations between the director and the firm to which the contract was awarded, the original bid submitted in September, 1905, was modified, and the contract was awarded to them for a sum amounting on the estimate of materials to be furnished to \$302,936.33. The bid when thus reduced was lower than that of Louchheim.

The learned counsel for appellants contend that under these facts there was no such open competitive bidding when the award was made as is required by the act of assembly and the municipal ordinances. The act of May 23, 1874 (P. L. 230), provides that all work and materials required by the city shall be furnished under contract to be given to the lowest responsible bidder under such regulations as shall be prescribed by ordinance. The city councils, in order to make effective the legislative requirement, passed the ordinances of May 10, 1876, July 5, 1877, and December 28, 1882, in which it was ordained, in substance, that when work, materials, and supplies are required for the city, bids shall be asked for by advertisement, and when received they shall be opened and the contract awarded to the lowest responsible bidder in the presence of the head of the department. It is perfectly clear that the legislative and municipal intent in the awarding of such contract was that there should be open and honest competition in order that fair prices should be secured, and the city protected from collusive bidding, as well as favorite bidders. This rule was announced in *Mazet v. Pittsburg*, 137 Pa. 548, 20 Atl. 693, in which Mr. Justice Sterrett, who delivered the opinion of the court, said: "It cannot be doubted that the true intent of the act of 1874, and the ordinances passed in pursuance thereof, regulating the awarding of public contracts, is to secure to the city the benefit and advantage of fair and just competition between bidders, and at the same time close, as far as possible, every avenue to favoritism and fraud in its varied forms." This is a wise and wholesome rule which should always prevail in the letting of such contracts. In the present case the contract, it is true, was awarded at a sum below the lowest bidder in the open competition, but it was so clearly the result of private negotiations between the director and the successful contracting firm, without regard to the conditions of the open competitive bidding and the requirements of the act of assembly and the municipal ordinances, that the award cannot be sustained without striking down all those safeguards which the Legislature, the courts, and the city have thrown around the letting of these contracts. If the director had the power to enter into private negotiations with a contracting firm for the purpose of reducing its original bid submitted at the time of the open competition, it would necessarily follow that he would have the same power to allow the

bidder to increase the amount of his bid submitted at the public letting. If such a rule is to be established, it must be held to work both ways; and this would lead to favoritism and fraud in its varied forms which the courts have said must not be allowed. It is obvious that such a rule would lead to a disregard of those wholesome limitations which the Legislature and the courts have imposed on the awarding of contracts under the act of 1874, and would submit this whole question to the discretion of the director. We do not doubt that the director in this instance acted in entire good faith, and did what he believed to be for the best interests of the city; but the question involved is not one of good faith on the part of the head of the department, but of power in that official in the exercise of his discretion to disregard the plain mandate of the law. There was only one safe rule to follow in this case, and that was to observe the requirements of the statutes and the ordinances regulating the awarding of the contract. Private negotiations between a director and a successful bidder through which the terms and conditions of the competitive bids are modified or changed, resulting either to the advantage or disadvantage of the city, are not within the spirit and purpose of the law. The proper method for the director to have pursued, if convinced that the best interests of the city demanded it, was to set aside all of the bids, readvertise, and secure another open competitive bidding, when all of the bidders would have been on an exact equality. We therefore hold that the contract was not awarded according to law, and sustain this bill for that reason.

In deciding that the contract was improvidently awarded, it must not be understood to indicate that it should have been awarded to any other bidder, for clearly the director had the power, if the facts warranted it, to set aside all bids, but this question is not before us, and we express no opinion on it. This view of the law being conclusive of the controlling question raised by this appeal, it is unnecessary to discuss other assignments of error.

Decree reversed, and record remitted to the court below, with instructions to make the injunction permanent as prayed for, unless cause be there shown why such decree should not be made.

(218 Pa. 88)

NORRIS et ux. v. DELAWARE, L. & W. R. CO. et al.

(Supreme Court of Pennsylvania. May 6, 1907.)

1. TAXATION—TAX SALE—DESCRIPTION OF PROPERTY.

The assessment, the return by the collector, and the conveyance by the treasurer should sufficiently describe the property sold at tax sale, so that the record will identify and disclose the property taxed and sold.

2. SAME—DESCRIPTION IN ASSESSMENT.

An owner of certain coal lands had been dead more than nine years before an assessment thereon, and a severance of the surface and the mineral estate had taken place 15 years prior to that time. *Held*, that a description under the heading "Names of Taxables" of the name of such deceased owner, and under the heading "Description of Real Estate" the word "Flats," and under the heading "Seated Lands, Improved and Unimproved—Number of Acres of Coal Only—Acres" the figures "14," was insufficient to convey a large body of land known as the "Kingston Flats," or simply as the "Flats."

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Taxation, §§ 711-719.]

3. SAME—DEMAND FOR TAXES.

Under Act April 29, 1844, § 41 (P. L. 501), providing that no sale shall be made of seated lands until the owners shall have refused or neglected to pay the taxes aforesaid for the space of two years, evidence that the collector went to the residence of a deceased owner of land and was told that the heirs had sold the coal, that he made no inquiry as to the name of the owner, and made no demand on the owners of the coal for the taxes, was insufficient to authorize a sale of such coal for the taxes assessed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Taxation, § 1266.]

Appeal from Court of Common Pleas, Luzerne County.

Action by James M. Norris and Grizzle G. Norris, his wife, against the Delaware, Lackawanna & Western Railroad Company and Charles D. Foster. Judgment for defendant, and plaintiff appeals. Affirmed.

On a rule for a new trial Ferris, J., filed the following opinion:

"On and before February 2, 1882, Sarah Horton was the owner in fee of 14 acres of land in the said township, being part of a larger body of land lying between the hills forming the northwesterly boundary of the Wyoming Valley and the Susquehanna river, and commonly known as the 'Kingston Flats'—or simply as the 'Flats.' By a written instrument of that date, termed a 'coal lease,' she granted to the Delaware, Lackawanna & Western Railroad Company, defendant, all the coal underlying the said tract, with the right to mine and remove the same. The lease was duly recorded in the office of the recorder of deeds on February 10, 1882. Upon the execution of this instrument a severance was effected between the surface land and the subjacent strata; Mrs. Horton remaining liable for the taxes on the former, and the defendant company becoming primarily responsible for taxes on the latter (*Sanderson v. Scranton*, 105 Pa. 469), although by terms of the coal lease, as between the parties thereto, the lessors assumed the payment of taxes on the coal in place. Mrs. Horton died intestate July 18, 1888, leaving to survive her six children, who, by their deed dated May 26, 1892, conveyed the surface estate in the said 14 acres to Uriah Beacham. By indenture of assignment, dated June 13, 1894, Julian G. Horton, one of the six heirs of Sarah Horton, deceased, assigned to C. D. Foster (defendant) all the former's right, title, and interest in

and to the coal lease above mentioned. For the years 1897 and 1898 Mr. Beacham was assessed for, and paid to the proper collector, taxes on his 14 acres of surface land in Plymouth township. The description in the original assessment for each year is, as to location, 'Kingston Flats,' and as to quantity, etc. (under the heading "acres—No. of acres of cleared land"), the figures '14.'

"The assessment books for Plymouth township for these same years, also show the following: (1) For the year 1897: Under the heading 'Names of Taxables,' etc., is the name 'Mrs. Sarah Horton'; under the heading 'Description of Real Estate, * * * Street, Adjoining Owner,' is the word 'Flats'; and under the heading 'Seated Lands, Improved and Unimproved—Number of Acres of Coal Only—Acres,' are the figures '14.' No other description of the coal estate sought to be assessed is given. The tax collector's return, filed December 31, 1897, contains the following: In column with word 'owner' is the name 'Mrs. Sarah Horton Estate'; in column headed 'Quantity and Description of Property, Boundary by Warrantee, Name, Number of Lot, Street or Adjoining Property,' appear the words 'Kingston Flats cannot find.' (2) For the year 1898: The assessment book for Plymouth township contains the following: In the column headed 'Name of Owner,' etc., is the name 'Mrs. Sarah Horton, C. H. Welles, 5 6, Scranton'; in the column headed 'Description of Real Estate,' etc., is the single word 'Flats'; in the column headed 'Real Estate,' subdivision, 'Coal only, acres,' are the figures '14.' No other description or identification of the coal sought to be assessed is given. The tax collector's return, filed December 31, 1898, contains the following: In the column with the word 'owner' appears the name 'Sarah Horton,' and opposite her name and in the column headed, 'Quantity and Description of Property,' etc., is the single word 'Flats.' No other description or identification of the land returned is given. In each return the collector certified that the owners had neglected or refused to pay the tax assessed on the land mentioned, and that, after a proper effort at the proper time, he could not find sufficient personal property by a legal sale of which the taxes specified in the return could have been collected. The tax collector for 1897 and 1898 was sworn on the trial, and testified that he made no demand on the owners of the coal estate for the taxes assessed as above stated; that he went to Mrs. Horton's late residence for that purpose, but was told that the heirs had sold the property; that he made no inquiry as to whom it had been sold, nor did he examine the records to ascertain that fact, but that he then made the return marked with 'Cannot find.'

"It will be observed that no 'coal only' or land described in any way as coal land was returned as delinquent. The return of 14 acres of land as 'Flats' or as 'Kingston

Flats,' contained nothing to indicate what particular piece of land embracing 14 acres located on what is known as the 'Flats' was intended, except in so far as the name 'Sarah Horton,' or 'Sarah Horton Estate,' might tend to identify it. Let it be assumed that Sarah Horton owned no other tract of 14 acres on these flats. There is still absolutely nothing to show the owner of the coal that this property had been returned for sale for unpaid taxes. Upon examination he might discover that a tract containing 14 acres of 'Flats' had been so returned in 1897 and 1898 for taxes assessed for those years against 'Sarah Horton' and 'Mrs. Sarah Horton Estate.' He could not know from these returns that his coal was intended rather than the surface sold by the Horton heirs to Beacham. Indeed, the only descriptive words used, 'Flats' in the one case, and 'Kingston Flats' cannot find' in the other, might well be taken to mean surface land as opposed to 'coal only' where there had been a severance, of which latter fact the coal owner must have been aware. We were of opinion at the trial, and that opinion remains unchanged, that a return and sale for taxes by the treasurer and commissioners of 14 acres of land designated as 'Flats' is not a return and sale of a like quantity of other land whose sole distinctive description is that it is 'coal only'; and that the collector's return was insufficient to operate as notice to the coal owner that his estate was liable to be divested. That the tax collector not only failed to make a demand for the taxes on the owner, but also failed to use due diligence to that end, is clear from his own evidence. Neither was there anything in the published advertisement of the tax sale to notify the owner of the coal estate that his property was liable to be sold for taxes. 'Coal only' was assessed. No coal was returned. No coal was sold. The conclusion would seem to follow that no coal can be recovered by the plaintiff in this action.

"As was said by the present Chief Justice in *Kean v. Kinnear*, 171 Pa. 639, 33 Atl. 325, and by Mr. Justice Dean in the recent case of *Davis v. Beers*, 204 Pa. 288, 54 Atl. 35, so it may with equal propriety be said here 'that [in cases of seated lands] the law has established the order for liability for taxes to be, first, the personal property on the premises; second, demand on the owner individually; and lastly, the land itself, and it is only the failure to collect by the first two methods that resort can be had to the third and the land be legally sold or returned for sale.' The contention that the owner of coal in place may have his property swept away by a deed for 'land' based on a return of land called 'Flats' for non-payment of taxes assessed on 'coal only,' where he had covenanted with his lessor that such taxes should be paid by the latter, where no demand had been made on the owner for their payment nor any notice giv-

en him by advertisement or otherwise, that the taxes on the coal remained unpaid, such a contention might with some show of reason be held to be open to the criticism expressed by Mr. Justice Mestrezat in *Simpson v. Meyers*, 197 Pa. 522, 527, 47 Atl. 868, quoting from the syllabus to *Jenks v. Wright*, 61 Pa. 410: 'The acts authorizing sales of land by the commissioners or treasurer are laws for collection of taxes; not to sacrifice individual property as a forfeiture.'

"Counsel for the plaintiff urge, as the fourth reason for a new trial, that 'the court erred in admitting in evidence the papers (newspapers) offered by the defendants to show how the property in controversy had been advertised,' and argue, in support of this reason, that the advertisements were admitted without prior proof that they were official, and were authorized to be published in the newspapers in question by the county commissioners. This might have been a good objection if it had been made at the trial. But it was not, and therefore is to be treated as waived. But it is difficult to see how the admission of this evidence, even if it was error, could prejudice the plaintiff's case, since the advertisements are in substantial conformity with the recital in the commissioners' deed to Mrs. Norris 'that a public sale of the said described lot or tract of land' had been duly advertised, etc.; 'the said described lot being a certain lot, piece or parcel of land situate in the township of Plymouth, in the county of Luzerne and commonwealth of Pennsylvania, containing one-sixth interest in 14 acres on which is — and which was assessed in the year of our Lord one thousand eight —, in the name of Mrs. Sarah Horton, and adjoining property of —,' etc. The declared purpose of the offer was to show that there was no mention made in the advertisement of the fact that any coal property was delinquent for the nonpayment of taxes. The objection which was made is as follows: 'Plaintiff objects to the offer for the purpose stated, inasmuch as there is nothing in the act of assembly prescribing the form of advertisement to the effect that coal only should be advertised as coal.' If the newspapers had been excluded, it would be presumed from the recital in the deed that an advertisement of the sale of 'the said described lot' had been duly published. Either the advertised description of the lot was as contained in the deed or it was not. If it was, then it (like the deed) did not follow the assessment. If it was not, then the deed did not follow the advertisement.

"The first, second, and third reasons assigned for new trial relate to the rejection of testimony. We are not satisfied that there was error in the rulings complained of. The fifth, sixth, seventh, eighth, and ninth reasons allege error in the court's remarks to the jury and answers to points for charge. As binding instructions were given, what

was said to the jury or by way of answers to points was immaterial except the affirmation of defendants' fifth point, which asked for binding instructions. *Trust & Safe Deposit Co. v. White*, 206 Pa. 611, 56 Atl. 76."

Argued before MITCHELL, C. J., and BROWN, MESTREZAT, POTTER, and ELKIN, JJ.

W. Alfred Valentine, A. L. Williams, and Henry W. Dunning, for appellants. Arthur Hillman and A. H. McClintock, for appellee D., L. & W. R. Co. John McGahren and P. A. O'Boyle, for appellee Charles D. Foster.

MESTREZAT, J. This is an action of ejectment to recover the undivided one-sixth interest in 14 acres of coal land in Plymouth township, Luzerne county. Mrs. Norris, one of the plaintiffs, claims title to the land by virtue of a commissioners' sale for unpaid taxes. In his opinion refusing the motion for a new trial, the learned judge has found and stated at length the facts of the case, and they need not be repeated here. His instruction to the jury to find a verdict for the defendants was warranted by the evidence.

It is well settled in this state that, in order to give a purchaser at a tax sale a good title, the provisions of the statutory law regulating the subject must be complied with. The right to make a sale of real estate for unpaid taxes is wholly statutory, and hence the necessity in order to give validity to the sale that the provisions of the statute be observed. The several steps resulting in the sale are the assessment of the property, a return by the collector to the county commissioners when the taxes are not paid, and an advertisement and sale by the treasurer. These several steps must be taken and in the manner pointed out in the statute. If the title of the real owner is to be divested and vested in the purchaser by a tax sale. The assessment, the return by the collector, and the conveyance by the treasurer should sufficiently describe the property so that the record will identify and disclose the property taxed and sold. Says Agnew, J., in *Philadelphia v. Miller*, 49 Pa. 440: "The evidence of identity is the record which contains the description and fixes the duty. Assessment is, from its legal requirement, and the necessity of preserving its evidence, a written entry, and must depend upon the records of the commissioners' office, and not upon parol testimony, or the private duplicate of the assessor. * * * It is the assessment which confers the power to sell, in the same manner as a judgment on which an execution is issued. It is the assessment, therefore, which must contain the means of identification of the ownership in order that the proprietor may pay his tax, or redeem if he fails to pay in time. * * * The result of the whole is that where the assessment wholly fails to lead to identification, so that neither the owner nor the officer can tell that his land is

taxed, the duty of payment cannot be performed, and the assessment is void." The description of the land in the return of the collector should also be definite; and sufficiently so to enable the owner and also the officer and the public to identify and determine from the return the exact property which is delinquent and liable to sale. *Vandermark v. Phillips*, 116 Pa. 199, 9 Atl. 257. The owner should have an opportunity to pay the taxes or redeem the land after it has been sold within the time permitted by the statute, but this right will be denied him, if by reason of an insufficient description, the return fails to disclose the location of the property, and hence its ownership. It is not the intention of the law, even in cases of tax sales, that an owner shall be deprived of his property by failure to perform a duty imposed by that law, unless he has notice or an opportunity to discharge the duty. As said by Agnew, J., in *Philadelphia v. Miller*, 49 Pa. 448, 449: "Notice, or at least the means of knowledge is an essential element of every just proceeding which affects rights of persons or property." If the owner is expected to perform his duty and pay the taxes, the least that can be expected of the taxing officers is that they will give him an opportunity to do so. In *Vandermark v. Phillips*, 116 Pa. 199, 203, it is said: "The owner of the property has the right to know at once from the collector's return of delinquent properties which of his properties it is claimed is delinquent and liable to be sold; and he is entitled to this knowledge while everything is still fresh in his mind, and it is in his power to have any mistake of the collector remedied." And in *Lyman v. Philadelphia*, 56 Pa. 488, Agnew, J., after saying that the fact that the return constitutes the evidence of the assessment is conclusive against the argument that by act of 1815 no alleged irregularity in the assessment or process shall be construed to affect the purchaser's title, proceeds as follows (page 502): "Affect his title to what? If nothing capable of identification be returned, what is to be affected [by the sale]? If no discoverable thing be returned, how can anything be sold? It is not irregularity, but the absence of anything to be sold. And, if this subject can be supplied by evidence wholly dehors the assessment, what is to prevent fraud or perjury from applying it to my land or his, as well as to the particular tract for which a suit is brought? The guess can be made in one direction as well as in another."

In 1882 Sarah Horton was the owner in fee of 14 acres of land in Plymouth township, Luzerne county. In that year, by a lease duly recorded, she granted all the coal underlying the tract, with the right to mine and remove the same, to the defendant, the Delaware, Lackawanna & Western Railroad Company. Uriah Beacham became, and is now, the owner of the surface. As said in *Powell v. Lantzy*, 173 Pa. 543, 34 Atl. 450,

after the severance, the two "estates were distinct and the division was as complete as if it had been made by lines on the surface. They were separately the subjects of possession, enjoyment, incumbrance, and taxation. There was no community of interest between the owners." After the lease the taxing authorities were required to levy their taxes according to the ownership and value of the surface and coal, respectively, and Mrs. Horton was liable for the taxes on the surface and the defendant company was primarily liable for the taxes on the coal. *Sanderson v. Scranton*, 106 Pa. 469. In 1897 and 1898 the surface was assessed to Beacham, and he paid the taxes on it for those years. In the year 1897 there are contained in the assessor's book of Plymouth township the following entries: Under the heading "Names of Taxables," etc., is the name "Mrs. Sarah Horton"; under the heading "Description of Real Estate, * * * Street, Adjoining Owner," is the word "Flats"; and under the heading "Seated Lands, Improved and Unimproved—Number of Acres of Coal Only—Acres," are the figures "14." No other or further description is given in the assessment. The assessor's book for 1898 contains substantially the same entries. Mrs. Horton had been dead more than 9 years, and, as will be observed, a severance of the surface and the mineral estate had taken place 15 years prior to that time. During that period the title to the coal under the 14 acres was in the Delaware, Lackawanna & Western Railroad Company. The insufficiency of the description of the premises assessed is shown by the return of the collector who, although presumably familiar with the real estate of the township, certifies under oath that he could not find the property assessed. In the tax collector's return for 1897 there appear in the column headed "owner," the name "Mrs. Sarah Horton Estate," and in the column headed "Quantity and Description of the Property," etc., the words "Kingston Flats cannot find." In the collector's return for 1898 the name "Sarah Horton" appears under the word "Owner," and the word "Flats" appears under the head of "Quantity and Description of Property." Pursuant to these returns, the property therein returned was sold by the treasurer to the commissioners of Luzerne county as "a tract of seated land containing one-sixth of fourteen acres, situated in the township of Plymouth, county of Luzerne, assessed to Mrs. Sarah Horton." The property was subsequently sold by the commissioners to Mrs. Norris under the description of "a certain lot, piece or parcel of land, situated in the township of Plymouth, in the county of Luzerne, and commonwealth of Pennsylvania, containing one-sixth interest in fourteen acres." It is under this tax title that the plaintiffs claim to recover in this action "an undivided one-sixth of all the coal and other minerals in, upon, and

underlying all that certain piece or parcel of land situate in the township of Plymouth, county of Luzerne * * * containing fourteen acres, one hundred and nine and five-tenth perches."

The record as thus given shows that the coal assessed to Mrs. Horton was not returned or sold under these tax proceedings. It may be assumed that the collector intended to return the coal which was assessed for the nonpayment of the taxes, but he failed entirely to do so. The property returned by the collector was for the year 1897, "Kingston Flats cannot find," and for the year 1898 the "Flats." These descriptions cannot be construed in any way so as to include "coal only" which was assessed and which it has been assumed was returned by reason of the nonpayment of taxes. It appears by the opinion of the learned trial judge that in the Wyoming Valley there is a large body of land known as the "Kingston Flats," or simply as the "Flats." If we assume that the property returned is a part of this large body of land, what part of it and where is it located? Do the names given in the returns describe the tract in fee, the surface, or the coal? They might mean the first or the second, but certainly could not mean "coal only." From this return, therefore, it is apparent that neither the owner, the collector, nor the public could determine what property was intended to be returned for the payment of taxes. The description would apply more nearly to the surface owned by Mr. Beacham which was severed from the coal 15 years prior thereto than it would to the coal. It could reasonably be applied to mean the surface as distinguished from "coal only" in view of the fact, known to the owner of the coal, of the prior severance of the two estates. We are of opinion that the returns of the property by the collector for the years 1897 and 1898 on which the sale in this case was made to the plaintiff were wholly insufficient and inadequate as a description of "coal only" which was assessed for the years 1897 and 1898, and for that reason that the sale to the plaintiff conveyed no title to the coal for which this action was brought.

On the trial of the cause the collector was called as a witness, and he testified that he went to Mrs. Horton's late residence and was told that the heirs had sold the coal, that he made no inquiry to ascertain the name of the owner, and that he made no demand on the owners of the coal for the taxes. By the proviso to section 41 of the act of April 29, 1844 (P. L. 501; 2 *Purd.* [12th Ed.] 1994), it is enacted "that no sale shall be made of such lands * * * until the owners * * * shall have refused or neglected to pay the taxes aforesaid for the space of two years." It is therefore a statutory prerequisite to the validity of a tax sale of seated land that there be a prior demand by the collector for the payment of the taxes. This we have dis-

tinctly ruled, and that the collector proceeding against the land without such demand is a trespasser. *Kean v. Kinnear*, 171 Pa. 639, 33 Atl. 325. Here the collector totally disregarded his duty in not ascertaining the owner of the coal and demanding of him the payment of the taxes. The defendant company, as we have seen, had for 15 years been the owner of this coal. During the same time the title to the surface was in another party. From the fact that "coal only" was assessed, it is obvious that the assessor knew there had been a severance of the estates, and that the title to the coal was in another than the owner of the surface. It is to be inferred, therefore, that a simple inquiry by the collector from almost any person in the community, familiar with the premises, would have given him the name of the real owner of the coal. A single response from an unknown woman at the house on the premises that she did not own the coal seemed to satisfy the collector, and, disregarding his duty, he made no further inquiry. The effect of this improper conduct on the part of the collector resulted in the return by him of the coal in the name of a party who he knew was not the owner, a subsequent sale for a trifling sum, and this action of ejectment. The necessity for and importance of a demand for payment of the taxes upon the owner is well illustrated in this case. It is manifest that it would have resulted in the payment of the taxes, and prevented the subsequent expense, as well as trouble, to the parties concerned. At all events, the statute required this duty of the collector, and as a compliance with the statute in this respect was necessary to give validity to the sale of the property assessed, it follows that even if the other requirements of the statute had been observed the sale must for this reason be declared invalid. The plaintiffs, therefore, cannot maintain this action.

We need not notice specially the several assignments of error. Any testimony that might have been given on the offers made could not have changed the result of the trial and established a good title in the plaintiff. It was the duty of the court below, even if it had admitted the testimony offered, to have directed a verdict for the defendants.

The judgment is affirmed.

(118 Pa. 114)

PALMER et al. v. PHILADELPHIA, B. & W. R. CO.

(Supreme Court of Pennsylvania. May 6, 1907.)

DEATH—EXEMPLARY DAMAGES.

Under Act April 4, 1868, limiting the amount to be recovered for wrongful death to compensation for loss and damages pecuniarily suffered, no exemplary damages can be recovered for injuries resulting in death in an action by a parent.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Death, § 98.]

Action by J. Monroe Palmer and Alice M. Palmer, his wife, against the Philadelphia,

Baltimore & Washington Railroad Company. Judgment for plaintiffs, and defendant appeals. Reversed.

The court charged in part as follows: "Punitive damages are allowed where the wrongdoer is guilty of gross negligence, of manifest recklessness, absence, practically, of all real care, conduct indicating a total disregard, in this case, for the safety of the company's passengers. And we say to you that if the evidence satisfies you that either this engineer of his own motion, or under orders from a superior of this company, was guilty of conduct indicating a total disregard for the safety of the passengers of train 43, then this company is liable in punitive damages. Now, in that connection, you will recall the testimony of the engineer. It is for you to remember it. If I misstate it, you will correct me by your recollection of it; but, in substance, I think the situation was this: He arrived with his freight train, which consisted of 21 cars, and which he said were quite heavily laden, and stopped with it on a descending track that would of necessity, as the tracks there existed at the time, project by gravity that train down along the track that was soon to be occupied by train 43, and that he knew, and that this company knew, was about to be occupied by train 43; that there was this heavily laden freight pointed at the place that would be occupied in some 24 or 26 minutes later by train 43, and the freight, there being such a heavy grade, certain to undertake by gravity to occupy the same position that 43 would be occupying in some 26 minutes, if not restrained. Now, that being the situation, 18 minutes before train 43 arrived—because nothing was done for some 5 or 6 minutes after the freight took the position I have referred to—18 minutes before train 43 arrived in front of the station the engineer, admitting that, if his engine had remained attached to the freight, the freight must have held its position and this collision could not have occurred in the way it did, this engineer, either of his own motion, or under orders of a superior employé of this company, uncoupled his locomotive, left this train to depend on the restraint afforded by nothing but its air brakes, and went away with his locomotive to the southernmost siding track, to stay there for at least 18 minutes; in other words, to stay there until train 43 should arrive at the station and should pass on between the freight and the locomotive to the south. And he tells you that that freight, left as it was, could not be depended upon to wait more than 10 of the 18 minutes that would elapse before the arrival of train 43. It might wait 10 minutes, it might wait 15 minutes, possibly it might wait 18, but it could not be depended upon to wait more than 10 of the 18 minutes that would elapse before the arrival of train 43, in a position, such that if the freight did start nothing apparently could avoid a collision. We say

to you that if those facts are true, if you find that this engineer of his own motion, or under orders of a superior, left that freight in the position described, not intending to return until after 43 should pass—which it would not do for 18 minutes, at least—and at the time it was apparent that that freight could not be at all depended upon to maintain its position until after 43 should have passed, but on the other hand, was manifestly likely to endanger 43, just as the sequel showed it did, then you would, in the judgment of the court, be clearly warranted in imposing punitive damages upon this defendant, because, if those circumstances are true, then the engineer, of his own motion, or under orders, was guilty, it seems to the court, though that is a matter for you, of conduct indicating a total disregard for the safety of passengers on train 43. We submit this question entirely to you. Unless you are satisfied by a fair preponderance of the evidence or by the evidence that there was on the part of this engineer, of his own motion or under orders, conduct indicating a total disregard for the safety of the passengers of train 43, unless you are satisfied of that clearly and reasonably you will not find punitive damages for the plaintiffs. But if you are satisfied that the engineer of this freight train, either of his own motion or under orders, was guilty of conduct indicating a total disregard for the safety of passengers of train 43, then you would be warranted, and, in the opinion of the court, you ought to impose punitive damages on this defendant, because, in that case, you would have found that he willfully, with recklessness, left a heavy train ready to charge down on a passenger train, and likely to do so, and all of that without any necessity or excuse whatever, if you find the facts I have suggested to you."

Verdict and judgment for plaintiffs in the sum of \$5,000 punitive damages, and in the sum of \$1,540 compensatory damages.

Argued before MITCHELL, C. J. and FELL, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

John J. Pinkerton and J. Frank E. Hause, for appellant. A. M. Holding and John J. Gheen, for appellees.

ELKIN, J. Two questions are raised by this appeal: First. Was there sufficient evidence to submit to the jury to find that the act complained of had been committed under circumstances of violence, oppression, outrage or wanton recklessness upon which to warrant a verdict for exemplary damages? And, second, whether exemplary damages can be recovered in this or any other case for injuries resulting in death when the action is brought by surviving parents? We will discuss the last question first.

While the general rule in negligence cases is that only compensatory damages can be allowed, yet it has been frequently held that

injuries may go further and allow exemplary damages where the injuries complained of were the result of such a reckless indifference to the rights of others as to be equivalent to a violation of them. In such cases the evidence must show such willful misconduct or entire want of care as to raise a presumption of conscious indifference to consequences. *Railway Company v. Rosenzweig*, 113 Pa. 519, 6 Atl. 545; *Philadelphia Traction Company v. Orban*, 119 Pa. 37, 12 Atl. 816. It has also been held that, where the negligence has been committed willfully, maliciously, or so negligently as to indicate a wanton disregard of the rights of others, the jury are not restricted to compensatory damages only. *Railway Company v. Lyon*, 123 Pa. 140, 16 Atl. 607, 2 L. R. A. 489, 10 Am. St. Rep. 517; *Artherholt v. Motor Company*, 27 Pa. Super. Ct. 141. It must be observed, however, that in all of the cases in which the right to recover exemplary damages has been sustained the action was for damages resulting from personal injuries, and the suit was instituted by the person receiving the injuries, or, in case of a minor, by the parent. The rule in such cases in our state is predicated on the theory that, when injuries are inflicted willfully, maliciously, wantonly, oppressively, or recklessly, the party inflicting such injuries is liable for exemplary damages to the party receiving them in the nature of a punishment for the willful and malicious acts.

It is perfectly clear that prior to the act of 1855 parents had no right of action in a case like the one at bar. There is no common-law right of action in such a case, and the right to recover here depends solely on that act. There is nothing in the provisions of that act which expressly gives the right to recover exemplary damages, and, although in force for more than half a century, there is no reported case in which exemplary damages have been allowed parents for injuries resulting in the death of a child. It may be, as argued by the learned counsel for appellees, that the exact question has not been raised and decided in our cases, but it must be conceded that the whole trend of judicial interpretation bearing on this question has been to indicate that only damages of a compensatory character can be recovered in cases where the injuries resulted in death and the suit was instituted by surviving parents or other parties having the right to institute the action under the act of 1855. One of the earliest cases in which this question was discussed is *Railroad Company v. Kelly*, 31 Pa. 372. This case did not turn on the question of exemplary damages, but was reversed because, in affirming the seventh point, the trial judge instructed the jury that there is no definite measure or standard of damages. Then, again, in that case the action was by the father to recover damages for the maiming of his minor son, whose injuries did not result in death. In that case, however, it

was held that the father was only entitled to compensation for the pecuniary loss he sustained. The next case decided was *Railroad Company v. Zebe*, 38 Pa. 318, wherein it was held that under the act of 1855 the damages to be recovered by surviving relatives for an injury resulting in death are confined to such as are capable of pecuniary estimate. Nothing is to be allowed for the mental suffering of the survivors or the corporal sufferings of the injured party. In that case Mr. Justice Thompson, who delivered the opinion of the court, in discussing the proper measure of damages allowable to parents for injuries resulting in the death of a child, said: "This is the only pecuniary damage done to them, and this the law allows them to recover if entitled on the facts to recover at all. This excludes damages for the suffering to the deceased, which was personal to himself, and did not survive, as well as for solace, which are incapable of appreciation so as to be compensated." In *Railroad Company v. Vandever*, 86 Pa. 298, a widow brought an action against a railroad company for injuries resulting in the death of her husband, and it was held that the measure of damages in Pennsylvania was confined to pecuniary loss, and did not include solatium for wounded feelings or vindictive damages. In *Railroad Company v. Henderson*, 51 Pa. 315, it was decided that the right of action which a wife has for the death of her husband caused by negligence is different from that which would have accrued to him had he survived the injury, and excludes all questions of exemplary damages; the damages being simply compensatory for the loss sustained by the surviving family.

Clearly, therefore, the damages to be recovered by surviving parents, as in the present case, must be measured by this rule, because both rights accrue under the same act. Our attention has not been called to any case in which the doctrine therein laid down has been overruled, and, if that case is to be regarded as authority, it would seem to be conclusive of the question raised by this appeal. *Caldwell v. Brown*, 53 Pa. 453, held that in an action by parents for the death of a minor child they can recover only the pecuniary value of his services during minority, and cannot be allowed damages for the agonized feelings of parents nor the loss of the society of the child. It will be observed that in all of these cases the rule of compensatory damages was adhered to when the action was brought under the act of April 26, 1855 (P. L. 809), for injuries resulting in death. These decisions were rendered prior to the passage of the act of April 4, 1868 (P. L. 58), which limited the amount to be recovered by providing that "only such compensation for loss and damages shall be recovered as the evidence shall clearly prove to have been pecuniarily suffered or sustained, not exceeding in the case of personal injuries the sum of three thou-

sand dollars, nor in the case of loss of life the sum of five thousand dollars." In *Railroad Company v. Rowan*, 66 Pa. 393, decided in 1870, it was again held that exemplary damages could not be recovered in an action by a parent for the death of a child. In the discussion of the principle involved, the learned Chief Justice who wrote the opinion in that case pointed out that prior to the act of 1868 the weight of authority, as shown by the reasoning of all the cases, adhered to this rule, although the dicta in some instances might indicate a different view. It is perfectly clear the court, even at that time, considered the rule settled that exemplary damages could not be recovered for injuries resulting in death, and that it had been recognized and followed before the act of 1868. In *Railroad Company v. Keller*, 67 Pa. 300 (1871), it was said that the act of 1868 was declaratory of the rule previously established; that is to say, only compensatory damages can be recovered by the parties authorized to institute suit under the act of 1855 for injuries resulting in death. In *Mansfield Coal & Coke Company v. McEnery*, 91 Pa. 185, 36 Am. Rep. 662 (1879), the same rule was again asserted. Mr. Justice Paxson, in discussing the question, said: "It was early held that in such an action exemplary damages could not be recovered, but that they must be compensatory only."

It is contended for appellees that the act of 1868 is unconstitutional, and *Penna. Railroad Company v. Bowers*, 124 Pa. 183, 16 Atl. 836, 2 L. R. A. 621, is cited in support of this contention. It is true this court held in that case that section 2 of the act of 1868, limiting the liability of railroad companies and common carriers for personal injuries was avoided by section 21, art. 3, of the Constitution of 1874. A careful examination of that case shows that the portion of the act of 1868 which was obnoxious to the constitutional mandate was that which limited the amount to be recovered for personal injuries to \$3,000, and for death \$5,000. The language of the act of 1868, restricting damages to such loss as may have been pecuniarily suffered, was not commented upon nor considered in the decision of that case, nor do we consider the determination of that question vital in the disposition of the present case. For, even if it should be finally determined, which it has not been, that the act of 1868 was avoided in all of its parts by the Constitution of 1874, there would be no reason for disturbing the rule which prior to that time had been so well established, and it would remain in force just as it was before the act became a law. It is true that some of our cases decided after the passage of the act of 1868 referred to the statutory rule therein contained as a denial of the right to recover exemplary damages, but in no case was this question expressly raised and decided. Even in the cases referred to, the opinions clearly indicate that the

rule established by the courts prior to the act of 1868 was that exemplary damages could not be recovered for injuries resulting in death. It must be conceded that there is confusion in the cases on the question of exemplary damages. This results from the dicta in some of the cases rather than from the questions actually decided. In not a single case, however, has it ever been decided that exemplary damages could be recovered by the surviving parties for injuries resulting in death. We believe this to be the correct rule, supported by reason and authority, and so hold in this case.

This view of the law disposes of the present case, and makes it unnecessary to discuss at length the other question raised by this appeal. However, after a careful examination of the testimony produced at the trial, it does not appear that the injuries to the minor son, resulting in death, were occasioned by any such violent, or oppressive, or wanton, or reckless act on the part of the employees of the appellant company as to make it liable for exemplary damages, even if, under the law, appellees were entitled to recover such damages.

The jury, under the instructions of the learned trial judge, having returned a verdict fixing the exact amount of compensatory damages found, and also the amount of punitive damages allowed, judgment having been entered for the whole amount, and this appeal only raising the question of the right to recover punitive damages, the assignments of error relating thereto are sustained, and the record is remitted to the court below with instructions to enter final judgment in accordance with this opinion.

Judgment reversed.

(218 Pa. 104)

MINT REALTY CO. v. CITY OF PHILADELPHIA et al.

(Supreme Court of Pennsylvania. May 6, 1907.)

TAXATION—PUBLIC LANDS—SALE.

Where the United States sells real estate, reserving title to itself until all payments are made and conditions performed, such real estate is not taxable until the vendee has made all the payments and performed the conditions.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Taxation, §§ 34, 35.]

Mestrezat and Potter, JJ., dissenting.

Appeal from Court of Common Pleas, Philadelphia County.

Bill by the Mint Realty Company against the city of Philadelphia and Charles L. Riddell. Decree for plaintiff, and defendants appeal. Affirmed.

In the court below Martin, P. J., found the facts to be as follows:

"The United States of America, being the owner of the property known as the 'Mint Site,' at the northwest corner of Chestnut and Juniper streets, in the city of Philadelphia, the Secretary of the Treasury, on March 22,

1902, executed and delivered to Felix Isman an option, agreeing to accept him as the purchaser for the property at the price of \$2,000,000, to be paid within 60 days, of which sum \$25,000 was paid in cash upon the execution of the option, \$25,000 more was to be paid within 30 days afterward, and the balance of \$1,950,000 within 6 months. Isman assigned his option to the Mint Realty Company, the complainants in this case. On May 28, 1902, a contract for the sale of the property to the Mint Realty Company was executed by the Secretary of the Treasury, in which the United States agreed to deliver to the Mint Realty Company, upon payment in full of the purchase money, a deed for the property. It was stipulated in this agreement that the balance of the consideration money, \$25,000, should be paid within 30 days, and \$1,950,000 on or before September 22, 1902. Possession of the premises was to be given at the time of final payment. There was a provision of forfeiture of the contract in the event of default in payment of the consideration money, and the United States reserved the right to resell the property and to hold the Mint Realty Company responsible in the event of loss. The Mint Realty Company, having paid an additional sum of \$25,000 on account of the purchase money, on August 21, 1902, a further sum of \$200,000 was paid to the United States, and it was agreed that the period for the payment of the balance of \$1,750,000 should be extended for 18 months from the time stipulated in the former agreement, with the right on the part of the company to pay the entire balance at any time. This contract provided that: "The United States Government, acting as aforesaid hereby agrees and does deliver possession to the Mint Realty Company of the old United States mint property in Philadelphia, situate at the northwest corner of Juniper and Chestnut streets, with the express understanding that the said company may make such alterations, additions and improvements or construct such new building or buildings as it may deem fit, with the further express understanding, however, that in the event of the default for a further period than thirty (30) days after the 22d day of March, one thousand nine hundred and four (1904) the said United States Government shall have the right to enter the premises, eject and expel said Mint Realty Company and all others claiming under it, therefrom, and this agreement shall cease and absolutely determine and the said Mint Realty Company shall forfeit, which it hereby agrees to do, all sums of money heretofore paid by it on account of the said old United States mint property at Philadelphia as aforesaid, as well as such building which the said Mint Realty Company may have constructed, altered or improved, and in the event of such default, the United States Government is hereby empowered to enter in any competent court an amicable action in ejectment against the said Mint Realty Company

and all persons claiming under it, for recovery of possession of the old United States mint property, situate at Philadelphia and for which this agreement shall be a sufficient warrant.'

"In July or August of 1903 complainants entered into actual possession of the property, removed the old structure, and proceeded to erect the building now on the premises. On December 14, 1903, \$50,000 having already been paid on account of the purchase money, the sum of \$250,000 additional was paid by the complainants to the United States, and a contract was made extending the time for the payment of the balance of the consideration money, viz., \$1,700,000, and providing that of this sum \$100,000 should be paid March 22, 1904, \$100,000 December 22, 1904, and \$1,500,000 on February 21, 1905, and extending to complainants the privilege of paying the amount in full at any time. Upon completion of the building it was rented by complainants to various tenants. Assuming the complainants to be the owner of the property by virtue of the contract of sale, the city of Philadelphia caused an assessment for taxes to be made from the date of November 1, 1902, and for the entire year of 1903. These taxes remaining unpaid, a levy was made on the tenants, pursuant to the terms of the act of April 19, 1888 (P. L. 9). Application was made on behalf of complainants for an injunction to restrain the collection of the taxes on the ground that the title to the property is vested in the United States of America, and so remains until the final payment of the entire consideration money. The contract of sale between the United States and the Mint Realty Company not having been presented at the registry bureau of the city of Philadelphia, the tax was assessed in the name of the United States of America, the last registered owner, but was levied on the tenants of complainants. It was argued on behalf of the city that upon the execution of the agreement of sale, which vested in the vendee the right to possession under the terms of the contract of August 21, 1902, the Mint Realty Company became the owner of the property, and the United States retained only a vendor's lien for the unpaid purchase money, to enforce which provision was made in the agreements for forfeiture of complainants' title and the entry of an amicable judgment in ejectment, and that as the real owner complainants are liable for taxes, although assessed in the name of another; that, if complainants' title is hereafter forfeited to the government, the rents accrued belong to complainants, and the rights of the government are not affected by the pending levy upon the tenants of complainants. The tax is assessed upon the land itself. The entry upon the assessor's book for 1902, is as follows: 'Chestnut street, north side, west of Thirteenth street, northwest corner of Juniper street, United States of North America, 2 sty. marble Mint build-

ing, with mansard roof. Lot 152x204. Exempt \$1,250,000. Taxable as of November 1, 1902. Valuation \$208,333, added by certificate 11/8/02.' And for 1903: 'Chestnut street, north side, west of Thirteenth street, N. W. cor. Juniper street, United States of North America, lot 152x204, valuation \$1,250,000.'"

It appears by the testimony that the property was considered by those interested in it to be of much greater value than the figure at which it was assessed, but no evidence was presented which indicated that the assessment was made upon any less interest than the entire property. The court entered a decree in accordance with the prayer of the bill.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

J. Howard Gendall, Mayne R. Longstreth, James Alcorn, and John L. Kinsey, for appellants. John G. Johnson, for appellee.

ELKIN, J. This is a proceeding in equity to restrain the city of Philadelphia from the collection of taxes levied against the appellee company for the years 1902 and 1903. The appellee is a private corporation, and has entered into an article of agreement for the purchase of the old mint site from the United States government. The legal title to the property is in the United States, and will remain there until the final payments are made and all the precedent conditions are performed. The general rule is that real estate, the title to which is in the United States, is not subject to taxation for state and local purposes. It is familiar law that in dealing with the taxation of real estate belonging to the United States the decisions of the federal courts are final and conclusive in all jurisdictions. Starting, then, with the conceded fact that the title to the property attempted to be taxed in this case is in the United States, and therefore ordinarily not subject to municipal taxation, the appellants must show that they come within some exception to the general rule in order to give them any standing to assert a claim for taxes against the appellee company. The attempt is made to take this case out of the general rule by showing that the United States by article of agreement had sold and agreed to convey the property to the appellee, and this company being in possession, receiving rents, and exercising all rights of ownership, has such an equitable title as to subject the property to taxation in its name. This contention would be perfectly sound if the rule of taxation applicable thereto could be determined by Pennsylvania law. The difficulty, however, is that in the present case our state law has no application, and it becomes necessary to look to the decisions of the federal courts in order to determine the rights of the parties.

The rule which denies the right of a state or municipality to tax the property of the

United States is founded on the principle which inheres in every independent government, that it must be free from any such interference of another government as may tend to destroy its powers or impair their efficiency. *Wisconsin Central Railroad Co. v. Price County*, 133 U. S. 496, 10 Sup. Ct. 341, 33 L. Ed. 687. The power to tax implies the power to divest the title by a tax sale when there is default in the payment of the taxes levied. Hence the federal government has most carefully guarded its property from the vigilance of the local tax gatherer. There is, however, an exception to the general rule recognized by the federal courts, and that is, where Congress has prescribed the conditions upon which portions of the public domain may be alienated, and provided that upon the performance of the conditions a patent of the United States shall issue to the purchaser, and all such conditions have been complied with, the land alienated being distinctly defined, it only remaining for the government to issue its patent, and until such issue holding the legal title in trust for the vendee, who has gone into possession and is exercising the rights of ownership therein, the purchaser will be treated as the beneficial owner of the land, and the same may be subjected to taxation for local purposes. The appellants rely upon this exception to the general rule to support their contention in the present case. It must not be overlooked, however, that this exception is only recognized where Congress has prescribed the conditions upon which portions of the public domain may be alienated, and directed that upon the performance of these conditions a patent shall issue. In these exceptional cases the federal courts have distinctly held that all of the precedent conditions must have been complied with so that nothing remains on the part of the purchaser to be done before he is entitled to the legal title in order to subject the property to local taxation. *Railway Co. v. Prescott*, 83 U. S. 603, 21 L. Ed. 373; *Central Pacific Railroad Co. v. Nevada*, 162 U. S. 512, 16 Sup. Ct. 885, 40 L. Ed. 1057; *Northern Pacific Railroad Co. v. Myers*, 172 U. S. 589, 19 Sup. Ct. 276, 43 L. Ed. 564. In other words, even in these exceptional cases it has been uniformly held that, if any part of the purchase money remains unpaid, or anything remains to be done by the purchaser, or any precedent condition has not been performed, the right to subject the property to local taxation does not exist.

Let us see, then, whether the case at bar comes within the exception to the general rule as defined by the federal courts. The purchaser, the vendee company here, has agreed to pay the United States for the property the sum of \$2,000,000, on which it had only paid at the time of the filing of this bill \$250,000, leaving a balance unpaid of \$1,750,000, so that all of the money has not yet been paid. Then, again, under the terms of the

agreement the government expressly reserved the right to declare a forfeiture of the contract, as well as of all moneys paid on account thereof, if all of the conditions contained were not performed by the purchaser, so that if the balance of the purchase money is not paid, or if any of the conditions are not performed, the purchaser will forfeit his equitable interest in the property. Clearly, therefore, the facts of this case do not bring it within the exception to the general rule.

The appellants, however, rely upon one of the latest decisions of the Supreme Court of the United States to support their contention that the rule of the earlier cases hereinbefore cited has been modified or changed. In *Baltimore Shipbuilding, etc., Company v. Baltimore*, 195 U. S. 375, 25 Sup. Ct. 50, 49 L. Ed. 242, it was held that the real estate of the shipbuilding company was subject to taxation by the city of Baltimore. After a careful consideration of that case we have failed to discover that the rule of the earlier cases has been changed, either in express terms or by necessary implication. In that case, however, it must not be overlooked that the title to the property was not in the United States, but in the shipbuilding company. There was a duty on the part of the company to allow government vessels to put into dry dock for repairs, and there was a condition subsequent of defeasance, and these were the distinguishing features of that case clearly pointed out by the court in rendering the decision. The legal title was in the shipbuilding company, and therefore under the law of the state it would be subject to local taxation just like the property of any other private corporation or individual unless entitled to exemption for some sufficient reason. It undertook to evade the payment of local taxes on the ground that the United States had an equitable interest in the title to the property, and therefore claimed that the case came within the general rule of taxation of property belonging to the federal government. The court very properly held that under such circumstances the shipbuilding company could not be permitted to avoid its share of the burdens of local taxation, because it had entered into an agreement with the United States providing that if the conditions thereof were not kept and performed a defeasance would result. Another ground upon which the right to impose the tax in that case was predicated was that under the laws of the state of Maryland even an equitable interest in the title to real estate may be taxed, and in default of payment thereof a tax sale would only divest the equitable interest against which the tax was assessed. The answer to this position is that in Pennsylvania this is not now, and never was, the law. In this state the *rem* is taxed, and, if a tax sale results from default in the payment of the taxes levied, the title to the *rem* is sold. It is true that in our state a vendee of land purchased by article of agreement

may be assessed for the full taxable value of the land, although he has only paid a portion of the purchase price. Indeed, this very frequently happens; but the right to do so is founded on the principle that the tax is against the rem, and it is a matter of no importance whether the tax is assessed in the name of the legal or equitable owner, so long as it is assessed against the whole title to the land. Some confusion about this matter may have arisen because our courts have always recognized the right to impose a tax upon the holder of the legal title to different strata within the boundaries of a particular tract of land. As, for instance, it frequently happens that the legal title to the surface is in one owner, the title to the coal in another, and the title to the ores in still another. In such a case the surface is taxed to its owner, the coal to its owner, and the ores to their owners, but this is because there has been a severance of the legal title to the different strata, and each stratum is subject to taxation in the name of its owner just as much as if it represented a distinct and separate acreage. In the taxation of the coal, for instance, in such a case, the legal title might be in one owner and the equitable title in another, but the tax would be levied and assessed against the rem, that is, all the coal; and, if a tax sale resulted from default in the payment of these taxes, the whole title to the coal would pass.

Another answer to the contention made by the appellants in this respect is that the learned court below has found as a fact that there was no assessment or attempt to assess the property otherwise than as a whole in the name of the United States until after the filing of the present bill. Of course, the rights of the parties to this controversy must be determined upon the facts as they stood at the time the bill was filed. On this ground, as well as for the other reasons set out in this opinion, we are compelled to hold that the property was not subject to taxation for municipal purposes, and that the decree entered by the court below must be sustained. Decree affirmed.

MESTREZAT and POTTER, JJ., dissent.

MEMORANDUM DECISIONS.

(69 N. J. Eq. 839)

ACKERMAN v. CROUTER et al. (Court of Errors and Appeals of New Jersey. March 5, 1906.) Appeal from Court of Chancery. Bill by James T. Ackerman against Cornelius P. Crouter and others. Bill dismissed (59 Atl. 574, 68 N. J. Eq. 49), and complainant appeals. Affirmed. James T. Ackerman and David D. Ackerman, for appellant. Cornelius Doremus, for respondents.

PER CURIAM. The decree appealed from is affirmed, for the reasons set forth in the opinion

of the chancellor, delivered in the court below. 59 Atl. 574, 68 N. J. Eq. 49.

The CHIEF JUSTICE, and DIXON, GARRISON, FORT, GARRETSON, PITNEY, SWAYZE, BOGERT, VREDENBURGH, VROOM, GREEN, GRAY, and DILL, JJ., concur.

AMOLE et al. v. MEYERS et al. (Court of Errors and Appeals of New Jersey. June 26, 1905.) Appeal from Court of Chancery. Bill by one Amole and others against one Meyers and others. From an order striking out a demurrer to the bill, defendants appeal. Affirmed. John C. Reed, for appellants. Eli H. Chandler, for respondents.

PER CURIAM. We concur in the view of the Court of Chancery that the demurrer is frivolous. The order appealed from should be affirmed.

The CHIEF JUSTICE, and DIXON, GARRISON, FORT, GARRETSON, PITNEY, SWAYZE, REED, BOGERT, VREDENBURGH, VROOM, GREEN, and GRAY, JJ., concur.

ANDREWS v. CAMDEN & S. RY. CO. (Court of Errors and Appeals of New Jersey. March 7, 1907.) Error to Supreme Court. Action by Clayton L. Andrews against the Camden & Suburban Railway Company. From a judgment for plaintiff, defendant brings error. Affirmed. E. A. Armstrong, for plaintiff in error. Samuel H. Richards, for defendant in error.

PER CURIAM. The assignments of error argued before us are conspicuously lacking in merit. The testimony which, it is contended, was improperly received, was clearly competent; and if the instruction to the jury, as to the method by which they should admeasure the damages in case their verdict should be for the plaintiff, was inaccurate in the respect pointed out in the assignment, the error was harmful to the plaintiff below, rather than to the defendant. The judgment under review will be affirmed.

(69 N. J. Eq. 834)

AVAKIAN v. AVAKIAN. (Court of Errors and Appeals of New Jersey. March 5, 1906.) Appeal from Court of Chancery. Bill by Louisa Avakian, by Mariam Boyajian, guardian ad litem, against Hagop Avakian. Decree for complainant (60 Atl. 521), and defendant appeals. Affirmed. Weller & Lichtenstein, for appellant. Eusebius W. Arrowsmith, for respondent.

PER CURIAM. The decree appealed from is affirmed, for the reasons stated in the opinion filed in the Court of Chancery by Vice Chancellor Pitney. 60 Atl. 521.

The CHIEF JUSTICE, and GARRISON, FORT, GARRETSON, PITNEY, SWAYZE, BOGERT, VREDENBURGH, VROOM, GREEN, GRAY, and DILL, JJ., concur. DIXON, J., dissents.

(69 N. J. Eq. 842)

AYRES v. AYRES. (Court of Errors and Appeals of New Jersey. March 5, 1906.) Appeal from Court of Chancery. Bill by Lydia Y. Ayres against John H. Ayres, administrator. Decree for plaintiff (60 Atl. 422), and defendant appeals. Affirmed. Herve C. Scudder and Edwin Robert Walker, for appellant. Linton Satterthwait, for respondent.

PER CURIAM. The decree appealed from is affirmed, for the reasons stated in the opinion delivered in the Court of Chancery by Vice Chancellor Bergen. 60 Atl. 422.

The CHIEF JUSTICE, and DIXON, GARRISON, FORT, GARRETSON, PITNEY, SWAYZE, BOGERT, VREDENBURGH, VROOM, GREEN, and GRAY, JJ., concur.

(69 N. J. Eq. 832)

COSTELL v. COSTELL. (Court of Errors and Appeals of New Jersey. March 5, 1906.) Appeal from Court of Chancery. Bill by Annie E. Costell against Smith Costell. Decree for complainant (60 Atl. 49), and defendant appeals. Affirmed. William T. Hilliard, for appellant. Howard L. Miller, for respondent.

PER CURIAM. The decree appealed from is affirmed, for the reasons set forth in the opinion filed in the Court of Chancery by Vice Chancellor Grey. 60 Atl. 49.

The **CHIEF JUSTICE**, and **DIXON, GARRISON, FORT, GARRETSON, PITNEY, SWAYZE, BOGERT, VREDENBURGH, VROOM, GREEN, GRAY, and DILL, JJ.**, concur.

(69 N. J. Eq. 831)

FURNISS et al. v. LEUPP. (Court of Errors and Appeals of New Jersey. March 5, 1906.) Appeal from Court of Chancery. Bill by Grace L. Furniss and another against William H. Leupp, trustee. From the decree (58 Atl. 374, 67 N. J. Eq. 159), defendant appeals. Affirmed. Crouse & Perkins, for appellant. Willard P. Voorhees, for respondents.

PER CURIAM. The order appealed from should be affirmed, for the reasons stated in the opinion of the Vice Chancellor, 58 Atl. 374, 67 N. J. Eq. 159. It will appear from an examination of the opinion that the learned Vice Chancellor concluded that the fund in dispute was not within the scope of the "anticipation" clause of the trust deed, and in this conclusion we concur. The case, therefore, does not call for a consideration of the question whether or not that clause is valid. It was assumed to be so by the learned Vice Chancellor. As the question is not involved in the determination of the case, we express no opinion upon it.

The **CHIEF JUSTICE**, and **DIXON, GARRISON, FORT, GARRETSON, PITNEY, SWAYZE, BOGERT, VREDENBURGH, VROOM, GREEN, GRAY, and DILL, JJ.**, concur.

(69 N. J. Eq. 841)

MONMOUTH COUNTY ELECTRIC CO. v. McKENNA. (Court of Errors and Appeals of New Jersey. March 5, 1906.) Appeal from Court of Chancery. Bill by the Monmouth County Electric Company against Thomas P. McKenna. Decree for complainant (60 Atl. 32, 68 N. J. Eq. 160), and defendant appeals. Affirmed. Collins & Corbin, for appellant. Grey, McDermott & Enright, for respondent.

PER CURIAM. The decree appealed from is affirmed, for the reasons stated in the opinion delivered in the Court of Chancery by Vice Chancellor Pitney. 60 Atl. 32, 68 N. J. Eq. 160.

DIXON, FORT, GARRETSON, PITNEY, BOGERT, VROOM, GREEN, and GRAY, JJ., concur. The **CHIEF JUSTICE** and **SWAYZE, J.**, dissent.

(69 N. J. Eq. 833)

SEYMOUR v. GOODWIN et al. (two cases). (Court of Errors and Appeals of New Jersey. March 5, 1906.) Appeal from Court of Chancery. Bill by James M. Seymour, Jr., against Rebecca Goodwin and others. Demurrer overruled (59 Atl. 93, 68 N. J. Eq. 189), and defendants appeal. Affirmed. Cortlandt & Wayne Parker, for appellants. Louis A. Ziegler and James E. Howell, for respondent.

PER CURIAM. The order brought up for review by these appeals is affirmed, for the reasons set forth in the opinion filed in the Court of Chancery by Vice Chancellor Emery. 59 Atl. 93, 68 N. J. Eq. 189.

The **CHIEF JUSTICE** and **FORT, GARRETSON, PITNEY, BOGERT, VREDEN-**

BURGH, VROOM, and GREEN, JJ., concur. **DIXON, GARRISON, and SWAYZE, JJ.**, dissent.

(73 N. J. Eq. 435)

SIEGMAN v. ELECTRIC VEHICLE CO. et al. (Court of Errors and Appeals of New Jersey. March 28, 1907.) Appeal from Court of Chancery. Bill by Richard Siegman against the Electric Vehicle Company and another. From an order of the Chancellor, defendants appeal. Affirmed. Richard V. Lindabury, for appellants. James E. Howell, for respondent.

PER CURIAM. This cause was argued together with Siegman v. Electric Vehicle Co. and Kissel, 65 Atl. 910, decided by this court at the present term upon an opinion delivered by Mr. Justice Pitney. The same question being presented in each of the two cases, the other under review herein will be affirmed, with costs, for the reasons given in that opinion.

(69 N. J. Eq. 843)

UNITED NEW JERSEY R. & CANAL CO. et al. v. **LEWIS et al.** (Court of Errors and Appeals of New Jersey. June 18, 1906.) Appeal from Court of Chancery. Suit by the United New Jersey Railroad & Canal Company and others against Francis Lewis and others. Judgment sustaining demurrer to complaint affirmed on appeal (59 Atl. 227, 68 N. J. Eq. 437), and complainants appeal. Affirmed. Alan H. Strong, for appellants. George T. Parrot, for respondents.

PER CURIAM. The decree in this case will be affirmed, for the reasons contained in the opinion delivered in the Court of Chancery by Vice Chancellor Bergen. 59 Atl. 227, 68 N. J. Eq. 437.

The **CHIEF JUSTICE** and **GARRISON, FORT, PITNEY, SWAYZE, REED, BOGERT, VREDENBURGH, VROOM, and GRAY, JJ.**, concur.

(69 N. J. Eq. 844)

UNITED NEW JERSEY R. & CANAL CO. et al. v. **McCULLY et al.** (Court of Errors and Appeals of New Jersey. June 18, 1906.) Appeal from Court of Chancery. Suit by the United New Jersey Railroad & Canal Company and others against William McCully and others. Demurrer to the bill sustained (59 Atl. 229, 68 N. J. Eq. 442), and defendants appeal. Affirmed. Alan H. Strong, for appellants. George T. Parrot, for respondents.

PER CURIAM. The decree in this case is affirmed, for the reasons contained in the opinion delivered in the Court of Chancery by Vice Chancellor Bergen. 59 Atl. 229, 68 N. J. Eq. 442.

The **CHIEF JUSTICE** and **GARRISON, FORT, PITNEY, SWAYZE, REED, BOGERT, VREDENBURGH, VROOM, and GRAY, JJ.**, concur.

(69 N. J. Eq. 835)

VAN HOUTEN v. STEVENSON et al. (Court of Errors and Appeals of New Jersey. June 28, 1905.) Appeal from Court of Chancery. Bill by Aaron Van Houten against Mary B. Stevenson and another. Application to stay proceedings denied. 64 Atl. 1058, 1094, 68 N. J. Eq. 490. Defendants appeal. Affirmed. Preston Stevenson, for appellants. Frederick W. Van Blarcom, for respondent.

PER CURIAM. The decree appealed from is affirmed, for the reasons stated in the opinions of Vice Chancellors Stevens and Garrison, delivered in the Court of Chancery in this cause. 64 Atl. 1058, 1094, 68 N. J. Eq. 490.

The **CHIEF JUSTICE**, and **DIXON, GARRISON, GARRETSON, PITNEY, SWAYZE, REED, BOGERT, VREDENBURGH, VROOM, GREEN, and GRAY, JJ.**, concur.

BOWEN v. REYNOLDS, City Treasurer. (Supreme Court of Rhode Island. March 7, 1906.) Action by Charles A. Bowen against Charles A. Reynolds, city treasurer. Exceptions overruled, and case remitted to the superior court, with direction to enter judgment on the verdict. James F. Murphy, for plaintiff. John N. Butman and Thomas Rily, Jr., for defendant.

PER CURIAM. The decision of the court below is correct, and the exceptions thereto are overruled. Case remitted to the superior court, with direction to enter judgment on the verdict.

HALL v. T. W. ROUNDS CO., Limited. (Supreme Court of Rhode Island. Jan. 22, 1906.) Action by Harold A. Hall against the T. W. Rounds Company, Limited. From an order denying defendant's motion for a new trial, he excepts. Exceptions overruled. Ezra K. Parker and W. Louis Frost, for plaintiff. Cyrus M. Van Slyck and Frederick S. Jones, for defendant.

PER CURIAM. We think the verdict of the jury is amply supported. The evidence shows negligence and lack of ordinary skill on the part of the defendant's servant in directing and controlling the horse which ran over the plaintiff and caused the injuries complained of. The defendant's petition for a new trial is therefore denied, and the case will be remanded to the superior court for judgment on the verdict.

PALMER v. WHITE, City Treasurer, et al. (two cases). (Supreme Court of Rhode Island. Jan. 8, 1906.) Actions by Mary Palmer and by William Palmer against J. Ellis White, as city treasurer, and others. Verdicts for plaintiffs, and petitions by defendants for new trials denied. Causes remanded, with directions to enter judgments. Hugh J. Carroll, for plaintiffs. Edward W. Blodgett, for defendant White. Henry W. Hayes, Frank T. Easton, Lefferts S. Hoffman, and Alonzo R. Williams, for defendant Rhode Island Company.

PER CURIAM. These cases, which grew out of the same transaction, present two questions of fact, to wit: Whether Mrs. Palmer was in the exercise of due care when the accident occurred; whether the defendant the Rhode Island Company failed to properly light the obstructions in the street. The evidence on these issues does not so strongly preponderate in favor of the plaintiffs as to warrant us in setting aside the decision of the trial court, and the petitions for new trials are denied. The cases will be remanded to the superior court, with directions to enter judgments on the decision.

PROBATE COURT OF EXETER v. CARR et al. (Supreme Court of Rhode Island. March 19, 1906.) Debt on a creditor's bond by the probate court of Exeter against Albert H. Carr, Jr., and others. On demurrer to defendant's second plea. Sustained. Plea overruled. Albert B. Crafts, for plaintiff. Samuel W. K. Allen and Gardner, Pirce & Thornley, for defendants.

PER CURIAM. The plaintiff's demurrer to the defendants' second plea must be sustained, and the plea overruled, for the reasons stated in the opinion of this court in the same case.

27 R. I. 184, 61 Atl. 171. The case is remanded to the superior court for further proceedings in accordance with this rescript.

SCULLY v. PROVIDENCE BREWING CO. (Supreme Court of Rhode Island. March, 1906.) Action by Philip Scully against the Providence Brewing Company. Verdict for the defendant. Heard on plaintiff's petition for a new trial. Petition denied, and cause remanded, with instructions to enter judgment for defendant. Sheehan & O'Brien, for plaintiff. Gorman, Egan & Gorman and Edward De V. O'Connor, for defendant.

This is an action to recover back moneys alleged by the plaintiff to have been paid by him for ale, lager beer, and other liquors to the defendant, a licensed dealer; the plaintiff claiming that he, the purchaser, was an unlicensed dealer, and that the defendant corporation sold to the plaintiff intoxicating liquors, "having reason to believe that the same were to be resold by said plaintiff" in violation of section 7, c. 102, Gen. Laws R. I. 1896, and claims to recover under the provision of section 60 of said chapter 102. There was conflicting testimony as to whether or not the liquors were sold to Philip Scully individually, or to Scully & Haggerty, a copartnership, of which Haggerty, holding a license, was a member, and as to whether or not the defendant treated Scully merely as an agent of Haggerty, and had reason to believe that the liquors were to be sold under Haggerty's license. The jury found for the defendant generally, and also, upon lawful request, found specially as follows: "(1) That Philip Scully, the plaintiff, was an unlicensed dealer in the city of Providence on the 17th day of October, 1904, to March 15, 1905. (2) That the Providence Brewing Company, the defendant, was a licensed liquor dealer in the city of Providence from October 17, 1904, to March 15, 1905. (3) That the Providence Brewing Company did not sell to Philip Scully individually from October 17, 1904, to March 15, 1905, lager, ale, or any other intoxicating liquors, or for any part of that time. (4) That the Providence Brewing Company had no reason to believe that the ale and lager or intoxicating liquors purchased by Philip Scully of said Providence Brewing Company was to be resold by Philip Scully illegally." Upon careful reading of the record of testimony we are of the opinion that the jury were justified by the evidence in finding as they did. The plaintiff's exceptions are overruled, the petition for new trial is denied, and the case is remanded to the superior court, with instructions to enter judgment for defendant upon the verdict.

SHEA v. TAFT, Town Treasurer. (Supreme Court of Rhode Island. Jan. 15, 1906.) Action by Dennis J. Shea against Cyrus Taft, as town treasurer. Verdict for plaintiff, defendant's petition for a new trial denied, and case remitted to the superior court for judgment on the verdict. James L. Jenks, for plaintiff. Wilbur A. Scott, for defendant.

PER CURIAM. The questions of the negligence of the town, the care observed by the plaintiff, and the value of the horse were left to the jury under proper instructions from the court, and we find nothing in the evidence to invalidate their conclusions. The petition for a new trial is denied, and the cause will be remitted to the superior court for judgment on the verdict.

